INTERNATIONAL TRADE COMMISSION

[USITC SE–96–21]

Emergency Notice; Sunshine Act Meeting

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: Thursday, October 10, 1996 at 10:30 a.m.

PLACE: Room 101, 500 E Street S.W., Washington, DC 20436.

STATUS: Open to the public.

MATTER TO BE CONSIDERED: 1. The Chairman's proposal for Fiscal Year 1997 Expenditure Plan and Fiscal Year 1998 Budget Request.

CONTACT PERSON FOR MORE INFORMATION: Donna R. Koehnke, Secretary, (202) 205–2000.

Issued: October 7, 1996.

Donna R. Koehnke,

Secretary.

[FR Doc. 96–26252 Filed 10–8–96; 8:45 am]

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DEPARTMENT OF JUSTICE

Antitrust Division

Public Comments and Plaintiff's Response; United States of America v. The Thomson Corporation and West Publishing Company

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), that Public Comments and Plaintiff's Response have been filed with the United States District Court for the District of Columbia in *United States* v. *The Thomson Corporation and West Publishing Company,* Civ. Action No. 96–1415.

On June 19, 1996, the United States filed a Compliant seeking to enjoin a transaction in which The Thomson Corporation (''Thomson'') agreed to acquire West Publishing Company (''West''). Thomson and West are two of the country's largest publishers of law books and legal research materials. Thomson and West publish numerous competing legal publications, including the only two annotated United States Codes and the only two enhanced U.S. Supreme Court reporters. The Complaint alleged that the proposed acquisition would substantially lessen competition in the market for legal publications in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 1 of the Sherman Antitrust Act, 15 U.S.C. 1.

Public comment was invited within the statutory 60-day comment period. Such comments, and the responses thereto, are hereby published in the Federal Register and filed with the Court. Charts appended to the Public Comments have not been reprinted here, however they may be inspected with copies of the Complaint, Stipulation, proposed Final Judgment, Competitive Impact Statement, Public Comments and Plaintiff's Response in Room 3233 of the Antitrust Division, Department of Justice, Tenth Street and Pennsylvania Avenue, N.W., Washington. D.C. 20530 (telephone: 202–633–2481) and at the office of the Clerk of the United States District Court for the District of Columbia, Third Street and Constitution Avenue, N.W., Washington, D.C. 20001.

Copies of any of these materials may be obtained upon request and payment of a copying fee.

Constance K. Robinson,

Director of Operations, Antitrust Division.

In the United States District Court for the District of Columbia

United States of America, 1401 H Street, NW, Suite 4000, Washington, DC 20530 (202) 307–5779, State of California, State of Connecticut, State of Illinois, Commonwealth of Massachusetts, State of New York, State of Washington, and State of Wisconsin Plaintiffs, v. The Thomson Corporation, and West Publishing Company Defendants. Civil No. 96–1415 (PLF)

PLAINTIFFS' RESPONSE TO PUBLIC COMMENTS

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) (''Tunney Act''), the United States and the attorneys general of the states of California, Illinois, Massachusetts, New York, Washington, and Wisconsin hereby respond to the public comments received regarding the proposed Final Judgment in this case.[1]

I

Background

On June 19, 1996, the United States Department of Justice (''the Department'') and the seven plaintiff state attorneys general's offices filed the Complaint in this matter. The Complaint alleges that defendants Thomson Corporation (''Thomson'') and West Publishing Company (''West''), in violation of Section 7 of the Sherman Act, 15 U.S.C. 18, proposed a merger that was likely substantially to lessen competition.

[1] The State of Connecticut does not join in this Response to Comments. Therefore, subsequent references to ''the governments'' or ''the plaintiffs'' refer only to the plaintiffs who have signed the response.

Simultaneously with the filing of the Complaint, the plaintiffs filed the proposed Final Judgment and a Stipulation signed by all the parties that allows for entry of the Final Judgment following compliance with the Tunney Act. A Competitive Impact Statement (''CIS'') was filed and published in the Federal Register on July 5, 1996. The CIS explains in detail the provisions of the proposed Final Judgment, the nature and purposes of these proceedings, and the practices giving rise to the alleged violation.

As the Complaint and CIS explain, the merger as originally proposed was likely to reduce or eliminate competition between Thomson and West in several specific markets in three categories: enhanced primary law, secondary law, and comprehensive online legal research services. Complaint §§ 24 and 25. The proposed Final Judgment is intended to prevent the expected lessening of competition caused by the merger in those specific markets.

As a remedy to particular competitive concerns in enhanced primary and secondary law product markets, the Department, seven states, Thomson, and West agreed to certain product divestitures, the mandatory licensing of the internal pagination from West's National Reporter System (''star pagination''), and, in the case of official reporter contract states, an option to those states to obtain a new official publisher and to require divestiture of Thomson's official reporter assets.

These divestitures of enhanced primary and secondary law products are also intended to protect consumers by ensuring continued vigorous competition between Lexis-Nexis and WESTLAW in the ''comprehensive online legal research services'' market after the merger, but the plaintiffs agreed also to the extension of certain licenses to Lexis-Nexis, a division of Reed Elsevier, Inc., and the divestiture of Auto-Cite to address this concern.

The 60-day period for public comments expired on September 3, 1996. As of September 23, 1996, plaintiffs had received comments from 26 persons.[2]

The comments come from a variety of sources. The most extensive comments are submitted by Lexis/Reed Elsevier; Alan Sugarman, President of HyperLaw, Inc. (''HyperLaw''); and Matthew Bender & Company, Inc. (''Matthew Bender''). Lexis/Reed Elsevier is the owner of the only existing competitor to West in the comprehensive online legal research services product market. Alan Sugarman and Matthew Bender are currently engaged in copyright litigation with West in the District Court for the Southern District of New York. Other comments are from private attorneys, librarians, individuals, non-profit organizations, government organizations, and one anonymous commenter.

II

Response to Public Comments

In the legal publishing industry, there are a number of contentious legal, business, and public policy issues being debated. Many of these issues involve the merging parties or the Department of Justice. This fact has generated a large number of comments that do not relate to the specific law violations charged in the Complaint or even to the merger in any way.

The Court's responsibility under the Tunney Act is to determine whether entry of the proposed Final Judgment is ''within the *reaches* of the public interest.'' *United States* v. *Western Elec. Co.,* 993 F.2d 1572, 1576 (D.C. Cir.), *cert. denied,* 114 S. Ct. 487 (1993) (emphasis added, internal quotation and citation omitted). The Court may not look beyond the Complaint ''to evaluate claims that the government did *not* make and to inquire as to why they were not made.'' *United States* v. *Microsoft,* 56 F.3d 1448, 1459 (D.C. Cir. 1995) (emphasis in original). Thus, comments that relate to conduct plaintiffs did not pursue are beyond the scope of Tunney Act review for the reasons set forth fully in section III, below.

Many of the comments raise issues not relevant to this merger or in this Tunney Act proceeding. Rather, they are statements about:

—*Other* public policy issues in the legal publishing industry;
—Issues in litigation in *other* non-merger cases;
—Conditions in the legal publishing industry—*unrelated* to the merger—that make it less competitive than the commenter believes it could be;
—Arguments that plaintiffs should have brought a *different* case; and
—*Individual complaints* about behavior of one of the merging parties, unrelated to the merger.

In general, this Response mentions these comments and explains why they are not the proper subject of this proceeding. Where appropriate, the comments are placed in context.

Each of the comments that is relevant to this Tunney Act proceeding is addressed below. In general, they fall in three categories:

—Some comments raised relevant issues that the decree has already resolved. Plaintiffs explain the proper interpretation of the decree and demonstrate why this is the case.
—In three instances, comments raise issues of ambiguity in the decree. To resolve the matter, plaintiffs have agreed with defendants on new, clarifying language for the decree.
—Other comments make criticisms that simply are not warranted. For example, they are premature, or go to matters that will happen after the Final Judgment is entered, or are otherwise unfounded.

Because a number of the commenters adopted or replicated the comments of other commenters, plaintiffs have organized this Response by subject to avoid redundancy. An appendix list the comments submitted and cross-references to the places where they are discussed in this Response. Many of the arguments made by Lexis/Reed Elsevier in its Motion to Intervene and accompanying papers were essentially comments on the decree, or they repeated or elaborated their previous comments; accordingly, such Lexis/Reed Elsevier arguments are addressed in this Response.

A. Divestiture of the Publications Enumerated in the Decree Adequately Protects Competition

Several commenters expressed concern that the divested publications will not be viable without divestiture of additional products and rights.[3] Viability of divestiture assets is an important concern in virtually every merger case, and plaintiffs in this case carefully reviewed these issues and took steps in the proposed Final Judgment to ensure viability of the divested publications. We believe that when the terms of the proposed Final Judgment are carefully examined, it will be clear that these concerns have been adequately addressed.

1. Divestiture of Competing Products, not Companies, and Supporting Infrastructure

Professor Robert Oakley of the Georgetown Law Center comments as Washington Affairs Representative of the American Association of Law Libraries (''AALL''). The AALL stated, at

[2] The comments received as of September 23, 1996, are attached, preceded by a list of the 26 commenters. The United States plans promptly to publish the comments and this response in the Federal Register.

[3] Professor Robert Oakley, American Association of Law Libraries; Cyndi A. Trembley, Association of Law Libraries of Upstate New York; Alois V. Gross, Esq.; Gary L. Reback, Esq., Lexis/Reed Elsevier; Kendall F. Svengalis, Rhode Island State Law Library; James P. Love, Consumer Project on Technology.

the beginning of the governments' investigation, that it was neutral on the Thomson/West merger, and in its comment it reiterates that it remains neutral. At the same time, the AALL questions certain aspects of the proposed Final Judgment.

AALL states that some of its members are concerned that individual titles are required to be divested rather than subsidiary companies.[4] They think this may mean some individual titles will not continue to be viable entities in the market after divestiture. They are concerned that the divestiture products share a ''supporting infrastructure'' with other, non-divested products, and that at least some of the divestiture publications are an essential component of a ''larger system of legal research.'' Divestiture of such non-divested products would mean ordering defendants to divest products where there were no product overlaps.

Plaintiffs agree that the future viability of divestiture products is a legitimate concern and assert that this concern is fully addressed in the decree. The government's investigation examined the supporting infrastructure of the parties very carefully. Except in the case of the California Reports and Deering's California Code,[5] production costs are not formally allocated between or among Thomson products to an extent sufficient to question the viability of individual products, and plaintiffs discovered relatively little evidence of joint production of Thomson products. This means such products can be viable on a stand alone basis, provided the acquirer has the necessary editorial staff and production infrastructure. For this reason, plaintiffs have ensured that acquirers of divestiture products will have access to these resources. The proposed Final Judgment provides that acquirers receive all production assets of the divestiture products, including intellectual property, work in progress, plates, films, master tapes, machine-readable codes for CD–ROM production, existing inventory, pertinent correspondence and files, a copy of the current subscriber list, all related subscriber information, advertising materials, contracts with authors, software, and, at the acquirer's option, computers and other physical assets. Proposed Final Judgment at ¶ II.B. Also at the acquirer's option, Thomson must agree to provide transition production of the product on behalf of the acquirer (essentially as a contract publisher) for a reasonable period of time and a reasonable price.[6] In order to facilitate divestiture, provisions in the Proposed Final Judgment specifically say prospective purchasers can have access to personnel, physical facilities, and financial documents. *Id*. at ¶ II.E. And, the proposed Final Judgment states that Thomson/West shall not interfere with any negotiations by acquirers to make offers of employment to Thomson/West employees whose primary responsibility is the production, sale or marketing of divestiture products. *Id*. at ¶ II.F. Thomson/West must preserve the divestiture products until divestiture is made, must not reassign employees to avoid their being hired by acquirers, except for transfer bids initiated by employees which must be reported to plaintiffs. *Id*. at ¶ VIII.A–C. Finally, all divestitures are subject to the approval of the United States with the consultation of the state plaintiffs, and divestitures of state-specific products are subject to the approval of the United States and the appropriate state plaintiff. Approval of the divestitures will only be made if, to the sole satisfaction of the appropriate plaintiffs, the divestiture product(s) can and will be operated by the acquirer as viable, ongoing product lines. Thus, the decree has properly addressed the issue of viability of divested assets and contains adequate provisions to protect viability.

2. Availability of Legal Editors

Gary L. Reback at the law firm of Wilson Sonsini Goodrich & Rosati submitted comments on behalf of Lexis/Reed Elsevier. Reed Elsevier, the Anglo-Dutch corporation that owns Lexis-Nexis, had 1995 revenues of $5.8 billion. Lexis-Nexis is the sole competitor to West's WESTLAW service. The comments of Lexis/Reed Elsevier express concern that there is an inadequate supply of qualified legal editors to maintain the divestiture products. In its Motion to Intervene and accompanying papers, Lexis/Reed Elsevier claims that Thomson/West has a ''monopoly in editorial staff.'' Memorandum in Support of Motion to Intervene at 22.

Plaintiffs agree that a capable editorial staff is needed to continue these divested products. But a qualified purchaser of the divestiture products can hire editorial staff pursuant to the divestiture terms or secure them elsewhere in the market.

On the basis of our investigation, plaintiffs believe that the divestiture products will attract a strong, capable buyer, which has the capability to ensure their viability. Plaintiffs understand, from the reports submitted pursuant to the proposed Final Judgment, that several significant publishing firms, including Lexis/Reed Elsevier itself, indicated interest in purchasing the divestiture assets. These potential buyers already possess editorial staffs and publishing infrastructure. Other possible buyers include firms that could hire staff and create infrastructure to accompany the divestiture product.

Furthermore, the decree provides, as noted above, that the acquirer of the divestiture products will have access to relevant Thomson employees for purposes of making offers of employment. Of course, such employees are free to decide whether or not to accept such an offer of employment. But they may be expected to carefully consider whether future prospects are better at the acquiring firm, if the product on which they have worked is being divested.

In addition, there is market evidence of the ability of prospective acquirers to obtain qualified legal editors. A number of legal publishers and some states employ trained editorial staffs who editorially enhance their respective law products. For example, Michie, which is also owned by Reed Elsevier, employs an editorial staff which enhances over 20 state code products. Another commenter, CD Law (a company which has been very successful with its own Washington state product) prepares headnotes for the official Washington state reports. Another such example is the editorial staff at the Bureau of National Affairs (''BNA''), which editorially enhances United States Law Week. Similarly, the States of New York, Illinois, and Massachusetts write their own headnotes for their official case reporters. Thomson uses contract employees for some of its editing. The preceding is not intended to be an exhaustive list, but is included only to provide representative examples of the fact that qualified editorial staffs are now widely employed, and there is no ''monopoly'' of legal editors, as Lexis/Elsevier claims. A suitable publisher which uses the provisions of the decree and other sources could assemble a capable editorial staff.[7]

[4] Similar comments were submitted by E. Scott Wetzel, CD Law, Inc.

[5] As explained below, both these products are to be divested pursuant to the proposed Final Judgment.

[6] Proposed Final Judgment at ¶ II.C. The acquirer will control all pricing, promotion, sales, and order fulfillment. *Id.*

[7] The preceding discussion also addresses the argument of Garth Saloner in his Declaration in Support of Lexis-Nexis' Opposition to the Entry of the Proposed Final Judgment that defendants will have a unique incentive to pay editors who work with divestiture products more than the potential

3. Divestiture Products Independent of a Cross-Referencing ''System''

Other comments suggested that the divestiture products are integrated in a ''research system.'' Lexis/Reed Elsevier's Motion to Intervene also raises this issue. See Declaration of Kendall F. Svengalis in Support of Lexis-Nexis' Opposition to the Entry of the Proposed Final Judgment ¶¶ 7–9.

Some of these comments relate to the viability of the divested products, an appropriate Tunney Act comment. This was an issue the plaintiffs considered carefully and concluded that divestiture of independent products was sufficient. Other comments, however, essentially suggest that the plaintiffs should have brought a different case—one based on loss of competition between research systems. For reasons stated in Section III, the latter sort of comment is not appropriate in a Tunney Act proceeding.

The proposed Final Judgment is the culmination of an extensive investigation by Plaintiffs. In the course of the investigation, plaintiffs subpoenaed documents from defendants, deposed employees and officers of defendants, and interviewed numerous law librarians, legal publishers that compete against defendants, and other legal publishing industry participants. Plaintiffs carefully examined whether significant numbers of users of legal research tools consider Thomson's ''Total Client Service Library'' or ''TCSL'' [8] to be a substitute for West's ''Key Number'' system. See section II.C.1 below.

In fact, most law schools do not teach that the TCSL and West Key Number system are substitutes. This is true, for example at the Georgetown University Law Center, at which Professor Oakley, who commented on behalf of AALL, teaches.

Nor did our investigation reveal that competition between the parties' individual products is based on competition between TCSL and Key Numbers. Rather, the competition between individual products is based primarily on substantive content in the publications. For example, in new York, both firms have annotated statutes. They are substitutes primarily because they both offer statutory text and annotations to relevant case law. For case law reporters, both firms offer case law publications that are substitutes primarily on the basis of containing case law and editorial enhancements such as headnotes and summaries. The parties' divestiture publications do compete in part because they are enhanced with cross-references.

At the conclusion of the investigation of these issues the Department carefully considered, under the prevailing legal standard, the evidence supporting the theory that the merger harmed competition between competing research systems, and determined that no further action was warranted on the evidence before it.

After careful investigation, the governments decided that it would not be necessary to divest all the publications to which divestiture products are cross-referenced in order to keep the divestiture products competitive. Lexis/Reed Elsevier complains that ''the Consent Decree exacerbates the proposed acquisition's anticompetitive effects in its failure to require Thomson to provide continued access to, and use of, the portions of the Thomson system that the Department is not proposing for divestiture.''

Divestiture products that contain cross-references to Thomson products will *still* be able to include those cross-references. Thomson has never objected to, and has in fact encouraged, cross-references (of the kind contained in the TCSL) to their products by other publishers. The governments' investigation revealed many instances of other publishers cross-referencing to Thomson, West, and other firms' publications. For example, Matthew Bender includes American Law Reports (''ALR'') references in several of its publications. Thomson has confirmed to the Department that it will continue this practice of open citation to Total Client Service Library products.[9] See attachment A. Plaintiffs expect that the acquirer(s) of the divestiture products will continue to be able to cross-reference Thomson publications, which will help the divestiture products remain competitive.

Lexis/Reed Elsevier's comments express concern that Thomson will charge monopoly prices for cross-referencing to ALR and other Thomson publications that are part of the TCSL. This concern is unfounded as Thomson has never claimed a proprietary interest in such cross-references and has never charged a royalty for them. Lexis/Reed Elsevier is also concerned that Thomson may ''save itself the cost of maintaining ALR.'' The implication is that Thomson would stop publishing this popular publication because ALR is a substitute for a West product or products. This fear is not supported by substantial evidence. See II.C.1.

Similarly, Lexis/Reed Elsevier comments that the acquirer of United States Reports, Lawyers Edition will not have access to the annotations at the back of each reporter. Plaintiffs disagree. The proposed Final Judgment provides that defendants will divest to the acquirer the annotations in existing volumes. Proposed Final Judgment at ¶ II.B. The acquirer will be responsible for continuing to provide such annotations in future volumes.

4. California

Mr. L. David Cole, an attorney in Beverly Hills, California, a subscriber to Thomson's CD–ROM titles in California, is concerned that the divestiture of Deering's California Code Annotated will separate it from other titles such as California Reports, the Witkin Library, and Miller & Starr, and that such separation will result in ''unintegrated sets, thereby frustrating the reason for my choice of products * * *.'' He states, ''my * * * investment in Deering's and California Reports will be rendered substantially less valuable when the related treaties are no longer under common ownership and integrated.''

The precise issue identified by Mr. Cole's comment was considered seriously during the investigation of potential competitive effects caused by the Thomson/West merger—that is, whether any of the parties' competing products involve such integration with other, non-competing products that they could not after divestiture, compete in the marketplace. Specifically, the issue of integration of Thomson's California products was investigated and reviewed. It was determined by the plaintiffs that Deering's Code and the California Reporter are integrated sufficiently to indicate that they should both be divested.[10] On the other hand,

acquirer would in order to interfere with an offer by the divestiture buyer. (¶¶ 13–16). Furthermore, the decree forbids the defendants to interfere with the acquirer's attempt to hire personnel whose primary responsibility encompasses a divested product.

[8] The Total Client Service Library includes cross-references that Thomson includes in many of its legal publications.

[9] Professor Saloner maintains that ''new entrants'' are unlikely to come into the markets for enhanced primary law products even if postmerger prices increase, because the cost of developing and introducing a cross-reference methodology for a small set of products would be prohibitive. Declaration of Garth Saloner in Support of Lexis-Nexis' Opposition to the Entry of the Proposed Final Judgment ¶¶ 17 and 18. However, as explained above, a ''new entrant'' would be able to cite to the TCSL products and would therefore not have to develop its own cross-reference methodology.

[10] The proposed Final Judgment requires immediate divestiture of Deering's Code. The proposed Final Judgment also contemplates the divestiture of California Reports; however, the concurrence of the State Reporter of Decisions is an

Continued

there was insufficient evidence that one or both of those two products are sufficiently integrated, in the minds of consumers, with Witkin or any other Thomson product, to warrant a challenge involving more titles.

5. Brand Names

Mr. Alois V. Gross, an attorney in Minneapolis, Minnesota, comments that trade names must be divested, including Lawyer's Cooperative, Bancroft-Whitney, LawDesk, TCSL, and American Jurisprudence. He believes these names carry valuable goodwill and brand recognition and are essential to the divestiture products' viability. Where brand names appeared important to the divestiture product, their divestiture has been included. For example, Deering's Annotated California Code, Corbin on Contracts, and United States Reports, Lawyers Edition, all will be divested. The brand names Mr. Gross mentions cover a broad range of products and are not those primarily associated with the specific divestiture products.

B. The Option to Official Reporter Contracts States Provision is Appropriate and Adequate Relief for the Violation Alleged in the Complaint

Several commenters expressed concerns about the scope and terms of the decree provision which requires Thomson to grant the Official Reporter Contract States the option to terminate their Thomson contracts for publishing official reporters.[11]

1. California

On August 7, 1996, Mr. Edward Jessen submitted comments as Official Reporter of Decisions and Secretary of the Advisory Committee for Publication of the Official Reports of the State of California. He questioned whether the proposed Final Judgment adequately addressed the fact that California Reports and Deering's California Codes share costs and text and should be together to stay competitive. Lexis/Reed Elsevier' Motion to Intervene and accompanying papers also expressed this concern.

Deering's and its assets are required to be divested. California Reports, and all its related assets, also must be divested if the governing entity in California awards the official publisher contract to another firm. Mr. Jessen is the head of that governing body. This provision was inserted into the Final Judgment (Washington and Wisconsin are treated similarly) for the sole purpose of allowing the state governing bodies to concur in the need for divestiture of official reported assets and to decide who should buy the official reporter assets.

Plaintiffs believed this would be a superior approach to attempting directly to require the abrogation and assignment of the contracts with the state judicial branch entities.[12] Therefore, the affected states were effectively given the option to obtain full divestiture. Mr. Jessen and his committee are given control over whether to require divestiture of California's official reporter assets or continue with Thomson. The committee can re-open bidding for the state contract, and give significant weight to ownership of Deering's Code. This places California in a similar position to its pre-merger position. This action should satisfy Mr. Jessen's concerns completely.

Mr. Jessen has now indicated he no longer has the concerns he initially addressed. On September 17, 1996, Mr. Jessen sent a letter to Thomas Greene, Senior Assistant Attorney General at the State of California Department of Justice, in which he stated that, ''I now fully support the proposed consent decree for the Thomson/West transaction as sufficient to protect California's interests as far as my office is concerned.'' (The entire correspondence is contained in attachment B). This letter appended Mr. Jessen's September 16, 1996 letter to Brian Hall, President of the West Information Publishing Group.

In his letter to Mr. Hall, Mr. Jessen stated,

> I now understand that this issue was thoroughly investigated by the California Attorney General's Office and by the United States Department of Justice. I also understand that any sale of Deering's and the other California products to be divested must be approved under the consent decree by the California Attorney General's Office and the United States Department of Justice, and that Thomson is not free to select any purchaser of its choosing regardless of its qualifications. I am confident that the California Attorney General's Office and the United States Department of Justice will exercise their powers of approval as provided in the proposed consent decree to ensure that the purchaser of any divested product will have the managerial, operational and financial capability to compete effectively in the publication and sale of that product.

The plaintiffs agree that there is a nexus between California Reports and Deering's California Code.

2. Washington

E. Scott Wetzel comments on behalf of CD Law, Inc. of Seattle, Washington. CD Law publishes case law, administrative law, and other Washington state legal materials on CD–ROM and the Internet. CD Law comments that ''Thomson and West competed vigorously for the contract to publish the official Washington state reports.'' Plaintiffs agree. However, as CD Law concedes, Thomson and West were not the only competitors for the contract—Darby, Michie, and CD Law also submitted bids.

CD Law comments that ''there are virtually no publishers capable of competing with West/Thomson'' and summarily dismisses companies such as Darby and Michie. Darby currently holds the official reporter contracts for Georgia and the Virginia Supreme Court, and recently was named the successful bidder in Michigan, beating out Thomson among others. Darby has in the past had the official reporter contract for Massachusetts and Arkansas. Michie publishes numerous print and CD–ROM codes and case reporters. Further, Michie is owned by Reed Elsevier, the second largest legal publisher in the United States. In addition to these two serious bidders, the governments' investigation revealed that there are a number of other companies which have bid on and/or published official reporters in other states and which possibly could bid in Washington.

CD Law is also concerned that defendants will not renew its contract to write the headnotes for the official state reports. This concern does not necessarily flow from the merger, as Thomson could have decided not to renew the contract and instead to write its own headnotes in the absence of the merger. In addition, CD Law is not precluded from contracting with the successful bidder for a contract to write headnotes in the event that the state of

additional requirement before its divestiture can occur.

[11] L. David Cole, Esq.; Edward D. Jessen, California Advisory Committee on Publication of Official Reports; Kathleen Jo Gibson, New Mexico Compilation Commission; Karen Ehmer, Esq., Darby Printing Company; E. Scott Wetzel, CD Law, Inc.; John H. Lederer, Esq.

[12] Darby believes that the official reporter assets of official reporter contract states should also be immediately divested. The part of proposed Final Judgment relating to the re-opening of bidding of official state reporter contracts involves a true option to the state governing bodies. These bodies are not required to re-open bidding. The plaintiffs have no information on the requirements that will be placed on bidders by the state governing bodies. There is nothing in the proposed Final Judgment insuring that Thomson will participate in bidding, or requiring states to allow Thomson to participate. Even if Thomson were to participate in a re-opened bidding process, there are no restrictions in the proposed Final Judgment on the state governing bodies' criteria or decision on what firm to pick as a new official reporter or a state's decision to choose Thomson if the state wishes.

Washington decides to exercise its option to terminate its contract with Thomson and awards the contract to another bidder.

CD Law complains that it will not be able to compete with defendants because its product will lack headnotes and case summaries; however, even if Thomson does not contract with CD Law to perform these editorial enhancements, CD Law has not explained why it cannot continue to create the enhancements for its own CD–ROM products. The governments' investigation revealed that CD Law has been a vigorous competitor in Washington for a number of years, and CD Law has not advanced any reasons why that should not continue to be the case.

3. Wisconsin

John H. Lederer, Esq., a retired attorney in Oregon, Wisconsin, expresses concern that defendants will be the only bidders for the Wisconsin official reporter contract. As noted above, the governments' investigation revealed that a number of companies bid for various official reporter contracts in a number of states. Any of these companies potentially could bid for the Wisconsin contract.

4. Other States

Ms. Karen Ehmer comments on behalf of Darby Printing Company, a printer of court opinions in a number of states. Darby asks that Illinois, Massachusetts, and New York (where Thomson publishes other official reporters) also be given the opportunity to re-open bidding for official reporter contracts.

With respect to the official reporters for Illinois, Massachusetts, and New York, competition for these was considered carefully by the plaintiffs in the course of the investigation. This comment relates to markets not included in the Complaint, and thus it is not an appropriate Tunney Act comment. Plaintiffs note, however, that as Darby knows (it was the official printer of Massachusetts opinions until 1995 when it lost the contract to Thomson), in these three states the states themselves write the headnotes and summaries and make other editorial judgments about content. Thomson acts as a printer, rather than an editorial writer in these states. In these states, then, existing editorial competition is only between the state and West. More important, however, is that a court-ordered divestiture of assets is not required for the state to choose a new printer that is capable and adequate to replace Thomson. Printers do not also need to be law publishers in order to compete. There are many printers that can do the job, including Darby (e.g., in Massachusetts, or in Michigan where Darby won the printing contract in 1995). Finally, plaintiffs note that the state attorneys general's offices from Illinois, Massachusetts and New York joined the Complaint and settlement.

Ms. Kathleen Jo Gibson comments on behalf of the New Mexico Compilation Commission. The Commission wants the proposed Final Judgment to include language giving New Mexico, and other states that have official reporters, an option to re-open bidding similar to that now in the proposed Final Judgment for California, Washington, and Wisconsin. The Commission would also like a permanent, royalty-free license to New Mexico court opinions reported by West.

The merger does not affect competition for the sale of official reporters in New Mexico. Thus, it would be inappropriate to require the relief requested by the New Mexico Compilation Commission. West has been the official reporter of New Mexico opinions since 1933. Thomson simply does not compete in New Mexico with an official reporter. In fact, Thomson has not represented even potential competition with West; according to the Commission, ''For a number of reasons, it is not economical for small states such as New Mexico to contract with any other publisher * * *'' New Mexico's dispute with West over the copyrightability of West-reported New Mexico opinions likewise is not related to any actual or potential competition likely to be lost as a result of the Thomson/West merger.

C. Divestiture of Auto-Cite and Lexis/Reed Elsevier's Option To Extend Critical Thomson Content Licenses Adequately Protects Competition in the Comprehensive Online Legal Research Services Market

The complaint alleged that the merger could harm consumers by adversely affecting competition in the comprehensive online legal research services market. Specifically, there was a risk that Thomson, a supplier of content to Lexis-Nexis, could use this position to harm Lexis-Nexis and benefit WESTLAW (which Thomson would now own) in a way that would harm consumers.[13] In reviewing the situation created by this merger, thus, the question is whether the Lexis-Nexis service could be so degraded by Thomson's postmerger actions that consumers (not Lexis/Reed Elsevier) would be hurt.

In reviewing how competition in this market functions, plaintiffs observed that Lexis/Nexis and WESTLAW compete not only by offering virtually identical data bases of court decisions, but also by offering various, different secondary legal materials and a wide variety of non-legal materials; their products are differentiated. Competition in the market to date has resulted in two services that are partly similar, partly differentiated and constantly changing. The merger does not affect the similar part of the services—the text of court decisions. Thus plaintiffs considered the effect on the differentiated portion of the services. Plaintiffs noted that Lexis/Reed Elsevier itself, of course, is a large multinational publishing corporation. Plaintiffs are also aware that shortly after the Thomson/West merger announcement, Lexis/Reed Elsevier entered a new arrangement with Matthew Bender (another significant legal publisher) in which Matthew Bender's content will be included in the Lexis/Nexis service. Plaintiffs also noted that this market is evolving extremely rapidly—indeed, it virtually did not exist before the Lexis-Nexis service was created in the 1970s.

In this context, plaintiffs evaluated a possible case and potential relief. Prior to the governments' review of this merger, Thomson and Lexis negotiated extensions of the most important licenses for Thomson content, both legal and non-legal.[14] Virtually all of the licenses were extended for five additional years and generally at the existing price, *i.e.*, prices that had been negotiated when Thomson did not own WESTLAW and thus could have no anticompetitive incentives with regard to Lexis/Nexis. With the extensions, the average length of the licenses was about seven years.

The plaintiffs thus evaluated whether additional relief was necessary to ensure vigorous competition in this market. Two additional protections were determined to be necessary. First, for certain key non-legal data bases,

[13] This ''vertical foreclosure'' risk is likely to lead to anticompetitive effects on consumers, however, only to the extent that Lexis/Reed Elsevier cannot take market actions to maintain content adequate to allow it to be a vigorous competitor. If the downstream firm (here, Lexis/Reed Elsevier) in a possible vertical foreclosure situation can readily obtain its inputs (here, content) from other sources, or develop the inputs itself, then there is no antitrust violation (even though the downstream firm might prefer simply to continue its existing source of inputs).

[14] These licenses included the following materials: (1) Legal publications (including Auto-Cite, ALR U.S.C.S., and AmJur2d); (2) non-legal databases (including ASAP, Predicasts, and Investext); and tax materials from Research Institute of America.

Thomson was required to offer to extend Lexis/Reed Elsevier's licenses for an additional five years. These data bases (ASAP, Predicasts and Investext) had been identified by Lexis/Reed Elsevier as particularly significant. Second, Auto-Cite was required to be divested, so that Lexis/Reed Elsevier could obtain it from a source independent of Thomson (or buy it itself). These two provisions, together with the previously negotiated license extensions, and the normal market incentives and capabilities of Lexis/Reed Elsevier (such as those that led it to a new partnership with Matthew Bender), should be sufficient to maintain vigorous competition that would protect consumers in the comprehensive online legal research services market.

Lexis/Reed Elsevier comments that these actions are not enough. These arguments are not new. Plaintiffs heard them from Lexis/Reed Elsevier during the investigation and investigated them extensively and intensively.

Specifically, Lexis/Reed Elsevier makes two complaints. First, they seek divestiture of TCSL. Second, they criticize the divestiture of Auto-Cite. These points are essentially reiterated in their Motion to Intervene.

1. TCSL

Lexis/Reed Elsevier complains that plaintiffs should have obtained an additional divestiture—the TCSL—in order to enable Lexis/Reed Elsevier to use the components of the TCSL to compete with WESTLAW's Key Numbers and headnotes. Plaintiffs disagree. Plaintiffs carefully considered this argument and all the evidence relevant to it—and found it wanting. The information filed by Lexis/Reed Elsevier with its Motion to Intervene itself demonstrates why this argument is without merit.

Lexis/Reed Elsevier asserts that there are four "portions of the TCSL" that are "the most important * * * enhancements" and that Lexis/Nexis must license "(i)n order to compete with Westlaw": "the annotations found in ALR and Lawyer's Edition, the AmJur encyclopedia, and Auto-Cite." Emrick Declaration ¶7. In fact, the enhancements that are important to Lexis/Reed Elsevier will continue to be available. First, Lawyer's Edition is, of course, a divestiture product. The new buyer, if other than Lexis/Reed Elsevier, certainly will have every incentive that Thomson had to earn revenue by licensing Lawyer's Edition to Lexis/Nexis. Second, Auto-Cite, too, is a divestiture product. If Lexis is not the buyer of this product, it will have access to Auto-Cite, as explained more fully in the next section. Third, the claim that AmJur is essential to Lexis/Nexis is undercut by Lexis/Nexis' own behavior. AmJur was only added to the Lexis/Nexis service in February 1996 after Lexis/Nexis fitfully negotiated for it over a course of several years.

Fourth, ALR is touted by Lexis/Reed Elsevier as a substitute for West's Key Number system in finding cases. Emrick Declaration ¶8. But a document attached to the Emrick Declaration directly undercuts this claim. This Thomson document reports on research with focus groups of lawyers and librarians, addressing the issue of whether ALR is a substitute for West Key Numbers. The results were that "ALR was not well received as being a place to start research" even among groups "where familiarity with ALR was skewed in ALR's favor." Emrick Declaration Exhibit B at 11, 12.[15] In focus groups of Lexis/Nexis sales people, "No one understood the analogy of ALR as a competitive alternative to headnotes." *Id.* at 9.[16]

There is simply insufficient evidence that ALR must be divested to preserve competition with the West key number system. Under the Tunney Act the Department has the duty to review the evidence and determine the litigative prospects. Lexis/Reed Elsevier asks the court to adopt this prosecutorial function.

2. Product Differentiation

Similarly, Lexis/Reed Elsevier argues that divestiture of TCSL is necessary to allow Lexis/Reed Elsevier to offer a product that is differentiated from that offered by defendants. Plaintiffs disagree. The governments' investigation revealed that the Lexis-Nexis and Westlaw services are today quite different and that Lexis-Nexis continues to add new, non-Thomson publications and databases to its service. In addition, we note that Lexis/Reed Elsevier, on its own, was able to negotiate and extend its licenses for these components into the next decade. For example, Lexis/Reed Elsevier negotiated a license for ALR through 2002 and a license for AmJur2d through 2006. This may provide an additional cushion for further differentiation of Lexis-Nexis and addition of additional secondary sources. Furthermore, Lexis/Reed Elsevier's joint venture with Matthew Bender, a leading legal publisher with numerous primary and secondary law products, will bolster its ability to continue to offer a good quality, differentiated product. Finally, the proposed Final Judgment requires Thomson to grant Lexis/Reed Elsevier the option to extend its License Agreements for three non-legal databases—Investext, ASAP, and Predicasts[17]—which are offered on Nexis, for an additional five years. Thus Lexis/Reed Elsevier may, at its option, extend these contracts until 2010. Proposed Final Judgment at ¶ X. (As with the legal publications above, Lexis/Reed Elsevier and Thomson have already negotiated extended contracts for these databases into the next decade.) In the judgment of plaintiffs, this is sufficient time for Lexis/Reed Elsevier to seek other sources, differentiate its product in other ways, or create competing databases.

3. Auto-Cite Divestiture

Lexis/Reed Elsevier also comments that the proposed Final Judgment "impairs Lexis-Nexis' contract rights to Auto-Cite, thus affirmatively damaging its ability to compete." The plaintiffs disagree. As explained above, Thomson has never discouraged citations to its publications and the acquirer of Auto-Cite will be able to continue to cite to defendants' publications, including ALR. In addition, the acquirer of Auto-Cite will be bound by the terms of the existing license between Thomson and Lexis/Reed Elsevier. Further, the acquirer—if it is a firm other than Lexis/Reed Elsevier—has every incentive to continue to offer Lexis/Reed Elsevier a competitive citator rather than risk losing that revenue stream.

Lexis/Reed Elsevier further comments that defendants should have been required to divest "all rights and interests" in Auto-Cite and complains that

> Thomson is thus not divesting itself of Auto-Cite at all: it is retaining the database itself, the staff trained in its use; the

[15] Among other points, it was also noted that "[b]oth attorneys and librarians view ALR as one of many available secondary sources, often cited in the same category as law reviews and treatises." *Id.* at 11. "ALRs were not highly regarded as definitive legal research." *Id.* at 12. Lexis sales people said that "Attorneys mostly use ALR as a last resort * * *." *Id.* at 10.

[16] Because the evidence does not support the proposition that ALR is a substitute for West Key Numbers, there is no basis for the claim in the Saloner Declaration (¶ 11) that the price of ALR will rise. Saloner assumed such substitutability.

[17] Investext is a collection of approximately 200 brokerage house reports regarding individual equities and industries. ASAP is an indexed consolidation of approximately 450 specialized industry publications. Predicasts includes the following three databases: (1) PROMT, an indexed database of over 1,100 trade and business publications; (2) MARS, an indexed database that includes information relating to advertising and marketing of consumer products and services; and (3) Newsletter, an indexed international database including 650 different newsletters from 165 publishers.

(apparently exclusive) right to use important elements of the system, *i.e.*, the cross-references and integration with the ALRs and other Thomson products; and other important incidents of ownership, such as the ability to sublicense.[18]

The governments' investigation revealed that Lexis/Reed Elsevier needed to be able to license Auto-Cite and provide it on its system in order to effectively compete in the comprehensive online legal research service market. The proposed Final Judgment addresses this concern and ensures that the acquirer of Auto-Cite will be able to continue to provide Auto-Cite to Lexis/Reed Elsevier.

The proposed Final Judgment provides that the divestiture of Auto-Cite:

> Shall include the sale of all Auto-Cite trademarks and service markets, the assignment of the Auto-Cite License Agreement, and delivery of a transferrable royalty-free perpetual license of the Auto-Cite case database as of the time of the divestiture and all software, trade secrets, and know-how used in producing and updating the Auto-Cite case database.

¶II.B. Thus, Thomson must divest to the acquirer everything it needs to be able to continue to offer Auto-Cite to Lexis/Reed Elsevier, other than new cases, which the acquirer can get from a number of sources, including Lexis/Reed Elsevier.

Furthermore, the plaintiffs will ensure that Auto-Cite will be acquired by a qualified bidder. The proposed Final Judgment provides that the United States after consultation with the state plaintiffs must be satisfied that: (1) The acquirer can and will operate Auto-Cite as a viable, ongoing product; (2) the purchase is for the purpose of competing effectively in the sale of Auto-Cite; and (3) the acquirer has the managerial, operational, and financial capability to compete effectively in the sale of Auto-Cite.[19]

Professor Saloner's concern that (1) ''the acquirer will merely be given a license to the product, without the personnel that currently produce Auto-Cite,'' and that (2) ''Lexis-Nexis has lost effective access to Auto-Cite because of the failure to include critical components of the service (*e.g.*, prospective access to ALR) in the divestiture'' are addressed above and also in Sections II.A.2 and II.A.3 Declaration of Saloner ¶¶19–23.

Lexis/Reed Elsevier also complains that Thomson has not provided it with basic information about Auto-Cite, including cost information, so that it could ''evaluate and make a meaningful bid.'' Plaintiffs investigated this complaint and requested additional information from Thomson about the bidding process. The governments' inquiry revealed that the bidding process is at an early stage. At this point, only non-binding expressions of interest, not actual bids, have been requested by defendants. A number of interested companies, including Lexis/Reed Elsevier, have expressed interest in bidding.

During the next stage of the bidding process, prospective bidders will receive a presentation by Thomson personnel and access to a due diligence room containing proprietary documents. Ironically, because of its confidential license agreements with Thomson, Lexis has access to key data that no other bidder can obtain and therefore has more information than any other bidder. Thus, prospective bidders will have adequate information before formulating their bids.[20]

4. Overall Competition in the Comprehensive Online Legal Research Service market

Matthew Lee, Executive Director of Inner City Press/Community on the Move (''ICP'') also expressed concerns about competition in the comprehensive online legal research services product market. ICP comments that the comprehensive online legal research service product market was already an ''over-concentrated and anticompetitive'' duopoly and faults plaintiffs for taking no action to change this situation. ICP's complaint is unrelated to the merger. ICP's complaint essentially seeks a Sherman Act section 2 monopolization case in the comprehensive online legal research services market. Whatever the merits of such an action, it is far beyond the scope of this Tunney Act proceeding on a Clayton Act section 7 matter.

O.R. Armstrong submitted comments on behalf of Geronimo Development Corporation, St. Cloud, Minnesota. Geronimo Development publishes a CD–ROM format, Virginia case law, statutes and administrative materials, along with U.S. Fourth Circuit and Supreme Court case law. Geronimo claims that because Lexis will be weakened by the merger, West's enhanced lower federal court case law monopoly therefore will be strengthened. Plaintiffs disagree. Our response to Lexis' comments relating to the merger's effect on it are above in II.C. However, even if Geronimo's claim about weakening Lexis were true, the merger cannot accurately be described as strengthening West's position in any enhanced federal case reporters, because there is insufficient evidence to support a successful allegation that Lexis is an actual or potential competitor in that market.

D. The Star Pagination License Eases a Significant Barrier to Entry and is Procompetitive

A number of commenters raised concerns about the decree provision which requires defendants to grant licenses to star paginate to West's National Reporter System publications.[21] This license provision was included in the proposed final judgment because West's prior refusal to grant such licenses was a barrier to entry into some markets affected by the merger, particularly emerging electronic forms (particularly CD–ROM) of enhanced primary law and secondary law.

West's claim of copyright infringement by ''star pagination'' is controversial. It has been the subject of litigation. In current litigation the United States has stated its position that use of star pagination does not constitute copyright infringement.[22] If

[18] James P. Love of the Consumer Project on Technology submitted a similar comment.

[19] Before Thomson offered Auto-Cite as a commercial product on the Lexis online service, it used it internally for editorial purposes. (The same is true of West's Insta-Cite service). The governments' investigation revealed that entirely foreclosing Thomson editors from internally using Auto-Cite for essential, editorial purposes would harm its retained products, which would clearly harm competition. Thus Thomson retains a copy of Auto-Cite and can use that copy (though not, for example, the Auto-Cite trademark).

[20] Lexis/Reed Elsevier's real concern appears to be that Thomson could use its copy of the Auto-Cite database to improve WESTLAW, West's comprehensive online legal research service. WESTLAW's counterpart to Lexis-Nexis' Auto-Cite is called Insta-Cite. Insta-Cite only offers a portion of what Auto-Cite offers—it does not offer negative, indirect history before 1972 nor does it offer cross-references to ALR. If Thomson does ''upgrade'' Insta-Cite, it would be a procompetitive result. The governments' investigation did not reveal—and even Lexis/Reed Elsevier has not argued—that Auto-Cite has to be ''better than'' Insta-Cite for the Lexis-Nexis service to compete with WESTLAW. Continued access to Auto-Cite is sufficient. Further, West could have, absent the merger, to fill in the Insta-Cite database.

[21] Lynn Warmath, Hirschler, Fliescher, Weinberg, Cox & Allen; Alan D. Sugarman, HyperLaw, Inc.; Professor Robert L. Oakley, American Association of Law Libraries; Alois V. Gross, Esq.; Gary L. Reback, Esq., Lexis/Reed Elsevier; O.R. Armstrong, Geronimo Development; Morgan Chu, Esq., Matthew Bender & Company; E. Scott Wetzel, CD Law; Jose is. Rojas, Esq., Oasis Publishing Company, Inc.; Eleanor J. Lewis, American Association of Legal Publishers; Professor J.C. Smith, Artificial Intelligence Research Project; John H. Lederer, Esq.; Kendall F. Svengalis, Rhode Island State Library; James P. Love, Consumer Project on Technology; Norman S. Wolfe, International Compu Research, Inc.

[22] The United States recently filed briefs to this effect in *Matthew Bender & Co., Inc.* v. *West*

Continued

that position prevails, then licenses pursuant to the decree will be unnecessary. If that position does not prevail, then the license provisions will reduce existing entry barriers and thus make these markets more competitive.

Because the issue of West's alleged pagination copyright has been so controversial, this provision of the decree attracted a substantial number of comments. Most of them are comments about this general public policy issue and do not relate to harm caused by the merger and to the violation alleged in the complaint. Each is discussed below.

1. Validity of West's Star Pagination Copyright Claim

Many of the commenters questioned the propriety of including the Star Pagination License provision in the proposed Final Judgment.[23] Specifically, these commenters believe that the license provision somehow endorses West's claim that star pagination infringes its copyright. This argument ignores the plain language of the decree.

Language in the Stipulation, proposed Final Judgment, and Competitive Impact Statement clearly states that the license provisions created in settling this case shall not have any bearing, in any forum, on any West intellectual property claim. This provision was added specifically in anticipation that some persons might incorrectly infer that the proposed star pagination license endorses West's star pagination claim. If defendants ever attempt to use the Final Judgment, or any pleading in this case, to support any intellectual property claim in any other forum, any opposing party can simply cite the relevant disclaimer language to rebut Thomson/West.

In addition, the proposed final judgment has been revised with the addition of the following language to the disclaimer:

> Defendants have agreed that they will not use the model license contained in this Final Judgment, or the fact that any such license was included in the Final Judgment, in any litigation or negotiations with third parties to support the validity of their position on star pagination.

2. Abandonment of Star Pagination Copyright Claim

Several of the commenters who made the foregoing point also argued that plaintiffs should have insisted on total abandonment of the claim that star pagination infringes West's copyright. For example, Morgan Chu at the law firm of Irell & Manella submitted comments on behalf of Matthew Bender. Matthew Bender cites two cases for the proposition that this decree should require abandonment of star pagination claims; however, these cases presented entirely different factual situations. *United States* v. *Borland International, Inc.*, 1992–1 Trade Cas. (CCH) ¶ 69,774 (N.D. Cal. 1992), involved a merger of firms that controlled competing database programs and related intellectual property. Had Borland not been barred from pursuing Ashton-Tate's copyright infringement claims against ''clones,'' the resulting increase in concentration from the acquisition would have been anticompetitive. Thus, the abandonment of infringement claims directly addressed competitive harm posed by the transaction. In this case, the deal does not combine two competing sets of intellectual property rights; no one is seeking the right to star-paginate to Thomson products. Therefore, *Borland* does not apply.

The relief in *Hoechst AG,* 60 Fed. Red. 49609 (F.T.C. 1995), was even more narrowly drawn. Hoechst's acquisition of Marion Merrell Dow, Inc. (''MMD''), put it in control of Cardizem CD, the dominant product in the market for once-a-day Dilitiazem, which is used to treat, among other things, high blood pressure and angina. Before the acquisition, Hoechst and another firm had been developing a drug to compete with Cardizem CD, and MMD had sued them for patent infringement. In ensuring that the third company would be able to continue to develop the competitive drug as effectively as it would have absent the merger, the decree required dismissal of the infringement suit. Since Hoechst had left the new drug in the other firm's hands and the infringement suit was dismissed, there was no need for the sweeping relief obtained in *Borland.*

Matthew Bender further comments that defendants should have been forced to abandon West's star pagination claims because they will give Thomson and West an unfair advantage in creating new products which integrate Thomson's secondary law with West's primary law. Matthew Bender argues that other publishers will not be able to compete with these new, integrated products because of the star pagination claim. However, Matthew Bender does not explain how the star pagination license leaves it worse off. If it prevails in its litigation with West, of course, Matthew Bender will not need a license at all to star paginate. If however, it loses, the license ensures that Matthew Bender will be able to obtain a star pagination license at a reasonable rate. The creation of new, integrated products is a procompetitive development, which the antitrust laws encourage. To the extent this acquisition makes that creation possible, the proposed Final Judgment should not prevent it.

3. Text Copyright

Mr. Sugarman claims the proposed Final Judgment unfairly benefits Thomson/West in HyperLaw's private suit with defendants, for infringement of a West (claimed) copyright in the text of cases reported in West reporters. He apparently believes the proposed star pagination license will be falsely characterized by West to sway and mislead courts and the United States Congress, to persuade them to adopt West's view of its copyright claim in the text of West-reported cases. Plaintiffs disagree. The proposed Final Judgment does not support or even address West's claim to a text copyright. The decree's disclaimer language applies equally to any West text copyright claim.

4. Other Antitrust Violations

Mr. Sugarman states that, ''the Antitrust Division has punched a free antitrust waiver ticket to West-Thomson. It will be able to throw its weight around in the legal market without any concern as to enforcement from the Antitrust Division.'' There is no support for this statement. Thomson/West remains subject to full antitrust investigation and enforcement on any conduct other than this specific merger.

Mr. Sugarman states, ''there is nothing in Hart-Scott-Rodino [the premerger notification filing statute, codified at 15 U.S.C. 18a] that prohibits the United States from initiating antitrust enforcement action when it develops evidence of violation of the antitrust laws in the course of a Hart-Scott-Rodino investigation.'' Plaintiffs agree. If an antitrust violation unrelated to this merger were to be uncovered during the course of the investigation, or in any other investigation, the appropriate remedies would necessarily be sought in other fora, for example, by challenging the conduct in a civil complaint, a grand jury proceeding and/or indictment in a potentially criminal matter, by amicus brief in a private suit, or by competition advocacy in legislative or regulatory forums.

Publishing Co., 94 Civ. 0589 (JSM) (S.D.N.Y.) and *Oasis Publishing Co.* v. *West Publishing Co.,* No. 96–2887 (8th Cir.).

[23] Alan D. Sugarman, HyperLaw, Inc.; Alois V. Gross, Esq.; Morgan Chu, Esq., Matthew Bender & Company; Jose is. Rojas, Esq., Oasis Publishing Company, Inc.; Eleanor J. Lewis, American Association for Legal Publishers; Professor J.C. Smith, Artificial Intelligence Research Project; Kendall F. Svengalis, Rhode Island State Library; James P. Love, Consumer Project on Technology.

Mr. Sugarman worries that the Department, West and others mischaracterize the star pagination license as ''resolv[ing] any possible antitrust concern regarding the availability of star-pagination licenses.'' We agree that such a statement, by itself, would be a mischaracterization of the intended effect of the proposed license. The plaintiffs believe only that the proposed license, along with the other relief obtained in this settlement, resolves any possible antitrust concerns arising from this merger. The plaintiffs have no control over the mischaracterization of any part of the proposed Final Judgment by any other person. However, the terms and circumstances of the star pagination license are sufficiently clear to make successful mischaracterizations of the kind that concerns Mr. Sugarman highly unlikely.

5. Citation to First Page of an Opinion

Matthew Bender comments that it believes that West claims to have ''a copyright interest in the initial parallel citations (i.e., the cite to the first page of a case) in the National Reporter System that may be infringed when a competitor uses such citations.'' The governments' investigation revealed that West claims it has a copyright interest in such ''initial parallel citations,'' but concedes that third party use of such citations is a fair use and as such is a defense to infringement and that such citations are ''effectively in the public domain.'' Further, West has never enforced such a copyright interest, and defendants have stated that they have no intention of enforcing such a copyright interest in the future. See Attachment A.

6. Level of License Royalty Fees

There were many comments on the level of the pagination license fees. After carefully reviewing these comments and after obtaining more information about license fees, the parties negotiated a revision to the schedule of pagination license fees contained in the proposed Final Judgment. With this revision, the fees per thousand characters would be as follows:

1st year of a license	4¢
2d year of a license	4¢
3d year of a license	6¢
4th year of a license	6¢
5th year of a license	8¢
6th year of a license	8¢
7th year of a license	9¢
Subsequent years	9¢

This new schedule, compared to that in the initial proposal, reflects the comments on the need for lower fees to more effectively encourage new entrants. The new schedule has overall lower fees for such entrants. Furthermore, the new schedule both begins at a lower rate and allows a longer period in which a new entrant benefits from low rates.

7. Large Publishers

A number of commenters express concerns that the star pagination graduated royalty rate (license fee) structure will benefit only large publishers.[24] The revised fee structure is likely to result in entry by some legal publishers, which should result in competition being preserved and perhaps enhanced by new competition. The ''graduated'' structure is specifically aimed at encouraging entry of publishers who are new or small, by providing a lower license price in the early years. This should assist start-up firms with less capital in the early years. Then, after the entrant has had a few years to establish its new publication the rate levels off.

It also should be remembered that the license fee is a function of the number of cases for which star pagination is licensed. Thus, the size of the total fee payment should be compared to the number of cases and expected sales, not the size of the publisher. Finally, the license provides that the fee is not to *exceed* the stated rates; therefore, the license specifically allows for negotiation and payment of a lower fee.

8. Other Markets

Ms. Lyn Warmath, Library Director at Hirschler, Fliescher, Weinberg, Cox & Allen in Richmond, Virginia expresses concern about the level of the fee anticipated for the star pagination license. Ms. Warmath calculates the license fees for various publications, for example, she calculated the license to duplicate West's Federal Supplement to be $632,000 in the first year. This product, however, is not affected by the merger, so the relevance of this point is dubious.

Essentially, the plaintiffs' approach to this case is to encourage competition in the enhanced primary and secondary law product markets alleged in the Complaint where a star pagination license might be useful. Simply, competition for federal reported case law (other than the enhanced Supreme Court reporters for which divestiture is required) is not affected by the merger of Thomson and West, because Thomson does not publish products that compete with West's Federal Supplement or Federal Reporter series. The proposed Final Judgment therefore addresses the relief deemed necessary to preserve competition.

The Department has said publicly that it hopes the mandatory star pagination license encourages entrants in other markets. These generally pro-competitive results, if they occur, would be ancillary to the remedy sought in the proposed Final Judgment.

9. The Need for a Text License Is Unrelated to This Merger Transaction

Mr. Sugarman insists that the proposed star pagination license should also include a mandatory test license and a waiver of any Thomson/West copyright claims on intermediate copying as long as any published case does not include West head notes and summaries. Similarly, Eleanor J. Lewis of the American Association of Legal Publishers (''AALP''), comments on the unavailability of an archive of federal judicial decisions. Norman Wolfe of International Compu Research, Inc. (''ICRI'') comments that ''[t]here is no provision in either the settlement document or the licensing agreement for obtaining the full text of judicial opinions.'' Plaintiffs disagree with the proposition that a text license should have been included in the decree.

The relevant question is not what license would be the best possible license to address all possible issues involving the legal publishing industry in a vacuum. The proposed license is an attempt, in connection with the other relief, to remedy the effect of this particular merger. The straightforward purpose of the star-pagination license is to open access to the de facto star pagination standard in the markets alleged in the Complaint. A text license or intermediate copying waiver is not necessary to address any competitive harms flowing from this merger. In fact, in the enhanced primary case law markets alleged in the Complaint for which the proposed star pagination license is intended to encourage entry, court opinions are available to potential entrants from the courts, so a text license and an intermediate copying waiver are not necessary.

Mr. Sugarman insists that the Final Judgment include relief on the issue of West's claimed text copyright merely because the text of judicial opinions is difficult to obtain. HyperLaw alleges

[24] Lyn Warmath, Hirschler, Fliescher, Weinberg, Cox & Allen; Alan D. Sugarman, HyperLaw, Inc.; Professor Robert L. Oakley, American Association of Law Libraries; Gary L. Reback, Esq., Lexis/Reed Elsevier; Morgan Chu, Esq., Matthew Bender; Jose is. Rojas, Esq., Oasis Publishing Company; Eleanor J. Lewis, American Association of Legal Publishers; John H. Lederer, Esq.; Kendall F. Svengalis, Rhode Island State Law Library; James P. Love, Consumer Project on Technology; Norman S. Wolfe, International Compu Research, Inc.

that West has made it difficult to obtain opinions in some jurisdictions and that this places firms like HyperLaw at a competitive disadvantage. Plaintiffs agree that judicial opinions may be difficult to obtain in some jurisdictions, and that this is an entry barrier to some enhanced primary law markets. Complaint ¶30. However, there is no evidence that the merger of Thomson and West, or the proposed Final Judgment, will affect in any way HyperLaw's ability to obtain the text of judicial opinions. Mr. Sugarman states, ''Thomson was not only a potential competitor in the creation of archives of opinions, but was well on the way to doing so.'' Plaintiffs are unaware of any basis for this assertion. The most likely broad-scope source of opinions competing with West, in those instances where the difficulty in obtaining opinions may be a barrier to competition, is Lexis/Reed Elsevier. Moreover, in the enhanced primary law markets alleged in the Compliant, the text of opinions is not difficult to obtain.

10. Selection of Cases

Mr. Sugarman complains that Section 1.03 of the proposed star pagination license defines ''Licensee Case Reports'' as reports of decisions ''selected for reporting by Licensees,'' and it therefore will allow Thomson/West to refuse to license if it determines that the potential licensee did not select the decisions, but instead copied the selection of West, a state, or some other party. Ms. Lewis of the AALP expresses concern that ''only licensing original compilations and West's right to determine what is an original compilation'' will undermine the purpose of the license. Matthew Bender comments, ''West apparently can still challenge a licensee's use of star pagination if West contends that the licensee has not made its own selection, coordination, and arrangement of cases.'' Plaintiffs disagree.

The plaintiffs interpret the proposed license to mean that a license must be issued for star pagination any set of cases selected by the licensee, even if West or any other person had previously selected a similar set of cases. Defendants have stated to plaintiffs that they would not consider a CD–ROM product which included exactly the same cases included in a West print reporter to be an infringement. Indeed, Matthew Bender has introduced such a product and we are informed defendants have not challenged it as a ''selection infringement. Defendants would object to a print product which simply replicated a West print reporter; however, there is no reason to expect entry into print products and, in any event, CD–ROM products compete with print products and thus provide competitive constraint.

11. Description of Product or Service

A number of commenters think the proposed star pagination license should not unnecessarily require licensees to disclose competitive product information to defendants in order to obtain a star pagination license.[25] For example, Eleanor Lewis of AALP comments, ''A licensee should be required to disclose to West only the most general ideas about the proposed use of the licensed materials.''

Plaintiffs agree. There is no requirement in the proposed license that detailed information be disclosed. Section 1.03 merely requires licensees to provide a short, general description of the licensee's product or service to defendants, *i.e.*, a title. This limited disclosure is necessary so that it is clear what product is covered by the license. Ultimately, the licensee must disclose what cases are included in their product so that the license fee can be calculated. This simple information is not the type that should or could be considered sensitive competitive information, as the cases selected by the licensee for publication will subsequently be public information.

12. License fee per Format

A number of comments maintain that the provision in the proposed star pagination license that requires the payment of a separate license fee for each format—books, CD–ROM, on-line or the Internet—erects too high a barrier to potential entrants.[26] However, the governments' investigation indicated that many, perhaps most, prospective entrants would only consider one medium—CD–ROM. One of the main objectives of the licensing provision was to facilitate entry specifically into the new technology/new product of CD–ROMs incorporating analytical material and hypertext links to relevant primary law. Because enhanced primary case law on CD–ROM competes with enhanced primary law in print, CD–ROM entry should be sufficient (with the other relief in the decree) to deter anticompetitive behavior by Thomson/ West in either print or CD–ROM.[27]

Addtionally, the governments' investigation revealed that for those existing publishers who publish in more than one format, for example CD–ROM and on-line, the latter medium is used primarily to provide updates (new cases) and therefore does not duplicate the cases on the CD–ROM and would not require multiple payment of the license fee.

13. Challenges to West's Copyright

Mr. Sugarman and Matthew Bender, who are currently engaged in copyright litigation with West, contend that the prohibition in the proposed star pagination license that bars licensees from challenging the validity of West star pagination copyright claims ignores *Lear* v. *Adkins*, 395 U.S. 653 (1969), and assures that no West copyright claim will be challenged. Ms. Lewis states that the license ''requires competing publishers to renounce their First Amendment right to express their opinions about the Licensor's alleged copyright during the term of the license.'' Mr. Wolfe of ICRI also comments regarding ''this obvious abandonment of our First Amendment rights.'' Plaintiffs disagree.

First, the prohibition in Exhibit B is limited to challenges only to the star pagination claim, not to any other West copyright claim, and is limited in time—only during the duration of the license. Second, it is questionable as to whether the progeny or policy of *Lear*, a patent case, applies to copyright licenses. See, *e.g.*, *Saturday Evening Post Co.* v. *Rumbleseat Press, Inc.*, 816 F. 2d 1191 (7th Cir. 1987); *Nimmer on Copyright* § 10.15[B] at 10–134–137 (questioning *Rumbleseat*). In addition, this prohibition is much more narrowly tailored than the broad no-challenge clauses courts have struck down in patent-license contexts.

Third, this provision will not prevent challenges to the validity of West's star pagination infringement claims; publishers may still choose the option they have today—publish without a license and litigate the star pagination copyright claim's validity. The proposed Final Judgment simply provides prospective publishers with an entry option they would not otherwise have.

Fourth, a licensee may exercise his First Amendment rights and speak out publicly and lobby for changes relating to this issue.

[25] Alan D. Sugarman, HyperLaw; Morgan Chu, Esq., Matthew Bender; Eleanor J. Lewis, AALP; Norman Wolfe, ICRI.

[26] Alan D. Sugarman, HyperLaw; Morgan Chu, Esq., Matthew Bender; Eleanor J. Lewis, AALP; James P. Love, Consumer Project on Technology.

[27] As reflected in the Complaint, Thomson and West do not compete in the provision of enhanced primary case law in the online medium. Although the plaintiffs are fully aware that several firms desire to enter the provision of case law online and on the Internet, entry into these mediums is not a remedy intended to be addressed by the proposed star pagination license.

14. The Confidentiality Provision Is Intended to Protect the Licensee and Could Encourage Procompetitive Discounting

Mr. Sugarman, Ms. Lewis, and Mr. Wolfe comment that the confidentiality provision in the proposed star pagination license will permit Thomson/West to engage in preferential licensing and to continue to engage in abusive licensing practices in secret. Plaintiffs disagree. The confidentiality provision in the star pagination license is intended to protect the product development and marketing plans of the licensee, not any secrets of Thomson/West. Thomson/West's minimum license terms are already public in Exhibit B. The company is required to grant a license—in at least this favorable a form—to anyone who wants one. Failure to fulfill this requirement and any licensing obligation would be a violation of the Final Judgment and grounds for contempt.

Concerns about secret, preferential licensing and abusive licensing practices may in fact be concerns that Thomson/West might enter some licenses that are more favorable to the licensee than Exhibit B. But entering into licenses with more favorable terms will generally be desirable and pro-competitive. Moreover, a ''most-favored-nation'' clause (one that states Thomson/West will not grant to any licensee a more favorable license) would discourage pro-competitive discounting that Thomson/West may undertake on its own in response to market forces.

15. Arbitration

Mr. Sugarman states that provisions in the proposed star pagination license requiring arbitration in West's home state will lead to bias in favor of West on any arbitrated matter. Ms. Lewis agrees and comments that arbitration should occur in Washington, D.C. or the home state of the licensee. Mr. Wolfe comments, ''[i]t is not appropriate for the jurisdiction for any dispute to be any place other than Washington, DC.''

Plaintiffs disagree. Such provisions are standard in licenses which are negotiated at arms length in the context of private business transactions, and are usually included only for the convenience of traveling. There is no reason to call into question the honesty, integrity, or ability of any impartially appointed arbitrator based solely on his or her location or citizenship in the State of Minnesota. In addition, the decision of the panel of arbitrators is appealable to the appropriate state or federal court.

16. The Internet

James P. Love of CPT comments that the ''license agreement is written in such a way that the subscribers must agree to the terms of the license, and Thomson must approve the license, making it extremely unlikely that the citations will ever be available for browsing on the Internet.'' We interpret Mr. Love's concern to be that the license provisions to which a licensee's subscribers must agree may be used to restrict some form of Internet publication of licensed material on the Internet.

The possibility that Mr. Love suggests appears unrelated to the acquisition. Provisions of this kind are conventional in intellectual property licenses. Nothing would have prevented West, prior to the acquisition, from insisting on such provisions in licenses. The acquisition should not aggravate Mr. Love's concern, and therefore, there is no need for the remedy to alleviate it. In short, this comment addresses a public policy concern not related to the merger.

17. License Fee for Books

Mr. Sugarman claims that the proposed star pagination license is ambiguous as to the license fee charged for books. Plaintiffs intended that the fee would be paid by the licensee in the year the book is printed. In other words, books first printed, then stored, and sold in later years would not require additional fee payments for the later years. In order to avoid any confusion, the language of the proposed License Agreement will be modified. Defendants have agreed to the following modification, which plaintiffs will include when we later move the Court to enter the decree:

2.01. *Star Pagination License.* During the term of this Agreement, subject to the terms and conditions hereof, including, without limitation, the timely payment by Licensee to Licensor of the licensee fees provided for in Section 2.03 hereof, Licensor hereby grants to Licensee, and Licensee hereby accepts from Licensor, a non-exclusive, non-transferable (except as specifically provided in Section 6.05 hereof), limited License (i) * * * (iii) to license and/or distribute such [Licensee Product(s)/Services(s)] to Licensee Subscribers subject to Licensee Subscriber Limitations; * * *

2.03 *License Fees.* In consideration of the license granted under Section 2.01 hereof, Licensee shall pay Licensor the license fees provided for in this Section 2.03; provided, however, that the licensee fee for [print Licensee Product(s)] needed only be paid for the year in which the [print Licensee Product(s)] are printed.

18. *Other Comments Regarding the Star Pagination License*

Mr. Sugarman believes that third party information providers should be able to sell or license case law data which includes licensed star pagination and text as long as the purchasers or licensees have entered into or are subject to a pagination license agreement with Thomson/West.[28]

Plaintiffs agree. Section 2.02 of the license addresses this point specifically: ''nothing in this Agreement shall prohibit Licensee from selling, leasing, licensing or otherwise transferring Licensee Case Reports that contain Licensed NRS Pagination to third party information providers, but such transfers shall not include or grant any right to reproduce, publish, broadcast, distribute, loan, rent, lease, sell or otherwise transfer, make available or use the Licensed NRS Pagination contained in such Licensee Case Reports.'' Any third party information provider that obtained a star pagination license could, of course, use the transferred star pagination under its own license with Thomson/West. There is nothing in the proposed license to the contrary. Nevertheless, to clarify that the license fee need only be paid by the publisher, and not also by the third party information provider, plaintiffs proposed and defendants reviewed and agreed to the following language:

2.01. *Star Pagination License* * * *. (iv) to have a third party obtain, on behalf of Licensee, NRS Pagination from West Case Reports contained in NRS Reporter publications and include such NRS Pagination (which shall become Licensed NRS Pagination when so included) in corresponding Licensee Case Reports contained in [Licensee Product(s)/Service(s)].

Mr. Sugarman comments that Thomson/West should be required to agree not to assert future database protection legislation and anti-RAM copying claims against licensees, for use of star pagination. This issue is specifically addressed in the proposed license in Exhibit B. The proposed license ensures that Thomson/West will not contend that a licensee's use of star pagination infringes any intellectual property right. Section 2.01 also provides that ''Licensor [Thomson] shall not challenge, under any present *or future legislation,* any use by the Licensee of Licensed NRS Pagination if Licensee's use of same conforms to the terms of this Agreement.'' (emphasis added).

[28] Mr. Wolfe of ICRI offered a similar comment on behalf of ICRI, which describes itself as ''a wholesale customer of legal publishers with the rights to resell, as part of our product and for the use of our product, case law data.''

Mr. Sugarman comments that the proposed Final Judgment should require West-Thomson to negotiate star pagination licenses in good faith. Plaintiffs disagree because the proposed Final Judgment requires Thomson/West to grant the license contained in Exhibit B to the Judgment to anyone who wants one; therefore, good faith is not relevant. Any refusal to license would be punishable as contempt.

Mr. Sugarman states that the proposed star pagination license is not an ''open license,'' ''* * * when it will be negotiated in private and arbitrated in private pursuant to confidentiality provisions agreed to by the Antitrust Division.'' Plaintiffs disagree. The proposed license is in fact ''open'' within the common meaning of that word. The terms are *public* and mandatory, and are attached the proposed Final Judgment as Exhibit B. While it is true that negotiations with potential licensees seeking more favorable terms than the proposed license may be non-public, licenses arranged for under more favorable terms will not cause an anticompetitive effect and in fact should be pro-competitive.

Mr. Sugarman feels that the requirement in the proposed star pagination license that licensees prominently display West internal pagination should be deleted. In fact, Section 2.05 of the license merely requires licensees to present NRS Pagination ''*no less prominently than* any other unofficial pagination or pinpoint locators.'' (emphasis added). Plaintiffs cannot determine what possible anticompetitive effects, if any, could arise from this provision. Mr. Sugarman does not state any.

Mr. Sugarman is concerned that the proposed star pagination license does not include a mandatory license agreement for statutes. Star pagination to West's statutes has not become an issue. We are aware of no jurisdiction where it is conventional to cite to statutes by West pages. A license agreement on the text of statutes themselves is not called for in the context of the competitive issues raised in this merger investigation. Statute text is available in every jurisdiction, for every potential entrant, and in every product market involving statutes affected by the merger.

E. Plaintiffs Used Appropriate Merger Analysis in Examining this Merger

Ms. Trembley comments that ''[i]n the past, Thomson practices have made acquired products both more labor intensive and costly to maintain.'' She is concerned that Thomson-owned products in the past have had their price raised at a higher rate than West products. Similarly, Mr. Marc Ames, an attorney in New York City, comments that he has been involved in a lengthy billing dispute with Lawyers Cooperative Publishing, a part of Thomson. He brings this to our attention to ''point out and underscore a shift in attitude when business becomes too large as the result of mergers and acquisitions.''

Past price increases by Thomson are beyond the scope of this merger challenge. To the extent they indicate that price rises have resulted when Thomson takes over specific competing products, evidence of past price increases is useful as evidence that similar product pairings should be prohibited.

Plaintiffs believe such pairings have been identified and prohibited in this case by the required divestitures. Plaintiffs note that it does not necessarily follow that a large firm always will engage in harmful pricing or service practices to its customers. Competition leads to lower prices and increased service, quality and innovation. However, there is no way to prove a likely decrease in competition due to a merger without first carefully examining the factual details in specific product markets.

Mr. David C. Harrison, an attorney in Philadelphia, Pennsylvania, asks how the Justice Department can approve the merger of ''the second largest legal publisher with the largest legal publisher, giving the new company a virtual monopoly.'' Even if it was true, a merger of the second largest and largest legal publisher would not necessarily lead to an irreplaceable reduction in competition in legal publishing.[29] As stated above, increases in industry concentration is an important indicator of possible anticompetitive effects of any merger, however, courts require more before a merger challenge will be successful. Generally, courts require provable relevant product markets and a lack of likely substitutes or entry. The plaintiffs believe every plausible, legally recognizable, anticompetitive effect of the Thomson/West merger has been addressed in the Complaint and proposed Final Judgment.[30]

F. Plaintiffs Should not Require Divestiture of the JURIS Database

1. There is no Conflict of Interest Within the Department on This Matter

Tax Analysts (''TA'') comments that the United States Justice Department (''the Department'') should be forced to disclose the contents of its former JURIS database in order to remove an alleged barrier to entry described in paragraph 30 of the Complaint—that in many jurisdictions case law is difficult to obtain. TA also believes that because the Department's Civil Division, joined by West, is defending a Freedom of Information Act (''FOIA'') (5 U.S.C. 552 *et seq.*) request by TA for the JURIS database in another action, the Department has an irreconcilable conflict of interest that causes the Department to act against the public interest. TA filed a motion to intervene in this Tunney Act proceeding on July 25, 1996, which was denied by an order of Judge Richey of this Court.

TA is a non-profit vendor of publications relating to legal tax issues, that logically wishes to obtain historic reports of legal opinions and statutes cheaply, or for free, in order to offer these to its customers. It applied for but was denied a FOIA request to obtain the JURIS database.[31] TA filed a FOIA action against the Department in the District of Columbia in January, 1994, seeking an order requiring disclosure of the database. West intervened. It sought to protect its interest as the original provider of the case reports to the Department; West continues to sell similar reports to its other customers. The Department has been defended at all times in that matter by attorneys of the Federal Programs Branch of the Civil Division. In January 1996, Judge Kessler granted the partial motion of the Department to dismiss the suit as it related to the status of the West-supplied case reports as an ''agency record'' under FOIA. The order was

[29] According to SIMBA/Cowles Professional Publishing Information Report (1996) and Lexis' own figures, measured by sales Thomson has been the number three legal publisher, behind Reed Elsevier, owner of Lexis. Thomson owns many non-legal assets unrelated to this merger. West is the largest legal publisher.

[30] Lexis states that consumers are already feeling the loss of competition because Thomson has stopped publication of the Illinois Administrative Code, and that Thomson may be on the verge of canceling its New Jersey Administrative Code. Mem. at 6. However, Thomson's codes in Illinois and New Jersey do not compete in any market alleged in the Complaint, nor do they compete with any West product, as they are *unenhanced*. Moreover, the regulatory materials contained in these products are freely available from the states and entry into the publication of unenhanced state administrative codes is unlikely to be difficult.

[31] JURIS was established and used by the Department for internal use by its many components for legal research. It licensed case reports and statutes from West and made them available along with other legal information and documents online across the Department and other United States Government agencies. In an effort to reduce costs, JURIS was discontinued in 1993, and replaced at the Department with contracts for direct provision of case reports and statutes from Lexis/Reed Elsevier and West.

certified as final on April 1, 1996. *Tax Analysts* v. *Department of Justice and West Publishing Company,* 913 F. Supp. 599 (D.D.C. 1996).

TA was denied the database it sought because Judge Kessler held that the Department did not control the West-supplied case reports, which were provided under a contract with West. The contract restricts the Department's right to use, dispose of, or transfer the database; and it therefore does not qualify as an ''agency record'' for purposes of disclosure under FOIA. *Tax Analysts,* at 604. At no time has the Department asserted any proprietary or copyright interest in the database, nor has it made any assertion on behalf of West's copyright claim. The Department's defense in the FOIA matter is not related to any conduct of Thomson or West relating to the merger. TA has appealed Judge Kessler's ruling.

The Antitrust Division's unrelated investigation of the proposed merger of Thomson and West began on March 12, 1996, pursuant to the Clayton Antitrust Act, 15 U.S.C. 12 *et seq.* At all times, the Department's investigation, challenge and settlement negotiations of the Thomson/West matter have been conducted by attorneys of the Merger Task Force of the Antitrust Division or their direct supervisors within the Antitrust Division, and in direct coordination with several state attorneys general's offices. At no time during the investigation or subsequent challenge has the Department or any plaintiff made any assertion relating to the JURIS database.

In the *Tax Analysts* defense, the Department seeks to protect against unwarranted disclosures under FOIA and to protect against violating its contract with a private entity. The Thomson/West merger challenge and settlement, on the other hand, involves the public interest reflected in the federal antitrust statutes for the preservation of competition in markets affected by mergers. There is simply no conflict or inconsistency between the public interests sought to be protected by the two cases.

TA argues that the Department has an irreconcilable conflict of interest resulting from its litigating relationship with West in the *Tax Analysts* case. At all times the Department has conducted an independent FOIA defense in the *Tax Analysts* case. West intervened on its own initiative and has made its own pleadings and assertions. To the extent West's views in that matter coincide with the Department's, joint pleadings were appropriate for judicial economy.

West is not the Department's client in either this or the *Tax Analysts* matter. TA avers that the Department has adopted the interests of West in the *Tax Analysts* case, and substituted them for the public interest. The Department has a clearly articulated and valuable role in protecting the public interest against unwarranted FOIA disclosure and breach of government contracts with private persons. Department attorneys are strictly prohibited from representing other persons in matters involving the United States. 18 U.S.C. 203. Moreover, West's interest in the *Tax Analysts* case is commercial, while the Department has no commercial interest whatsoever in the JURIS database.

There have been no Department attorneys involved at any time in both matters. The first time any attorney from the Antitrust Division's Merger Task Force (handing the Thomson/West matter) had any contact or even knew the identity of any attorney from the Civil Division handling the *Tax Analysts* matter was after Tax Analysts filed a motion to intervene in this matter.

TA does not seek to protect rights that would be impaired by the entry of the proposed Final Judgment. TA seeks relief directed at the conduct of the Department and which would place requirements on it alone. Essentially, TA seeks to prohibit a merger between two parties unless and until another party not involved in the proposed merger takes some affirmative action to increase competition (they believe) in the legal publishing industry. The paragraphs in the Complaint towards which TA points as examples of the harm not remedied by the proposed settlement are pre-existing industry facts that will not be changed by the merger. (See *e.g.,* paragraph 30 of the Complaint, which states, ''[p]ast and/or current opinions simply are not available from many courts, and in many others, obtaining access is costly and time-consuming.''). In short, this is a public policy issue unrelated to the merger.

2. Familiarity With Legal Publishing Industry

Another allegation made by TA is that the Department is unfamiliar with the workings of the legal publishing industry, particularly with the role of online legal publishing. The Department regularly investigates, challenges, and reaches settlement with participants in many industries in which it is not a participant. In order to develop expertise in an industry for purposes of merger enforcement, the Department uses past experience, examines documents, conducts interviews and depositions, employs industry experts, and reviews publicly available materials. These activities were all done in the investigation of the Thomson/West merger.

In addition, during this merger investigation, an unprecedented level of cooperation was established between the Department and several states, and the expertise of seven state attorneys general's offices was combined. The state attorneys general have joined in the Complaint and proposed Final Judgment after participating in fact-gathering and legal analysis. Two of the states, New York and California, devoted full-time employees to the investigation throughout its duration. All of the state governments provided valuable assistance due to their intimate knowledge of state-related publications.

TA states the Department has mischaracterized existing competition between Lexis and WESTLAW in the ''comprehensive online legal research services'' market and argues that other small legal publishers exist. However, the existence of small, online legal publisher has no impact on the anticompetitive effects alleged to result from the Thomson/West merger in the *comprehensive* online legal research services market in which there are only two participants at this time.

G. Miscellaneous Comments—Unrelated to Merger or Unsupported by the Investigation

A number of comments were received when raised concerns which are either unrelated to the merger or asserted conclusions which were not supported by the governments' investigation.

Ms. Cyndi A. Trembley, President of the Association of Law Libraries of Upstate New York, comments, ''Thomson will have control of a significant portion of the secondary sources that aid in interpreting the law.'' Kendall F. Svengalis of the Rhode Island State Law Library comments that defendants will control a large percentage of legal publications, and that they therefore should have been required to divest Lawyers Cooperative Publishing (''LCP'').

It is true that Thomson has owned and now owns, as a result of its merger with West, a significant number of secondary law titles. However, that fact alone is not grounds on which to base a merger challenge under the antitrust laws. Elements of a legally recognizable merger challenge include proving that the merging firms actually compete with each other in one or more product markets and that the effects of that competition will be lost and not replaced after the merger. The burden is also on the enforcing agency or agencies to show that there are insufficient substitutes for the products of the merging firms, and that entry into the product market is difficult. Thus, plaintiffs focused on *competing* legal publications. A torts handbook does not compete with a contracts treatise, for example. In the proposed Final Judgment, the plaintiffs require divestiture of one of the parties' products in as many product markets as could plausibly be alleged, or that the plaintiffs believed were likely to be allegeable, in a litigated merger challenge.

Mr. Svengalis complains that some of the titles that defendants must divest are relatively small and that only three states must be given the option to rebid their respective official reporter contracts. The fact that some parts of the divestiture list are small does not mean that the entire settlement is inadequate.

Mr. Gross states that the bids (for divestiture products) should not be limited to the entire list of divestiture products. The proposed Final Judgment permits Thomson/West to package, initially, the divestiture products in any manner it desires. The only requirements on bidding for divestiture products are contained in the proposed Final Judgment and relate to the need that the divestiture products are sold to some person who will keep them viable and competitive. There is no reason to believe (in fact it may be to the contrary) that the divestiture products will be more viable and competitive in the hands of two or more acquirers. In any event, the divestitures remain subject to approval by the appropriate plaintiffs, who must agree that the products will be kept viable.

There is no reason to believe that ''having more legal publishers in the market will result in competitive pricing and higher quality of law products for the consumer,'' as suggested by Mr. Gross. The relief in this merger challenge addresses the expected loss of competition due to Thomson and West no longer competing with each other. If all the Thomson products go to one able firm, as long as there is no reduction in competition resulting from the divestiture, then any competition lost by the Thomson/West merger will be replaced and preserved.

Mr. Gross comments that Thomson should have to pay a license fee for ALR cites on Auto-Cite, after Auto-Cite is divested. Plaintiffs disagree. It is true that Auto-Cite includes ALR cites. However, there is no requirement that the acquirer of Auto-Cite continue to include ALR references. If the acquirer wants to, however, it is free to continue them. Thomson may receive some incidental benefit to continued ALR references at the option of the acquirer, but if Thomson cares about the cites remaining on Auto-Cite, Thomson can negotiate on its own a contract/license to place them there. The investigation of this merger did not reveal sufficient evidence that the competitive value of Auto-Cite derives from ALR references. Rather, Auto-Cite's value comes from an accurate, up-to-the-date display of case citations, and an accurate display of whether or not a case opinion is still good law by showing the case's direct history.

Mr. Gross claims that the competition between West's Corpus Juris Secundum (''CJS'') and Thomson's American Jurisprudence 2d (''AmJur2d'') will be eliminated by the merger and therefore one of them should be divested.[32] Plaintiffs disagree. This comment does not relate to any claim made in the Complaint and thus is not relevant. In fact, while they are both referred to as ''encyclopedias,'' there was insufficient evidence that CJS is a strong competitor for AmJur2d in the minds or actual use of consumers.

Geronimo comments that the Complaint fails to address West's monopoly in reporting enhanced lower federal (U.S.) court opinions. Geronimo suggests four remedies designed to open up the market for enhanced lower federal case law. This comment also relates to a market not included in the Complaint and thus is not relevant. West reports decisions of lower federal courts in its *Federal Supplement* and *Federal Reporter* series. The Complaint does not include a count involving enhanced lower federal case law because Thomson is not even a participant in that market. There also is insufficient evidence to allege that Thomson is an actual potential or perceived potential competitor to West's alleged monopoly in enhanced lower federal case law. That Thomson is a large company with financial resources and editorial expertise does not make it a potential competitor.

Lexis/Reed Elsevier comments that plaintiffs in their press release incorrectly calculated the sales of the divestiture products, in which Lexis/Reed Elsevier claims is only $48 million. Plaintiffs disagree. The $72 million figure was based upon information obtained from Thomson about the sales of the divestiture products, including Auto-Cite, and products related to the Official Reporter Contracts. Lexis/Reed-Elseiver's reference to the lower figure apparently does not include the retail revenues of Auto-Cite or the sales of Official Reporters and related products.

[32] A similar comment was submitted by Bartlett F. Cole, Esq.

Scott Wetzel of CD Law comments that ''the Washington States legal publishing market is pervaded with anti-competitive practices that include predatory pricing, exclusive contracts for certain legal materials, and tying agreements. The Department consent decree does little or nothing to prevent or ameliorate these practices.'' These comments go beyond the allegations in the Complaint. Hence, they are not relevant to the Tunney Act proceeding.

Matthew Lee for ICP complains that West does not offer ''any program or provision for granting access to Westlaw and other West resources to non-profits, particularly grassroots civil rights and consumers' groups at reduced or waived fees.'' Whether defendants offer such programs falls outside of the process of merger review and analysis.

ICP also questions ''DOJ's long standing inter-relation with West, particularly the selection of West as the DOJ's legal-materials supplier after, largely due to West's anticompetitive behavior, the DOJ abandoned its 'Juris' project.'' Since discontinuing Juris, DOJ attorneys have used both Lexis-Nexis and Westlaw. Further, if merely using a product or service were grounds for concern, government attorneys would be unable to investigate and analyze many of the mergers that come before them.

ICP further maintains that ''DOJ should attempt to better inform the affected public, especially the 'retail' and low and moderate income segment thereof, of pending DOJ merger reviews, such that the DOJ can receive, and consider, comments from those who stand to be most affected.'' First, the plaintiffs, during the investigation, sought to receive very wide input from affected users, and in fact received information from an unusually wide number of sources. Second, as required by the APPA, plaintiffs have filed the requisite documents with this Court and published them in the Federal Register and the *Washington Post.* Furthermore, it would be impossible for plaintiffs to identify all members of ''the affected public'' and then notify each of these individual and entities of the proposed Final Judgment. In this case, plaintiffs also personally notified many of the individuals and companies who had been involved in the investigation of the proposed Final Judgment.

Some commenters were concerned that politics played a role in governments' investigation and settlement of this matter.[33] There is no political context to this merger challenge or the proposed Final Judgment, and any comments making such accusations are wrong. Recommendations of the settlement reached were made by the Department's career professional staff. We note that the Department of Justice is joined by seven state attorneys general's offices in this matter, all of which are dedicated to impartial law enforcement regardless of politics.

An anonymous commenter alleges that West is in collusion with the United States Congress in the production of United States Code Annotated (''U.S.C.A.''). The commenter says whatever company possesses this privileged, insider relationship, whether it be West or Thomson, enjoys an enormous and unwarranted market advantage. Plaintiffs received no other information to support this anonymous allegation. However, any condition of advantage enjoyed by West through its relationships with the Congress or any judicial entity is not affected by the merger of Thomson and West. Thomson may replace West in the position of advantage, but existing competition between Thomson and West is not changed. In any event, Thomson's annotated United States Code product, United States Code Service, is a divestiture product under the proposed Final Judgment.

III

The Legal Standard Governing the Court's Public Interest Determination

Once the United States moves for entry of the proposed Final Judgment, the Tunney Act directs the Court to determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e). In making that determination, ''the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest.'' *United States* v. *Western Elec. Co.*, 993 F.2d 1572, 1576 (D.C. Cir.), *cert. denied*, 114 S. Ct. 487 (1993) (emphasis added, internal quotation and citation omitted).[34] The Court should evaluate the relief set forth in the proposed Final Judgment and should enter the Judgment if it falls within the government's ''rather broad discretion to settle with the defendant within the reaches of the public interest.'' *Microsoft*, 56 F.3d at 1461. *Accord, Associated Milk Producers*, 534 F.2d at 117–18.

The Court is not ''to make *de novo* determination of facts and issues.'' *Western Elec.*, 993 F.2d at 1577. Rather, ''[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General.'' *Id.* (internal quotation and citation omitted throughout). In particular, the Court must defer to the Department's assessment of likely competitive consequences, which it may reject ''only if it has exceptional confidence that adverse antitrust consequences will result—perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency.'' *Id.*[35]

The Court may not reject a decree simply ''because a third party claims it could be better treated.'' *Microsoft*, 56 F.3d at 1461 n.9. The Tunney Act does not empower the Court to reject the remedies in the proposed Final Judgment based on the belief that ''other remedies were preferable.'' *Id.* at 1460. As Judge Greene has observed:

> If courts acting under the Tunney Act disapproved proposed consent decrees merely because they did not contain the exact relief which the court would have imposed after a finding of liability, defendants would have no incentive to consent to judgment and this element of compromise would be destroyed. The consent decree would thus as a practical matter be eliminated as an antitrust enforcement tool, despite Congress' directive that it be preserved.

United States v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D. D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (Mem.).

Moreover, the entry of a governmental antitrust decree forecloses no private party from seeking and obtaining appropriate antitrust remedies. Thus, Defendants will remain liable for any illegal acts, and any private party may challenge such conduct if and when appropriate. If any of the commenting parties has a basis for suing Defendants, they may do so. The legal precedent discussed above holds that the scope of a Tunney Act proceeding is limited to whether entry of this particular proposed Final Judgment, agreed to by the parties as settlement of this case, is in the public interest.

Finally, the Tunney Act does not contemplate judicial reevaluation of the wisdom of the government's determination of which violations to allege in the Complaint. The government's decision not to bring a particular case on the facts and law before it at a particular time, like any other decision not to prosecute, ''involves a complicated balancing of a number of factors which are peculiarly within [the government's] expertise.'' *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). Thus, the Court may not look beyond the Complaint ''to evaluate claims that the government did *not* make and to inquire as to why they were not made.'' *Microsoft*, 56 F.3d at 1459 (emphasis in original); See also, *United States* v. *Associated Milk Producers, Inc.*, 534 F.2d 113, 117–18 (8th Cir. 1976), *cert. denied*, 429 U.S. 940 (1976).

Similarly, the government has wide discretion within the reaches of the public interest to resolve potential litigation. *E.g., United States* v. *Western Elec. Co.*, 993 F.2d 1572 (D.C. Cir.), *cert. denied*, 114 S. Ct. 487 (1993); *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D. D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983) (Mem.). The Supreme Court has recognized that a government antitrust consent decree is a contract between the parties to settle their disputes and differences, *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 235–38, (1975), *United States* v. *Armour & Co.*, 402 U.S. 673, 681–82 (1971), and ''normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.'' *Armour*, 402 U.S. at 681. This Judgment has the virtue of bringing the public certain benefits and protection without the uncertainty and expense of protracted litigation. *Armour*, 402 U.S. at 681; *Microsoft*, 56 F.3d at 1459.

IV

Conclusion

After careful consideration of these comments, the plaintiffs conclude that entry of the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint and is in the public interest. The Plaintiffs

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[33] David C. Harrison, Esq.; John H. Lederer, Esq.

[34] The *Western Electric* decision concerned a consensual modification of an existing antitrust decree. The Court of Appeals assumed that the Tunney Act was applicable.

[35] The Tunney Act does not give a court authority to impose different terms on the parties. See, *e.g., United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 153 n.95 (D. D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983) (Mem.); *accord* H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974). A court, of course, can condition entry of a decree on the parties' agreement to a different bargain, see, *e.g., AT&T*, 552 F. Supp. at 225, but if the parties do not agree to such terms, the court's only choices are to enter the decree the parties proposed or to leave the parties to litigate.

have moved the Court to enter the proposed Final Judgment after the public comments and this Response have been published in the Federal Register, as 15 U.S.C. 16(d) requires.

Dated: September 23, 1996.

Respectfully submitted,

James K. Foster,

Minaksi Bhatt (DC Bar #434448),

Attorneys, U.S. Department of Justice, Antitrust Division, 1401 H Street, N.W., Suite 4000, Washington, D.C. 20530, Tel: 202/514–8362.

For Plaintiff State of California:

Kathleen E. Foote,

Deputy Attorney General, 50 Fremont Street, Suite 300, San Francisco, CA 94105, (415) 356–6320.

For Plaintiff State of Illinois:

Christine H. Rosso

For Plaintiff Commonwealth of Massachusetts:

George K. Weber

For Plaintiff State of New York:

Stephen P. Houck

For Plaintiff State of Washington:

Tina E. Kondo

For Plaintiff State of Wisconsin:

Kevin J. O'Connor

APPENDIX—INDEX OF PUBLIC COMMENTS AND RESPONSE

Comment	Response
Lyn Warmath, Library Director, Hirschler, Fleischer, Weinberg, Cox & Allen, Pp. 1–3 (pagination license)	II.D.6., II.D.7, II.D.8.
L. David Cole, Esq., Pp. 1–2 (unintegrated products)	II.B.1.
Alan D. Sugarman:	
June 26 letter:	
P. 1 (good faith negotiation)	II.D.18.
P. 2 (text license)	II.D.3., II.D.9.
Pp. 2–3 (level of license fees)	II.D.6., II.D.7.
P. 3 (copyright challenges)	II.D.13.
Pp. 3–4 (confidentiality of license)	II.D.14.
P. 4 (arbitration)	II.D.15
P. 4 (selection of cases)	II.D.10.
Pp. 4–5 (text license)	II.D.3., II.D.9.
P. 5 (license fee per format)	II.D.12.
P. 5 (West pagination display)	II.D.18.
P. 5 (description of product)	II.D.11.
P. 5 (book license fees)	II.D.17.
P. 6 (third party providers)	II.D.18.
June 28 letter:	
Pp. 1–2 (selection of cases)	II.D.10.
P. 2 (license for statutes)	II.D.18.
September 3 letter:	
P. 2 (other antitrust violations)	II.D.4.
P. 2 (products divested)	II.A.1.
P. 3 (good faith negotiation)	II.D.18.
P. 4 (open licenses)	II.D.18.
Pp. 5, 9 (confidentiality of license)	II.D.14., II.D.18.
P. 5 (level of license fees)	II.D.6.
P. 5–8 (text license)	II.D.9.
P. 8 (selection of cases)	II.D.10.
P. 8 (copyright challenges)	II.D.13.
Pp. 8–9 (license fee per format)	II.D.12.
P. 9 (third party providers)	II.D.18.
P. 9 (arbitration)	II.D.15.
Edward D. Jessen, Reporter of Decisions, Supreme Court of California, Pp. 2–3 (divestitures of products)	II.B.1.
Professor Robert L. Oakley, American Association of Law Libraries:	
P. 2 (divestiture of products)	II.A.1.
P.2 (editorial staffs)	II.A.2.
P. 3 ("systems")	II.A.3.
Pp. 3–4 (level of license fees)	II.D.6., II.D.8.
Pp. 4–5 (copyright challenges)	II.D.13.
P. 5 (online competition)	II.C.4.
Cyndi A. Trembley, President, Association of Law Libraries of Upstate New York, P. 1 (merger and pricing)	II.A.1., II.E., II.G.
Kathleen Jo Gibson, New Mexico Compilation Commission:	
P. 1 (state reporters)	II.B.4.
Pp. 1, 2 (text copyright)	II.D.3., II.D.9.
P. 2 (star pagination copyright)	II.D.2.
Karen Ehmer, Esq., Darby Printing Company:	
P. 1 (state reporters)	II.B.4.
Pp. 1–2 (state reporters)	II.B.1.–3.
David C. Harrison, Esq.	
P. 1 (merger)	II.E.
P. 1 (political considerations)	II.G.
Alois V. Gross, Esq.:	
August 12 letter:	
Pp. 1–4 (brand names)	II.A.5.
Pp. 4–5 (star pagination copyright)	II.D.1., II.D.2.
Pp. 5–6 (state reporters)	II.B.1.–3.

APPENDIX—INDEX OF PUBLIC COMMENTS AND RESPONSE—Continued

Comment	Response
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P. 7 (legal encyclopedias)	II.G.
August 20 letter:	
Pp. 1–5 (brand names)	II.A.5.
Pp. 2–3 (''systems'')	II.A.3.
P. 4 (encyclopedias)	II.G.
P. 5 (Auto-Cite)	II.C.2., II.G.
Thomas F. Field, Publisher Tax Analysts:	
August 29 letter:	
Pp. 1–8 (access to case law/Juris)	II.F.
P. 8 (online competition)	II.C.
September 3 letter:	
Pp. 1–2 (barriers to entry)	II.D.
Gary L. Reback, Esq., Wilson, Sonsini, Goodrich & Rosati (for Lexis-Nexis Division of Reed-Elsevier):	
Pp. 1–2, 7 (divestiture of products)	II.A.1.
Pp. 2–6 (''systems'')	II.A.3.
Pp. 2, 8–9 (Auto-Cite)	II.C.2.
Pp. 5–6 (editorial staffs)	II.A.2.
Pp. 7–8 (''systems'')	II.C.1.
Pp. 10–11 (level of license fees)	II.D.6., II.D.8.
P. 12 (value of divestitures)	II.G.
Anonymous, Pp. 2–3 (U.S.C.A.)	II.G.
Marc L. Ames, Esq., Pp. 1–3 (merger)	II.E.
O.R. Armstrong, President, Geronimo Development Corporation:	
Pp. 2, 4–5 (pagination copyright)	II.D.1., II.D.2.
P. 2 (online competition)	II.C.1.–3.
Pp. 2–3 (monopoly in federal case law)	II.G.
Pp. 3–4 (text copyright)	II.D.3.
P. 5 (Tax Analysts)	II.F.
Morgan Chu, Irell & Manella LLP, (for Matthew Bender & Company, Inc.):	
P. 9, 11 (initial parallel citations)	II.D.5.
P. 12 (star pagination copyright)	II.D.1., II.D.2.
P. 13 (integration of products)	II.D.2.
P. 13 (level of license fees)	II.D.6., II.D.8.
P. 13 (license fee per format)	II.D.12.
P. 14 (selection of cases)	II.D.10.
P. 14 (description of product)	II.D.11.
Pp. 14–15 (copyright challenges)	II.D.13.
E. Scott Wetzel, CD Law:	
Pp. 3–4 (Washington case law)	II.B.2.
Pp. 4–5 (other antitrust violations)	II.G.
P. 6 (level of license fees)	II.D.6., II.D.8.
P. 6 (copyright challenges)	II.D.13.
P. 6 (arbitration)	II.D.15.
P. 6 (divestiture of products)	II.A.1.
Jose I. Rojas, Esq., Broad and Cassel (for Oasis Publishing Company):	
August 27 letter:	
P. 1 (star pagination copyright)	II.D.1.
P. 1 (copyright challenges)	II.D.13.
P. 2 (level of license fees)	II.D.6., II.D.8.
August 30 letter:	
P. 1 (level of license fees)	II.D.6., II.D.8.
Eleanor J. Lewis, American Association of Legal Publishers:	
Pp. 1–4 (text license)	II.D.3., II.D.9.
P. 4 (selection of cases)	II.D.10.
P. 4 (description of product)	II.D.11.
Pp. 4–5 (level of license fees)	II.D.6., II.D.8.
P. 5 (license fee per format)	II.D.12.
P. 5 (copyright challenges)	II.D.13
P. 5 (confidentiality of license)	II.D.14.
P. 5 (arbitration)	II.D.15.
Professor J.C. Smith, Director, Artificial Intelligence Research Project, P. 2–3 (license agreement)	II.D.1., II.D.6.
John H. Lederer, Esq.:	
P. 1 (''systems'')	II.A.3.
P. 2 (level of license fees)	II.D.6., II.D.8.
P. 2 (copyright challenges)	II.D.13.
P. 2 (state reporters)	II.B.3.
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Professor Kendall Svengalis, Rhode Island State Law Library:	
Pp. 1–2, 5 (divestiture of products)	II.A.1.
Pp. 2, 5 (''systems'')	II.A.3.
Pp. 3–4 (secondary law)	II.G.

APPENDIX—INDEX OF PUBLIC COMMENTS AND RESPONSE—Continued

Comment	Response
P. 4 (state reporters)	II.B.1.–3.
P. 5 (level of license fees)	II.D.6., II.D.8.
Matthew Lee, Executive Director, Inner City Press/Community on the Move:	
Pp. 2–6 (online competition)	II.C.2.
P. 8 (non-profit organizations)	II.G.
James Love, Director, Consumer Project on Technology:	
P. 1 (divestiture of products)	II.A.1, II.A.3.
P. 2 (''systems'')	II.A.3.
P. 2 (editorial staffs)	II.A.2.
P. 2 (license fee per format)	II.D.12.
P. 2 (level of license fees)	II.D.6., II.D.8.
P. 3 (Internet)	II.D.16.
P. 3 (validity of copyright)	II.D.1.
Norman Wolfe, International Compu Research, Inc.:	
P. 2 (level of license fees)	II.D.6., II.D.8.
P. 2 (third party providers)	II.D.18.
P. 2 (text license)	II.D.9.
P. 2 (copyright challenges)	II.D.13.
P. 2 (description of product)	II.D.11.
P. 3 (confidentiality license)	II.D.14.
P. 3 (arbitration)	II.D.15.
Bartlett F. Cole, P. 1 (encyclopedias)	II.G.
Lexis-Nexis Opposition to the Entry of the Proposed Final Judgment, P. 22 (editorial staffs)	II.A.2.
Mary Brandt-Jensen Declaration:	
¶¶ 4, 7 (''systems'')	II.A.3.
¶ 6 (text copyright)	II.D.3.
¶ 6 (level of license fees)	II.D.8.
¶ 9 (online competition)	II.C.1.–2.
Nicholas R. Emrick Declaration:	
¶¶ 7–12 (''systems'')	II.C.1.–2.
¶ 13 (editorial staffs)	II.A.2.
Michael A. Jacobs Declaration:	
¶¶ 3–5, 9–12 (Auto-Cite divestiture)	II.C.3.
¶ 13 (value of divestiture)	II.G.
Garth Saloner Declaration:	
¶ 7 (divestiture of products)	II.A.1.
¶¶ 10–11 (ALR)	II.C.1.
¶ 12 (ALR)	II.A.3
¶¶ 13–16 (editorial staffs)	II.A.2.
¶¶ 17–18 (''systems'')	II.A.3.
¶¶ 19–23 (Auto-Cite)	II.C.2.
Kendall F. Svengalis Declaration:	
¶¶ 7–9 (''systems'')	II.A.3.
¶ 11 (Auto-Cite)	II.C.2.
¶ 12 (divestiture of products)	II.A.1.

The Thomson Corporation

September 18, 1996.

Via Facsimile 202 307 5802

Ms. Minaksi Bhatt,
U.S. Department of Justice, City Center Building, 1401 H Street, NW., Washington, DC 20530.

Dear Ms. Bhatt:

I'm writing in response to your letter to Dale Collins and me of September 13 asking for clarification of Thomson's position regarding the use by competitors of first page citations to West case reports.

As we discussed last Thursday, Thomson's position and belief is that the use of first page citations by competitors or others is a fair use under 17 U.S.C. § 107—i.e., an otherwise infringing use that, when analyzed under the four fair use factors set forth in § 107, is deemed ''fair.'' This is the same position consistently taken by West. *See West Publishing Company* v. *Mead Data Central, Inc.*, 616 F.Supp. 1571, 1580–81 (D.Minn. 1985), *affirmed*, 799 F.2d 1219, 1228 n.3 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987); *Oasis Publishing Company* v. *West Publishing Company*, 924 F.Supp. 918, 926 (D.Minn. 1996).

The reason Thomson and West believe that the use of first page citations is ''fair'' (while star paging is not) is that, as found by the Court in *Oasis*, ''[a]lthough with either the parallel cites or an internal cite form each case a user could sort West's cases and determine West's arrangement, the former does not utterly supplant the need for West's product while the latter does.'' 924 F.Supp. at 926. As a result of their belief regarding fair use, neither Thomson nor West objects to the use of first page citation by others, including competitors. Therefore, Thomson does not plan to seek to prevent, by legal action, citation to the first page of West case reports.

Additionally, I wish to confirm that Thomson has not in the past, nor will it in the future, take any action to prohibit third parties from cross-referencing any of its publications (including, for example, ALR, Am Jur, or any of its treatises). Additionally, our proposed divestiture agreement will, likewise, recognize the right of the buyer to cross-reference Thomson publications.

I trust this responds to your questions. If not, please feel free to call me.

Sincerely,

Michael S. Harris

MSH/kpf

cc: L Fullerton, Esq., C. Robinson, Esq., C. Conrath, Esq., J. Foster, Esq., B. Hall, D. Collins, Esq., J. Schatz, Esq.

State of California, Department of Justice

September 12, 1996.

Edward W. Jessen,
Reporter of Decisions, Supreme Court of California, 303 Second Street, South Tower, Eighth Floor, San Francisco, CA 94107.

Re: Thomson/West Merger, *Proposed Settlement*

Dear Mr. Jessen: Your letter of September 5, 1996 to Tom Greene of this office expresses concern that the proposed judgment in settlement of the Thomson/West merger might leave the Court without effective competitors for the job of publishing the California Official Reports. In particular, you noted that the integration of the Official Reports with other editorially enhanced titles, especially Deering's California Codes, renders a more competitive product from the standpoint of both consumer appeal and the efficiencies of joint editing. You are concerned that these assets might be lost as a result of awards to separate publishers in the divestiture process.

Historically, Thomson and West have bid competitively for the right to publish the Official Reports. Safeguarding the ability of the Court to rebid the Official Reports contract in a comparable climate of competition following the merger was a primary aim of this office in reaching the proposed settlement. Recognizing the volume and complexity of the materials and the Court's special need for accuracy and speed in publication, we required measures to facilitate the transfer of Bancroft-Whitney's editorial expertise, in addition to other provisions designed to promote the competitive strength of any prospective new publisher.

From a practical financial standpoint, this office believes the successor publishers of Deering's Codes and the other divested California titles will likely be, and should be, strong, active bidders for the right to publish the Official Reports, in the event the court elects to rebid that contract. We expect to apply this perspective in reviewing the competitive suitability of the Acquirer(s) of the California titles under paragraph IV.C. of the proposed judgment. In light of your concerns and consistent with our own past practice, we will examine in some detail what concrete plans, if any, the Acquirer has for taking on the Official Reports publication.

We believe that this approach should produce a bidding climate comparable to that enjoyed by the Court in past years. Moreover, it should do so without disturbing the proposed settlement or jeopardizing the prospective competitive benefits that it contains.

Sincerely,

Daniel E. Lungren,

Attorney General.

Kathleen E. Foote,

Deputy Attorney General.

cc: Craig W. Conrath (U.S. Dept. of Justice), Wayne D. Collins (Shearman & Sterling)

Supreme Court of California, Office of the Reporter of Decisions

September 13, 1996.

Kathleen E. Foote,

Deputy Attorney General, Department of Justice, 50 Fremont St., Suite 300, San Francisco, CA 94105–2239

Dear Ms. Foote: Recently expressed concerns on the proposed settlement for the Thomson/West merger have been substantially mitigated by your September 12 letter, and by a verbal understanding reached this week in a conversation with Wayne D. Collins and a subsequent conference call with Brian Hall and two other Thomson executives responsible for the California Official Reports. On that basis, please consider the suggestions in my September 5 letter to your office as moot.

This assumes, of course, that the verbal understanding reached with Thomson will be reduced to writing over the next few business days, consistent with the discussions.

The verbal understanding with Thomson provides that: (i) The license for use of summaries and headnotes will be expressly prospective in application, both as to material in existence on the finality date for the consent decree and material yet-to-be-written under the present publication contract; (ii) a license similar to the one stated for summaries and headnotes will be provided for use of the digest classification scheme for the California Official Reports, notwithstanding possible divestiture of the digest; and, (iii) a waiver of Thomson's right to withhold consent should California exercise the option for a second one-year extension of the present contract, and an express statement that exercising that option waives no rights under the consent decree. (The above is intended to be descriptive and is not necessarily reflective of the precise language that will be employed.)

In combination with your September 12 letter, this understanding satisfactorily addresses concerns relating to the California Official Reports set forth in the advisory committee's August 7 public comment letter to Craig Conrath, and in my September 5 letter to your office. On behalf of the Official Reports advisory committee, thank you for your assistance.

Cordially,

Edward Jessen,

Reporter of Decisions.

cc: Justice Marvin Baxter, chair of advisory committee, Wayne D. Collins, Shearman & Sterling, Brian Hall, Jim Fegen, Tom Trenkner, members of the advisory committee.

Supreme Court of California, Office of the Reporter of Decisions

September 16, 1996.

Brian Hall,

President, West Information Publishing Group, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164–0526.

Dear Brian: Thank you very much for your attention to my concerns about the proposed consent decree relating to the Thomson/West legal publishing transaction. Since Thomson is presently the publisher of the Official Reports, it is my duty as the Reporter of Decisions to ensure that the interests of the Supreme Court and the people of California are protected by any agreement settling the investigation.

My greatest concern was whether California's ability to select a ''substitute publisher'' would effectively be dictated by Thomson's selection of a buyer for Deering's Codes. In particular, I was concerned that the production synergies between Deering's and the Official Reports are so great that the only substitute publisher that could support the Official Reports was the publisher of Deering's.

I now understand that this issue was thoroughly investigated by the California Attorney General's Office and by the United States Department of Justice. I also understand that any sale of Deering's and the other California products to be divested must be approved under the consent decree by the California Attorney General's Office and the United States Department of Justice, and that Thomson is not free to select any purchaser of its choosing regardless of its qualifications. I am confident that the California Attorney General's Office and the United States Department of Justice will exercise their powers of approval as provided in the proposed consent decree to ensure that the purchaser of any divested product will have the managerial, operational and financial capability to complete effectively in the publication and sale of that product.

Moreover, I was very glad to learn that the proposed decree requires Thomson to reveal to any new purchaser of the divested products information about the personnel whose primary responsibilities are the editorial production of these products. I also understand that the proposed decree prohibits Thomson from interfering with any negotiations between the new purchaser and Thomson employees whose primary responsibility is the production, sale or marketing of the divested products. These requirements should help ensure that a new buyer will be able to continue with the products without any loss of continuity.

Finally, I was not aware that any buyer of Deering's or substitute publisher of the Official Reports would be free to provide the cross-references to ALR, AM Jur, Cal Jur and the other Thomson publications that make up the other half of Thomson's research system of cross-references. You have told me, however, that Thomson has never asserted a copyright interest in these cross-references and does not intend to do so in the future, so that a new publisher of Deering's or the Official Reports would be free to include these cross-references as they saw fit. I understand that you have similar representations to the California Attorney General's Office and the United States Department of Justice.

In light of this, my level of comfort with the transaction has greatly increased. As we discussed, however, I have several more concerns that I do not believe are addressed by the proposed decree and that need to be resolved before I can fully support the proposed settlement. First, I am concerned that there will be a ''gap'' in the Thomson license to the State and the State's potential introduction of any substitute publisher. Second, although Thomson is required by the proposed decree to divest the California digest in the event California finds a substitute publisher, I am concerned that this does not give the State an adequate interest in the Digest's classification scheme. Third, I am concerned that Thomson may not consent to continue, at California option, as the publisher of the Official Reports for a second one-year extension of the existing contract to begin November 1, 1997, as contemplated by our contract extension agreement of April of this year.

Therefore, to fully satisfy my concerns, I ask that Thomson, subject to whatever approvals are required from the California's Attorney General's Office and the United States Department of Justice, agree to the following:

Condition 1. Extend the license to California provided by Section XI(C) of the proposed consent decree to include the use of any intellectual property rights which Thomson holds pertaining to the headnotes, case notes, and/or case summaries in the Official Reports created through the end of the existing contract, including any extensions pursuant to the April, 1996, agreement.

Condition 2. Include in the license to California provided by Section XI(C) the use of the classification scheme of Thomson's California Digest.

Condition 3. Agree to consent to the additional one-year extension from November 1, 1997, to October 31, 1998, of the existing publication contract of the California Official Reports as provided in the publication contract extension agreement of April, 1996, if California elects to exercise its option to extend under the extension agreement, and acknowledge that during any such extension California retains all rights under Section XI of the proposed consent decree to terminate the publication contract without cause upon ninety days notice to Thomson.

If you agree to these three conditions, I will withdraw my letter to Assistant Attorney Greene by sending him a copy of this letter and your response, and fully support the proposed consent decree as sufficient to protect California's interests as far as my office is concerned.

Cordially,

Edward Jessen,

Reporter of Decisions.

WEST

September 16, 1996.

Edward W. Jessen,

Reporter, Supreme Court of California, Office of the Reporter of Decisions, 303 Second Street, South Tower, Eighth Floor, San Francisco, CA 94107.

Dear Ed: Thank you very much for your letter of September 16, 1996. As you know, we take your concerns very seriously. Your satisfaction as a Reporter of Decisions with our performance on the Official Reports and with the adequacy of the proposed consent decree to protect the interests of your office is very important to us. I am glad that we have had the opportunity to discuss your concerns and resolve them to your satisfaction.

To that end, I am happy to agree on behalf of Thomson to the three conditions set forth in your letter. In particular, subject to whatever approvals are required from the California Attorney General's Office and the United States Department of Justice, Thomson (operating through the West Information Publishing Group) agrees to do the following:

1. Extend the license to California provided by Section XI(C) of the proposed consent decree to include the use of any intellectual property rights which Thomson holds pertaining to the headnotes, case notes and/ or case summaries in the Official Reports created through the end of the existing contract, including any extensions pursuant to the April, 1996, agreement.

2. Include in the license to California provided by Section XI(C) the use of the classification scheme of Thomson's California Digest.

3. Agree in consent to the additional one-year extension from November 1, 1997, to October 31, 1998, of the existing publication contract of the California Official Reports as provided in the publication contract extension agreement of April, 1996, if California elects to exercise its option to extend under the extension agreement, and acknowledge that during any such extension California retains all rights under Section XI of the proposed consent decree to terminate the publication contract without cause upon ninety days notice to Thomson.

With these commitments in hand, I am delighted that you will now be able to inform Assistant Attorney General Greene of your support for the proposed consent decree.

We very much look forward to working with you in the future.

Respectfully,

Brian H. Hall.

Supreme Court of California

September 17, 1996.

Thomas Greene,

Senior Assistant Attorney General, Department of Justice, P.O. Box 944255, Sacramento, CA 94244–2550.

Dear Mr. Greene: Please regard my September 5 letter to you as withdrawn. I now fully support the proposed consent decree for the Thomson/West transaction as sufficient to protect California's interests as far as my office is concerned.

This change in view results from discussions initiated by Brian Hall, President of the West Information Publishing Group, to address the concerns expressed in the September 5 letter, and also the August 7 public comment letter to Craig Conrath, United States Department of Justice. These discussions culminated in the attached exchange of correspondence, which set forth provisions that will significantly improve the commercial viability of the Official Reports in the coming years.

Also contributing to my change in view is Kathleen Foote's September 12 letter, which sets forth the perspective the Attorney General will likely apply in reviewing the competitive suitability of the acquirer of California divestiture titles.

In sum, my concerns have been satisfactorily addressed by the discussions and correspondence that followed the September 6 letter.

Cordially,

Edward Jessen,

Reporter of Decisions.

cc: Brian Hall, Kathleen Foote

Certificate of Service

On September 23, 1996, I caused a copy of Plaintiffs' Response to Public Comments to be served by first-class mail upon all parties to this action, and a courtesy copy to be mailed to each commenter.

Minaksi Bhatt

Public Comments

1. Lyn Warmath, Library Director, Hirschler, Fliescher, Weinberg, Cox & Allen, P.O. Box 500, Richmond, VA 23218–0500
2. L. David Cole, Esq., 433 North Camden Drive, Beverly Hills, CA 90210
3. Alan D. Sugarman, President, HyperLaw, Inc, P.O. Box 1176, Ansonia Station, New York, NY 10023–1176
4. Edward D. Jessen, Reporter of Decisions and Secretary to California Advisory Committee on Publication of Official Reports, Office of the Reporter of Decisions, 303 Second Street, South Tower, San Francisco, CA 94107
5. Professor Robert L. Oakley (For American Association of Law Libraries), Georgetown University Law Center, Edward Bennett Williams Law Library, 111 G Street, NW, Washington, DC 20001
6. Cyndi A. Trembley, President, Association of Law Libraries of Upstate New York, 557 Cutler Road, Homer, NY 13077
7. Kathleen Jo Gibson, Secretary and Clerk, New Mexico Compilation Commission, P.O. Box 15549, Santa Fe, NM 87506
8. Karen Ehmer, Esq., Darby Printing Company, 6215 Purdue Drive, Atlanta, GA 30336
9. David C. Harrison, Esq., 2100 Arch Street, Fifth Floor, Philadelphia, PA 19103–1399
10. Alois V. Gross, Esq., 2219 Pillsbury Avenue, Minneapolis, MN 55404–3266
11. Thomas F. Field, Publisher, Tax Analysts, 6830 North Fairfax Drive, Arlington, VA 22213
12. Gary L. Reback, Esq. (For Lexis-Nexis Division of Reed-Elsevier), Wilson Sonsini Goodrich & Rosati, 650 Page Mill Road, Palo Alto, CA 94304–1050
13. Anonymous
14. Marc L. Ames, Esq., 225 Broadway, New York, NY 10007
15. O.R. Armstrong, President, Geronimo Development Corporation, 606 25th Avenue South, Suite 206, St. Cloud, MN 56301
16. Morgan Chu, Esq., (For Matthew-Bender & Company, Inc.), Irell & Manella, 1800 Avenue of the Stars, Suite 900, Los Angeles, CA 90067–4276
17. E. Scott Wetzel, CD Law, Inc., 1000 Second Avenue, Suite 1610, Seattle, WA 98104
18. Jose I. Rojas, Esq. (For Oasis Publishing Company), Broad and Cassel, 201 South Biscayne Boulevard, Miami, FL 33131
19. Eleanor J. Lewis, American Association of Legal Publishers, 282 North Washington Street, Falls Church, VA 22046
20. Professor J.C. Smith, Faculty of Law Artificial Intelligence Research Project, The University of British Columbia, 1822 East Mall, Annex 1, Vancouver, BC, Canada V6T 1Z1

21. John H. Lederer, Esq., 5678 Vineyard Road, Oregon, Wisconsin 53575
22. Kendall F. Svengalis, State Law Librarian, Rhode Island State Law Library, 250 Benefit Street, Providence, RI 02903
23. Matthew Lee, Executive Director, Inner City Press/Community on the Move, 1919 Washington Avenue, Bronx, NY 10457
24. James P. Love, Consumer Project on Technology, P.O. Box 19367, Washington, DC 20036
25. Norman S. Wolfe, Vice President/General Manager, International Compu Research, Inc., 1401 Dove Street, Suite 580, Newport Beach, CA 92660
26. Bartlett F. Cole, Esq., 1201 S.W. 12th Ave. Rm. 305, Portland, OR 97205–1705

Hirschler, Fleischer, Weinberg, Cox & Allen

August 2, 1996.

By telecopier and first class mail

Mr. Craig Conrath,

Chief—Merger Task Force, Antitrust Division, United States Department of Justice, 1401 H Street, Suite 4000, Washington, DC 20530.

Re: United States of America v. The Thomson Corporation and West Publishing Company, No. 96 1415

Dear Mr. Conrath: I am writing to express my opposition to the settlement in the acquisition of West Publishing Company by the Thomson Corporation. I was initially pleased by the general terms of the settlement until I read details of licensing fees for internal pagination to West's National Reporter System. I was further alarmed when a colleague did some arithmetic based on the fee schedule described in the settlement agreement.[1]

Using a random volume of the Federal Supplement reporter, licensing the star pagination from a single volume of this one reporter appears to be a bit less than $541. Multiplied by the 918 bound volumes in the set as of mid-July, star pagination for *this single set of reporters* would start off in the general vicinity of $496,000 *annually.* This does not even take into consideration the addition of approximately 36 new volumes per year as well as the increases built into the settlement agreement for the second and third years. The settlement agreement provides $0.02 per year annual increases per 1,000 characters and at first glance we seem to be discussing mere pennies. The reality, however, is that we are discussing astronomical amounts of money. Licensing this one title for the second year will add approximately $632,000 to a small business's production costs while licensing this one title for the third year will add a further $774,000 to production costs. These increases are nearly 22% and 37% over the first year's estimated costs.

The first year's license fees alone are a staggering amount for a small business to contemplate and few businesses can sustain production increases like those described above. These licensing fees will have a direct and critical impact on prices of potential competing products.

I believe these facts merit repeating: So far, I have described costs for one title. The license agreement, however, covers 19 titles:

Titles	Number of volumes
Supreme Court Reporter	112
Federal Reporter 2d	999
Federal Reporter 3d	79
Federal Supplement	918
Federal Rules Decisions	164
Atlantic Reporter	674
North Eastern Reporter	660
North Western Reporter	546
Pacific Reporter	913
South Eastern Reporter	467
Southern Reporter	671
South Western Reporter	919
California Reporter 2d	286
California Reporter 3d	47
Illinois Decisions	355
New York Supplement	628
Bankruptcy Reporter	193
Military Justice Reporter	42
United States Claims Court Reporter	26
Federal Claims Reporter	8
Veterans Appeals Reporter	8
Total	8,715

West Publishing clearly stands alone as the single authoritative source to provide precise licensing costs that take into account characters of text in its national reporter system minus characters of its secondary, proprietary headnotes. Over the last several weeks I have repeatedly called West Publishing to inquire about exact costs for one, two and three year license fees or even ballpark figures for the same three-year period. Over the course of several phone conversations, West Publishing's agent has replied that she ''has no idea,'' still ''does not know,'' or ''has not found that information yet.'' Perhaps the figures are so unthinkable for a small business to contemplate that public disclosure is not in West's best interests.

While licensing fees in the range of $.09, $0.11 and $0.13 per 1000 characters initially might look like mere pennies, ''doing the math'' actually presents an entirely different and untenable picture to small, medium and even some large publishers.

I predict these licensing fees will lock out competitors and virtually guarantee a monopoly for Thomson/West. Some of the settlement clauses are reasonable. The licensing agreement, however, is disastrous for legal information consumers, who in the end are our country's everyday citizens and neighbors.

Yours truly,

Lyn Warmath,

Library Director.

L. David Cole

July 12, 1996.

Bancroft Whitney,

P.O. Box 7006, San Francisco, California 94126–7004.

Attention: Brian H. Hall, President West Information Publishing Group

Dear Mr. Hall: As a user of Bancroft Whitney CD-ROMs (California Reports, Deerings, Miller & Starr and California Transactions Forms) for some time, as well as a less frequent user of West Publishing CD-ROMS (U.S. Code Annotated), I was interested to learn of the planned divestiture to which Thomson Publishing has apparently agreed with the Antitrust Division of the United States Department of Justice, as a result of its review of the acquisition of West Publishing by Thomson. When I read the detail which accompanied your letter of June 28, 1996, my interest turned to concern.

I subscribed to Deerings and the California Reports services on CD-ROM from Bancroft Whitney, rather than two comparable sets from West Publishing, primarily because of their integration to Miller & Starr, which I use regularly in my practice. An additional incentive was the potential further integration if I elected to subscribe to Witkin. (Absent that integration, I would probably have chosen West's services, based on its ''key number'' organization.) I observe that neither Miller & Starr nor Witkin is to be included in the divested products. The apparently piecemeal divestiture will over time likely result in unintegrated sets, thereby frustrating the reason for my choice of products, an important component of the value to me of the California Reports and Deerings sets. I foresee, unhappily, that my substantial (to me) investment in Deering and California Reports will be rendered substantially less valuable when the related treatises are no longer under common ownership and integrated. Please consider this letter my protest of the piecemeal divestiture which has apparently been agreed.

As the divestiture is apparently mandated by agreement with the Antitrust Division, I am forwarding a copy of this letter to the Antitrust Division as well, for its consideration, (the likelihood of which, I acknowledge, is slight). However, as the divestiture agreement is, at least from my perspective as a user of the divested product, ill advised and potentially damaging, my protest is made to the U.S. Department of Justice in the hope that it may be considered if public or other comment with respect to the divestitures contemplated.

I hope, without optimism, that my misgivings prove unfounded.

Very truly yours,

L. David Cole

LDC:jb

cc: U.S. Department of Justice

[1] Calculations are based on 1,000 characters of text equalling 38 characters across each of two columns and 50 lines on a page in a random volume of Federal Supplement that contains 1583 pages. That totals approximately 6,015,400 characters in the sample volume, although some amount should be subtracted for West's proprietary headnotes.

HyperLaw

June 26, 1996.

Craig W. Conrath,

Chief, Merger Task Force, Antitrust Division, U.S. Department of Justice, Suite 4000, 1401 E Street, N.W., Washington, D.C. 20530.

Dear Mr. Conrath: Although we have a number of concerns relating to the approval by the Department of Justice of the merger of West Publishing Company and The Thomson Corporation, this letter addresses only the proposed compulsory license agreement for internal pagination.

We conclude that the License Agreement form attached as Exhibit B provides illusory benefits, is not drafted to protect the interests of licensees, is an invitation for the Licensor to engage in further abusive conduct, and is not in the public interest.

We believe that the Final Judgment needs to include an obligation by West-Thomson to negotiate in good faith, an agreement to not enter into discriminatory licensing agreements, and affirmative statements as to what constitutes ''fair use'' in the copying of West case reports when the only purpose of copying the opinion is to remove identifiable West copyrighted material.

The proposed License Agreement is unacceptable. It seems to assume that the Licensor will act in good faith. Based upon past activities of the Licensor, this belief is completely unwarranted. The License Agreement is riddled with one-sided provisions and invitations for the Licensor to continue its anti-competitive practices.

We urge the Department of Justice, as well as the plaintiff Attorney Generals, withdraw consent to the Stipulation and Order until the License Agreement is modified to remedy these substantial problems.

It would appear that the Department of Justice in requiring compulsory licensing was addressing the 1988 pagination licensing agreement entered into between West and Mead at the conclusion of a two week trial. Presumably, West is being required to offer to all what was available only to Mead and now Reed-Elsevier/Lexis. However, in 1988, West and Mead entered into *two* licenses in connection with the settlement of the three pending actions: one license covered internal pagination and the other license covered the use of text copied by Mead from West books. In addition, the 1988 agreements were not an arms length negotiation, and moreover, involved the only two companies in the industry.

Some have even suggested that the 1988 agreements were themselves violative of the antitrust laws, and were nothing other than agreements by the only two companies in the industry to work to keep everyone else out.

Unfortunately, the compulsory licensing agreement crafted by the Antitrust Division addresses only one of these two components, the pagination issue, and even that in an completely impractical manner.

For opinions published in the last 75 years of West reporters, West has asserted proprietary claims as to the opinion text. These claims cover West's non-creative editorial enhancements, such as judge authored changes to an opinion. These text claims are inherent in the compilation copyright claims which have been constructed by West and which West ominously waves when convenient for West to ward off competition. West also claims that the temporary copying of their case reports for the purpose of removing identifiable copyrighted information is not fair use, and is a violation of their copyright.

In order to buttress these claims, West is formulating and pushing legislation. The two main components of the West legislative program are the database protection bill now in Congress and the anti-RAM copying provisions contained in another bill before Congress. The database protection bill is supported by West surrogates such as an ABA subcommittee chaired by a West employee who promoted the original lawsuit by West against Mead and by the West dominated Information Industries Association. The anti-RAM copying provision can similarly be tracked to West initiatives in executive department public/private committees and the IIA. The net effect of these two provisions would be to make it a violation of law to scan a West opinion from a book into a computer, delete the West digests and summaries, and then publish the remaining text. We note that for older opinions found only in West reporters, this is the only practical way, and in many situations the only way, to locate final older opinions.

Thus, at the very least, West must be required as a condition of the merger, to agree not to attempt to assert copyright or any future database protection act claim against those who (1) copy West opinions for the purposes of removing copyrighted materials or (2) copy West corrections and other non-creative material found in the resulting text. Moreover, the pagination license should carry with it a ''license'' for use of the text itself.

The problems presented by the License Agreement include:

1. An escalating royalty rate structure that will benefit only the largest of legal publishers.

• The royalty structure as presented will only be meaningful in the market for smaller collection of cases where there is one time publication, and only if the pagination license carries with it a text license. At this time we will not comment further on the rate structure because we expect that you will receive comments from others. However, for most smaller CD-ROM publishers, a license would not be cost effective and is prohibitive. For example, a number of small CD-ROM publishers have databases of cases of approximately 1 Gigabyte, and all do, or plan Internet availability. The license fee to West would start off at $180,000 per year and grow year after year as a result of escalations and the natural increase in database size. None of these companies can sustain these royalty payments.

• The licensing fee should be a one-time fee.

• The licensing fee should be on a per opinion bases and should be no more than $.05 per opinion (in our view, free) and should be less for older opinions, and no fee for de minimis numbers of opinions, for example, under 1000 opinions on a single CD-ROM.

• The licensing fee should cover all media in which the opinion is disseminated.

• Licensees with products containing under 5000 opinions should not be required to enter into a formal agreement, and royalty payments will be deemed payable on publication, with or without an agreement.

2. Prohibitions in the Agreement against licensees contesting any West compilation copyright claims while licensing internal pagination. This ignores Lear v. Adkins, 395 U.S. 653 (1969), and assures that the West dubious copyrights will not be challenged.

''3.01 *Copyrights.* During the term of this Agreement, Licensees (I) shall respect and not contest the validity of the copyrights claimed by Licensor's arrangement of case reports in NRS Reporters as expressed by NRS Pagination.* * *''

• Licensees should be free to contest the validity of West copyrights.

3. Confidentiality provisions which will permit West to engage in preferential licensing and to continue to engage in abusive licensing practices in secret.

See Section 4.01

• Licensees should have the privilege to waive confidentiality.

• West should report all license agreements to DOJ.

• There should be most-favored-nation clauses.

4. Provisions requiring arbitration in West's home state, and, presumably in privacy.

See Section 6.07

• Arbitration should not be private, unless elected by the Licensee.

• Arbitrations should be able to be held in Washington, DC, at the Licensees option.

• The decision of the Arbitrator should be appealable to the US District Court for the District of Columbia.

5. Enabling West to limit licenses to what it considers in its own discretion to be an original compilation. This limits the meangingfulness of the license. In other words, a company such as Oasis could not take a license to publish Florida Cases, notwithstanding that the selection of these opinions contained therein are made by the Florida courts, because West claims this is an original compilation belonging to West. If the license as drafted is approved, West will remain the monopoly publisher of opinions in a substantial number of states and at the federal level.

''1.03 'Licensee Case Reports' shall mean Licensee's reports of judicial decisions that are selected for reporting by Licensees in [Licensee Product(s)/Service(s) and coordinated and arranged by Licensee within [Licensee Product(s)/Services].''

• The limitation needs to be removed. The West reporters in most situations include only opinions that the authoring courts indicate in one way or another as being suitable for publication.

• In addition, the list of reporters in Section 1.02 should include all of the West state case reporters, and, where West does not claim proprietary rights in a state reporter, that should be clearly identified and West should publicly release rights therein.

6. The pagination license does not extend to the text of the opinions, thereby permitting West to continue its expansive definition of arrangement and coordination and originality to include factual corrections and changes made to individual opinions by West and/or the courts.

• The pagination license should also include a text license, and a waiver of any West claims of intermediate copying, as long as any published case does not include West headnotes and summaries.

7. Provisions that will require the triple payment of license fees—one fee for CD–ROM, one for the Internet or on-line, and another for books.

• The license should cover dissemination of the information in all formats.

8. Requirements that the Licensee prominently display West internal pagination in a way as to further the questionable market position of the internal pagination.

2.05. *Display of Licensed NRS Pagination.* During the term of this Agreement, if Licensee includes NRS Pagination as a part of any Licensee Case Report, such Licensed NRS Pagination shall be presented no less prominently (in terms of size, high-lighting, underlining, etc.) than any other unofficial pagination or pinpoint locators for the Licensee Case Report in question.

Section 2.05 should be deleted.

9. Requirements that the licensee disclose competitive product information to West prior to consummation of the license agreement. Detailed disclosure of product information would provide West with advance plans of competitors.

''1.03. 'Licensee Product(s)/Services]' shall mean [description of Licensee Product(s)/ Services]''

• The licensees should only be required to disclose the product in the most general terms. Why should the biggest competitor receive prior information about all new products.

10. Ambiguous provisions as to the License charges for books. It is not clear whether the payment applies only on first publication of a book, or continues as long as the book is being marketed.

• For book and CD–ROM products, the license with West need only be in effect on the date of publication and would be paid only as of the date of first publication.

In addition, it is very important that the following provision be added to create a wide number of sources of paginated opinions to supply smaller independent publishers:

• Third party information providers may sell or license case law data which included West pagination and text on a wholesale basis as long as the purchasers or licensees of the data have entered into or are subject to a pagination License Agreement with West.

There is absoltely nothing in the factual circumstances to indicate that West will negotiate fairly with licensees. To the contrary, all evidence and history would suggest that West will engage in obfuscatory and dilatory tactics, matched with continued expansive intellectual property claims.

As noted above, the License Agreement must be viewed in the context of the legisaltive programs actively pushed by West and its surrogate organizations and association (such as the IIA and the ABA Intellectual Property subcommittee) as found in the proposed Database Protection Act and the Anti-RAM copying bill.

The License Agreement as presently drafted is not in the public interest, and the DOJ should withdraw its consent until a fair, arms-length agreement that reflects the past conduct of the parties and the realities of publishing is negotiated.

We are continuing to ananlyze this provision and will provide additional recommendations before the expiration of the 60-day period.

Sincerely,

Alan D. Sugarman,

President, HyperLaw, Inc.

HyperLaw

June 28, 1996.

Craig W. Conrath,

Chief, Merger Task Force, Antitrust Division, U.S. Department of Justice, Suite 4000 1401 E Street, N.W., Washington, D.C. 20530.

Dear Mr. Conrath: In my letter to you two days ago concerning the many problems with West's License Agreement form, I referred to the following section in the agreement which permits West to vitiate the agreement.

''1.03 'Licensee Case Reports' shall mean Licensee's reports of judicial decisions that are selected for reporting by Licensees in [Licensee Products(s)/Services(s) and coordinated and arranged by Licensee within [Licensee Product(s)/Services].''

I understand that West representatives are now saying that this provision does not mean what it says. It is clear to me: if the Licensee does not itself select for reporting the decisions and then also coordinate and arrange them, as defined by West in its own confidential arbitrary discretion subject only to review by confidential non-appealable arbitration in Minnesota, then West will not grant a license.

To understand what this means, I quote to you the following from a letter from West that is attached to the complaint in Oasis v. West, about to be appealed to the Eighth Circuit.

''[W]est does not object to the use by a competitor of a parallel citation to the first page of West case reports of judicial decision independently selected by the competitor for inclusion in its own reporter volume.''

''With respect to your question of whether West would enter into a star pagination license agreement, the answer is yes. West has entered into star pagination licenses with other publishers and would be happy to discuss such a license with your client. However, the terms of such licenses are individually negotiated and depend in part upon the scope of the use contemplated by the licensees. Therefore, I am unable to quote any type of price or even discuss basic license terms without knowing more about your client's intended product.''

Letter dated January 4, 1995 from Joseph M. Musilek, outside litigation general counsel for West, responding to request ''Our client would like to use not only the initial page numbers of each case but also 'star pagination' reflecting the pagination of the *Florida Cases* as published by West under contract with the State of Florida.''

It would seem that under the proposed License Agreement, West would be able to continue to assert that *Florida Cases* is a West selection of decisions, and deny a license to companies like Oasis under Section 1.03, since the Licensee would, according to West, be copying the West section. And, Oasis would not even be able to tell anyone because it would be muzzled pursuant to the confidentiality provisions accorded to West. Good public policy? I think not.

In response to our letter, others have noted to us that the Department of Justice and the plaintiff Attorney Generals have reserved the right to contest the copyright claims of West. I wish to bring to your attention State of Texas v. West Publishing Co., 882 F.2d 171 (5th Cir. 1989) which was a declaratory judgment action brought by the Attorney General of Texas re West's claims to ownership of chapter and section numbers of Texas statutes.

The Texas Attorney General's challenge was dismissed because there was no case or controversy—the State of Texas was not deemed to have met the justiciabilty standard that the state itself had the immediate intent ability to itself publish the statutes. So, I am having a hard time understanding how these attorneys general or even the Department of Justice is going to challenge the West claims. And, the United States has never intervened in the still pending West v. Mead 1988 case, despite the obvious anti-competitive impact of the settlement, nor has the United States ever taken the obvious step of asking the court to make the agreements public, so that the public can see just how much the public is being abused.

One would conclude that these reservation of rights by the United States and the Attorneys General to contest West copyrights is simple window dressing.

We also note that there is no statute license agreement (something else covered in 1988 between West and Mead in their secret settlement which it seems the Department of Justice and the Attorney Generals felt was only important to Lexis and would not be important to other publishers).

Sincerely,

Alan D. Sugarman,

President, HyperLaw, Inc.

HyperLaw, Inc.

Via Fax—202–307–5802

Copy by Federal Express and Hand Delivery

September 3, 1996.

Craig W. Conrath,

Chief, Merger Task Force, Antitrust Division, U.S. Department of Justice, Suite 4000, 1401 E Street, N.W., Washington, D.C. 20530.

Dear Mr. Conrath: This letter completes HyperLaw's comments to the Department of Justice concerning the Consent Decree relating to the merger of Thomson and West Publishing Company. This letter should be read in conjunction with our letters of June 26, 1996 and June 28, 1996.

The Consent Decree is not in the public interest and the Department of Justice must withdraw its consent.

HyperLaw, Inc. publishes the opinions of federal appellate courts on CD–ROM, and is thus a competitor of West. It also is a supplier of tagged federal appellate opinions to Thomson. In addition, HyperLaw has been threatened by West, which threats have prevented HyperLaw from including West's star pagination in its product and from copying public domain material from West reporters. As United States District Judge John S. Martin found in *Matthew Bender & Company, Inc. and HyperLaw, Inc. v. West Publishing Company,* 94 Civ. 0589 (JSM), 1996 U.S. Dist. LEXIS 11091 (SDNY August 5, 1996) (attached):

''[t]he Court finds that HyperLaw had a reasonable apprehension of being sued by West over use of the West features at issue here at the time that it filed the complaint.''

Among the factors the court considered was that ''Schatz [West General Counsel] told Sugarman that his firm wins all his lawsuits for West.'' The Court ''accept[ed] Sugarman's testimony that Schatz made the comment in the context of a discussion about HyperLaw's use of West features'' after noting that ''Schatz gave varying versions of the time and place of the conversation in his deposition and hearing testimony, and finally testified at the hearing that he was not certain where the conversation took place.'' The Court also found it relevant that ''Stephen Haynes, a senior executive and attorney for West approached Sugarman at a convention and stated that Sugarman was aiding and abetting infringement of West copyrights * * *'' [This is the same Stephen Haynes that is the chair of an ABA Database Protection subcommittee which authored a 1996 report in favor of database protection legislation.]

By filing a comprehensive complaint against West-Thomson, and then proposing an ineffectual consent decree, the Antitrust Division has provided the following benefits to West-Thomson:

Insulated West-Thomson from further antitrust enforcement by the Department of Justice for the foreseeable future.

Sanctioned a license agreement which will be falsely characterized by West-Thomson so as to enable West-Thomson to sway and mislead Congress, the courts, and public opinion, as shown below. Without a doubt, West-Thomson will use this license agreement before Congress as a reason why a database protection action would not be anticompetitive.

In a sense, the Antitrust Division has punched a free antitrust waiver ticket for West-Thomson. It will be able to throw its weight around in the legal market without any concern as to enforcement from the Antitrust Division.

Indeed, the half-hearted inconsequential relief is so limited in effect that we urge DOJ to withdraw its complaint and have no consent decree, rather than perpetuate a meaningless remedy on the public.

Lawyers Cooperative must be divested as an ongoing operating entity, and, the License Agreement must be revised to provide in an unambiguous way a meaningful and adequate remedy to the harms described in the complaint, many of which pre-existed the merger.

We reject as ludicrous the position of the Antitrust Division that in the Division must ignore preexisting violations of the antitrust laws that are discovered during a merger approval investigation.

The consent decree does not provide an adequate remedy to the allegations in the complaint, is ambiguous (the ambiguity of the license agreement has been documented in HyperLaw's previous letters), and lacks any effective enforcement methodology.

If the Antitrust Division persists in its efforts to protect its public relations posture and its political deal with West and Thomson, we believe that even under the stringent standards of *U.S. v. Microsoft,* the District Court should reject the consent decree. The following excerpts are from *U.S. v. Microsoft* and describe what the District Court judge may do. Of course, the Antitrust Division, after consideration of the new information brought to its attention, is in no way restricted by the limited discretion permitted to the District Court.

''whether the remedy provided in the decree was adequate to the allegations in the complaint''

''A district judge pondering a proposed consent decree understandably would and should pay special attention to the decree's clarity.''

''Similarly, we would expect a district court to pay close attention to the compliance mechanisms in a consent decree.''

''When the government and a putative defendant present a proposed consent decree to a district court for review under the Tunney Act, the court can and should inquire, in the manner we have described, into the purpose, meaning, and efficacy of the decree. If the decree is ambiguous, or the district judge can foresee difficulties in implementation, we would expect the court to insist that these matters be attended to. And, certainly, if third parties contend that they would be positively injured by the decree, a district judge might well hesitate before assuming that the decree is appropriate.''

U.S. v. Microsoft, 56 F.3d 1148 (D.C. Cir. 1995) [Because West claims a copyright in its internal page numbers, and because HyperLaw has not paid a citation tax to West so that it could insert the page numbers in its database . . . assuming that West would license the internal pagination for use in HyperLaw's CD–ROM database of almost all of the opinions in recent Federal Reporters and assuming that HyperLaw would sign the onerous agreement and could afford the exorbitant up-front payments without any assurance that it could increase prices and sales to cover such payments . . . HyperLaw does not have the internal page numbers of this opinion in its database, and is unable to cite to the internal page numbers without locating an open public law library during the Labor Day weekend.]

We conclude as follows:

The Consent Decree is defective ab initio and has little remedial effect on a grossly anticompetitive merger.

To the extent the Consent Decree might provide a scintilla of meaningful relief, it relies for enforcement on the good faith of parties that in the past has never been shown. Between the signing of the settlement and the present time, the Wilson Sonsini letter shows that West-Thomson is not acting, and has no intent to act, in good faith.

The Department of Justice has not the means or the will to enforce even that scintilla of relief.

The Department of Justice in its description of the Consent Decree has intentionally misrepresented the scope and effect of the Consent Decree and the License Agreement.

The Antitrust Division has argued as a reason for its tepid actions that in a merger approval under Hart-Scott Rodino, it is circumscribed in addressing past antitrust wrongs. However, there is nothing in Hart-Scott Rodino that prohibits the United States from initiating antitrust enforcement action when it develops evidence of violation of the antitrust laws in the course of a Hart-Scott-Rodino investigation. Thus, there is no justification for the Division's argument that a weak meaningless license agreement should be gratefully accepted by the public merely because it remedies problems that pre-existed (but are worsened by) the merger.

THE LICENSE AGREEMENT IS NOT AN ''OPEN LICENSE AGREEMENT AND IS BEING MISREPRESENTED BY THE ANTITRUST DIVISION AND WEST TO FURTHER THEIR MUTUAL SELF-INTEREST AND TO DECEIVE THE PUBLIC INTO BELIEVING THAT THE CONSENT DECREE IS A ''VICTORY FOR ALL OF US'' AND ''RESOLVE[S] ANY POSSIBLE ANTITRUST CONCERN REGARDING THE AVAILABILITY OF STAR PAGINATION LICENSES.''

DOJ's initial press release misdescribed the scope and applicability of the Consent Decree and in particular called the license agreement an ''open agreement.'' Nothing could be further from the truth. Subsequent to our June letters, during a two hour telephone conversation (described below in more detail) with you, Larry Fullerton and others in the Antitrust Division, we reiterated our displeasure with this mischaracterization, and the Division was unable to provide a credible defense for its positions concerning the license agreement.

Shortly thereafter, as part of its public relations campaign, the Antitrust Division once again engaged in gross misrepresentation of the license agreement in a letter and brief filed by the Antitrust Division on August 5, 1996 before the United States District Court for the Southern District of New York in Matthew Bender & Co., Inc. and HyperLaw, Inc. v. West Publishing Company.

''Part of that settlement requires Thomson to license to other law publishers the right to star paginate to West's National Reporter System. . . . In announcing the settlement, the U.S. Department of Justice stated: 'Today's settlement, with its open licensing requirement does not suggest . . . that the Department believes a license is required for use of such pagination.' ''

Memorandum of United States Of American As Amicus Curiae In Support Of The Proposition That Bender's Star

Pagination To West's National Reporter System Does Not Infringe Any Copyright Interest West May Have In The Arrangement Of The National Reporter System Volumes, p. 2, August 5, 1996, Matthew Bender & Co. Inc. and HyperLaw, Inc. v. West Publishing Company, 94 Civ. 0589 (JSM), United States District Court, Southern District of New York (DOJ New York Brief).

Among other things, it is inappropriate to describe the License Agreement as an ''open'' agreement when it will be negotiated in private and arbitrated in private pursuant to confidentiality provisions agreed to by the Antitrust Division.

We also note that this continued misrepresentation in the August 5 brief occurred after our June letters and the two hour conference in late July with you and other senior Antitrust Division counsel.

DOJ tossed out this self-serving public relations slow ball. Then, West on August 24, 1996, exaggerated further this mischaracterization in its response to the DOJ New York Brief:

''West had agreed, as part of its Proposed Final Judgment in United States v. The Thomson Corp., No. 96–1415 (D.D.C. filed June 19, 1996), to license all other law publishers the right to star paginate to West's National Reporter System publications—at standardized royalty rates which the Antitrust Division approved as commercially reasonable. While, as the Antitrust Division points out, the inclusion of a star-pagination license in the Proposed Filed Judgment does not mean that the Antitrust Division agrees with West's position on star-pagination—it doesn't—the negotiation of the Proposed Final Judgment does not mean that the Antitrust Division agrees with West's position on star-pagination—it doesn't—the negotiation of the Proposed Final Judgment does resolve any possible antitrust concern regarding the availability of star pagination licenses to West competitors.''

West Publishing Company's Memorandum Of Law In Opposition To The Memorandum Of The Antitrust Division Of The Department Of Justice As Amicus Curiae, August 24, 1996, Matthew Bender & Company, Inc. and HyperLaw, Inc. v. West Publishing Company.

We were not aware that the Division was of the opinion that the Proposed Final Judgment ''resolved any possible antitrust concern regarding the availability of star-pagination licenses'' nor are we aware of any basis that the rates are commercially reasonable. We note that there has been no record created as to how the Division arrived at the royalty rates, and how it may be commercially reasonable in certain limited situations, and unreasonable in others.

We believe that West-Thomson should be held to its posturing, and the Licensee Agreement be renegotiated to resolve ''any possible antitrust concern'' by making the agreement an open, practical, reasonably priced agreement both in form and in substance.

WEST'S COPYRIGHT CLAIMS TO TEXT OF COURT OPINIONS, OPINION ARCHIVES AND THE DATABASE PROTECTION ACT.

The DOJ Complaint fully recognized the importance of archives of the text of legal opinions. Unfortunately, not only does the Consent Decree not propose any relief with respect to this problem, but the merger only increases the concentration in this area, by placing into the combined entity the archives of West and the Thomson Companies, and removing the Thomson Companies from its continuing efforts to create and obtain its own archives of opinions. Quite clearly, Thomson was not only a potential competitor in the creation of archives of opinions, but was well on the way to so doing.

The License agreement provides for West to license the internal pagination at an expensive license fee, but is singularly silent as to whether a licensee as part of the license may obtain the text by copying the opinion text from a West reporter. Moreover, no other relief provided in the consent decree will have any measurable impact on the dominance of West and Thomson in enhanced and unenhanced case law.

What does the complaint state:

''Entry would be difficult for three reasons. First, successful entry would require access to past and current court opinions and statutes. Past and/or current opinions simply are not available from many courts, and in many others, obtaining access is costly and time-consuming.''

DOJ is correct in this regard. This paragraph of the complaint although devoted to the West Thomson dominance in enhanced case law, applies equally to unenhanced case law, particularly in those jurisdictions, such as the federal courts (recipients of West's largesse) at West's urging have acquiesced to West's being the provider of the authoritative archive of federal court opinions. The reasons set forth in Paragraph 19 are some of the factors relating to the domination of on-line case law research described later in the Complaint. [Paragraph 19 of the Complaint's lists those markets where West and Thomson's compete in case law. This list is substantially understated, since it only refers to enhanced case law. For example, HyperLaw licenses to Thomson tagged case opinions for the federal appellate courts which Thomson includes on CD–ROMs of state case law in Texas, Louisiana, Mississippi, and Kansas.)

We understand that the American Association of Legal Publishers is providing today to DOJ an analysis of its efforts to obtain original copies of federal court opinions directly from the courts for opinions from the 1960's and 1970's. This study shows that opinions are simply missing from files, that court files are not able to be found, that opinions are misfiled in the case files, that the court archive centers limit the number of case files to as few as three that may be viewed, and that the process if fraught with delays, confusion and expense. It is sometimes difficult to obtain even current court opinions and some federal courts of appeals do not even make all of their published opinions available electronically.

One reason that archives are such a competitive advantage is that the incremental cost of publishing a CD–ROM treatise or enhanced product with the full text of cited opinions is zero for a company with an archive. In other words, the West incremental cost is zero. It does not have to locate and copy the original opinions and does not have to convert them to electronic form. Nor of course does West have to pay a license fee to use the star-pagination.

What is the current position of West-Thomson on the issue of copying court opinion text from West case reports? West's Response to Matthew Bender's Rule 3(g) Statement (wherein Matthew Bender recited undisputed facts in support of its motion for summary judgment) filed August 19, 1996 in Matthew Bender & HyperLaw v. West states as follows:

MATTHEW BENDER STATEMENT OF UNDISPUTED FACT: 40. West contends that rival publishes, including Matthew Bender, are free to obtain slip opinions directly from their issuing courts, but will incur copyright liability by copying those opinions from a West reporter.

WEST'S RESPONSE: West cannot admit or deny this statement, which is actually a hypothetical situation, rather than a ''fact,'' without having specific facts about how much copying has been done from a West Reporter. This statement also incorrectly refers to opinions rather than case reports.

To make matters worse, the DOJ New York Brief suggests that the Antitrust Division is playing a double game here. First, the Antitrust Division has at no time indicated its desire to file a brief in support of HyperLaw's motion that will permit rival publishers to copy the text of court opinions from West reporters. Second, as anticipated in HyperLaw's June letters which referred to West efforts to end-run the copyright laws by lobbying for database protection legislation, DOJ states as follows in its brief:

''Copyright is not the only conceivable legal regime for protecting the fruits of industrious collection. The Delegation of the United States of America recently proposed to the World Intellectual Property Organization an international treaty that would provide to the ''maker'' of certain databases the exclusive right to extract all or a substantial part of the contents, without regard to copyrightability. World Intellectual Property Organization, Preparatory Committee of the Proposed Diplomatic Conference (December 1966) on Certain Sui Generis Protection of Databases, CRNR/PM/7 (May 20, 1996). Legislation providing for such protection has been introduced in Congress. *See* H.R. 3531, 104th Cong., 2d Sess. (1996).

DOJ New York Brief, Page 6, Note 4.

Fortunately, because of widespread opposition, the Congressional legislation has not gone anywhere. So, what has the Administration done in this political season: on behalf of information industry lobbyists and campaign contributors including West, with the seeming support of the Antitrust Division, the Administration has put in place an end-run around the United States Congress and the United States Constitution by having international bodies composed of member nations with constricted views of the public's right of access to government information agree to a treaty that will then be forced down Congress's throat.

If the Antitrust Division was merely being inartful in its disregard of the West monopoly on text, and if it agrees that West has and is engaging in copyright misuse and anti-trust violations by asserting claims in the text of court opinions drawn from West case reports in West reporters, then we invite the Antitrust Division to: (1) require the amendment of the License Agreement to specifically include the right of the pagination licensee to copy the text of court opinion from West case reports and (2) file an amicus brief in support of HyperLaw's motion for declaratory relief permitting competing publishers to copy the court opinion portion from West case reports.

LICENSE AGREEMENT ISSUES DISCUSSED IN JULY MEETING

We also wish to follow up on the discussion we held in late July concerning our two letters:

1. We specifically objected to the characterization of the license agreement as an ''open'' license agreement. Thereafter, DOJ repeated this mischaracterization twice in its filings in Matthew Bender & HyperLaw v. West.

2. We discussed the effect of Section 1.03, which states:

''1.03 'Licensee Case Reports' shall mean Licensee's reports of judicial decisions that are selected for reporting by Licensees in [Licensee Product(s)/Service(s) and coordinated and arranged by Licensee within [Licensee Products(s)/Services].''

Not one of the five senior Antitrust Division attorneys present at the meeting disputed our interpretation that West would not be required to license page numbers to publishers publishing all of the opinions in a single West Reporter Series. I used as examples the proposed Oasis CD–ROM of opinions found in West Florida Cases, and HyperLaw's CD–ROM which includes almost all opinions appearing in West's Federal Reporter.

3. The Antitrust Division argued that *Lear v. Adkins,* in prohibiting no-contest provisions in license agreements, had been narrowly construed in later opinions. However, there was no response to our point that the public policy issues raised in *Lear v. Adkins* remain valid and were even more relevant where the Antitrust Division had negotiated a compulsory license to remedy destructive anti-competitive behavior.

4. The Division argued that the no-contest provision was narrowly drafted and would only relate to ''contest[ing] the validity of the copyrights claimed by Licensor in Licensor's arrangement of case reports in NRS Reporters as expressed by NRS pagination'' and would not prohibit other objections to West copyright claims. However, we pointed out that West linked all of its claims to its compilation claims, and, that, all West had to do was pull the license and take the licensee to a confidential arbitration in Minnesota, so, that the effect of 3.01 was to prohibit a broader range of contest.

5. The Division argued that the multiple license fee was not a problem since it had determined that most publishers were not intending to publish in multiple media. We pointed out that this was a flatly incorrect statement and that most CD–ROM publishers are or were planning to offer Internet versions. One example I provided was CD-LAW in Washington. In addition, Law Office Information Systems has announced that it would make its CD–ROM information available on the Internet. The Department's position evidences a complete lack of understanding of the information industry wherein the medium of dissemination is irrelevant. In addition, the Division's response is just plain illogical. If no publishers will publish in multiple media, then West-Thomson would lose no revenues by permitting a single license to cover publication in different media. The Division cannot have it both ways.

6. The Division argued that the confidentiality provision were for the protection of the licensee. That may be if the licensee desires confidentiality, and, the Division was unable to explain why the licensee would be forced to maintain confidentiality over its objections. It is clear to us that the primary beneficiary of confidentiality would be West-Thomson. Once again, the Division's defense to accepting this provision is completely illogical.

7. We objected to the fact that providers of HyperLaw would be unable to market star-paginated cases to third parties who would then obtain a license from West, unless HyperLaw also obtained a license from West. Thus, West would obtain two license fees for only one public distribution. The Division staff argued that third-party sales was permitted under Section 2.02. But, we think the staff has misunderstood our objection. Only a third party provider who already had a license would be able to engage in the wholesale sale of star-paginated cases. This is like paying a double sales tax. Moreover, HyperLaw, in order to sell star-paginated cases would have to both sign the license agreement and thereby agree to dismissal of its litigation against West. We think that the Division has completely misconstrued the clear language of Section 2.02.

8. We addressed another issue not covered in our earlier letters: Section 2.01 requires the Licensee to provide star-paginated cases to customers, but only if the customer has signed a Licensee Subscriber Limitations contractual agreement as described in section 1.08. In other words, star-paginated cases will only be available to customers who sign contracts similar to contracts signed by Westlaw subscribers. West as part of the licensing will be able to ask for copies of proposed license agreement and even monitor that process and otherwise harass the publisher. Most important, we noted that any star-paginated case law on the Internet would be limited only to services with restricted access and who obtained written agreements with each user. We noted the belief by Emory Law School that it could obtain a star-paginated license for its Federal Court of Appeals WEB pages was completely misplaced, although, understandable in view of the DOJ's misleading press releases. Here, the Division completely misunderstood the practical impact of this provision.

In our prior letters, and during that conversation, we referred several times to the fact that any and all ambiguity or arguable ambiguity would be interpreted by West-Thomson in its own interests, absent any concept of implied good faith. In all due deference to the views of the Division staff, we do not believe that commercial arbitrators from Minnesota will share the Division's view of the License Agreement.

We have reviewed the letter submitted by Wilson Sonsini Goodrich and Rosati on behalf of Lexis-Nexis, a Division of Reed Elsevier. This letter describes conduct that to us would indicate a complete variance by West-Thomson from the divestiture procedures outlined in the Consent Decree. West-Thomson for example has ignored the requirement to divest Auto-Cite and ignored requirements to permit publishers acquiring divested products to hire West-Thomson employees. We also understand from other sources that publishers are not being permitted to purchase single products, but most also agree to purchase the dog products which riddle the list of divested products. Thus, even during this period where the Consent Decree is under review and its actions are not subject to confidentiality, West-Thomson is acting as expected, to narrowly and in bad faith interpret each and every provision of the Consent Decree. No doubt, it will do the same with the License Agreement.

Our comments focused on the license agreement. However, the approval of the merger, without also requiring the divestiture of Lawyers Cooperative is not in the public interest.

The divestiture of products with a revenue of only 48 million dollars will have no significant competitive impact on legal publishing in the future. We believe that most of these products would have been consolidated with other West-Thomson products, left without marketing or development resources to die on the vine, or killed outright. Certainly, West-Thomson has no reason to fear competition from any company that is foolish enough to purchase a crippled divested product.

Absent significant modifications to the Consent Decree, we believe that the public interest would be best served were the Antitrust Division to seek dismissal of the Complaint without prejudice.

We believe that the bad faith shown by West-Thomson as described in the Wildson Sonsini letter and the mischaracterization of the settlement as indicated in the West filing in the New York litigation is sufficient reason standing alone for the Antitrust Division to pull its consent.

Sincerely,

Alan D. Sugarman,

President, HyperLaw, Inc.

This letter could not be reprinted in the Federal Register, however, they may be inspected in Suite 215, U.S. Department of Justice, Legal Procedures Unit, 325 7th St. N.W., Washington, D.C. at (202) 514–2481 and at the Office of the Clerk of the United States District Court for the District of Columbia.

Supreme Court of California

August 7, 1996.

Craig W. Conrath,

Chief, Merger Task Force, Antitrust Division, U.S. Department of Justice, 1401 H Street, N.W., Suite 4000, Washington, D.C., 20530

Dear Mr. Conrath:

Standing of Advisory Committee

This comment on the proposed consent decree for merger of the Thomson Corporation and West Publishing Company is submitted on behalf of the California Advisory Committee on Publication of the Official Reports.

The California Advisory Committee for Publication of the Official Reports was appointed by the Chief Justice of California in October 1995 to study the California Official Reports, solicit publication proposals pursuant to the California Government Code, and make recommendations concerning publication of the Official Reports, including a recommendation as to the publisher. The committee's recommendations are made to the California Supreme Court and the contracting parties to the Official Reports publication contract for the State of California (i.e., the Chief Justice of California, the Attorney General, the Secretary of State, the President of the State Bar, and the Reporter of Decisions).

The advisory committee consists of Supreme Court Associate Justice Marvin R. Baxter, chair; Court of Appeal Associate Justice J. Gary Hastings; Supervising Deputy Attorney General Linda Cabatic; Chief Assistant Secretary of State Robert Jennings, Kenneth Drexler for the President of the State Bar; Nanna Frye, Librarian for the Fourth District Court of Appeal; and, Edward Jessen, Reporter of Decisions.

Advisory Committee's Analysis of Proposed Consent Decree

The advisory committee met on July 15, 1996, to review how the proposed consent decree would affect publication of the California Official Reports. The committee concluded that the proposed consent decree does not adequately preserve competition in California for enhanced primary law products. (Primarily, present competition is between Thomson's California Official Reports and West's unofficial California Reporter, and between Deering's Annotated California Codes and West's Annotated California Codes).

The economic reality of publishing enhanced primary law products in California compels a continuing nexus between Deering's Codes and the Official Reports following completion of the Thomas/West merger. The advisory committee notes that there is no language in the proposed consent decree to require continuation of the existing nexus between Deering's Codes and the official Reports. (Relevant language on page 19 of the proposed consent decree is as follows: ''Thomson shall transfer to the Official Reporter Contract State a license, which shall be perpetual in term, sublicensable, assignable,and royalty-free, to the use of any intellectual property rights which Thomson holds pertaining to the headnotes, case notes, and/or case summaries in the products at issue.'' This language does not relate to the future; there is some doubt it will suffice to maintain a nexus between Deering's Codes and the Official Reports after completion of the merger and divestitures.

In California, Thomson and West presently have competing enhanced primary law products. Each publisher pairs an enhanced opinion products and an enhanced code product, and each also publishes secondary law materials that combine with the enhanced primary law products to form two competing systems of integrated legal information. With the possible exception of New York, the committee is unaware of any state that has competing systems of legal information.

The economic importance to a publisher of such an integrated system of legal information is that a portion of the editorial cost of producing headnotes for the enhanced opinion product (i.e., the California Official Reports and West's unofficial California Reporter) can be allocated to the enhanced code product (i.e., Deering's Annotated California Codes and West's Annotated California Codes), as well as to secondary law materials. The significant nexus, however, is between the opinion and code products.

The proposed consent decree preserves West's economic advantage of having enhanced primary law products within an integrated system of legal information. It fails, however, to include provisions to preserve the existing unity of Thomson's enhanced primary law products within an integrated system of legal information. Preservation of the existing unity of opinion and code products is left to chance. The advisory committee believes that this situation is not in California's public interest.

If Deering's Annotated California Codes cannot use the headnotes from the California Reports as annotations in an enhanced code product, the resulting increased editorial costs will lead to uncompetitive pricing. Likewise, pricing for the California Official Reports may increase unless a portion of editorial costs for headnoting opinions can be allocated to other products.

If two competing lines of enhanced primary law products within integrated systems of legal information are reduced to a single Thomson/West integrated system, the economic reality is that no publisher would be able to effectively compete with Thomson/West in California. Rather than fostering competition, the consent decree would lead to a market with a single dominant vendor.

Conclusion

The foregoing analysis reflects the consensus of the California Advisory Committee on Publications of the Official Reports pursuant to the committee's study of Official Reports publication. The committee requests that the proposed consent decree be modified to require that divestiture of Deering's Annotated California Codes be linked in some manner to the California Official Reports.

For the advisory committee,

Edward W. Jessen,

Reporter of Decisions and Secretary to California Advisory Committee on Publication of Official Reports.

American Association of Law Libraries

July 29, 1996.

Mr. Craig Conrath,

Chief, Merger Task Force, Antitrust Division, U.S. Department of Justice, Suite 4000, 1401 H Street, N.W., Washington, D.C. 20530

Subject: Proposed Merger of West Publishing with Thomson Corporation

Dear Mr. Conrath: I am writing today to comment on the proposed consent order in the sale of West Publishing Company to the Thomson Corporation. The American Association of Law Libraries presented its views on the merger at an earlier stage of the proceeding in a letter to Ms. Anne Bingaman dated March 26, 1996. We appreciate the attention the Department has given to this issue, and we very much appreciate the effort the Department has made to respond to our concerns. Nonetheless, in light of the proposed settlement, we do wish to submit some additional comments for your consideration.

The American Association of Law Libraries is a nonprofit educational organization headquartered in Chicago with nearly 5,000 members nationwide. Our members build legal and law-related collections in over 1,900 libraries, and they respond to the legal and governmental information needs of attorneys and law students, judges and legislators, and the general public. We are almost certainly the largest single identifiable consumer group for the products of the companies involved. As our immediate past-President, Patrick E. Kehoe, said when the merger was first announced: ''the merger of Thomson and West will change legal publishing forever.''

The American Association of Law Libraries remains neutral on the issue of the merger itself. In filing these comments A.A.L.L. does not wish to be understood as opposing the sale of West to Thomson, and nothing we say here should be construed in that manner. Rather, the American Association of Law Libraries remains committed to the larger goal of ensuring the continuation of high quality legal information products at reasonable prices in a healthy competitive environment. With that general goal in mind, A.A.L.L. would like to comment on three aspects of the settlement including: the proposal to sell selected individual titles from the publishers' inventory, rather than selling off companies, the amount of the proposed license fee for the use of star pagination from West's National Reporter System, and the requirement in the license agreement that a licensee relinquish their legal right to challenge West's claim of copyright. We also want to reiterate our concern for the impact of the sale on competition in the online environment.

The viability of individual titles. The proposed settlement relies heavily on spinning off some 52 titles to maintain competition in the legal publishing industry. With those sales as the basis of the future competitive environment, it will be essential that those titles are able to survive in the marketplace.

From the beginning of this process, the members of the American Association of Law Libraries have been concerned about the impact of the merger on their ability to choose among competing print products and their ability to obtain the benefits of competition in matters of product pricing and product quality (see letter to Anne Bingaman, March 26, 1996, pp. 2–5). The settlement is plainly responsive to those concerns since it proposes to maintain the competitive environment by requiring the companies to sell off those individual products where the impact of the merger on competition would be the greatest.

Some members of our Association are concerned, however, about the decision to require the sale of individual titles rather than subsidiary companies. To them, it is not clear that individual titles will continue to be viable entities in the market when separated from the larger organizations of which they have been a part.

First, the production of a complex legal title requires the existence of a substantial supporting infrastructure. Most obviously, it requires a trained and knowledgeable staff, skilled in the identification and analysis of legal developments, whether statutory or judicial, and skilled in the presentation of those developments in a format that is useful to attorneys. Although the settlement allows the purchaser to attempt to hire the staff that has been involved in the creation of the titles in question, it is by no means clear that staff would choose to leave a larger parent organization to follow an individual stand-alone title.

The supporting infrastructure also includes production, including design and layout, marketing and sales, computer support, and printing. Each of these operations is substantial and is frequently shared across product lines within a single company. Again, it is not clear that it is economically viable to establish this kind of production and printing support for a single title, or even for a small group of titles that have been split off from a larger company.

Second, at least some of the publications in question have long been an essential component of a larger system of legal research. The Total Client Service Library provides a system by which the many products of Lawyer's Coop have been integrated into a research system. Cross references among the products provide a helpful and seamless way for the lawyer to move from one Lawyer's Coop product to another, including the American Law Reports, American Jurisprudence, 2d, and other practice materials that are not being sold as part of the divestiture.

A booklet published by Lawyer's Coop in 1990 described Am Jr 2d, ALR and USCS as being ''part of a comprehensive legal research system.'' (See A Student's Guide to Am Jur 2d, ALR and USCS, Lawyers Coop, 1990.) The booklet states: ''The comprehensive legal research system published by Lawyers Cooperative Publishing covers everything from on-point cases in both state and federal jurisdictions, to principles of law, statutes, procedure, model forms, trial techniques * * * in short, everything you need to handle almost any legal matter. And since it is fully cross-referenced, you can go quickly from one aspect of your matter to another with assurance that no aspect will be overlooked.''

They then list as part of the ''system'' some fourteen separate titles ranging from encyclopedias and form books to ALR, the USCS, and Lawyers Edition, to several services and texts on specialized legal topics. With extensive cross-referencing among these products, it is again not clear that one or two can be pulled out, scrubbed clean of the value-added cross-referencing, and then be expected to stand alone in the market place. Pulled out of the system, they will be different products, and the market may no longer find them to be so desirable or so valuable.

The American Association of Law Libraries would very much like to see further analysis on the issue of the viability of individual titles and they would like to receive some assurance that those titles will be able to continue to compete in the marketplace following the merger.

Pricing of the license for use of the West pagination. The association is concerned about the pricing of the proposed license for the use of the pagination in the West Reporter system.

The Association has long believed that the system of citation to legal publications should be in the public domain. In testimony on behalf of the American Association of Law Libraries in favor of H.R. 4426 in the 102d Congress, Professor Laura Gasaway stated: ''Copyright protection should not extend to volume and page numbers of these materials for two reasons: because page numbers lack sufficient originality to merit protection, and [because] allowing one publisher to control the means of citation to important public domain materials gives that publisher the power to exclude others from the market. Such protection would become a mechanism by which one publisher could turn public domain materials into protected materials that they can control.''

At the same hearing, the representative of Thomson Legal Publishing was even more forceful. Accompanied by a representative of Lawyers Cooperative, she argued that the copyright of legal citation information had led to the monopolization of the ''publication of lower federal court opinions, statutory law in Illinois and Texas and elsewhere, and the appellate case law of many states.''

The proposed license illustrates the problem. The American Association of Law Libraries welcomes the development of an open structure for the pricing of West's citation information. But the level of the pricing involved seems designed to accomplish precisely what the proponents of H.R. 4426 feared: exclusion of others from the marketplace. Nine cents does not sound like a great deal of money until one does the math. But when the numbers are multiplied out for some of the very large sets in the National Reporter System, the price seems to us to be significant. Such pricing could be a major barrier to using the data and entering the legal publishing market to anyone except a very large existing enterprise.

The Association does note that this issue could become moot or largely irrelevant if the courts and organs of legal scholarship would accept a medium neutral/vendor neutral system of citation, such as the one previously endorsed by this Association.

The Association takes no position on what the appropriate level of pricing ought to to be. Nonetheless, in view of the Association's interest in promoting a healthy competitive environment for access to legal information, we believe that the level ought to be set such that a prospective entrepreneur can enter the market, and with a reasonable increment on its other costs add the system of pagination to its new product. The current strikes us as excessive to meet that goal.

The requirement that a licensee give up some of their legal rights. The Association believes that the license approved by the United States Department of Justice and the United States District Courts for the District of Columbia should not contain a provision that requires the licensee to give up its legal right to contest West's claim of copyright in the system of pagination.

The proposed license agreement states in relevant part:

3.01. *Copyrights.* During the term of this Agreement, Licensee (I) shall respect and not contest the validity of the copyrights claimed by Licensor in Licensor's arrangements of case reports in NRS Reporters as expressed by NRS Pagination. * * *

We understand why West-Thomson would want such a provision as part of the agreement. However, in this case, the provision will have the approval of the U.S. Department of Justice and approval is now being sought from the United States District Court for the District of Columbia as well. We see no reason why those organs of justice should approve a provision requiring a licensee to give up a legal right when they sign the agreement.

We respectfully request that this provision be stricken from the proposed license.

Online competition. The Association remains concerned about the impact of the merger on the market for online legal information.

In its earlier letter to the Department, the American Association of Law Libraries expressed concern about the impact the merger could have in the competition for online legal services, citing the need that LEXIS has to acquire source data from existing publications that will now be under the sole control of its chief competitor. Insofar as the record shows, nothing has changed in this regard.

The Order does direct the sale of one legal database—Auto-Cite—and grants an option to extend the License Agreements for Investext, ASAP, and Predicasts, three non-legal databases. But nothing is said about access to other legal databases to which LEXIS might want access such as state statutory materials, American Law Reports Annotated, and other ancillary material such as the RIA Tax Coordinator. We worry that if one company is the sole source for certain important information, it could use that control to make its competitor's product less desirable and thereby squeeze it out of the market. In view of the fact that there are only two major competitors in the market for online legal information, we believe it is critical to address the issue of licensing, or equitable access to such sole source information, in the final order.

The American Association of Law Libraries appreciates the opportunity to comment again on the proposed merger of the two largest legal publishers. This change in the legal publishing landscape is almost certainly the most important development in the field that any of us will see during our careers. It is critical to do it in a way that maintains a competitive market for high quality legal information products at reasonable prices.

If we may be of further assistance or answer any questions about any of these matters, I hope you will not hesitate to call upon me at (202) 622–9161.

Sincerely,

Robert L. Oakley.

Craig W. Conrath,

Chief, Merger Task Force, Antitrust Division, U.S. Department of Justice, Suite 4800, 1401 H Street, N.W., Washington, DC 20530

Dear Mr. Conrath: Even after taking the list of divested titles into consideration, members of the Association of Law Libraries of Upstate New York continue to feel concern over the potential ramifications of the acquisition of West Publishing by Thomson. With this purchase, Thomson will have control of a significant portion of the secondary sources that aid in interpreting the law. In the past, Thomson practices have made acquired products both more labor intensive and costly to maintain. Updates to looseleaf sets from Callaghan and Clark Boardman are updated routinely more than once a year as Clark Boardman Callaghan titles. With the advent of online services, the need for an increase in chapter and supplement shipments has come into question. In addition, many former pocket titles from Lawyers Cooperative have been converted to binder formats which are more labor intensive to update.

It is the area of pricing that is truly cause for concern. Ten years ago, it was rare for maintenance of a Lawyers Cooperative title to increase more than 9% a year excluding price spikes created by revisions or new editions. Since Thomson acquired Lawyers Cooperative, individual title maintenance often runs well over 25% a year. This has not been true for West products. For example:

	Percent increase 1985	Percent increase 1995
CBC: Bailey, Crimes of Violence: Rape	4.3	57.4
LCP:		
Carmody-Wait	8.5	63.0
Foster, Law and the Family	7.5	20.4
WEST: Devitt, Federal Jury Practice	1.4	10.2

Your consideration of these factors in your continued review of West's acquisition by Thomson will be appreciated.

Sincerely,

Cyndi A. Trembley,

President.

This letter could not be reprinted in the Federal Register, however, they may be inspected in Suite 215, U.S. Department of Justice, Legal Procedures Unit, 325 7th St., N.W., Washington, D.C. at (202) 514–2481 and at the Office of the Clerk of the United States District Court for the District of Columbia.

Darby Printing Company

August 9, 1996.

Mr. Craig W. Conrath,

Chief, Merger Task Force, Antitrust Division, U.S. Department of Justice, Suite 4000, 1401 H Street, N.W., Washington, D.C. 20530.

Dear Mr. Conrath: On behalf of Darby Printing Company I wish to comment on the proposed consent degree entered in the merger of Thomson Corporation and West Publishing Company.

After reviewing the documents filed in this anti-trust action, we have two questions regarding the proposed settlement. First, why were the states of Washington, Wisconsin, and California given the option to rebid their contracts and not the states of Illinois, Massachusetts and New York? These states also have enhanced case law reporters which fit the two principle criteria as defined in paragraph 21, beginning on page 8 of the Complaint, in that these publications contain the entire body of case law for their respective jurisdictions and they contain comprehensive written descriptions of points of law within the opinions. As with the states covered in the complaint, West and Thomson publish the dominant enhanced case law reporters in the states of Illinois, Massachusetts and New York.

Second, after having contacted those responsible for overseeing the publication of the case law reporters in California, Washington, and Wisconsin, there appears to be some confusion as to the definition of ''option''. Is the option given to these states a true option, in that these states may opt not to rebid the contracts, or is it a mandate that these states rebid? The opinions of those involved in making the decision in these states are split as to what they are required to do under this proposed consent. Furthermore, if the option is exercised will Thomson-West be allowed to participate in the bid process?

Darby Printing Company believes that based on the Herfindahl-Hirschman Index those states given the option to rebid their respective case law contracts should be mandated to rebid those contracts without the participation of the Thomson Corporation. The HHI numbers, 4762 for California enhanced case law, an increase of 3866, 4521 for Washington enhanced case law, an increase of 996, and 5535 for Wisconsin enhanced case law, increased by 2424, as provided in Appendix B of the complaint, prove that the post merger markets in these states are very concentrated. It is our opinion that the only way to create competition in these markets is to compel the Thomson Corporation in effect to divest these products.

Thank you for your attention in this matter. We look forward to hearing your response to our questions.

Sincerely,

Karen Ehmer, Esq.

Law Offices, David C. Harrison, Daniel M. Belov

July 2, 1996.

Janet Reno,

Attorney General, Department of Justice, Washington, DC 20530.

RE: Merger: The Thompson Corporation/ West Publishing

Dear General Reno: I have just learned that Anti-Trust Division has approved the merger of The Thompson Corporation (which is better known as Lawyers Cooperative Publishing) with West Publishing. How can the Justice Department approve the merger of the second largest legal publisher with the largest legal publisher, giving the new company a virtual monopoly?

It is this kind of nonsense that enrages Democrats who would like to support President Clinton but are finding it increasingly difficult to do so. He is becoming a Republican clone, as is his administration. How can this merger be justified?

Very truly yours,

David C. Harrison

DCH: slh

ALOIS V. GROSS

August 12, 1996.

Mr. Craig W. Conrath,

Chief, Merger Task Force, Antitrust Division, U.S. Department of Justice, 1401 H Street N.W., Suite 4000, Washington, D.C. 20530.

Re: Public Comment, U.S. v The Thompson Corporation and West Publishing Co., U.S. District Court for the District of Columbia, Civil Action No. 96–1415

Dear Mr. Conrath: I have enclosed my Public Comment on the above matter. I understand the enclosed comments and your reponses will be published in the Federal Register and filed with the Court.

Please feel free to call me if you would like clarification of anything in my Public Comment.

I am part of a group who is a prospective acquirier of Divestiture Products. Although my private comments in this respect have been directed in a separate letter to Mr. James Foster at the U.S. Department of Justice, I have enclosed a copy of that letter for your review as well.

Very truly yours,

Alois V. Gross

Enclosures/2

Public Comment on Proposed Final Judgment and Competitive Impact Statement, U.S. v. The Thomson Corporation and West Publishing Co., U.S. District Court for the District of Columbia, Civil Action No. 96–1415

I. Premise

The Proposed Final Judgment fails to attain its goal, as required by the federal antitrust laws of eliminating the anticompetitive effect that a merger of the two Defendants creates in the legal publishing market. It should therefore be rejected by the Court.

II. Argument

A. Tradenames Must Be Divested

Thomson/West is not required by the Proposed Final Judgment to divest the ''Bancroft-Whitney'', ''LawDesk'', and ''Lawyers' Cooperative Publishing'' tradenames currently owned by The Thomson Corporation. These tradenames should be included in the list of Divestiture Products in the Proposed Final Judgment (Exhibit A), but they are not.

These tradenames carry valuable goodwill and brand market recognition developed over many decades of legal publishing. They will be essential in maintaining the confidence of customers and the market share for the Divestiture Products identified with these tradenames. Without these tradenames, the acquirer of such Divestiture Products will have the same barriers to entry as a start-up publication. With its vast financial, marketing, and distribution resources. Thomson/West could easily overwhelm and overpower the acquirer within months of divestiture.

To ensure the Divestiture Products remain viable, the goodwill and market recognition associated with the ''Bancroft-Whitney'', ''LawDesk'', and ''Lawyers' Cooperative Publishing'' tradenames must transfer with the Divestiture Products, and therefore these tradenames must be divested by Thomson/West.

''Bancroft-Whitney'' is the tradename associated with the oldest law publishing company in the country, established in California nearly 150 years ago. ''Bancroft-Whitney'' is identified currently with the products Thomson sells to the California legal market, and will be vitally important to the successful acquirer of the California-specific Divestiture Products.

Substantial current revenue brought to Thomson from its ''Bancroft-Whitney'' office is derived from the sale of products listed as Divestiture Products, including Deering's California Codes Annotated; California Appellate Reports (official); California Reports (official); California Reports Advance Sheets (official); and California Digest. Consequently, without the Bancroft-Whitney tradename, the acquirer of these products is severely disadvantaged.

''LawDesk'' is also a tradename—for CD–ROM products—owned by Thomson that is not included on the list of Divestiture Products in the Proposed Final Judgment. It will be vitally important to the successful acquirer of Divestiture Products sold in CD–ROM format under the ''LawDesk'' tradename to maintain the market recognition and goodwill associated with the ''LawDesk'' tradename.

CD–ROM based legal information is a growth market. Both Thomson and West have CD–ROM product lines with tradenames associated with these products. West uses the ''West'' tradename for its CD–ROM products, and Thomson uses the ''LawDesk'' tradename for its CD–ROM products.

Each of these tradenames (''LawDesk'' and ''West'') has a substantial reputation in the CD–ROM legal information market. ''LawDesk'' CD–ROM products are the only major competitor to the ''West'' CD–ROM products in many markets.

Furthermore, Thomson's indication that it will be operating under the familiar and powerful ''West'' tradename in the United States following the merger (Thomson/West's merged organizational name will be West Information Publishing Group), highlights the probability that there will be little or no measurable loss to Thomson from the divestiture of the tradename ''LawDesk''.

''Lawyers' Cooperative Publishing'', a tradename owned by Thomson, is also excluded from the list of Divestiture Products in the Proposed Final Judgment. ''Lawyers' Cooperative Publishing'' is the tradename associated with the oldest continuously published edition of the United States Supreme Court Reports—Lawyers Edition (L Ed 2d)—which is listed as a Divestiture Product. ''Lawyers' Cooperative Publishing'' is the tradename identified with this and many other Divestiture Products that Thomson currently sells to the national, federal, and many state legal markets. Transfer of this tradename along with the Divestiture Products will be essential for their success.

B. The Star Pagination System Needs No License

''Star-pagination'' is not universally considered to be a definitive proprietary feature of the West National Reporter System.* No licensing arrangement should be established or sanctioned by the Court for ''star-pagination'' of the West National Reporter System.

Until such time as there is a definitive ruling, a licensing scheme that is national in scope, such as the License Agreement contained in the Proposed Final Judgment (Exhibit B), should not be established or sanctioned by the Court.

By sanctioning the licensing of ''star-pagination'' by a merged Thomson/West organization, the Court is establishing de facto monopolistic proprietary rights, which by its very nature is anticompetitive. The issue of the copyrightability of ''star-pagination'' has no definitive ruling from the United States Supreme Court or clear legislative coverage in the Copyright Act.

Moreover, by sanctioning such a licensing scheme for ''star-pagination,'' the Court will be fostering a monopoly for a merged Thomson/West organization and fostering anticompetitiveness in the legal publishing market by giving judicial approval to the West National Reporter System as the de facto official reporter system throughout the United States.

C. Official Reports and Digests Must Be Divested

Without clearly stating it, the Proposed Final Judgment allows a merged Thomson/West organization to retain and not divest the Divestiture Products listed in Exhibit A.3 (official reports, appellate reports, and advance sheets for California, Washington, and Wisconsin) and Exhibit A.4 (digest of official reports for California and Wisconsin).

The Proposed Final Judgment requires Thomson to offer information on such publications only after the respective States exercise their option to cancel their current contract to publish the official reports (which the States are not required to do). Thus, unless and until the respective States to which those publications apply choose to cancel their respective contracts with the merged Thomson/West organization, Thomson and West arguably are not required to offer information regarding such products to prospective bonafide acquirers.

Furthermore, if a merged Thomson/West organization is allowed to maintain these contracts, this will have an anticompetitive effect, since the Defendants also publish the major competing publications in the pertinent markets. Therefor, the final judgment should require Thomson to disclose to bonafide prospective acquirers all pertinent information on these Divestiture Products, without regard to whether the States cancel their current publishing contracts for these products. The final judgment should also require Thomson to divest these products: California Appellate Reports (official), California Reports (official), California Reports Advance Sheets (official), California Digest (of official reports and appellate reports), Washington Appellate Court Reports (official), Washington Supreme Court Reports (official), Wisconsin Official Reports, Wisconsin Official Reports Advance Sheets, and Wisconsin Digest (of official reports).

D. Bids Must Not Be Limited to Entire List of Divestiture Products Only

The Proposed Final Judgment ambiguously allows Thomson to require all prospective bonafide acquirers of Divestiture Products to bid only on the entire list of Divestiture Products, rather than on one or a group of the products. This has the anticompetitive effect of allowing Thomson to refuse to offer important information on individual Divestiture Products to prospective bonafide acquirers. Secondly, this allows Thomson to refuse to consider an offer on a single or group of Divestiture Products by a prospective bonafide acquirer.

Competitiveness in the legal publishing market will be fostered if Thomson is required to consider and in fact favor bids for individual or groups of Divestiture Products over bids for all the Divestiture Products. Having more legal publishers in the market will more likely result in competitive pricing and higher quality of law products for the consumer. Having a few very large legal publishers in the market could result in anticompetitive pricing and lower quality of law products for the consumer. Thomson should be required to consider and favor bids for individual or groups of Divestiture

* See *West Publishing Company* v *Mead Data Central, Inc.* (1985, DC Minn) 616 F Supp 1571, 227, USPQ 631, affd (1986, CA8 Minn) 799 F2d 1219, 230 USPQ 801, cert den (1987) 479 US 1070, 93 L Ed 2d 1010, 107 S Ct 962; *Oasis Publishing Company* v *West Publishing Company* (D Minn 1996) ______ F Supp ______, 1996 WL 264773 (pending litigation); *Matthew Bender and Company, Inc.* v *West Publishing Company* (S.D.N.Y.) Docket No. 94–CIV–0589 (pending litigation).

Products over bids for all Divestiture Products.

E. Jurisprudence Publication Must Be Divested

The Proposed Final Judgment fails to eliminate the anticompetitive effect of the merger of Thomson and West with regard to jurisprudence publications, otherwise known as legal encyclopedias. West publishes Corpus Juris Secundum (CJS); and Thomson publishes American Jurisprudence 2d (Am Jur 2d).

These two publications are the only major national legal encyclopedias in the United States legal market. Without divestiture of one of these publications, the merged Thomson/West organization will have a monopoly on the national legal encyclopedia market. Since the West tradename is already associated with CJS, divestiture of Am Jur 2d would more effectively satisfy the goal of ensuring competition in the market place. Thomson should be required to divest one of these two national legal encyclopedias to ensure a competitive market.

Dated: August 12, 1996.

Respectfully submitted,

Alois V. Gross,

Minnesota Attorney No. 13322X, 2219 Pillsbury Avenue, Minneapolis, MN 55404–3266, Phone: (612) 871–4680.

Alois V. Gross

August 12, 1996.

Mr. James Foster,

Merger Task Forth, Antitrust Division, U.S. Department of Justice, 1401 H Street N.W., Suite 4000, Washington, D.C. 20530.

Re: Private Comments by Prospective Acquirer of Divestiture Products, U.S. v The Thomson Corporation and West Publishing Co., U.S. District Court for the District of Columbia, Civil Action No. 96–1415

Dear Mr. Foster: I am part of a group who is a bonafide prospective acquirer of Divestiture Products in the above matter. I was recently informed by your office that private inquiries and comments should be addressed to you. I wish this letter and your response to it not be published in the Federal Register, nor filed with the Court in the above matter. I have under separate cover sent ‘‘Public Comments’’ to Mr. Craig Conrath, as well as a copy of this letter. I have also sent copies of this letter to the other Plaintiffs in the above matter.

Thomson has in a very short time decimated the competition in the legal publishing industry in the U.S., by following a course of takeover of companies and aggressive downsizing. Following Thomson’s acquisition/takeover of Lawyers’ Cooperative Publishing Company (along with its then subsidiary companies—Bancroft-Whitney and Research Institute of America) in 1989, Thomson ‘‘downsized’’ these U.S. organizations, eliminating two-thirds of the Bancroft-Whitney staff, as well as making severe reductions in the staff at the other acquired U.S. companies. Thomson then similarly acquired and substantially downsized other U.S. law publishers, such as Clark-Boardman and Callaghan.

In the process of this U.S. industry takeover by a foreign corporation, Thomson has been in a constant state of restructuring and reorganization of its U.S. legal publishing dynasty. This history of takeover by Thomson in the U.S. legal publishing industry is important to view in the proper perspective Thomson’s present acquisition/takeover/‘‘merger’’ of West Publishing Company (West).

If the current Proposed Final Judgment is approved by the Court, one result will be that the U.S. legal publishing industry will have no real competition. Furthermore, Thomson’s products for the U.S. legal market will likely suffer in quality from decreased editorial input. Its legal information products will likely have substantial price increases due to a lack of any real price competition in the market.

The Proposed Final Judgment does not require divestiture of certain valuable tradenames currently identified with the Divestiture Products. ‘‘Bancroft Whitney’’, ‘‘LawDesk’’, and ‘‘Lawyers’ Cooperative Publishing’’ command tremendous goodwill and brand market recognition in the legal publishing market. Brand market recognition is essential for the viability of the Divestiture Products in the legal publishing market. If a prospective purchaser acquires Divestiture Products such as the California Appellate Reports (official), California Reports (official), California Reports Advance Sheets (official), California Digest and Deering’s California Codes Annotated *without* the accompanying tradenames long associated with such product—‘‘Bancroft Whitney’’ and ‘‘LawDesk’’, then they are at a severe competitive disadvantage against the ‘‘West’’ brand. Thus, if Thomson is successful in maintaining ownership of the ‘‘Bancroft Whitney’’ and other tradenames, it will obtain a de facto monopoly in any legal publishing market where those tradenames hold clout.

Thomson has already indicated it will be using the familiar and powerful ‘‘West’’ tradename in marketing its products in the U.S. legal market, by announcing that its U.S. legal publishing operation will change its name from Thomson Legal Publishing to West Information Publishing Group. The ‘‘West’’ tradename has tremendous goodwill and brand market recognition attached to it in the legal publishing market. When familiar tradenames associated with legal publishing in the U.S. are no longer available to competitors, Thomson (with the ‘‘West’’ tradename) will achieve a de facto monopoly. In California, for example, the ‘‘West’’ California Reporter will continue to have the brand market recognition and goodwill it always has had. Without the Official Reports’ accompanying ‘‘Bancroft-Whitney’’ goodwill and brand market recognition, the perceived quality and resulting market share for the Official Reports will likely decline.

The same argument applies to the statutory law publications in California: without the accompanying ‘‘Bancroft-Whitney’’ goodwill and brand market recognition, the perceived quality and resulting market share of Deering’s California Codes Annotated will surely decline. As is, the Proposed Final Judgment will create a de facto monopoly for Thomson/West in one legal publishing market after another.

This reasoning applies equally to the legal CD–ROM product market in the U.S. There are two major competing legal CD–ROM product lines in the U.S.—the ‘‘West’’ CD–ROM products and the ‘‘LawDesk’’ CD–ROM products. In the interest of maintaining competition and preventing a de facto Thomson monopoly, Thomson must be required to divest one of these two major competing legal CD–ROM trademarks.

‘‘West’’ is the tradename The Thomson Corporation has already indicated that it will be relying on to advance its merged legal publishing business throughout the United States. Therefor, ‘‘LawDesk’’ is the likely candidate for divestiture.

It is even more likely Thomson will replace its ‘‘LawDesk’’ CD-ROM product line with the ‘‘West’’ CD-ROM product line, since Thomson now owns the operating system software on which the ‘‘West’’ CD-ROM product line is based—Premise.* Thomson should be required to divest the ‘‘LawDesk’’ tradename.

Initially, after we wrote to request information from Thomson and West on certain Divestiture Products, I was told in a telephone conversation by Thomson that, unless we intended to make one bid on *all* the Divestiture Product, Thomson was not obligated to—and would not—make available any information at all on individual Divestiture Products. This all or nothing approach is extremely anti-competitive. Thomson should be required to disseminate information and consider bids on any individual Divestiture Product.

In the ‘‘Offering Memorandum-Selected Legal Products’’ from Thomson, there is absolutely no information—financial or otherwise—concerning certain Divestiture Products such as the various official reports and digests for the three jurisdictions involved. When I then specifically requested by telephone this information from Thomson, I was informed that it was not required to give any information concerning the official reports or digests, or any information other than what it included in the above-mentioned Offering Memorandum. We intended to bid on some or all of the official reports and digests. However, without financial and other information, it is impossible to make an educated analysis of and proposal for these Divestiture Products. Thomson should be required to make information available on the official reports and digests, and all Divestiture Products, to bona fide prospective bidders.

Furthermore, the financial and other information included in the above-mentioned Offering Memorandum is misleading. It contains no meaningful and historical presentation of the facts and figures. The Divestiture Products have all seen changes in

*The operating system software for the ‘‘LawDesk’’ CD-ROM products (the base for the legal information that is stored there) is Folio—owned by Folio Corporation. The operating system software for the ‘‘West’’ CD-ROM products is Premise—owned by West * * * and now Thomson.

their production since Thomson first acquired many of them in 1989, in its acquition/takeover of Lawyers' Cooperative Publishing and Bancroft Whitney. To obtain an understanding of the value of the Divestiture Products, it is necessary to compare financial and other information on the products both prior to Thomson's initial acquisition of such products in 1989 and in the 7 years since its ownership of such products. This is important because of the changes in production that Thomson has implemented on these products since its ownership of them.

The present value of the Divestiture Products is directly related to how they have been produced both prior to Thomson's acquisition of them and since that time—a time that has been filled with substantial personnel reductions and shifting of resources throughout the Thomson organization, all of which affects the value of any Divestiture Products. Thomson should be required to disclose to all bonafide prospective acquirers, financial and other information on the Divestiture Products in a meaningful and historical presentation from the time immediately prior to its acquisition of such products in 1989 to the present time, with proper supporting documentation.

Thomson initially established a deadline of August 8th for submission of proposals for acquisition of the Divestiture Products. On August 2nd, Thomson sent a letter indicating the deadline was changed to August 15th. In light of the concerns and inquiries I have expressed here, Thomson should be required to extend its deadline on August 15th, until these concerns can be satisfactorily resolved. As part of a group who is a bonafide prospective acquirer of Divestiture Products, I ask that you apply to the Court for an appropriate and necessary order to resolve the issues raised in this letter.

I would like to speak with you at your earliest convenience since Thomson's August 15th deadline for proposals is almost here. Thank you.

Very truly yours,

Alois V. Gross

CC: Mr. Craig W. Conrath, Mr. James E. Doyle, Jr., Ms. Christine O. Gregoire, Mr. Dennis C. Vacco, Mr. Scott Harshbarger, Mr. Jim Ryan, Mr. Richard Blumenthal, Mr. Daniel E. Lungren

ALOIS V. GROSS

August 20, 1996.

Mr. Craig W. Conrath,

Chief, Merger Task Force, Antitrust Division, U.S. Department of Justice, 1401 H Street N.W., Suite 4000, Washington, D.C. 20530.

Re: Public Comment, U.S. v The Thomson Corporation and West Publishing Co., U.S. District Court for the District of Columbia, Civil Action No. 96–1415

Dear Mr. Conrath: The enclosed Public Comment on the above matter is an addendum to my Public Comment sent to you on August 12th. I understand the enclosed comments and your responses will be published in the Federal Register and filed with the Court.

Please feel free to call me if you would like clarification of anything in my earlier Public Comment or this Public Comment Addendum.

Very truly yours,

Alois V. Gross

Enclosure

Public Comment on Proposed Final Judgment and Competitive Impact Statement, U.S. v The Thomson Corporation and West Publishing Co., U.S. District Court for the District of Columbia, Civil Action No. 96–1415 (Addendum to Public Comment filed August 12, 1996)

I. Premise

The Proposed Final Judgment fails to attain its goal, as required by the federal antitrust laws, of eliminating the anticompetitive effect that a merger of the two Defendants creates in the U.S. legal publishing market. It should therefor be rejected by the Court.

II. Argument

A. Tradenames Must Be Divested

Thomson/West is not required by the Proposed Final Judgment to divest the ''Total Client-Service Library'' (''TCSL''), ''A Practice Systems Library Manual'', and ''American Jurisprudence'' (''Am Jur'') tradenames currently owned by the Thomson Corporation. These tradenames should be included in the list of Divestiture Products in the Proposed Final Judgment (Exhibit A), but they are not.

These tradenames carry valuable goodwill and brand market recognition developed over many decades of legal publishing. They will be essential for maintaining the confidence of customers and the market share for the Divestiture Products identified with these tradenames. Without these tradenames, the acquirer of such Divestiture Products will have the same barriers to market entry as with a start-up publication. With its vast financial, marketing, and distribution resources, Thomas/West could easily overwhelm and overpower the acquirer within months of divestiture.

To ensure the Divestiture Products remain viable, the goodwill and market recognition associated with the ''Total Client-Service Library'' (''TCSL''), ''A Practice Systems Library Manual'', and ''American Jurisprudence'' (''Am Jur'') tradenames should transfer with the Divestiture Products, and therefor these tradenames should be divested by Thomas/West.

''Total Client-Service Library'' (''TCSL'') is a tradename feature appearing in many Divestiture Products and other publications currently produced by the Lawyers' Cooperative Publishing (LCP) and Bancroft Whitney (BW) offices of Thomson. It is a very useful reference tool for locating related primary and secondary legal publications, by way of cross-reference citations. (Currently, ''TCSL'' is used to cross-refer readers to other publications produced by the LCP and BW offices of Thomas—a very useful internal marketing feature.) The Divestiture Products obtain value from the inclusion of the ''TCSL'' tradename feature. Without continued inclusion of the ''TCSL'' feature in the Divestiture Products, the acquirer of such products will be severely disadvantaged in the market from the inability to cross-refer, and ''internally market'' other related legal products published by the acquirer—in a manner that is both familiar to and valued by current users of the Divestiture Products. Any change in these publications following divestiture, whereby the ''TCSL'' feature is no longer included, will likely be a severe disadvantage to the competitiveness of such publications.

If Thomson/West desires to continue using the ''TCSL'' feature in non-divestiture products, it should be required to license the use of this tradename from the acquirer. The burden to license the use of the ''TCSL'' tradename should be placed on Thomson/West rather than on the acquirer, since the continued viability of Divestiture Products is already questionable due to the inevitable changes in their production following divestiture.

Any unnecessary burden, such as requiring the acquirer to license the use of existing tradenames in Divestiture Products will negatively affect the ability of the acquirer to maintain cost-effective production of the Divestiture Products. Should such a burden become too great for the acquirer, the ''TCSL'' tradename feature could be eliminated from the Divestiture Products, with a resulting negative impact on the competitiveness of such products. In order to maintain the competitive survival of the Divestiture Products, the ''TCSL'' tradename should transfer with such products upon divestiture, with a license-back to Thomson/West for its continued use of ''TCSL'' in non-divestiture products.

Similarly, ''A Practice Systems Library Manual'' is a tradename associated with many Divestiture Products, and other non-divestiture publications produced by the LCP and BW offices of Thomson/West. This tradename appears in the titles of such publications. This tradename is not included on the list of Divestiture Products, but it should be.

The goodwill and brand market recognition associated with the ''A Practice Systems Library Manual'' tradename was developed over many decades of legal publishing. The Divestiture Products currently associated with this tradename obtain value from this tradename. Without continued inclusion of this tradename in the Divestiture Products currently associated with it, such products will be competitively disadvantaged in the market. The same argument regarding licensure of this tradename feature discussed above for ''TCSL'' applies equally here. If Thomson/West desires to continue using this tradename in producing non-divestiture publications, it should be required to license-back such tradename use from the acquirer.

''American Jurisprudence'' (''Am Jur'') is the tradename currently associated with one of the two national legal encyclopedias in the U.S. that under the current divestiture plan will both be owned by a merged Thomson/West. Both the tradename and the encyclopedia (American Jurisprudence 2d) should be included on the list of Divestiture Products in the Proposed Final Judgment, but they are not. The encyclopedia was recommended for required divestiture in a Public Comment filed August 12, 1996.

If American Jurisprudence 2d is divested as recommended, the ''Am Jur'' tradename will still be associated with certain non-divestiture products owned by Thomson/West, including: Am Jur Legal Forms, Am Jur Pleading and Practice Forms, Am Jur Proof of Facts, and Am Jur Trials. Such related products should also be divested to keep the Am Jur product line in tact and competitive. Alternatively, Thomson/West should at the very least be required to license back the tradename ''Am Jur'' from the acquirer of American Jurisprudence 2d, for continued use in Thomson/West's related ''Am Jur'' products.

B. Thomson/West Must Pay License Fee for ALR cites on Auto-Cite

Auto-Cite is a Divestiture Product that contains substantial references to Thomson/West-owned legal publications, for which the acquirer of Auto-Cite should be compensated on a license basis from Thomson/West. The Proposed Final Judgment does not provide for a license fee to be paid by Thomson/West to the acquirer of Auto-Cite, but it should.

In particular, Auto-Cite contains the many thousands of citations to case reports and annotations contained in Thomson/West's American Law Reports (ALR) publications: ALR, ALR 2d, ALR 3rd, ALR 4th, ALR 5th, and ALR Federal. Developed over many years of legal publishing, Auto-Cite derives competitive value from the inclusion of citations to ALR case reports and annotations, since such citations in their entirety currently appear in no other electronic legal research product/service on the market.

Following divestiture of Auto-Cite, its competitive value attributable to ALR citations will probably diminish in some degree over time, since Thomson/West will in time likely add all ALR citations and text to its Westlaw electronic legal research product/service. Nevertheless, Thomson/West should be required to pay a license fee to the acquirer of Auto-Cite, for inclusion of all references to Thomson/West's ALR citations, since Thomson/West will also obtain value from the continued inclusion of ALR citations in Auto-Cite.

III. Conclusion

An overriding concern with the Proposed Final Judgment is that it does not effectively maintain real competition in the U.S. legal publishing industry, following this latest advance in Thomson's calculated takeover of the industry and fracturing of product lines. Valuable goodwill, brand market recognition, and product-line customer loyalty currently associated with Divestiture Products will likely suffer under the current divestiture plan. The current plan makes no attempt to maintain the competitiveness of Divestiture Products by requiring divestiture of and along entire product lines. Moreover, the current plan also makes no attempt to maintain the competitiveness of Divestiture Products by requiring divestiture of and along company tradename lines, such as all ''BW'' products or all ''LCP'' products.

Goodwill, brand market recognition, and customer loyalty associated with entire product lines and interrelated publications and services currently produced by the BW and LCP offices of Thomson will be fractured following divestiture under the current plan. Some of these BW and LCP products and services will be published by Thomson/West, and some (Divestiture Products) will be published by the acquirer(s), under the current plan.

Incongruously, the current plan leaves most products and entire product lines presently produced by West under the familiar ''West'' tradename in tact and largely unscathed, with regard to goodwill, brand market recognition, and customer loyalty. These are the products and product lines that Thomson/West will continue to own following divestiture under the current plan. While on the contrary, the current plan fractures many product lines of which Divestiture Products are presently a part. It also fractures the many tradenames presently associated with Divestiture Products. The current plan therefor places Divestiture Products and their acquirer at a severe competitive disadvantage in the legal publishing market following divestiture.

Under the Proposed Final Judgment, this fractured U.S. legal publishing industry will continue with only one clear market leader—Thomson/West—and a de facto monopoly in that organization. Real competition in the U.S. legal publishing industry will likely be gone forever under the current plan.

The Thomson/West merger-divestiture should be reevaluated with an eye toward requiring Thomson/West to divest entire product lines that share common tradenames. At the very least, all tradenames currently associated with Divestiture Products should be divested and transferred with those products.

Dated: August 20, 1996.

Respectfully submitted,

Alois V. Gross,

Minnesota Attorney No. 13322X, 2219 Pillsbury Avenue, Minneapolis, MN 55404–3266, Phone: (612) 871–4680.

Tax Analysts

September 3, 1996.

By Hand Delivery

Craig W. Conrath, Esq.

Chief, Merger Task Force, Antitrust Division, U.S. Department of Justice, 1401 H Street, N.W., Suite 4000, Washington, D.C. 20530.

Re: *United States* v. *The Thomson Corporation and West Publishing Company,* Case No. 1:96CVO1415 (U.S. District Court for the District of Columbia)

Dear Mr. Conrath, I have read the comments of Lexis-Nexis relating to the proposed final judgment in this case.

I agree with Lexis-Nexis' conclusion that the Department of Justice has failed to provide the safeguards that are needed to preserve competition in the market for enhanced case law. I also agree with Lexis-Nexis' conclusion that the proposed final judgment will result in substantially lessened competition in the markets identified in the complaint.

I particularly agree with Lexis-Nexis' criticism of the failure of the Department of Justice to take steps that would ''lower the high barriers to entry that have caused such extreme market concentrations'' in legal publishing. See comments, page 2. As a small legal publisher, Tax Analysts is well aware of the existence of these barriers to entry. For further information on this subject, please see the comments that we submitted to you on August 29, 1996.

Tax Analysts opposes entry of the Proposed Final Judgment, unless and until it is modified to eliminate the problems identified in the Lexis-Nexis comments and in our own comments of August 29, 1996.

Best regards,

Thomas F. Field,

Publisher.

cc: Constance Spheeris, Esq., General Counsel, Tax Analysts

PUBLIC COMMENTS SUBMITTED BY TAX ANALYSTS: CIVIL ACTION NO. 96–1415

The United States, et al. v. the Thomson Corporation and West Publishing Company

Mr. Craig W. Conrath,

Chief, Merger Task Force, Antitrust Division, U.S. Department of Justice, 1401 H. Street, N.W., Suite 4000, Washington, D.C. 20530.

Dear Mr. Conrath: Tax Analysts respectfully submits the following comments regarding the Department of Justice's current review of, and proposed settlement terms for, the acquisition of West Publishing Co. (''West'') by the Thomson Corporation (''Thomson''). As you know, Tax Analysts moved to intervene on July 25 in this matter and was denied. We reference by incorporation our court filings in that proceeding, particularly for the legal basis of our contentions.

One of the most serious barriers to competition in the legal publishing industry is the unavailability to most publishers, particularly newer and/or smaller publishers, of past or archival case law. The seriousness of this barrier is evidenced by its inclusion in the Department of Justice's (''the Department'' or ''Justice'') *prima facie* case in this action alleging anticompetitive behavior against defendants Thomson and West. *See* paragraph 30 of the Complaint. Despite this, the Department's proposed Final Judgment does not provide a remedy for this competitive barrier, which is serious enough to warrant inclusion in its *prima facie* case. Tax Analysts submits that this omission makes the proposed settlement incomplete and unworthy of judicial or departmental approval, as the underlying monopolistic behavior of West, not Thomson, remains unchecked.

The reason there is no remedy, we suggest, is because the Department has locked itself into a collusive posture with West in separate litigation over this very issue—public access to past case law. In that litigation, *Tax Analysts v. Department of Justice and West Publishing Co.*, 913 F.Supp 599 (D.D.C. 1996), stayed pending decision on appeal under F.R.Civ.Pro.54(b) in the U.S. Court of Appeals, Case No. 96–5109, Justice is co-asserting West's proprietary rights over the words of judges in United States federal case law. Thus, the Department has an irreconcilable conflict of interest with respect to the availability of past case law, paragraph 30 of the Complaint, because of its defensive position with West in co-asserting a West proprietary interest in the past case law contained in the JURIS database. This conflict clearly disables the Department from fulfilling its statutory mandate under the Tunney Act because it is unwilling or unable to provide a remedy to the anticompetitive allegations contained in paragraph 30 of the Complaint.

As a result, the proposed Final Judgment is inadequate and unacceptable and should be amended to provide a remedy, which is readily available, to this very real and continuing barrier to competition. Without access to past case law, there will be little or no increase in competition in the legal publishing industry. It is within Justice's authority to require the release of the past case law contained in JURIS as part of the terms of approval of Thomson's acquisition of West.

Tax Analysts urges the Department and the District Court to order the public domain release of nonproprietary federal case law and statutes contained in the JURIS database as a condition of settlement in its antitrust review of Thomson's acquisition of West.

1. The Public Is Not Represented by Justice's Collusive Position With West With Respect to Past Case Law

Because of Tax Analysts unique circumstances in litigating against the Department of Justice to secure release into the public domain of the only publicly developed database of archival case law, JURIS, we are acutely aware of your department's inability to represent the public interest because of its collusion with West in co-asserting West proprietary rights to entirely public domain information in case law contained in JURIS. This is also apparent in the divergent and conflicting positions adopted by the antitrust and civil divisions of the Department with respect to this issue. *See* Appendix A, *Memorandum of the United States of America as Amicus Curiae in Support of the Proposition That Bender's Star Pagination to West's National Reporter System Does Not Infringe Any Copyright Interest West May Have in the Arrangement of the National Reporter System Volumes, (''the Department's Memorandum''),* at 5–15, 17.

Tax Analysts is the plaintiff in a Freedom of Information Act suit which seeks to preserve and make freely available to the public the *nonproprietary* portions of the Department's electronic database known as JURIS. *See Tax Analysts, supra.* The nonproprietary portions of JURIS contain the words in judicial opinions written by U.S. judges and the statutes enacted by State and Federal legislatures.

The nonproprietary portions of the JURIS database do *not* contain value-added information that could arguably be subject to proprietary claims. For example, the nonproprietary portions of JURIS do not contain page numbers, synopses or headnotes, *nor* do these portions contain any West electronic formatting, search software, or electronic searching capability. West's so-called ''stream format'' was eliminated by use of government-owned software as the first step in creating JURIS. *See* Appendix A.

The JURIS database was electronically formatted by means of government-owned software, written at public expense by government employees, and applied at public expense by a third-party computer-services contractor, West, to the nonproprietary portions of the JURIS database. On the basis of its role as the computer-services contractor to the Department, West claims proprietary rights in the nonproprietary portions of the JURIS database; that is, the unenhanced text of the judges' own words and the legislatures' statutes. These claims, advanced in concert by West and the Department, have thus far been successful in blocking release of the JURIS database to the public.[1]

As a consequence, U.S. federal statutes and retrospective case law in electronic form are unavailable as a practical matter to smaller publishers seeking to enter the legal publishing market. And, as paragraph 30 of the Complaint in this action make clear, ''successful entry [into the legal publishing market for enhanced primary law] would require access to past and current court opinions and statutes. Past and/or current opinions simply are not available from many courts and in many others, obtaining access is costly and time-consuming.''

The nonproprietary portions of the JURIS database—the words of judges and legislatures—constitute a very valuable public asset. JURIS is the only publicly owned database containing Federal and State statutes and Federal case law. Until the nonproprietary portions of the JURIS database are made available to the public, including smaller publishers, there is ''unlikely to be entry by any company offering enhanced primary law in any of the relevant product markets identified. * * *'' *See* Complaint, paragraph 30.

It is clear from the proposed Final Judgment that the Department's collusion with West in *Tax Analysts, supra,* renders it unable to craft a fair settlement of third-party publishers in the current monopolistic conditions in the legal publishing industry. These conditions are almost entirely the result of West's monopolistic control and assertions of proprietary rights over the original, unenhanced words of judges in past case law. For small, innovative publishers, the lack of access to past case law is rightly alleged in paragraph 30 of the Complaint.

The Department's failure to require the release of nonproprietary federal case law and statutes contained in JURIS, as a response to this *prima facie* monopoly practice or claim, is untenable. The Department's JURIS database is a readily available and appropriate remedy to this competitive barrier. Tax Analysts believes that allowing this situation to continue will do more harm to competition in the industry than any existing remedy contained in the Final Judgment will do to alleviate it.

But for the Department's decision to propound and support West's assertions of proprietary rights over public domain case law in the JURIS database, the nonproprietary portions of that database rightly would be released into the public domain. Rather than encourage competition in the legal publishing industry by requiring release of this database by West and the Department, the Department continues to collude with West by choosing to omit the release of JURIS from the Final Judgment in this action.[2]

2. The Department Is Disabled From Representing the Public With Respect to Access to Past Case Law

If the Department were truly acting in the public interest with respect to access to past case law, it would require the release of JURIS into the public domain as a condition of approval of Thomson's acquisition of West. Collusion, including virtual co-pleading, in a prior litigation with a current opposing party, to the detriment of a current client—in this case, the American People, whom Justice purports to represent in this Tunney Act antitrust review—violates the very foundation of professional responsibility.[3] By these actions, Justice proves that it cannot represent the public interest in gaining access to past case law. The archival case law contained in JURIS, stripped of West enhancements, was and still

[1] On January 16, 1996, U.S. District Court Judge Gladys Kessler granted the motions of the Department and West to dismiss those portions of Tax Analysts' Complaint that relate to the nonproprietary portions of the JURIS database. On April 1, 1996, the Judge's ruling was certified as final, pursuant to Fed. Rule Civ. Pro. 54(b). Tax Analysts has appealed. The appeal will determine whether Judges Kessler and Richey erred in denying Tax Analysts' repeated requests for discovery needed to oppose West's claims that its computer services contract with Justice created proprietary rights in the federal statutes and case law contained in the nonproprietary portions of the JURIS system. Oral argument is set for January 13, 1997. The remainder of the JURIS case has been stayed, pending resolution of the appeal. Meanwhile, similar actions are in preparation in other venues.

[2] Although Tax Analysts and others maintain that the mere words of judges and legislators contained in case law and statutes, stripped of West value-added enhancements, is entirely nonproprietary, whether West holds any proprietary rights in the raw data that it provided to Justice under contract for JURIS is irrelevant here. Along with the other materials West and Thomson are required to divest for purposes of approval, the Department is fully empowered to require release into the public domain of the federal case law and statutes contained in JURIS, regardless of what portions are claimed as proprietary by the parties.

[3] *See, e.g.* pleadings in *Tax Analysts, supra:*

(1) Defendants' *Motions to Dismiss* using almost identical language and submitted to the court on the same day: (Justice, February 14, 1994) ''* * * dismiss * * * to the extent Plaintiff seeks disclosure of West licensed data.''; (West, February 14, 1994) ''* * * dismiss * * * insofar as it [Plaintiff] seeks to obtain West licensed data.'' At no time was West-licensed data ever sought by Tax Analysts in its FOIA request or in the subsequent litigation.

(2) West and Justice *Joint Opposition to Plaintiff's Motion to Establish Procedure for Resolution & Discovery on Agency Record Issue,* submitted to the Court on June 9, 1994.

(3) West and Justice joint statement as to undisputed facts and disputed issues of fact and law, Appendix B to *Joint Pleading Pursuant to Order Dated May 6, 1994,* dated May 27, 1994.

is available to Justice as a remedy here if it truly wishes to end the monopolistic hold of West on past case law, and, therefore, on the legal publishing industry as a whole. Justice's failure to include this remedy in its Final Judgment speaks of its continued collusion with West.

Release of JURIS is the simplest and quickest remedy to the competitive harm caused by the lack of access to past case law. Given the many millions of taxpayer dollars already spent on computer services contractors such as West to provide the raw data for JURIS, we urge the Department to include its release as a condition of approval of Thomson's acquisition of West.

3. Only the Public Can Claim Rights in the Words of Federal Judges

Even though it is irrelevant whether West has proprietary rights over the words of federal judges contained in the case law of JURIS for the purpose of an antitrust settlement, as a matter of record, it is important to examine who owns what in an electronic database. While proprietary claims in the electronic or digital world are in a state of change, some aspects of this emerging legal framework are clear. First, it is settled that mere gathering or collecting is not a copyrightable act, no matter how much ''sweat of the brow'' is involved. *See Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1990). Conversely, Tax Analysts agrees that West has a proprietary claim in its original, value-added enhancements to case law, such as synopses and headnotes.

Second, it is also settled that despite the originality of any compilation or arrangement, no one owns the actual information in the database, particularly when the information originates from a public entity, such as courts and legislatures. See Feist, supra, at 349, and Appendix A, the Department's Memorandum, at 5, 6, 11, 12, 14, 16, 17.

Third, in the digital world, value-added material—summaries, search engines, other formatting designs, etc.—that is digitally coded onto the raw data is easily removed. In the case of JURIS, West's value-added materials had to be removed and Department JURIS software procs inserted for the database to run the raw data, e.g. case law and statutes, provided by West under contract. See Appendix B. While West's enhancements may constitute value, they were never an object of Tax Analysts' original FOIA request for the public domain release of JURIS or of the subsequent litigation, nor are they contemplated in these comments for release as a remedy to the anticompetitive allegations in paragraph 30.

Simply put, the mere original words of judges and legislators in the JURIS database, devoid of West material, is what is appropriately available for release by Justice into the public domain. No one 'owns' these words except the public. The fact that West provided to Justice for departmental input in JURIS the words of judges in case opinions confers no proprietary right on West in the cases themselves. ''Feist's thin copyright leaves facts unprotected while protecting only creative selection and arrangement. West's principle, in contrast, effectively protects facts.'' Appendix A, the Department's Memorandum, at 15.

The following passage illustrates this point well:

An electronic database is any collection of information maintained in a computer * * * How much of an online database can be owned under copyright law? The answer is that a person who compiles a database will have a copyright in the original 'selection, coordination, or arrangement' of that database. However, no one can own the 'facts' contained in the database, no matter how much work he or she may have put into gathering those facts. This is because facts are not originated by the database developer, but are an independent part of the world apart from the developer, free to all who want to use them. In other words, a database developer does not create facts, he or she discovers them, and no one can copyright a discovery. * * * This legal rule may not seem fair * * * Nonetheless, it reflects a major limitation on copyright law, which protects expressions of facts only, and not the facts themselves. (emphasis added, except for ''discovers'')

Netlaw: Your Rights in the Online World, by Lance Rose (1995), p. 109–110.

The Department, in its Memorandum in the Matthew Bender case, explains the policy rationale behind this legal development:

This case [Matthew Bender & Co., Inc., v. West Publishing Co.] like Mead before it, arose primarily because new technologies, new means of managing information, became available, a frequent event in the information age. We have seen, in on-line computer searchable databases and in CD–ROM products, new ways of working with the raw materials of legal research—case reports, statutes, and other materials that once appeared only in print form. Neither we nor this Court can predict what new technological developments will next year or in the next decade further revolutionize the practice of law and make the substance of law more readily available to all. By making clear the limited scope of copyright protection for factual compilations, Feist cleared the way for these creative developments. It should be followed here. (emphasis added)

Appendix A, the Department's Memorandum, at 17.

Given this public representation in a court filing, the Department surely knows that ''these creative developments'' will occur only if ''the raw materials of legal research''—case law and statutes—are universally available. Why, then, is the availability of the raw material of legal research, the absence of which is part of the Department's prima facie case against the defendants, not made a condition of settlement in the proposed Final Judgment?

Moreover, the proprietary rights West claims, with Justice's support, in the compilation or arrangement of federal case law in JURIS is inapposite in a digital platform. There is no such thing as one arrangement or compilation in an electronic format. Unlike the print medium which permits presentation by only the arrangement appearing in the order designed on the printed page, information presented in digital media is accessible through a variety of entry points. There is no ''Table of Contents,'' only a vast, chaotic collection of digital bits, or data; analog material that has been randomly digitized and is accessible as randomly. While electronic formatting for search purposes is arguably copyrightable, West's formatting is not part of JURIS.

4. Small Publishers Must Have Access to Past Case Law or They Will Perish

The Department has demonstrated either wanton disregard or benign neglect of smaller legal publishers in this antitrust review. Not once is this dynamic and innovative segment of the industry mentioned in any pleading or proposed order. We urge the Department now to give fair attention to the critical competitive need of small legal publishers to gain access to past case law, as they are the ones most injured by the competitive barriers created by West's monopoly. Without the ability to provide complete primary law products with retrospective case law obtained at reasonable cost, particularly in electronic format, small publishers will not be able to launch primary law products on a competitive track with Thomson/West. It is well known in our industry that West's ability to maintain its monopolistic market position is largely based on its government sanctioned assertion of proprietary rights over the raw materials of legal research; viz., case law and statutes.

Indeed, as the attached statements of small publishers make clear, many of them already have suffered commercially and been forced to abandon projects because of their inability to gain access to past case law. (Other publishers have informed us that they will be sending to you directly their statements regarding this issue.) These smaller publishers experienced the anticompetitive effects of that monopoly when they tried to release new products. This is detrimental to a healthy economic climate and will only continue with the aggregated market share of Thomson/West. The Department has rightly cited this competitive harm in paragraph 30 as part of its prima facie case but has ignored the reality of its continuing harm in the Final Judgment.

In short, without public domain access to past case law, the legal publishing industry will become less and less competitive as a result of Thomson's acquisition of West, as Thomson will also acquire West's unsubstantiated and unproven proprietary claims to past case law; including the largest national, publicly financed electronic database of past case law that was maintained by the Department for decades for internal legal research, JURIS.

The Department's role as the nation's antitrust law enforcer mandates the formulation of an economic climate for the legal publishing industry that fosters a truly competitive and fair nonmonopolistic environment for all members of the industry. Public access to government-generated raw data—case law and statutes—is an essential component of such an economic environment:

The interest of the United States in ensuring the proper preservation of that balance [between protecting private ownership of expression and establishing the free use of basic building blocks for future creativity] also reflects the fact that it has primary responsibility for enforcing the antitrust laws, which establish a national policy favoring economic competition as a means to advance the public interest''

Appendix A, the Department's Memorandum, at 2.

5. The Electronic Legal Publishing Industry Is Not a Duopoly

The Department's treatment of the electronic legal publishing industry as a duopoly between Lexis and Westlaw and its exclusive inclusion of Lexis/Nexis in the Final Judgment adds insult to injury for smaller publishers. The fact that the Department was willing to craft a special remedy for one third-party legal publisher, and attempt to portray that publisher as the only competitor in electronic publishing, is astonishing to industry members.

There are scores of small legal publishers engaged in new, innovative, and entrepreneurial electronic products from CD–ROM to internet-based products formatted from and for multimedia platforms. Tax Analysts refers the Department to any of several listings of these many legal publishers, including the *Directory of Law-Related CD–ROMS*, 1996, Infosources Publishing. The Department demonstrates little understanding of and concern for the less powerful elements of the industry under review and, therefore, little regard for offering appropriate remedies for the enormous competitive barriers posed by West's monopolistic control over archival case law.

Tax Analysts is deeply concerned that the competitive damage done to small, especially electronic, legal publishers will only continue if the Department remains unwilling to address the competitive barrier named in paragraph 30. We bring their concerns to you because the cost of participation and legal representation prohibits most of them from doing so independently. An antitrust settlement that addresses only the competitive harm to consumers and to the largest of the defendants' competitors is not a fair or just settlement.

We urge you to reconsider the proposed Final Judgment so that the anticompetitive experiences of third-party legal publishers resulting from West's monopolistic control over past United States case law, soon to be in the hands of Thomson, will be terminated by this proceeding. There will not likely be another opportunity for the Department to stop the monopolistic practices cited in the Complaint. All members of the industry deserve the same deference reserved in the Final Judgment for Lexis/Nexis.

We are pleased to provide these comments and look forward to discussing them further with you.

Sincerely,
Thomas F. Field,
Publisher.

In the United States District Court for the Southern District of New York

Matthew Bender & Co., Inc., Plaintiff, v. West Publishing Company, Defendant. 94 Civ. 0589 (JSM)

Memorandum of United States of America as Amicus Curiae in Support of the Proposition That Bender's Star Pagination to West's National Reporter System Does Not Infringe any Copyright Interest West May Have in the Arrangement of the National Reporter System Volumes

ANNE K. BINGAMAN,
Assistant Attorney General.

JOEL I. KLEIN,
Deputy Assistant Attorney General.

CATHERINE G. O'SULLIVAN, DAVID SEIDMAN,
Attorneys, U.S. Department of Justice 10th & Pennsylvania Ave. NW, Washington, DC 20530, (202) 514–4510.

RALPH T. GIORDANO (RG0114),
Attorney, U.S. Department of Justice, 29 Federal Plaza, Room 3630, New York, NY 10278–0140, (212) 264–0390.

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In The United States District Court For The Southern District of New York

Matthew Bender & Co., Inc., Plaintiff, v. West Publishing Company, Defendant. 94 Civ. 0589 (JSM)

MEMORANDUM OF UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PROPOSITION THAT BENDER'S STAR PAGINATION TO WEST'S NATIONAL REPORTER SYSTEM DOES NOT INFRINGE ANY COPYRIGHT INTEREST WEST MAY HAVE IN THE ARRANGEMENT OF THE NATIONAL REPORTER SYSTEM VOLUMES

The United States submits this Memorandum to express its view that Bender's star pagination to West's National Reporter System does not infringe any copyright interest West may have in the arrangement of the National Reporter System volumes. We believe that the Court will be able to reach this conclusion without deciding disputed issues of fact and that the conclusion will permit the Court to rule for Bender on the critical issue in the parties' motions for summary judgment. This Memorandum, however, was prepared before the parties served their motions and without access to those portions of the summary judgment record under protective order.

INTEREST OF THE UNITED STATES

The United States has a substantial interest in the resolution of the issue discussed in this Memorandum. It has numerous responsibilities related to the proper administration of the intellectual property laws and to advancement of the public interest. The standards for copyright protection embody a balance struck between protecting private ownership of expression as an incentive for creativity and enabling the free use of basic building blocks for future creativity. *See Twentieth Century Music Corp*. v. *Aiken*, 422 U.S. 151, 156 (1975). The United States therefore has an interest in properly maintaining the ''delicate equilibrium,'' *Computer Associates International* v. *Altai, Inc.*, 982 F.2d 693, 696 (2d Cir. 1992), Congress established through the copyright law.

The interest of the United States in ensuring the proper preservation of that balance also reflects the fact that it has primary responsibility for enforcing the antitrust laws, which establish a national policy favoring economic competition as a means to advance the public interest. Moreover, the United States is a substantial purchaser of legal research materials of the kind at issue in this case.

Finally, the United States has recently taken actions relating to the issue discussed. On June 19, 1996, the United States, together with seven states, filed an antitrust suit challenging the acquisition of West Publishing Co. by The Thomson Corp., together with a proposed settlement of that suit. Part of that settlement requires Thomson to license to other law publishers the right to star paginate to West's National Reporter System. *United States* v. *The Thomson Corp.,* No. 96–1415 (D.D.C. filed June 19, 1996), Proposed Final Judgment, 61 Fed. Reg. 35250, 35254 (July 5, 1996). In announcing the settlement, the U.S. Department of Justice stated:

> Today's settlement, with its open licensing requirement does not suggest * * * that the Department believes a license is required for use of such pagination. The Department expressly reserves the right to assert its views concerning the extent, validity, or significance of any intellectual property right claimed by the companies [West and Thomson]. The Department also said that the parties agree that the settlement shall have no impact whatsoever on any adjudication concerning such matters.

U.S. Dept. of Justice, Press Release No. 96–287, at 3–4, 1996 WL 337211 (DOJ) *2 (June 19, 1996). This Memorandum asserts those views.

STATEMENT

1. West Publishing Company (''West'') publishes the well-known National Reporter System, which includes case reports of federal and state courts in the United States. In particular, it is ''the only entity to publish decisions of the United States Courts of Appeals and United States District Courts in comprehensive book form,'' *Matthew Bender & Company* v. *West Publishing Co.,* 1995 WL 702389 at *1 (S.D.N.Y.) (''*Bender I*''), in the familiar Federal Reporter and Federal Supplement series and other series. It also ''publishes the opinions of New York state courts,'' *id.,* in several series of volumes. West claims copyright in these volumes.

Matthew Bender & Company (''Bender''), another publisher of various legal materials, has prepared for publication in Compact Disk-Read Only Memory (CD–ROM) format a work (the ''New York product'') which includes, among other things, the text of opinions of the United States Court of Appeals for the Second Circuit, four United States district courts, and various New York state courts, all for a number of recent years.[1] Bender has inserted into the text of some of the opinions appearing in its New York product—those also published in West's volumes—information about the places in West's volumes where the text may also be found. Bender provides the West volume and page number where the beginning of each such case may be found; it also marks with West page numbers the places in its text where page breaks occur in West's publication of these opinions. In other words, Bender has star-paginated to West's volumes. *Bender II* at *3 & n.2.

2. Bender sued West for a declaratory judgment that ''West does not possess a federal statutory copyright in the pagination in West's federal reporters or West's New York reporters,'' and that ''Bender does not and will not infringe any copyright of West's by its current and intended copying of the pagination from West's federal reporters and West's New York reporters.'' Second Supplemental Complaint 9. West moved to dismiss for lack of an actual controversy between the parties, and this Court denied that motion on May 2, 1996. The parties agreed to serve each other with motions for summary judgment on August 5, 1996.

West has contended that the pagination of its volumes reflects the arrangement of cases in those volumes, that the arrangement is protected by West's copyright, and that therefore star pagination to West's volumes infringes West's copyrights. See, *e.g., Oasis Publishing Co.* v. *West Publishing Co.,* 924 F. Supp. 918, 922 (D. Minn. 1996), *appeal docketed,* No. 96–2887 (8th Cir. July 19, 1996). These contentions lie at the core of this case.

ARGUMENT

Bender's star pagination does not infringe West's copyright interest in the arrangement of cases within the National Reporter System volumes. To reach that conclusion, this Court need not determine whether that arrangement rises to the level of originality necessary for copyright protection. Even supposing the necessary level of

[1] Although West contends that a different Bender product, the ''Texas product,'' contains ''textual additions'' copied from West's volumes, *Matthew Bender & Company* v. *West Publishing Co.,* 1996 WL 223917 at *7 (S.D.N.Y.) (''*Bender II*''), it makes no such claims regarding the New York product.

originality in West's arrangement, Bender does not infringe unless it copies that which is protected. And only a discredited reading of copyright law suggests that Bender copied West's arrangement of cases.

I. The Copyright on a Compilation Is Thin, Protecting Only Those Components of the Work That Are Original to the Author and Only Against Copying of Those Components

The Supreme Court has made clear that copyright protection for compilations like West's is thin, far thinner than some courts had previously assumed. Even if the arrangement of West's volumes is protected by copyright, that protection extends no further than West's original contributions.

In *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U.S. 340 (1990), which concerned copying from a telephone directory, the Court addressed two fundamental tensions in copyright law. One is between the principle that facts are not protected by copyright and the principle that compilation of facts [2] generally are protected. *Id.* at 344–45.[3] The other is between the means of ''assur[ing] authors the right to their original expression'' and the end of ''encourag[ing] others to build freely upon the ideas and information conveyed by a work.'' *Id.* at 349–50. The Court resolved those two tensions by emphasizing that ''the copyright in a factual compilation is thin.'' The facts themselves are not protected because they are not the product of an act of authorship. *Id.* at 349.

The overriding principle is that ''copyright protection may extend only to those components of a work that are original to the author,'' *id.* at 348, where the concept of originality encompasses both independent creation and ''a modicum of creativity.'' *Id.* at 346. If the words expressing facts are original, they are protected; another author may copy the facts, but not the precise words. *Id.* at 348. But if ''the facts speak for themselves,'' protectible expression exists, if at all, only in ''the manner in which the compiler has selected and arranged the facts,'' and then only the original selection and arrangement are protected. *Id.* at 349. Because such a copyright is thin, copying from the copyrighted work is not infringement ''so long as the competing work does not feature the same selection and arrangement.'' *Ibid.*

This holding has economic bite. The value of a factual compilation may lie less in the compiler's selection and arrangement of the facts than in the industriousness required to compile them, and the thinness of the copyright may permit others to appropriate that value. As the Court observed, while, at first blush, it ''may seem unfair,'' *ibid.*, to permit that appropriation, ''[t]his result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.'' *Id.* at 350.[4]

Feist repudiated a body of case law that had used the so-called ''sweat-of-the-brow'' theory to provide broad copyright protection for factual compilations, thus protecting the fruits of mere industrious collection. The Court specifically rejected *Leon* v. *Pacific Telephone & Telegraph Co.*, 91 F.2d 484 (9th Cir. 1937), and *Jeweler's Circular Publishing Co.* v. *Keystone Publishing Co.*, 281 F. 83 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922), precisely because these cases ''extended copyright protection in a compilation beyond selection and arrangement—the compiler's original contributions—to the facts themselves.'' 499 U.S. at 352–53.[5]

Feist also addressed whether the alphabetical arrangement of a telephone book involved the ''quantum of creativity'' necessary for copyright protection. 499 U.S. at 363–64. It therefore speaks to whether West's arrangement of cases exhibits the necessary quantum of creativity to permit copyright protection. But it is not necessary to resolve that question to decided this case. It is enough that *Feist* makes clear that even if West's arrangement is protected by copyright, the protection resulting form that creativity does not extend beyond arrangement to protect other components of a work.

II. The Arrangement of Bender's Compilation of Cases Is Not A Copy Of The Arrangement Of West's Compilation Of Cases

No one seriously contends that Bender's CD–ROMs actually ''feature the same . . . arrangement,'' *Feist*, 499 U.S. at 349, of cases as West's National Report System, even in the limited sense of putting one case before the other in a pattern identical, or even notably similar, to the pattern found in West's volumes, let alone in a sense encompassing the arrangement of text on pages within each case.[6] This is true

[2] A compilation is defined as ''a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.'' 17 U.S.C. 101.

[3] The Copyright Act provides that ''[t]he copyright in a compilation * * * extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.'' 17 U.S.C. 103(b).

[4] Copyright is not the only conceivable legal regime for protecting the fruits of industrious collection. The Delegation of the United States of America recently proposed to the World Intellectual Property Organization an international treaty that would provide to the ''maker'' of certain databases the exclusive right to extract all or a substantial part of the contents, without regard to copyrightability. World Intellectual Property Organization, Preparatory Committee of the Proposed Diplomatic Conference (December 1966) on Certain Copyright and Neighboring Rights Questions, Proposal of the United States of America on Sui Generis Protection of Databases, CRNR/PM/7 (May 20, 1996). Legislation providing such protection has been introduced in Congress. See H.R. 3531, 104th Cong., 2d Sess. (1996). The Supreme Court long ago held that the common law of unfair competition or misappropriation protected uncopyrighted news reports. *International News Service* v. *Associated Press*, 248 U.S. 215, 239–40 (1918), although the preemption provision of the Copyright Act, 17 U.S.C. 301, may limit such protection to the case of systematic appropriation of ''hot'' news, *Financial Information, Inc.* v. *Moody's Investors Service, Inc.*, 808 F.2d 204, 208–09 (2d Cir. 1986), *cert. denied*, 484 U.S. 820 (1987). Trade secret law may also provide some protection in appropriate circumstances. See *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974).

[5] Although the Court specifically rejected a 1922 opinion of the Second Circuit, it also noted that the Second Circuit had since ''fully repudiated the reasoning of that decision.'' 499 U.S. at 360, citing *Financial Information, Inc.*, v. *Moody's Investors Service, Inc.*, 808 F.2d 204, 207 (2d Cir. 1986), *cert. denied*, 484 U.S. 820 (1987); *Financial Information, Inc.* v. *Moody's Investors Service, Inc.*, 751 F.2d 501, 510 (2d Cir. 1984) (Newman, J., concurring); and *Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980).

[6] In that respect, this case is unlike *Callahan* v. *Myers*, 128 U.S. 617, 660–61 (1888), where the infringing volumes of case reports substantially duplicated the paging of the infringed volumes. *Cf. Banks Law Publishing Co.* v. *Lawyer's Co-operative Publishing Co.*, 169 F. 386 (2d Cir. 1909) (implying same ordering of cases but different pagination; star pagination used in allegedly infringing work; held, no infringement), *appeal dismissed*, 223 U.S. 738 (1911). We note that the *Callahan* Court, following the lower court, did not treat duplication of the paging as an independent basis for finding infringement, apparently on the ground that arranging and paginating the cases involved inconsiderable labor and was not worthy of protection in and of itself. 128 U.S. at 662. The Eighth Circuit has read *Banks* as turning on the official status of the reporter whose works were copied. *West Publishing Co.* v. *Mead Data Central, Inc.*, 799 F.2d 1219, 1225 (8th Cir. 1986) (''*Mead*''), *cert. denied*, 479 U.S. 1070 (1987). That reading has been strongly criticized, *id.* at 1245–47 (Oliver, J., concurring in part and dissenting in part); L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. Rev. 719, 740–49 (1989), and a post-*Banks* case in the Second Circuit casts doubt on the Eighth Circuit's reading, *Eggers* v. *Sun Sales Corp.*, 263 F. 373, 375 (2d Cir. 1920) (copying from plaintiff's publication of uncopyrightable official report suggested by identity of pagination in defendant's publication, ''but legally that is not of sufficient importance to

whether ''arrangement'' refers to the physical ordering of electronic bits of information on Bender's CD–ROMs, to the order in which the Bender computer software presents cases to the user, or to any other concept of ''arrangement.'' Indeed, it is hard to see how there could be any such contention.

Courts routinely analyze whether an arrangement protected by copyright has been impermissibly copied by looking at the two works and comparing the ordering of material in the accused work with the ordering of material in the allegedly infringed compilation. *Seem, e.g., Lipton* v. *The Nature Co.,* 71 F.3d 464, 470, 472 (2d Cir. 1995) (plaintiff's arrangement of terms of venery protectible; defendant's arrangement of 72 of these terms is ''so strikingly similar . . . as to preclude an inference of independent creation'' when 24 of first 25 terms are listed in same order, and in four other places four or more terms appear in the same order); *Schiller & Schmidt, Inc.* v. *Nordisco Corp.,* 969 F.2d 410, 414 (7th Cir. 1992) (office supply catalog not infringed as compilation when plaintiff did not contend that defendant copied ''the order of products or other typical features of a compilation''); *Key Publications, Inc.* v. *Chinatown Today Publishing Enterprises, Inc.,* 945 F.2d 509, 515, (2d Cir. 1991) (no infringement when arrangement of categories in business directory is protectible, but facial examination reveals great dissimilarity between arrangement in copyrighted directory and in allegedly infringing directory); *Worth* v. *Selchow & Righter Co.,* 827 F.2d 569, 573 (9th Cir. 1987) (alphabetical arrangement of factual entries in trivia encyclopedia not copied when trivia game organizes factual entries by subject matter and by random arrangement on game card).

Infringement does not require exact identity of arrangement, but only substantial similarity between the protectible components of the copyrighted work and the corresponding components of the allegedly infringing work. *Key Publications,* 945 F.2d at 514. Nevertheless, a comparison may show some similarity of arrangement without suggesting copying. Some similarity of arrangement may result not from copying, but instead from common influences. Thus, for example, if Bender arranges cases in strict chronological order, while West's arrangement relies in part on chronology, there will be some similarity of arrangement. But that level of similarity does not ''preclude an inference of independent creation,'' *Lipton,* 72 F. 3d at 472, by Bender of its arrangement of cases, or even suggest that Bender has copied West's arrangement of cases, for it would suggest only the common influence of chronology.

A comparison of Bender's New York product and West's volumes in this case should be enough to decide the question of infringement of arrangement in Bender's favor. Our examination of Bender's product did not leave us confident that we understood the physical arrangement of the cases on the CD–ROM itself, unobservable by the naked eye. However, the computer program that allows the user to search for and read these cases did not present them to us in an order that closely matched the West ordering of cases. Thus, the Bender ''table of contents'' for the decisions of the United States Court of Appeals for the Second Circuit appeared to present all those decisions in strict chronological order (with the order of cases decided the same day following no principle we could discern). West can hardly tell the Court that it simply arranges cases chronologically. West has only recently explained to another federal district court its extensive departures from a chronological order, thus persuading that court that the arrangement is sufficiently creative to merit copyright protection. See *Oasis,* 924 F. Supp. at 924.[7] Some cases also in West's volumes appeared in the Bender table of contents in the same order as they appear in West's volumes (although generally separated by other cases in the Bender table of contents), while others appeared in an order that differed from West's. The Bender and West arrangements are clearly different. Nothing suggests that Bender's arrangement is a copy of West's arrangement.

III. Bender's Star Pagination May Describe, But It Does Not Copy, West's Arrangement of Cases

West relies on *West Publishing Co.* v. *Mead Data Central, Inc.,* 799 F.2d 1219 (8th Cir. 1986) (''*Mead*''), *cert. denied,* 479 U.S. 1070 (1987), in order to argue that Star pagination impermissibly copies West's arrangements despite clearly differing arrangement in the allegedly infringing work. In *Mead,* a divided panel of the Eight Circuit, ruling before *Feist,* concluded that a product that Star paginated to West's volumes impermissibly copied West's arrangement of cases. In effect, *Mead* holds that Star pagination, without more, is sufficient copying of the arrangement to infringe.[8] West had alleged that ''the LEXIS Star Pagination Feature is an appropriation of West's comprehensive arrangement of case reports in violation of the Copyright Act of 1976.'' 799 F.2d at 1222. The district court granted a preliminary injunction and the Eight Circuit affirmed.

Mead rests on the discredited ''sweat-of-the-brow'' theory of compilation copyright and cannot be reconciled with *Feist.* As we show below, to follow the *Mead* analysis is to eviscerate *Feist,* with substantial, and undesirable consequences for the progress of science and art in the modern technological era. This Circuit has not followed *Mead,* and this Court should not do so now.

The *Mead* district court recognized that the arrangement of cases in the Lexis database differed significantly from the West arrangement. Faced with the argument that the Lexis ''star pagination will not infringe West's arrangement because its random generated arrangement is entirely different from West's arrangement * * * [and] star pagination will not bring the arrangements closer together,'' *West Publishing Co.* v. *Mead Data Central, Inc.,* 616 F. Supp. 1571, 1579–80 (D. Minn. 1985), *aff'd,* 799 F.2d 1219 (8th Cir. 1986), *cert. denied,* 479 U.S. 1070 (1987), the district court held that ''for infringement purposes, [Mead] need not physically arrange it's [*sic*] opinions within its computer bank in order to reproduce West's protected arrangements.'' 616 F. Supp. at 1580. That is, it did not matter that Mead's work did not ''feature the same * * * arrangement,'' *Feist,* 499 U.S. at 349, as West's. As support for this pre-*Feist* holding, the court relied (616 F. Supp. at 1580) on *Rand McNally & Co.* v. *Fleet Management Systems, Inc.,* 600 F. Supp. 933, 941 (N.D. Ill. 1984): '' '[D]atabases are simply automated compilations—collections of information capable of being retrieved in various forms by an appropriate search program[.] * * * [I]t

constitute infringement of copyright,'' citing *Banks*), but our argument does not turn on the correct reading of *Banks.*

[7] As explained in *Oasis,* 924 F. Supp. at 924, West's arrangement of Florida cases in the Southern Reporter in general first separates cases by court level, then places the ''fully headnoted opinions and jacketed memoranda'' (arranged chronologically), before ''sheet memoranda,'' which in turn precede ''table dispositions'' (arranged alphabetically); West also makes exceptions to these general principles. Purely chronological ordering for a single court level would not separate by type of disposition, would not arrange some dispositions alphabetically, and would not make exceptions.

[8] In the recent *Oasis* decision, the district court in Minnesota followed the court of appeals for its circuit. 924 F. Supp. at 925–26.

us often senseless to seek in them a specific fixed arrangement of data.' '' [9]

Rand McNally, however, rests entirely on the theory *Feist* rejected: ''the basis for compilation protection is the protection of the compiler's efforts in collecting the data.'' 600 F. Supp. at 941. While the *Feist* Court thought selection and arrangement were the only protectible elements in the typical factual compilation, the *Rand McNally* court saw little significance to arrangement, relying on Professor Denicola: '' 'The creativity or effort that engages the machinery of copyright, the effort that elicits judicial concern with unjust enrichment and disincentive, lies not in the arranging, but in the compiling. * * * *The arrangement formulation* * * * *is dangerously limited. At face value the rationale indicates that the entire substance of a compilation can be pirated as long as the arrangement of data is not substantially copied.*' '' 600 F. Supp. at 941 (emphasis added) (quoting Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works.,* 81 Column L. Rev. 516, 528 (1981)). However limited, the ''arrangement'' formulation is the Supreme Court's. Specifically referring to the very same article by Professor Denicola, the *Feist* Court wrote, ''[e]ven those scholars who believe that 'industrious collection' should be rewarded seem to recognize that this is beyond the scope of existing copyright law.'' 499 U.S. at 360.

Nevertheless recognizing that West's case rested on the copying of the arrangement of cases, the *Mead* district court found, without further explanation, ''that [Mead] will reproduce West's copyrighted arrangement by systematically inserting the pagination of West's reporters into the LEXIS database. LEXIS users will have full computer access to West's copyrighted arrangement.'' 616 F. Supp. at 1580. One must look elsewhere for the reasons why the fact that Mead systematically inserted the pagination means that Mead reproduced West's arrangement.

On appeal, the Eight Circuit, which never questioned the district court's recognition that the Lexis arrangement of cases different significantly from the West arrangement, attempted to explain how Lexis could copy West's arrangement while not arranging its cases as West did. The court began by asserting that Mead's proposed star pagination would infringe West's copyright in the arrangement because, in combination with another feature of Lexis, it would permit Lexis users ''to view the arrangement of cases in every volume of West's National Reporter System,'' 799 F.2d at 1227, even if users were not likely to do so.[10] But the court added that it would find infringement even absent this capability. It is enough, the Court explained, that star pagination communicates to users ''the location in West's arrangement of specific portions of text,'' with the result that ''consumers would no longer need to purchase West's reporters to get every aspect of West's arrangement. Since knowledge of the location of opinions and parts of opinions within West's arrangement is a large part of the reason one would purchase West's volumes, the LEXIS star pagination feature would adversely affect West's market position.'' *Id.* at 1228.

Missing in the court's analysis is any explanation of how communicating location—that is, describing West's arrangement—amounts to copying West's arrangement. The court leapt directly from the fact of the communication to the economic consequence of that communication. Thus the vice of unauthorized star pagination, in the Eight Circuit's eyes, is made clear. The vice is not that original expression is copied; rather, it is that unauthorized star pagination permits unfair appropriation of the fruits of industrious collection.[11]

Feist, however, makes clear that, as a matter of copyright law, this appropriation is not unfair, and that this test is not the proper test of infringement. See page 6 *supra.* Assuming the copying of protected arrangement, the resulting impact on West's market position would properly be considered in addressing a fair use defense to infringement. See 17 U.S.C. 107(4) (fair use analysis to consider ''the effect of the use upon the potential market for or value of the copyrighted work''). But under *Feist* it plays no role in a determination of whether protected arrangement has been copied.[12]

There remains the fact that star pagination communicates to users ''the location in West's arrangement of specific portions of text.'' 799 F.2d at 1228. A compilation copyright, however, protects original components of the compilation against copying; it does not protect even original components against description. Many ways of describing West's volumes and their content other than star pagination would also communicate such information. Essentially any index, any topical or other table of contents, any concordance, or any other finding aid would do so.[13] But surely that does not mean that all such finding aids would *copy* West's arrangement, even though they might be said to describe that arrangement. An index is only an index, not a copy of the book it indexes.[14]

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[9] *Rand McNally* quoted those words from Professor Denicola. *Rand McNally* also supported its denigration of arrangement as the basis of protection for factual compilation by citing *National Business Lists* v. *Dun & Bradstreet, Inc.,* 552 F. Supp 89 (N.D. Ill. 1982), which expresses the view that because computers store information ''without arrangement * * * [,] an emphasis upon arrangement and form in compilation protection becomes even more meaningless than in the past.'' 552 F. Supp. at 97.

If it were true that data in an electronic database necessarily lacked arrangement, it would seem to follow that an electronic database simply could not infringe the copyright-protected interest in the arrangement of a compilation. Under *Feist,* the impossibility of copying the arrangement does not allow one to prove infringement without proof of copying. We doubt that it is true, however, since data lacking any arrangement at all would be difficult to use.

[10] Under appropriate circumstances, users' actions might lead to vicarious liability for infringement. But vicarious liability must rest either on the alleged vicarious infringer's right to control the conduct of the individual who actually performs the infringement, *Sony Corp.* v. *Universal City Studios, Inc.,* 464 U.S. 417, 437 (1984), or on an absence of substantial noninfringing uses, *id.* at 442. Neither requisite has been, or could be, established with respect to either Lexis or the Bender CD–ROMs.

[11] *Mead's* protection of industrious collection is underscored by the court's response to the argument that star pagination does not infringe because citations to West page numbers are merely statements of fact. In rejecting the argument, the Court said, ''The names, addresses, and phone numbers in a telephone directory are 'facts'; though isolated use of these facts is not copyright infringement, copying each and every listing is an infringement,'' 799 F.2d at 1228, citing *Hutchinson Telephone Co.* v. *Fronteer Directory Co.,* 770 F.2d 128 (8th Cir. 1985). *Hutchinson* adopts precisely the view of copyright rejected in *Feist*; it even relies on *Leon* and *Jeweler's Circular,* 770 F.2d at 130–31, two cases specifically rejected in *Feist. See* page 6 *supra.*

[12] In its infringement analysis, the Eight Circuit quoted the Senate Report on the Copyright Act of 1976, as quoted in *Harper & Row Publishers, Inc.* v. *Nation Enterprises,* 471 U.S. 539, 568 (1985): '' '[A] use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement.' '' 799 F.2d at 1228. *Harper & Row,* however, involved admittedly verbatim copying of protected expression, 471 U.S. at 548–49, and the issue was fair use.

[13] We realize, of course, that the economic significance of these finding aids differs substantially from the economic significance of star pagination of a collection of case reports. The pure finding aids no doubt do not reduce market demand for West's products. But as we have just observed, such marketplace factors go to fair use, not whether there is copying.

[14] Few cases address infringement by indexing. In *New York Times Co.* v. *Roxbury Data Interface, Inc.,* 434 F. Supp. 217 (D.N.J. 1977), the district court denied a preliminary injunction against publication of a personal name index to the New York Times Index. Although the court determined the likelihood of success in light of fair use factors, it noted that the ''personal name index differs substantially from the Times Index, in form, *arrangement,* and function,'' *id.* at 226 (emphasis added), even though it communicated the locations in the Times Index at which particular personal

Star pagination thus does not copy West's arrangement. To find infringement despite the absence of copying of original expression, and thus to protect its compilation from a competitor's description, West must rely on some other principle. The alternative principle on which West would rely, however, cannot be reconciled with *Feist* and if adopted would eviscerate *Feist. Feist's* thin copyright leaves facts unprotected while protecting only creative selection and arrangement. West's principle, in contrast, effectively protects facts. It has substantial implications for circumstances far beyond those of this case.

In essence, West's principle is this: Where the arrangement of a factual compilation is protected by copyright even though the facts are not, it is infringement for another to publish the facts if those facts include sufficient information to permit the protected arrangement to be recreated, even though the allegedly infringing publication does not itself recreate the protected arrangement. Indeed, if the ordering of the first compilation were based on the facts in that compilation, under West's principle it would seem to be infringement to obtain those facts from another source and publish them in an original order.[15] To escape a claim that it copied the first compilation's arrangement, the second compilation would have to leave out facts found in the first compilation.[16]

A hypothetical example may clarify the implications of West's principle. Suppose a firm obtains from the 1990 Census of the United States data concerning every county in the United States and publishes a compilation of those data, listing the counties in descending order of one of the included data elements, the proportion of the population consisting of males of ages 18 through 40. Suppose further that this arrangement, which may meet the *Feist* test of originality and which may interest those marketing products to adult males, is protected by the firm's copyright on the compilation. Under *Feist*, another firm may copy all the data from the first firm's compilation, while arranging its compilation alphabetically by state and county. It may do so because even though the arrangement of the first compilation is protected by copyright, the data themselves are not, and the second compilation does not ''feature the same * * * arrangement,'' *Feist,* 499 U.S. at 349, as the first. But the second compilation contains all the information a user needs to recreate the arrangement of the first, and so under West's principle, creation of the second compilation would infringe the copyright on the first.[17] West's principle therefore protects the facts themselves in many circumstances where *Feist* would leave them unprotected.

This case, like *Mead* before it, arose primarily because new technologies, new means of managing information, became available, a frequent event in the information age. We have seen, in on-line computer searchable databases and in CD–ROM products, new ways of working with the raw materials of legal research—case reports, statutes, and other materials that once appeared only in print form. Neither we nor this Court can predict what new technological developments will next year or in the next decade further revolutionize the practice of law and make the substance of law more readily available to all. By making clear the limited scope of copyright protection for factual compilations, *Feist* cleared the way for these creative developments. It should be followed here.

CONCLUSION

Star pagination to West's volumes does not in itself infringe any copyright interest West may have. The Court should therefore rule for Bender.

Respectfully submitted.

Anne K. Bingaman,
Assistant Attorney General.

Joel I. Klein,
Deputy Assistant Attorney General.

Catherine G. O'Sullivan,
David Seidman,
Attorneys.

U.S. Department of Justice, 10th & Pennsylvania Ave., NW., Washington, DC 20530, (202) 514–4510.

Ralph T. Giordano (RG0114),
Attorney.

U.S. Department of Justice, 29 Federal Plaza, Room 3630, New York, NY 10278–0140, (212) 264–0390.

names could be found. The court greeted with incredulity the plaintiff's argument ''that a copyrighted work cannot be indexed without permission of the holders of the copyright to the original work.'' *Id.* at 224–25. *See also Kipling* v. *G.P. Putnam's Sons,* 120 F 631, 635 (2d Cir. 1903) (defendants ''were at liberty to make and publish an index'' of copyrighted material).

15 Some compilations are arranged in orders not based on the data found in the compilation. In *Lipton,* for example, the compilation was arranged according to the compiler's esthetic judgments. 71 F.3d at 470. The copyright on a volume of Shakespeare's sonnets, all in the public domain, arranged in order of the editor's judgment of esthetic merit would, we assume, protect that original arrangement. Another editor could, without infringing the copyright, copy the sonnets from that volume and publish them in a different arrangement. But as we understand West's principle, it would be infringement were the editor of the second volume to include an appendix telling the reader the order in which the sonnets appear in the first volume.

16 Even under *Feist,* there may be infringement if a creative selection of facts is copied. We do not understand the star pagination question here to raise an issue of protected selection, so we simplify the analysis by abstracting from issues of selection.

17 To avoid infringing under West's principle, the publisher of the second compilation would have to omit the data concerning the proportion of the population consisting of males of ages 18 through 40, even though *Feist* would allow copying those data. And there would be no infringement even under West's principle if the first compilation arranged the counties in order of the first publisher's assessment of the moral worthiness of the county's population, and the second publisher listed the counties in a different order.

This page could not be reprinted in the Federal Register, however, they may be inspected in Suite 215, U.S. Department of Justice, Legal Procedures Unit, 325 7th St., N.W., Washington, D.C. at (202) 514–2481 and at the Office of the Clerk of the United States District Court for the District of Columbia.

Civic Research Institute, Inc.

July 31, 1996.

Certification

I, Arthur H. Rosenfeld, upon my oath depose and state:

1. I am the President of Civic Research Institute, Inc., (hereinafter referred to as ''CRI'') a publisher of legal materials, located at 4490 U.S. Rout 27, PO Box 585, Kingston, NJ 08528.

2. CRI published professional reference materials for lawyers and others including the following:

Correctional Law Reporter (''CLR''), a print on paper, bi-monthly report on legal developments affecting prisons and jails. It includes reports on new legislation and legislative trends and recent court cases, on the federal level and in all of the states. An annual subscription is $125. It is used by lawyers and other professionals working in the criminal justice system and in private practice.

Community Corrections Report on Law and Corrections Practice, a print on paper bi-monthly that covers programs and legal developments, as described in CLR above, affecting community corrections. Price, $125 a year. It is used by lawyers and other professionals working in community corrections and by lawyers in private practice.

Juvenile Justice Update, same format, frequency and price as above publications. It covers legal developments on all levels as they do and programs involving juvenile crime and delinquency. It is used by lawyers and other professionals working in the system and by lawyers in private practice.

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4. Our legal system depends on full and equal access to the law, to all federal and state statutes, past and present, and to all federal and state appellate court opinions, past and present, and it is inconceivable to me that any private company can be allowed to control access to these materials and charge whatever they choose to charge for access when they are willing to grant it. It is contrary to and undermines our system. Furthermore, even if there were some arrangements that could be made that would make it proper for one company to maintain such materials, it seems to me unwise and against our national interests to allow such company to be a foreign company subject to the control of another country.

I understand that if any statements made by me are knowingly false, I am subject to punishment.

Arthur H. Rosenfeld,

President.

InfoSynthesis, Inc.

CERTIFICATE

I. Clayton R. Smalley, certify that I am President and Executive Editor of InfoSynthesis, Inc., 10301 University Ave., N.E., Ste. 105, Minneapolis MN, 55434.

Since March, 1994, this Company has published USSC+ CD–ROM, a CD-based collection of the full text of United States Supreme Court decisions. Presently, the disc contains complete coverage of full decisions by the Court from 1966 to date, together with assorted earlier leading cases dating back to 1793—5000+ cases comprising some 250 megabytes of data. The cases are searched and retrieved by means of Folio Views(tm) software, the latter included at no extra charge.

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We have received many inquiries from customers and prospective customers as to what other bodies of cases and statutes are available. To date, we have had to respond to such inquiries that no other databases are offered, primarily because West Publishing Company, the sole present provider of printed versions of many state and federal reporters, claims a copyright on the inner pagination of its reporters. Although there has recently been word that West would license such pagination to others, the fees to be charged are far to high to be afforded by ‘‘boutique’’ electronic publishers such as our company.

Because of what we conceive to be the clear superiority of the Folio Views platform for search and retrieval purpose, particularly when that platform is implemented in the manner we have developed for USSC+, we believe we could be a significant competitor to other much larger legal publishers in both the CD–ROM and World Wide Web marketplace, particularly in the field of judicial decisions.

We currently obtain our information by scanning the official ‘‘United States Reports’’ version of the Supreme Court's opinions, thereafter enhancing the text with the indexing, internal segmentation, and ‘‘hot links’’ available through Folio Views technology. The acquisition and editing of the underlying data is a very expensive, exacting, and time-consuming process.

If the text of other bodies of federal and state judicial opinions were available to us in electronic form, and the copyright asserted by West were somehow eliminated as a barrier, we would be very interested in offering for sale other federal and state judicial decision databases, and are confident that our presence on those markets would (as it has in the case of the Supreme Court) lower the price of this information to the consumer by a factor of at least ten (i.e., an order of magnitude). Such price reductions are made possible by the recent advent of computer, CD, and internet technologies, which are revolutionizing legal (and other) publishing. The only barrier to that revolution remain the availability of the underlying data.

Dated: August 6, 1996.

Clayton R. Smalley,

Pres., InfoSynthesis, Inc.

I, Peter Wayner, certify that I am the President of NewRay Inc., a Maryland corporation that marketted disks filled with court opinions. These disks contained the electronic versions of the opinions of the U.S. Supreme Court supplied by the Court itself through the Hermes project. Unfortunately, the Court only released data beginning in 1990. The easy access to this data made it possible for me to offer the disk at a low price that was generally under $40.00.

Many customers asked for a larger and more comprehensive collection of opinions, but I was unable to supply them because I did not have the funds to either scan in the past opinions or pay for someone who could type them in. In the end, this prevented me from serving the needs of the customer.

If the Department of Justice could release the electronic versions of the case law that they control, I could easily produce a high-quality disk with many advanced searching features for a low price. It is silly for me to duplicate the work that was already done at the tax payer's expense. The customer would be forced to pay for the digitization twice—once in tax dollars and once by my corporation.

Peter Wayner,

President.

28 August 1996

WILSON SONSINI GOODRICH & ROSATI

August 29, 1996.

via Federal Express

Craig W. Conrath, Esq.,

Chief, Merger Task Force, U.S. Department of Justice, Antitrust Division, 1401 H. Street, Suite 4000, N.W., Washington, D.C. 20530

Re: *United States* v. *The Thomson Corporation and West Publishing Company* Case No. 1:96CV01415 (U.S. District Court for the District of Columbia)

Dear Mr. Conrath: On behalf of our client, Lexis-Nexis, a division of Reed Elsevier Inc. (‘‘Lexis-Nexis’’), we submit these comments concerning the Proposed Final Judgment in the above-referenced case.[1]

This acquisition involves the combination of the largest publisher of legal research materials (West Publishing Company) with the second largest legal publisher (Thomson Corporation) in an industry that is already highly concentrated. In permitting this acquisition to proceed, the Department of Justice has failed to achieve the level of safeguards necessary to preserve competition in the markets identified in the Complaint. Indeed, it is almost certain that the Proposed Final Judgment will result in substantially lessened competition in these markets for legal materials. Consumers will pay for this reduced competition through increased prices, reduced choice, and reduced innovation.

There are three principal flaws in the Proposed Final Judgment. First, West and Thomson are the only two companies that provide editorially enhanced case reporters and codes in the relevant product markets.[2] Yet the Proposed Final Judgment requires West and Thomson only to spin off the weakest of the overlapping products, and even then they are spinning off what amount to nothing more than product fragments. There is no chance (much less a significant chance) that an actual or potential competitor could take these fragments and put together a rival set of enhanced products that could compete effectively with West-Thomson.

Under these circumstances, the proposed acquisition never should have been permitted to be consummated: its likely harm to competition is obvious and inevitable. Even if the acquisition were permitted to proceed, however, the Department could have taken steps that would at least have ameliorated the acquisition's anticompetitive consequences. In particular, the Department should have required the divestiture of all of the essential Thomson materials—particularly its American Law Reports (‘‘ALRs’’) and American Jurisprudence 2d (‘‘Am Jur’’)—necessary for an acquiror to offer enhanced primary law products that can compete effectively with West-Thomson. By failing to do so, competition in the markets for enhanced case reporters and codes will

[1] The economic analysis set forth herein was prepared in extensive consultation with Garth Saloner, Magowan Professor of Economics and Strategic Management, Graduate School of Business, Stanford University.

[2] The Department's Competitive Impact Statement acknowledges this. *See* 61 Fed. Reg. 35250, 35260 (‘‘For both law reporters and codes, Thomson and West provide unique, enhanced primary law products. * * * There are no other codes or case law reporters in the above markets that offer this set of enhancements to consumers.’’).

wither, and monopoly in these markets is the likely outcome.

Second, the failure to require the effective divestiture of Auto-Cite, Thomson's electronic citator product, will have a substantial adverse effect in the market for comprehensive online services. The Department's Complaint recognizes that ''a price increase, reduction in quality and innovation, or loss of access'' to Auto-Cite would materially injure competition in the online legal research market, in which Lexis-Nexis provides the only significant competition to West. Complaint ¶ 60. Yet, as discussed in more detail below, this is precisely the outcome that the Department has endorsed in its Proposed Final Judgment.

Finally, other steps taken by the Department, including its failure to lower the high barriers to entry that have caused such extreme market concentrations, will exacerbate the acquisition's anticompetitive effects. Each of these consequences of the Proposed Final Judgment is discussed immediately below.

1. The Complaint recognizes that what distinguishes the West and Thomson case law reporters and codes is that they are *enhanced*. The Complaint identifies two significant features of such enhancements. The first is that they contain ''comprehensive written descriptions'' of the relevant law, which the Complaint refers to as ''headnotes'' and ''summaries'' (for case reporters) and ''annotations'' (for codes). *See* Complaint ¶¶ 20–21. The second is that ''each product also contains cross-references to relevant secondary law products or relevant case law in the same or other jurisdictions.'' *Id.*

Through the combination of these summaries and cross indexes, West and Thomson, prior to the acquisition, each had been able to offer their enhanced primary law products as parts of a system. As the Complaint reflects, West refers to its system as the West National Reporter System. Thomson's system of enhancements and cross-references is referred to as the Total Client-Service Library (''TCSL''). In both instances, integration of these features into case reports and codes provides the means for competitively ''enhancing'' the primary legal product.

Thus, for example, one of the product markets identified in the Complaint is the provision of editorially-enhanced case reporters for decisions by the United States Supreme Court. The West and Thomson offerings in this market typify the way their products are enhanced and cross-referenced, In the West version of the case reporter, each reported Supreme Court decision begins with a series of summary paragraphs (''headnotes'') regarding the holding of the case. These headnotes are organized by an indexing system known as Key Numbers. The Key Number system provides the principal means for conducting research in West products across courts in the same jurisdiction (for example, federal appellate and district court decisions) and across jurisdictions. Through a comprehensive set of digests organized by Key Numbers, the headnotes are collected and reproduced for all of the states and for all levels of the federal courts.

The Thomson system works quite differently. Prior to the acquisition, Thomson published enhanced codes and case reporters in just a small fraction of jurisdictions (for example, case reporters in only six states, and the Supreme Court in the federal system). A digest-based system therefore would have been inferior to the West offering, inasmuch as it would have covered only a small fraction of the potentially relevant case law.

Thomson accordingly took quite a different approach to its enhanced products, as its Supreme Court reporter reflects. Although each Supreme Court decision in the Thomson reporter, like the West reporter, is preceded by summary paragraphs organized by subject matter (for example, ''Administrative Law § 77''), these subject headings to not provide a means for cross-referencing decisions in other jurisdictions. Indeed, Administrative Law § 77 refers to one subject in Thomson's Supreme Court reporter, but a different subject, for example, in its California case reporter.

Instead of relying on such subject categories, the enhancements in Thomson's Supreme Court reporter are organized principally around a system of selective reporting, referred to as ''annotations.'' These annotations provide exhaustive coverage on selective, discrete subjects. Thus, for example the back portion of each Thomson Supreme Court reporter contains several annotations relating to subjects addressed recently by a decision of the Supreme Court. In addition, each Supreme Court decision in the volume begins (after a brief summary of the case) with a prominent box denominated ''Total Client-Service Library References.'' The box identifies other annotations, collected in Thomson's ALR volumes, that relate to the issues addressed in the opinion (as well as to other secondary products published by Thomson) The annotations thus serve as the springboard for comprehensive, cross-jurisdictional research in the Thomson system, in the same way that Key Numbers provide such a function in the West system.

As the Complaint recognizes, West and Thomas are able to charge significantly more for their products because of their enhancement systems. Unenhanced codes and case reporters sell for ''significantly less'' than the West and Thomson products. Complaint ¶¶ 23–24. This increased value is predicted by economic theory, which recognizes that users gain utility not just from the components but because of the way they are interconnected. For example, as Katz and Shapiro observed: ''Many products have little or no value in isolation, but generate value when combined with others. * * * We describe them as forming systems, which refers to collections of two or more components together with an interface that allows the components to work together.'' Michael L. Katz & Carl Shapiro, Systems Competition and Network Effects, J. Econ. Persp., Spring 1994, at 93.

The Complaint acknowledges (and the extraordinarily high HHIs cited by the Department confirm) that West and Thomson provide virtually the only enhanced primary case reports and codes in the product markets identified in the Complaint. If the merger is allowed to go through as proposed, competition in these markets will be adversely affected. That is because some of the central enhancements of the Thomson products—most notably, the ALRs that are at their core—will remain under the control of West-Thomson. Whereas divestiture of the ALRs (together with a relatively small number of other Thomson publications such as Am Jur) would potentially have enabled competition to continue, the Proposed Final Judgment effectively permits West-Thomson to avoid any meaningful threat of competition.

Competition will be adversely affected for two main reasons. First, the merged company has an obvious incentive to eliminate competition from whatever set of cross-references a competitor might try to cobble together using the fragmentary Thomson products. Control of important components of the Thomson system provides West-Thomson with a ready means of doing so. For example, West-Thomson can foreclose access to ALR (as well as other important elements of the TCSL) to the purchaser of its divested assets. In so doing, West-Thomson can destroy the effectiveness of the competitor's use of the divested assets, and accordingly monopolize the market for enhanced primary products.[3]

Second, even if a competitor were somehow able to remain in competition in these markets in the short run, control over ALR and other Thomson references would enable West-Thomson to eliminate the ability of the competitor to compete effectively in the long run. Thus, West-Thomson could choose to maintain ALR and to continue to offer access, but simply raise the price so as to extract it monopoly rents in that way. Clearly the incentive for the merged company is to charge a much higher price for ALR than Thomson does as a stand-alone company competing with the West Key Number system. Here too consumers would be harmed by having to face significantly higher prices.[4]

In the example of Thomson's Supreme Court reporter, therefore, one alternative is that the competitor's product will amount to nothing but a shell of the current Thomson offering. If West-Thomson decides to foreclose access to its annotations altogether, what is currently the back portion of each Thomson reporter will have to be omitted, as

[3] Under these circumstances, West-Thomson might continue to provide ALR and other Thomson components as part of a bundle with West products. It would do so, however, at monopoly prices. Alternatively, as a monopolist, West-Thomson might decide to save itself the cost of maintaining ALR. In that case, consumers would face not only monopoly prices but also reduced variety.

[4] Lexis-Nexis believes that, as between these two alternatives, it is unlikely that West-Thomson will continue to invest in both sets of classification systems. Moreover, whether it integrates the two systems or simply eliminates the Thomson products, it is undisputed that West-Thomson will control the only comprehensive system of cross-references in the United States. With the elimination of competition at the system level, West-Thomson is likely to have enhanced leverage from its dominance in editorial classification systems into related fields of legal information publishing.

well as the annotation cross-references at the beginning of each case. All that will remain are summary paragraphs organized in a way that provides no means for researching decisions by any court but the Supreme Court. Moreover, even if access to these annotations is permitted, it will be at prices that permit West-Thomson to extract its monopoly rent and that will harm consumers.[5]

2. Additional inadequacies in the Proposed Final Judgment exacerbate these anticompetitive effects. First, the Complaint recognizes that a significant barrier to entry in providing enhanced legal products is the fat that ''a sophisticated editorial staff would be needed to create the headnotes and summaries, as well as to identify relevant cross-references to other sources of authority on issues presented in each statute or current or historical case.'' Complaint ¶31. The Department has not identified any actual or potential entrant (and Lexis is not aware of any) with an editorial staff trained in the Thomson headnote and indexing system. Nor is Lexis aware of any actual or potential entrant with a trained editorial staff capable of processing the volume of headnotes and summaries required by the nine primary law products proposed to be divested.

There are only two companies with trained editorial staffs of that size: West and Thomson. Yet the proposed decree does not require West-Thomson to spin off the divested products as part of a viable operational entity. Instead, it simply invites prospective purchasers to try to hire away personnel from West-Thomson. Final Judgment ¶ IV.F.[6] The Department makes no assessment that a prospective purchaser is likely to succeed under these circumstances in assembling a ''sophisticated editorial staff'' on the requisite scale.

Presumably the Department's silence reflects the fact that any such conclusion would be economically unsound. Preservation of West-Thomson's (newfound) monopoly in editorial staff will permit it to extract monopoly rents. West-Thomson therefore will have a significantly greater financial incentive in retaining its staff than any potential acquiror would have in attempting to hire them away. At the same time, given expectations that West-Thomson will be the stronger (if not only) long-term provider of enhanced legal products, editorial staff would be unlikely to switch employers absent significantly greater incentives from the potential acquiror. There is accordingly no reason to expect that any potential acquiror will be able to assemble the staff needed to offer meaningful competition to the West-Thomson enhanced legal products.[7]

3. The second way in which the Consent Decree exacerbates the proposed acquisition's anticompetitive effects is in its failure to require Thomson to provide continued access to, and use of, the portions of the Thomson system that the Department is not proposing for divestiture. Ironically, the Final Judgment is careful to preserve *Thomson's* continued right to use the enhancements from the *divested* products in its retained products during a transition period. *See* Final Judgment ¶ IV.D. Yet the Department has failed completely to impose a reciprocal obligation on Thomson—even though it is apparent, from the most cursory review of the proposed divested products, that cross-references to annotations and indexes in Thomson's retained products (ALR, AmJur, Witkin for California law, and so forth) are at the core of the ''enhanced'' portion of the proposed divested products.

It thus appears that the Department understands the Final Judgment to permit West-Thomson to divest piecemeal the nine primary law products without permitting continued use of relevant cross-references and annotations that are an integral part of their enhancements. At the same time, there is no finding by the Department that an acquiror can develop or maintain effective competition with the West-Thomson enhanced products through use of only those components of the Thomson system that are included in the divestiture. In the words of Katz and Shapiro, *supra* , the divested primary law products ''have little or no value in isolation,'' but rather ''generate[d] value when combined with others.'' The Proposed Final Judgment permits West-Thomson to retain the crucial components of the Thomson system to itself, while divesting only isolated fragments from which no rival set of enhanced products can effectively be developed.

4. The failure to ensure continued system competition not only impairs competition in the primary law markets identified in the Complaint, but also in the market for comprehensive online legal research services. *See* Complaint ¶ 53 (identifying relevant product market). West's most important means of product differentiation in the online market is its integrated system of Key Numbers and headnotes. In order to compete effectively, Lexis-Nexis needs the ability to provide a competing system of enhancements.

To date, it has done so through the Thomson system of enhancements, consisting of its Auto-Cite citation service and other TCSL products. For example, when a user on the Lexis-Nexis system wishes to check the continued viability of a particular case, Auto-Cite provides not just the negative history of the case but also references to ALR and other Thomson sources. By clicking on the ALR reference, the user is taken immediately to the appropriate ALR annotation.

The Proposed Final Judgment injures Lexis-Nexis' ability to compete in two ways. First, by permitting West-Thomson to keep the key components (indeed, most of the components) of Thomson's system of enhancements, the Proposed Final Judgment effectively eliminates Lexis-Nexis' ability to offer competition to the West enhancement system. As discussed above, neither Lexis-Nexis nor any other actual or potential competitor has any reasonable likelihood of being able to develop the fragments being spun off into a viable ''non-West'' system. The Department in fact appears to have made no assessment that Lexis-Nexis (or any other source available to it) will be able to develop an alternative system. If the Department now purports to have made such a finding, such a finding is factually unsupportable and hence plain error.

Second, the Final Judgment impairs Lexis-Nexis' contract rights to Auto-Cite, thus affirmatively damaging its ability to compete. Under its existing contract, Lexis-Nexis has the right to use Auto-Cite in its existing form, which includes cross-references to sources such as ALR. Lexis-Nexis specifically bargained for the right to prevent Thomson from being able to modify any of these existing features without its consent.

By ''forcing'' West-Thomson to spin off its Auto-Cite license with Lexis-Nexis, the Department has abridged these critical contract rights. The acquiror of the existing Auto-Cite license agreement will have no ability on its own to provide such features (they are being retained, or course, by West-Thomson), and West-Thomson has refused to confirm that the acquiror will be permitted to continue to include such features after the divestiture. These issues were specifically raised with West-Thomson; West-Thomson refused to confirm that such rights would be included in the divestiture; and the Department has endorsed West-Thomson's refusal. The Department apparently thus intends for its Final Judgment to strip Lexis-Nexis of these valuable contract rights (without compensation for the taking), with a direct and substantial adverse effect on its ability to compete in the online legal research market.

5. In addition to impairing Lexis-Nexis' existing contract rights, the Department's

[5] Even for enhanced products within a single jurisdiction, the Department appears to have overlooked critical facts relevant to the question whether competition in the market will be adversely affected. For example, the summary paragraphs that Thomson includes in its California annotated code (and its California Digest) are reproduced from the summaries that it prepares for its California case reporters. The cost of developing these summaries accordingly can be spread out over several products.

1The Proposed Final Judgment, however, provides for the divestiture only of the California code—*not* of the case reporter or digest (unless California elects to place them up for rebid). Yet the Department appears to have made no factual finding that the enhancement costs that profitably could be undertaken when allocated among three sets of products, will be economically viable if required to be undertaken separately for the California code alone.

[6] Notwithstanding this provision, Thomson has required potential acquirors to agree, as a condition to receiving information needed to bid on the divested assets, that they will not solicit any West-Thomson employees for one year ''other than in response to a bona fide advertisement for employment.'' In other words, West-Thomson has been permitted to tie the hands of any potential acquiror, and even the modest proposal of Paragraph IV.F effectively has been nullified.

[7] Indeed, any finding that personnel could be hired in the requisite numbers would be plain error. In order to offer effective competition to West-Thomson, it would be necessary for a competitor to hire away not just a few individuals, but an entire editorial staff. For the reasons stated above, however, West-Thomson has a powerful economic incentive to retain its staff in order to preserve its monopoly. These incentives, combined with an incumbent's pre-existing advantages (such as seniority and pension benefits) make it exceedingly unlikely that a competitor could offer terms that would secure an editorial staff of the requisite size, training and experience.

description of the Auto-Cite divestiture in its press release and other public statements has been substantially misleading. In the Department's press release, and, indeed, in the Final Judgment itself, it appears that West-Thomson is being required to divest ''all rights and interests'' in Auto-Cite, *See, e.g.,* Proposed Final Judgment ¶ II.B. These rights are defined as ''including'' (not limited to) the ''delivery of a transferable royalty-free perpetual license of the Auto-Cite case database.'' *Id.*

Nevertheless, in West-Thomson's Offering Memorandum, and in subsequent communications with the Department, Lexis-Nexis has confirmed that transfer of a (non-exclusive) license right (together with the Auto-Cite trademarks and associated software and trade secrets) is *all* that the Department intends to require West-Thomson to divest. Thomson is thus not divesting itself of Auto-Cite at all: it is retaining the database itself; the staff trained in its use; the (apparently exclusive) right to use important elements of the Auto-Cite system, *i.e.,* the cross-references and integration with the ALRs and other Thomson products; and other important incidents of ownership, such as the ability to sublicense.

The Department has made no finding—and none can be made—that an acquiror of the Auto-Cite license can provide effective competition to West-Thomson with no trained staff, no ability to use key elements of the Auto-Cite system, and no ability to use cross-licenses as a means of enhancing the content accessible through the database. The Complaint recognizes that Lexis-Nexis will be materially injured in its ability to compete as a result of ''a price increase, reduction in quality and innovation, or loss of access'' to Auto-Cite. Complaint ¶ 60. All three consequences, however, would be likely to flow from the Proposed Final Judgment. Price increases would be likely because of the failure to require divestiture of Auto-Cite as a viable, ongoing product line, entailing additional expense, *inter alia,* in hiring and training staff.[8] Reduction in quality and innovation is likely because of the failure to require divestiture of ownership rather than merely a non-exclusive license with no ability to sub-license. And Lexis-Nexis has lost effective access because of the failure to include critical components of the service (*e.g.,* prospective access to ALR) in the divestiture.

Given these impairments in the ability to offer an effective Auto-Cite product, one of three outcomes is likely, none of which is beneficial to consumers. The first is that the absence of adequate infrastructure would effectively preclude continued use of Auto-Cite as a viable product, resulting in immediate and substantial injury to competition in the online legal research market. The second is that even if it were possible for Lexis-Nexis to offer an Auto-Cite product (either directly or through license), it would be at such a competitive disadvantage that West-Thomson would be well-positioned to engage in behavior (repackaging Auto-Cite, bundling it with Insta-Cite, and then pricing the products aggressively) designed to drive it from the market.

The third potential outcome is that Lexis-Nexis (or some other competitor) would offer a non-exclusive Auto-Cite product while West-Thomson would offer a bundle of both an Auto-Cite clone and Insta-Cite. Because of the influence of learning and network effects in this market, consumers would likely gravitate towards West-Thomson, a process that would become self-reinforcing as market shares became more disproportionate. Lexis-Nexis or its licensor would therefore have fewer resources to invest in the Auto-Cite product, thereby further aggravating the increase in concentration in the market. Whatever theoretical short-term efficiency gains might be asserted for the cloning of Auto-Cite, therefore, would be swamped by the adverse consequences of dramatically increased market concentration. Instead of a market characterized by two strong competitors, therefore, the only realistic outcome of the Proposed Final Judgment would be to substitute a market structure characterized by a single dominant player.

6. The Department has compounded these deficiencies regarding Auto-Cite by its failure to enforce Paragraph IV.E of the Proposed Final Judgment. That paragraph purports to require West-Thomson to provide prospective purchasers with ''any and all financial, operational, or other documents and information as may be relevant to the divestiture.'' In fact, West-Thomson has provided virtually no information regarding the Auto-Cite divestiture that would permit any prospective purchaser to evaluate and make a meaningful bid on the product. On the one hand, West-Thomson has refused to provide even the most basic information regarding what is actually being purchased. (What ownership rights is West-Thomson reserving? What rights are included in the divestiture?) On the other hand, West-Thomson has refused to provide *any cost information* regarding the product, so that it was impossible to assess the product's profitability. Yet prospective purchasers were required to ''bid'' under these (preposterous) circumstances. It is regrettable that, having shown the foresight to include Paragraph IV.E in the Proposed Final Judgment as an obviously necessary element, the Department now appears to have no intention of enforcing it.

7. The Department recognizes that West's claim of a copyright in the page-breaks of its case reporters has been a major barrier to entry for potential competitors considering entry into the market for enhanced primary products.[9] Complaint ¶ 32. Inconsistently with its own position in *Matthew Bender & Co., Inc.* versus *West Publishing Co.,* 94 Civ. 0589 (S.D.N.Y.), in which it has sought leave to file an *amicus* brief contending that West's copyright claim should not be enforced (and notwithstanding the extreme market concentrations in the nine primary law product markets identified in the Complaint), the Department did not require West to disclaim its copyright claim. Such a step was taken, for example, by the Department under the Bush Administration in connection with Borland International's acquisition of Ashton-Tate. In the Ashton-Tate acquisition, the barriers to entry were far lower, and of far shorter duration, than those which West has been able to sustain in the market for enhanced primary law products over the course of many decades.

In this case, however, rather than requiring such a divestiture, the Department claims that it has ''significantly lowered'' the royalty rates for potential competitors' use of West's ''copyright'' page-breaks.[10] As the Department is aware, however, that claim is wrong. The Department claimed that Lexis-Nexis' current licensing fee is 17 cents per thousand characters. That is not correct. It appears that the Department's figure was derived from a very minor license that West granted to Butterworths pertaining to case reports for the U.S. Virgin Islands (with license fees of less than $2,000 per year).

In fact, the rates set forth in the Proposed Final Judgment are approximately equal (but may under some circumstances exceed) the current Lexis royalty rate.[11] It is worth emphasizing that the Lexis license was entered into only (i) after a Court of Appeals decision had been entered in favor of West and against Lexis, but (ii) before the Supreme Court's 1991 decision in *Feist Publications* v. *Rural Telephone,* which rejected the principal rationale underlying the Court of Appeals decision which found in West's favor. The current Lexis rate therefore reflects the maximum rate that West would have sought even after the successful conclusion of litigation, and if *Feist* had never been decided. It seems unlikely that any higher fees would have resulted from private negotiations prior to the acquisition.[12]

[8] The failure to spin off Auto-Cite as an ongoing product line raises the same concerns regarding the ability to hire trained staff that were discussed above.

[9] Even though West's copyright claim ultimately may (and should) be found invalid, West successfully has used the *threat* of litigation as a substantial deterrent to potential competition.

[10] *See, e.g.,* Albert R. Karr, *Thomson's Pact to Acquire Rival Receives Government Approval,* Wall St. J., June 29, 1996, at B10 (quoting Department as stating that under the settlement, ''the rates that Thomson can charge when licensing the West page-numbering system are capped at a 'significantly lower' level than those charged by West for Lexis-Nexis''). *Accord,* Maria Shao, *Purchase of West Publishing Approved; Buyer Agrees to Divest 50 Legal Publications,* Boston Globe, June 20, 1996, at 42; Sharon Smickle et al., *West Deal Gets U.S. Go-Ahead,* Minneapolis Star-Tribune, June 20, 1996, at 1D.

[11] To make matters worse, West-Thomson has taken the unilateral position that, notwithstanding the fact that Paragraph IX.A of the Proposed Final Judgment provides that ''defendants shall grant to *any* third party'' the right to license star pagination at rates beginning at $0.09 for the first year, Lexis-Nexis will be charged $0.13 (the third-year rate) as its beginning rate. Lexis-Nexis has brought this flagrant violation of the Proposed Final Judgment to the attention of the Department, but is not aware of any steps taken by the Department in response.

[12] Other participants in the industry may well now accept these rates, however, because West-Thomson's ability to raise barriers to entry has been greatly strengthened by the proposed acquisition. That is because, as is implicit in the Department's submission, Thomson has *not* previously asserted a copyright claim in the page breaks of its reporters.

Continued

8. One final point requires comment. The Department's press release claimed that assets representing approximately $72 million in sales were to be divested. As the Thomson Offering Memorandum reflects, however, the divested assets generated sales of only approximately $48 million. The press release thus overstates the economic significance of the divested assets by 50%. Notwithstanding the misleading nature of the Department's press release (which it has been aware of for at least several weeks), the Department has not seen fit to issue a corrective press release clarifying that only approximately 4% ($48 million out of $1.1 billion) of the sales of the number one and number two legal publishers are subject to divestiture.[13]

Sincerely,

Gary L. Reback.

Dear Sirs: Please consider the enclosed as comment offered in regard to the consent decree entered in association with Thomson's acquisition of the West Publishing Company or, alternatively, as information bearing on anticompetitiveness in legal publishing generally.

I apologize for the informality of the submission and for my inability to provide my name.

Dear Sirs: In regards to the recent acquisition of West Publishing Company by the Thomson Corporation, here is some important information pertaining to the United States Code Annotated (U.S.C.A.), a West publication which is the dominant commercial compilation of federal statutes.

What needs to be understood is that U.S.C.A. is the product of a collaboration between West and the Office of the Law Revision Counsel of the United States House of Representatives (O.L.R.C.). This collaboration has given West a significant advantage over its competitors in this lucrative market.

When laws are enacted by Congress, and sometimes even before they are enacted, Ed Willett, the head of the O.L.R.C., seen to it that copies are quickly sent to West's Westbury, N.Y. office. There, under the direction of Michael Pavesi, Assistant Managing Editor in charge of the U.S.C.A., West employees ''classify'' the laws. This means they determine what provisions of the United States Code are affected by amending and repealing legislation and if, where and in what form new statutes are to appear in the Code.

In the primary law markets that are the subject of the Complaint (particularly those where Thomson was the official reporter), therefore, other competitors could cite to the specific page of the Thomson reporter without facing a copyright claim. Now, because (for the reasons noted previously) there is no substantial likelihood that there will be a viable competitor to replace Thomson in the market for enhanced case reporters, the ability of West-Thomson to raise barriers to entry in these markets has been significantly strengthened.

[13] This number actually significantly overstates the revenue that a West-Thomson competitor is likely to receive from the divested assets. As noted previously, this is the value of these components as part of a unified system. As individual fragments, they are likely to generate revenues that are only a fraction of their sales under Thomson.

West faxes these proposed classifications to the O.L.R.C., which reviews them and immediately reports any changes and/or corrections back to West. At this point, West has the official U.S. Code classifications, while its competitors do not. In a field where speed of publication and conformity to official classification are at a premium, this inside scoop virtually insures the dominance of West's product.

Nor does the collusion end here. West editors do all the work associated with the codification of the new law. They prepare the various notes necessitated by the legislation (Amendment, Reference in Text, Codification, etc.) as well as assigning headings where needed and making decisions about credits. Once again, all of this information is shipped to the O.L.R.C. where it will eventually appear, virtually verbatim, in the U.S. Code. In the event that major changes are to be made by the O.L.R.C., West is informed and incorporates them into U.S.C.A.

Finally, when the O.L.R.C. prepares new or supplementary editions of the U.S. Code, page proofs are sent to Westbury so that, as with the classification and codification of new legislation, West can be sure that it has the official version before any of its competitors.

Whatever company possesses this privileged, insider relationship, whether it be West or Thomson, enjoys an enormous and unwarranted market advantage. It borders on scandal that any single company is permitted to have a stranglehold on the market for federal statutory law, especially when that stranglehold is attributable exclusively to a sweetheart deal with an instrumentality of the federal government.

P.S.—For obvious reasons, the writer wishes to remain anonymous. Accordingly, the information in this letter has been left deliberately vague. The full scope of the relationship described herein can almost certainly be exposed with minimal investigation.

Marc L. Ames, Attorney at Law

July 9, 1996.

Philip Cody, Esq.,

Chief Attorney, U.S. Department of Justice, Anti-Trust Division, 26 Federal Plaza, 36th floor, New York, NY 10278

Re: Merger of Thompson Publishing Co. (which includes Lawyers' Cooperative Publishing Co.) and West Publishing Co.

Dear Mr. Cody; I am advised that the Department of Justice recently approved the merger between the two above captioned companies for reasons that remain unclear to me.

In any event, as one who has practiced law for almost thirty years I can tell you, without equivocation, that Lawyers' Coop and West have always been arch competitors and have presented and alternative for attorneys who sought information which these companies marketed. More particularly, as you know, both companies specialize in the publishing of legal research materials which are indispensable to any viable law practice.

Most recently, I became involved in a dispute with the Lawyers' Cooperative Publishing Co. over my account (017249–11801) which contains a balance reflecting certain large purchases that I had previously made of legal research materials on CD ROM as well as other subscriptions. Prior to making those purchases I had arranged with the Lawyers' Cooperative Publishing Co. to have all of the materials to which I subscribe paid by one monthly payment. Thereafter, at the time that the additional materials were sold to me I was informed that this would raise my monthly payment of approximately $125.00 only slightly, leaving it below $200.00 per month. However, in my subsequent dealings with the company and another salesman I was informed that the monthly payment must be increased to the sum of $205.00 in order to cover all of my outstanding charges for the various services and materials to which I subscribe. I reluctantly consented to this increase believing it would cover all of the materials.

Most recently, I was informed by somebody of Lawyers' Cooperative Publishing Co. that I was being undercharged on a monthly basis and that I should be charged $250,000 a month and failing my paying that amount or the arrears of $505.54 my subscriptions (apparently all of them) would be cancelled.

I thereafter wrote a letter to the President of Lawyers' Cooperative Publishing a copy of which is enclosed. It is regrettable that I shortly thereafter received a letter from Ms. Margaret Cook, the Delinquent Accounts Manager advising me my subscriptions had been canceled! A copy of that letter is well enclosed. There followed shortly on heels of Ms. Cook's correspondence a letter from Ms. Michele Miller also of the Account's Receivable Department, advising me I had given them authorization during May of 1994 to raise the monthly amount of my installment to $250.00 beginning with the September installment and she would accordingly charge my bank account (despite the cancellation of my subscriptions). I never authorized them to charge my bank account directly the sum of $250,000, monthly as a copy of the agreement enclosed will show. Ms. Miller's letter is obviously in error to put it euphemistically.

The point of my writing this letter is not to show you that such a company can make mistakes but rather to point out and underscore a shift in attitude when business becomes too large as the result of mergers and acquisitions. In years gone by it was eminently clear to me that the Lawyers' Coop would do everything in its power to straighten out and adjust any misunderstanding with one of its customers. This is apparently no longer the case because the company feels that it has the market cornered. More particularly, I point to the fact that West always presented an alternative to the materials published by Lawyers' Coop however now that the company has been acquired, any disagreement with Lawyers Coop leaves me without the alternative of seeking refuge with West and visa-versa.

Thus, the poor consumer is left at an inordinate disadvantage and the acquisition of the West Publishing Company by the Thompson Legal Publishing group should not be and should not have been approved.

As you are no doubt aware, law book publishing companies stand in a rather unique position in relation to their customers. The materials sold to customers are often of a extremely high price. Moreover, these materials are supplemented very regularly at an additional cost—generally a very substantial additional cost! Further, if one does not choose to subscribe to the supplementation he is paying a rather exorbitant fee for materials which when initially purchased are current but which soon become worthless if not kept up-to-date. In the circumstances the Justice Department should be extremely circumspect about approving any mergers among law book publishers that are giants and competitors, and which virtually control the field.

I sincerely believes in this instance you have left me and others with very little alternative in our dealings and urge that you do all necessary to reverse whatever action you have taken and undo the approval of this consolidation and merger.

I sincerely hope that you will give your attention to this matter in earnest and advise me of your thinking and any action taken herein.

Sincerely yours.

Marc L. Ames

Marc L. Ames

Attorney at Law

June 24, 1996.

Mr. James Lupisella,

Lawyers Cooperative Publishing, Aqueduct Building, Rochester, NY 14694

Dear Mr. Lupisella: As stated during our conversation as an inducement to purchase materials from your company I was told that one easy monthly payment of $205.00* charged to my bank account would take care of all payments required in connection with the open items on my account including supplementation. I made clear that I did not want my monthly obligation to exceed that sum. I was assured it would not.

Your recent letter threatening to terminate my subscription unless I cough up another $100/month is irksome, problematic and otherwise unappealing. Perhaps this is diagnostic of internal problems the consequences of which will be visited upon attorneys such as myself by reason of your recent acquisition of West.

By copy of this letter sent to Mr. Bryan Hall, the president of your company, I am requesting that someone in a higher position then yourself be in touch with me concerning this potential controversy and public relations problem.

Sincerely,

Marc L. Ames,

MLA/is

*Initially stated to be less.

Lawyers Cooperative Publishing

July 1, 1996

Marc L. Ames,

225 Broadway Rm 3005, New York, NY 10007

Re: Account #017249 11801

Dear Mr. Ames: Your subscriptions have been cancelled!

Recently we advised you that failure to pay on your account would result in cancellation of your subscriptions. Your failure to respond precipitated that action.

To prevent your library from becoming outdated, forward a check for $505.54. This will allow us to put your subscriptions back in line.

If you have made payment arrangements with our office or have forwarded the amount indicated above within the last 30 days, please disregard this letter.

Margaret Cook,

Delinquent Accounts Manager, 1–800–231–3120.

P.S. To make payment as convenient as possible, we will accept Visa, Mastercard, Discover and American Express. Simply fill out the information requested below:

Visa/MC/Disc/AE Account # ____________

Expiration date Q ____________

Total amount paid Q ____________

Authorized signature ____________

Lawyers Cooperative Publishing

January 11, 1995.

Re: Account Number 01724911801

Dear Client: Please consider this letter as a reminder that our terms are net 30 days.

The amount due on your account is $463.47. According to our records a portion of this amount includes items which are 60 days past due. Please use the enclosed envelope to mail your payment.

If you have made payment arrangements with our office, or have forwarded your check within the past 30 days, please disregard this letter.

Thank you.

Lori Smith,

Regional Collection Manager, 1–800–231–3120–ext 6482

P.S. To make payment as convenient as possible, we will accept Visa, Mastercard and American Express. Simply fill out the information requested below:

Visa/MC/AMEX Account ____________

Expiration Date ____________

Total Amount paid ____________

Authorized Signature ____________

Geronimo Development Corporation

September 3, 1996.

Craig W. Conrath,

Chief, Merger Task Force, Antitrust Division, United States Department of Justice, Suite 4800, 1401 H Street, N.W., Washington, D.C. 20530

RE: United States v. The Thomson Corporation and West Publishing Company Case No. 1:96CV01415 (U.S. District Court for the District of Columbia)

Dear Mr. Conrath: Geronimo Development Corporation, a Virginia corporation hereinafter ''Geronimo''), 1 submits the following Comments regarding the Final Judgment in the above matter.

Geronimo publishes, exclusively in CD–Rom format, Virginia case law, statutes and administrative materials, along with U.S. Fourth Circuit and U.S. Supreme Court cases. We compete directly with two giants, West Publishing Company and the Michie division of Reed-Elsevier, and with a small electronic, publisher, DiscSense, Incorporated.

The Complaint identifies nineteen product markets in which West and Thomson compete directly and identifies anti-competitive consequences of the merger in those product markets. The Final Judgment addresses those concerns. Comments from other parties address and express the concerns we have over the issues raised in the Complaint (most notably the comments from Gary L. Reback, counsel for Lexis-Nexis, and Robert S. Oakley on behalf of the American Association of Law Libraries [''AALL'']).

Our major concern is that the Complaint ignores the fact that West has a monopoly in the market for enhanced primary law products for the lower federal courts (the Federal District Courts and the Circuit Courts of Appeal). Only West publishes a complete set of enhanced opinions for these decisions. Although the Lexis online service includes all of the same opinions, West's monopoly is not broken thereby. The Complaint notes that online legal research services are ''not good substitute(s)'' for enhanced primary law products because they don't provide users with editorial analyses.

West has actively maintained its monopoly. For example, despite the decision in *Feist Publications, Inc. v. Rural Telephone Services, Inc.,* 499 U.S. 340, 111 S. Ct. 1282 (1991), West continues to claim that the interior page numbers of cases reported in its publications are entitled to protection under the copyright laws. West will not unequivocally state that the first page citation to cases in its reporters is in the public domain. West claims that its ''enhancements'' to the official text of decisions, including the correction of typographical errors, are entitled to copyright protection.[2] Finally, West actively opposes the adoption by any court of a public-domain citation system.[3]

To compete in this market while avoiding litigation, a potential competitor would need to obtain the original text of all the decisions from all federal courts, convert that text into digital format for either printing or electronic publication, create a new citation system, prepare headnotes and correlate such headnotes into a digest or encyclopedia. This is a daunting, if not impossible, task.

As noted at Paragraph 30 of the Complaint, accessing opinions in the product markets identified in Paragraph 19 is difficult because ''past and/or current opinions simply are not available from many courts, and in many others, obtaining access is costly and time-consuming.'' Because the lower federal courts have relied upon West for such a long time, it is likely that access to the original copies of these opinions would be even more difficult than in the state courts identified in Paragraph 19.[4]

The only entities with the financial ability and publishing expertise to produce and market a competing federal product would be other large legal publishers. After the West-Thomson merger, there will be one less potential competitor; possibly, none. Further, as noted in the comments of Lexis-Nexis and

AALL, this merger poses a threat to the continued viability of Lexis-Nexis, which is the *only* other source of the text of the decisions of the lower federal courts (albeit, electronic and ''unenhanced''). Thus, if the merger is allowed in its present form, West's monopoly over federal reports will be *strengthened*.

15 U.S.C. § 18 prohibits mergers.

''* * * where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.''

If an acquisition that might ''tend to create a monopoly'' is prohibited, then certainly an acquisition that would *strengthen* an existing monopoly must likewise be banned. The evil to be prevented, lessened competition, is the same in both instances.

Nothing in the Final Judgment addresses West's monopoly over federal case law. The provisions dealing with the licensing of interior page numbers will not foster competition in this market (see below). Three provisions should be added to the Final Judgment to encourage competition in this market:

1. Require West/Thomson to acknowledge that the text of court decisions reported in its products is in the public domain, regardless of trivial enhancements thereto, and to disclaim any copyrights in such text.

This would lower, slightly, the major barrier to entry into the market for primary lower federal case law, encouraging competition which might offset the harmful effects of this merger.

In many instances, especially with older materials, the text of decisions in the West federal publications is the *only* printed version of the decision. The only citation to a decision of a lower federal court allowed by the Harvard Blue Book is the West cite. The rules of all state and federal courts require that citations to lower federal court decisions cite the West reports.[5] Clearly, West's federal decisions represent the de facto official text of this fundamental body of law. It is inconceivable that the official text of the decisions of the federal courts would not belong to the people.

2. Require West/Thomson to allow third parties to retrieve the *public domain* portions of federal case law from West's print and/or electronic publications, and require West/Thomson to acknowledge that the inadvertent and temporary copying of materials in which West legitimately possesses a copyright during such retrieval constitutes ''fair use'' under copyright law.

By itself, an acknowledgment by West/Thomson that the text of federal court decisions contained in its reports is in the public domain will not foster competition because West/Thomson would be able to utilize current copyright law to thwart potential competitors from retrieving the text in any efficient manner (scanning and optical character recognition or direct extraction from CD–Rom databases). The only alternative for a potential competitor would then be to manually key in the text.

A competitor could digitally scan the pages of the printed reports and convert the text into computer format with optical character reading software. Such software allows the user to ''preview'' a page of text on the computer screen and to mark those portions (such as headnotes, West Key numbers, etc.) which should not be processed. However, current copyright law can be interpreted to hold that the image of the page in the computer's memory, and thus the image on the monitor, is itself a copy (See MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993), cert. dism'd 114 S.Ct. 671 (1994). Potential competitors would, of course, exclude West/Thomson's copyrighted materials from their finished product, and *the only reason for displaying such materials temporarily on their computer monitors would be for the purpose of identifying them in order to exclude them*. Thus, West/Thomson should be required to acknowledge that such ''copying'' falls within the ''fair use'' exclusion of U.S. copyright law.

Of course, scanning public domain materials from printed text and converting them into digital format is absurdly inefficient in light of the fact that the public domain text already exists in digital databases on West's CD–Rom products. Nothing could be simpler than for a competitor to ''download'' the public domain text from West's digital products for use in preparing a new electronic or print publication. Such an act, however, would surely assure a lawsuit from West/Thomson claiming violation of copyright in the database containing the public domain text, or violation of the license agreement pursuant to which the electronic media was accessed. Unfortunately, the law in this area is not sufficiently clear that a competitor could hazard such litigation.

The copyright office considers a computer database to be copyrightable as a ''compilation.'' Copyright law extends protection to compilations as a form of literary work. 17 U.S.C. § 103. When the compilation is composed of public domain materials, copyright protection may extend to the selection and arrangement of the materials, but it does not extend to the materials themselves. Feist, supra.

The medium on which material is recorded is irrelevant to the question of whether it is in the public domain. There is no question that the text of the U.S. Constitution, recorded in ink on a piece of paper, could be copied by anyone. Recording the same document on a floppy disk should not take it out of the public domain. Further, there is no question that a page containing the Constitution within a book (a ''compilation'') could be copied—even if the book itself was copyrighted. Likewise, placing the Constitution into a database (also a ''compilation'') should not remove it from the public domain, even though the database itself might be copyrightable.

Unfortunately, many opinions from U.S. courts reveal a lack of understanding of computer technology, much less the application of copyright law to electronic information. Would-be competition will be chilled by the threat of litigation. Thus, in order to encourage competition in this long-monopolized market, West/Thomson should be required to allow third parties to retrieve the public domain texts from the West CD-Rom databases.

3. Require West/Thomson to abandon claims that its internal page numbers are entitled to copyright protection.

The Eighth Circuit has held that West has a copyright in the arrangement of cases in its National Reporter System and that the internal page numbers of those books ''reflect and express'' this copyright, so that commercial use of those numbers infringes West's copyright in the arrangement. *West Publishing Co.* v. *Mead Data Central, Inc.*, 799 F.2d 1219 (8th Cir. 1986), cert. denied, 107 S.Ct. 962 (1987), aff g. 616 F.Supp. 1571 (D. Min. 1985). This decision, combined with West's de facto monopoly in the enhanced primary law of the lower federal courts, severely limits competition in this market.

The legal theories trotted out to support the decision in West break down upon closer examination. The Eighth Circuit granted copyright protection to interior page numbers because they ''express'' the arrangement of the cases in a volume. However, the Court also states ''West concedes that citation to the first page of its reports is a noninfringing 'fair use' * * * so these citations are not at issue here.'' Certainly the arrangement of the cases in a volume could be easily reproduced using the first page citations—which the Court does not protect. Consider the publisher who wishes to reproduce the cases as arranged in a West volume, but wants to use a page size that is somewhat larger than the page size used by West. In order to reproduce the *arrangement*, this publisher will refer to the first page citation (which West says is in the public domain), rather than any of the interior page numbers. Clearly, the interior page numbers have no value in protecting the arrangement of the cases in the West publications, they only serve to indicate where the page breaks fall in a particular report.

Further, while the Court allows West's claim of a copyright in the arrangement of cases within a volume, it ignores the fact that the arrangement of cases within a reporter is totally irrelevant to the *use* of those cases. No lawyer or judge I have ever known has ever read all of the cases, front to back, within a report. No case in a reporter is any more or less ''important'' than any other case to the researcher. West's ''arrangements'' serve no purpose other than to provide a means of removing public materials from the public domain.

While nothing that West does not and cannot claim any copyright in the judicial opinions themselves, the Court in West elaborated at length on the time and effort expended by West in preparing these reports, revealing that the true rationale for its decision was the ''sweat of the brow'' theory. However, in 1991 the Supreme Court opinion in Feist destroyed the ''sweat of the brow'' theory.

In light of the foregoing, it is clear that West's claim of copyright in the interior page numbers lacks any continuing legitimacy, and is being used solely to strengthen its monopoly over the publication of decisions of the lower federal courts. Requiring West/Thomson to license these page numbers is not a solution to a problem; it is an abdication of responsibility. If West/Thomson has a legitimate copyright in the interior page numbers, then they should be allowed to charge whatever they want and to license them to whomever they wish, without coercion from DOJ. If West/Thomson does not have a legitimate copyright in the page numbers, then competitors should be allowed to use them for free. DOJ should institute litigation for the purposes of deciding the legitimacy of the copyright claim, rather than 'duck'' the issue by requiring West/Thomson to license them at a specified price.

4. DOJ should comply with the Freedom of Information Act (''FOIA'') request made by Tax Analysts, Incorporated of Falls Church, Virginia, which seeks release of the public domain portions of tapes of federal cases contained in the now-defunct Juris database.

The Tax Analysis FOIA request is the subject of an appeal pending in the United States Court of Appeals for the District of Columbia. The decision on appeal was rendered by Judge Gladys Kessler of the Federal District Court for the District of Columbia, the same Court which is now reviewing this merger. In that appeal, DOJ is a Co-Appellee with West, taking the position that a large electronic archive of predominately public domain material should not be released to the Appellant. That position is at odds with DOJ's acknowledgment in the Complaint that the difficulty or impossibility of obtaining opinions is one of the barriers to entry in primary case law markets. DOJ's contrary positions on this issue should be reconciled, or in the alternative, a neutral party should be designated to represent the public interest in this matter.

Lest we forget: At issue in this proceeding is not some mean commercial commodity, not forest products, or steel, or computer programs. At issue is the Law; the fuel that fires the flame of freedom; the vehicle by which free people govern themselves. The Law belongs to no one, it belongs to all. It was purchased for us with patriot's blood; we have a sacred duty to hand it down, unshackled, to generations yet to come.

Thank you for your attention to our concerns. Please don't hesitate to contact me if you wish to discuss any of the points raised or would like additional information.

Sincerely,

O.R. Armstrong,

President.

Footnotes

[1] About Geronimo:

Virginia's open access to its primary law materials enabled Geronimo to enter the legal publishing business in 1991. The printed volumes of Virginia Supreme Court and (until recently), when West was awarded the publishing contract) Virginia Court of Appeals reports contain no claim of copyright whatsoever. Further, the contract for publication of the Virginia Code provides that the text of the statutes, along with catch lines and title, chapter and article headings are not copyrightable by the publisher.

Though we were the first to offer a stand-alone computerized research system for Virginia law, Michie (a subsidiary of Lexis-Nexis) and then West soon brought out competing products. Later, a small electronic, publisher, DiscSense, Inc. also entered the fray.

Since we were a new, small company, and we could not out-market the giants, our plan was to make our product easier to use, price it significantly lower than the competition, provide more databases and offer technical support. The plan worked. Our product was chosen, in head-to-head competition, for installation in all Commonwealths' Attorneys' offices throughout Virginia.

The real beneficiaries of this competition are all the attorneys, judges, prosecutors, government officials, law enforcement agencies, inmates, libraries, title companies, banks, and private citizens who are able to easily and economically access most of the law which applies to the citizens of the Commonwealth of Virginia.

[2] For example, the Complaint in West Publishing Company v. Mitchell Gross, Civil Action CV2071, Northern District, Georgia (1993) alleges, inter alia, that the Defendant violated West's copyrights by wholesale copying of its books. The Complaint states at pages 3–4.

Each Southern Reporter case report contains the following editorial enhancements created entirely by West: (a) West citation of the case; (b) case synopsis, including summary of the facts, the court's holding and the procedural history of the case; (c) numbered headnote(s) summarizing portions of the opinion relating to specific points of law, including the editorial designation of the statutes that relate to each headnote; (d) topic designations for each headnote; (e) topic designations for each headnote with individual ''Key Number System'' registered trademark symbols (keys) and numeric designations (key numbers) to which headnotes are referenced; (f) miscellaneous information prepared by West inserted within the text of the judicial opinion including parallel citations, corrections and cross-reference numbers relating back to corresponding headnote numbers; and (g) at the conclusion of each West case report, a West trademark, the symbol of a key enclosing the words ''West Key Number System.''

(Emphasis supplied)

[3] It should be noted that the House of Delegates of the American Bar Association passed a resolution at its recent Annual Convention urging all courts to adopt a public-domain citation system in which the court would assign the citation at the time a decision is issued and the paragraphs in the text would be numbered.

[4] In this regard, it is our understanding that the American Association of Legal Publishers has recently submitted to DOJ a study of the difficulties encountered in attempting to obtain original copies of opinions from the 1960's and 1970's from the federal courts. The study reveals that opinions are missing from files, that files are missing from filing cabinets, that opinions are mis-filed, that the courts limit the number of case files (to as little as three) which may be accessed, and that delay, confusion and expense hamper the process.

[5] West's domination of the federal market is so pervasive that most courts require attorneys to provide citations to West products (federal and state). Attorneys purchasing a competing product would still need to access West products for these citations. Thus, successful marketing of a competent product would require significantly lower pricing, reducing the return on the investment in the competing product, stifling competition.

Irell & Manella LLP

August 31, 1996

Via Federal Express

Craig W. Conratrh,

Chief, Merger Task Force, Antitrust Division, 1401 H Street, N.W., Suite 4000, Washington, D.C. 20530

Re: United States v. The Thomson Corporation and West Publishing Company, No. 96–1415 (D.D.C.)

Dear Mr. Conrath:

Introduction

Matthew Bender & Company, Inc. submits the following comments in opposition to the terms of the Proposed Final Judgment in the above-mentioned matter relating to ''star pagination.'' These comments are intended to supplement and amplify comments made by Lexis-Nexis in a letter dated August 30, 1996.

As the Department is well aware, defendant West Publishing Company claims that its copyright interests are infringed by competitors who use ''star pagination'' to West's reporters. The Complaint identifies this assertion of an intellectual property right as a significant barrier to entry into the relevant legal publishing markets. Moreover, the Department, acting as an amicus in copyright litigation between Matthew Bender and defendant West Publishing Company in the Southern District of New York, has recently expressed its views on behalf of the United States that West's copyright claim is without merit. Yet despite recognizing that West has imposed a barrier to entry through the erroneous assertion of a legally cognizable intellectual property interest, the Department has not sought to remove that barrier. Rather, the Proposed Final Judgment seeks to ameliorate the problem by mandating that West offer a license to its non-existent rights. Not only does this solution not remove the barrier to entry, it creates new anti-competitive effects through license terms that would cause harm both to licensees and to other potential competitors of the merged Thomson/West entity in the markets at issue. Matthew Bender accordingly urges that the proposed Final Judgment not be approved by the Department or the Court without modification to prohibit Thomson/West from enforcing any alleged rights with respect to star pagination.

The Importance of Star Pagination

Matthew Bender is one of this country's leading publishers of legal secondary literature, including such well known treaties as Moore's Federal Practice, Nimmer on Copyright, Collier On Bankruptcy, and *Weinstein's Evidence.* In recent years, Matthew Bender has offered many of its titles on CD–ROM. In order to remain competitive in the legal secondary source market, Matthew Bender must offer its CD–ROM titles in conjunction with pertinent primary materials. By having primary materials available together with secondary sources, a person using Matthew Bender's legal secondary source product will be able to move, at the touch of a button, from a citation to a primary source to the primary source itself. Thus, for example, if Moore's Federal Practice cites a particular page of an appellate decision as stating a particular holding, a person using an integrated CD–ROM product will be able to go from citation to the cited portion of the opinion, and then go back to the treatise (or to another authority cited in the opinion). Consumers of legal products benefit from this integration of secondary and primary sources through improved secondary source products.

In order to integrate judicial opinions with the existing base of legal secondary literature, and to make them competitive primary sources in their own right, those judicial opinions must include information about the location of page breaks from the version of the opinion appearing in the National Reporter System published by defendant West Publishing Company. This page break information is typically provided via the efficient shorthand of ''star pagination.''[1]

It is necessary to provide information about the location of page breaks in West's reporters for three primary reasons: (1) to allow users of Matthew Bender products to cite cases in the form that is mandated by law, practice and necessity; (2) to allow users of Matthew Bender products to locate the portion of a judicial opinion that is cited in a secondary or primary source; and (3) to allow the integration of primary sources with secondary sources that contain pinpoint citations to West's reporters.

The necessity of providing information about the page breaks in West's reporters emerges from many factors. West's federal reporters (i.e., Federal Cases, Federal Reporter, Federal Reporter—Second Series, Federal Reporter—Third Series, Federal Supplement, Federal Rules Decisions and *Bankruptcy Reporter*) are the de facto official reporters of the U.S. district courts and courts of appeals and thus are the standard citation source for the bench and bar. Only West publishes in book form a comprehensive collection of the published decisions of the lower federal courts. Consequently, the rules adopted by many of the federal courts require that citations in briefs be to the appropriate volume and page number of West's federal reporters. See e.g., Third Cir. R. 28.3(a). The preeminent legal citation manual also requires citation to West's federal reporters, including pinpoint citation. See generally the Bluebook; A Uniform System of Citation at 34–36, 165–67 (15th ed. 1991) (the ''Bluebook''). The Bluebook citation form, which the legal community regards as setting the standards for citations in legal writing, has been formally adopted by the local rules of various courts, thereby further extending the official status of West's federal reporters. See, e.g., Eleventh Cir. 28–2(k).

The de facto official status of citations to the volume and page numbers of West's federal reporters is further reflected in their use as the standard citation form in the printed opinions of the United States Supreme Court and the printed slip opinions of the lower federal courts. In the United States Reports, for example, the government's official reporter of Supreme Court decisions, citations to lower federal court decisions almost invariably consist of a citation to the volume and appropriate page numbers, including the pinpoint citation, of the West federal reporter in which the decision and pertinent passages were published.

The primacy of citations to West state court judicial reports is also a condition dictated by the requisites of legal practice. The judicial decisions of at least nineteen state court systems are not currently published in any ''official'' reporter. See Robert C. Berring, On Not Throwing Out the the Baby: Planning the Future of Legal Information, 83 Cal. L. Rev. 615, 633 n.66 (1995). Citations to judicial authority in states such as Texas are by necessity to an unofficial reporter, such as the reporters in West's National Reporter System. In yet other states, West is the official reporter. For example, in Florida, West publishes the official Florida Cases, which is a collection of Florida judicial opinions reprinted—including volume and page numbers—from West's Southern Reporter. A citation to Florida's ''official'' reporter is thus identical to a citation to West's ''unofficial'' Southern Reporter.

Even in the remaining states, such as New York, where there are non-West ''official'' reporters of judicial opinions (owned, in this case, by Thomson's subsidiary, Lawyers Cooperative Publishing Co.), law and practice nonetheless require parallel citations to West's New York reporters. For example, the rules adopted by certain federal courts require citations to West's New York reporters. *See, e.g.*, D.C. Cir. R. 28(b). The *Bluebook* (which, as noted above, various local rules of court adopt by reference) also requires citation to West's New York reporters, including pinpoint citation, in documents submitted to federal and state courts. *See id.* at 195–97. In accord with the standards promulgated by the *Bluebook*, citation to West's National Reporter System volumes, including pinpoint citation, is considered by the legal community to be the proper method of citation in memoranda of law submitted to the federal and state courts. Indeed, the *Bluebook* requires citation to West's reports of state judicial opinions in the National Reporter System in documents submitted to federal and state courts in every single state. *See generally Bluebook* at 169–216.

In sum, the bench and bar must (and do) cite to West's reporters. Pinpoint citations to West's National Reporter System volumes are thus ubiquitous in the U.S. state and federal *corpus juris*, in submissions to the courts, as well as in the vast secondary literature about our laws. Information about the location of page breaks in West National Reporter System volumes has thus become a standard frame of reference for discussion, debate and advocacy about the law of this country. Primary sources that do not contain information about the location of page in West's National Reporter System volumes are cut-off from this ubiquitous frame of reference.

West's Use of Its Alleged Copyright To Destroy Competition

As the Complaint recognizes, a significant barrier preventing Matthew Bender and other potential competitors from using star pagination to create better secondary source products, and to create new enhanced primary source products, has been erected by West's assertion of claims that star pagination infringes West's purported copyright in the arrangement of its reporters. *See* Complaint ¶¶ 32, 43. West aggressively pursues litigation against competitors who use star pagination. It also relies on jurisdictional machinations to make that litigation more expensive for those competitors and to confine examination of its alleged copyright interest in star pagination to its home base.

West's first action of this type was its successful litigation against Mead Data Central to enjoin Mead's intended inclusion of star pagination in the Lexis database. That suit resulted in the much-criticized *West Publishing Co.* v. *Mead Data Central, Inc.*, 799 F.2d 1219, 1227 (8th Cir. 1986), *cert, denied*, 479 U.S. 1070 (1987) decision, in which a two-judge majority of an Eighth Circuit panel held, over a vigorous dissent, that the internal page numbers of opinions published in West reporters are subject to copyright, and that a competitor that provided star pagination to those internal page numbers was liable for copyright infringement.[2]

The *West* v. *Mead* decision has been roundly denounced by copyright scholars,[3] the U.S. Copyright Office,[4] and most recently

[1] The Compliant recognizes this business reality. *See* Complaint ¶ 43 (''Particularly for CD–ROM products, where it is possible to include both primary and secondary law products on the same CD–ROM, the ability to include star pagination is an important competitive factor.'').

[2] The matter came before the Eighth Circuit on interlocutory appeal of a grant of preliminary injunction. The case settled before a decision was rendered after trial on the merits.

[3] *See, e.g.*, William F. Patry, *Latman's The Copyright Law* 63, n.212 (1986) (case is ''a most extreme misreading'' of the Copyright Act); 1 *Nimmer on Copyright* § 3.03 (''this case extends compilation copyright too far''). Two scholars devoted a hundred-page article to criticizing the *West* v. *Mead* case and decrying the majority's position as disturbing ''a century-and-a-half of precedent dating from the Supreme Court's first copyright decision, *Wheaton v. Peters*, in 1834.'' L. Ray Patterson & Craig Joyce, *Monopolizing the Law; The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. Rev. 719, 723 (1989). In *Feist Publications, Inc. v. Rural Tel. Service Co.*, 499 U.S. 340, 111 S. Ct. 1282 (1991), the Supreme Court cites repeatedly to the Patterson and Joyce article in reaching the conclusion that no compilation copyright protected the telephone book there at issue. *See Feist*, 499 U.S. at 347, 348–349, 351, 361–362, 111 S. Ct. at 1288, 1289 (twice), 1291, 1296 (twice).

[4] The Register of Copyrights (the senior official of the U.S. government charged with the formulation of copyright policy) testified before Congress regarding proposed legislation to amend the U.S. Copyright Act to clarify that there is no copyright in the volume and page numbers of judicial reporters that in the view of the Copyright Office,

by the U.S. Department of Justice,[5] as wrongly decided and clearly overruled by the subsequent U.S. Supreme Court decision in *Feist Publications, Inc.* v. *Rural Tel. Service Co.*, 499 U.S. 340, 111 S. Ct. 1282 (1991) which uprooted the ''sweat-of-the-brow'' copyright doctrine undergirding *West* v. *Mead.*

Nonetheless, the *West* v. *Mead* decision has not yet been explicitly overturned, and West has in fact continued its use of litigation to prevent competitors from using star pagination. *See, e.g., Matthew Bender & Co., Inc.* v. *West Publishing Co.*, 39 U.S.P.Q.2d 1079, 1082 (S.D.N.Y. 1996) (noting ''West's history of litigation against other legal publishers'' and its employees' testimony ''that they do not know of any companies that have used West's star pagination that West has not sued''); Susan Hansen, *Fending Off the Future*, American Lawyer 73, 73 (September, 1994) (''West's lawyers have earned a reputation for menacing letters and quick-strike lawsuits, hunting down infringers from coast to coast. One by one, 'copyists,' as [Vance] Opperman[, West's president,] likes to call them, have been marched into court and crushed.'').

Having succeeded before *Feist* in obtaining one favorable ruling in its home forum, West has attempted even past *Feist* to prevent courts outside the Eight Circuit for examining its ''scarecrow'' copyright. As Professor Craig Joyce, a strong critic of the *Mead* decision, explained to Congress:

The West Publishing Company is an able litigator. If it decides on a 'preemptive strike,'' it sues competitors asserting the right to use 'its' identifying matter—that is, the matter for which it claims protection by virtue of the *Mead* case—in the federal trial court for the District of Minnesota, the very jurisdiction in which it filed and won in *Mead.* For quite proper reasons, West likehood of success in that court, or anywhere in the Eight Circuit, is very high.

If, however, West is sued elsewhere *by* a potential competitor seeking to employ in its own works the identifying matter in which West claims ownership, West can in all likelihood get the case transferred to the District of Minnesota. Again, West's chances there are good.

Exclusion of Copyright Protection for Certain Legal Compilation: Hearings on H.R. 4426 Before the Subcomm. on Intellectual Prop, and Judicial Admin., 102nd Cong., 2d Sess., Serial No. 105 at 39–40 (1992) (footnotes omitted) (emphasis original).

Recently, West's project of confining examination of its pagination copyright to the Eight Circuit has been implemented through the attempted manipulation of federal jurisdiction. In two declaratory judgment actions brought by Matthew Bender against West in the Southern District of New York, *Matthew Bender & Co., Inc.* v. *West Publishing Co.,* 94 Civ. 0589 (JSM) (S.D.N.Y.) and *matthew Bender & Co., Inc.* v. *West Publishing Co.,* 95 Civ. 4496 (JSM) S.D.N.Y.) (seeking declarations that Matthew Bender's use of star pagination does not infringe any West copyright), West moved to dismiss for lack of subject matter jurisdiction on the ground that the actions allegedly do not involve actual controversies.[6] After extensive discovery, briefing and oral argument on the jurisdictional issue, the court denied West's motions, *see Matthew Bender & Co., Inc.* v. *West Publishing Co.,* 39 U.S.P. Q.2d 1079, 1082 (S.D.N.Y. 1996), as well as West's subsequent motion for reconsideration or interlocutory review. West's failed jurisdictional ploy delayed adjudication of the merits by at least two years and caused significant litigation costs.

The purposes animating West's attempts to evade the jurisdiction of the Southern District of New York become clear when evaluated in light of West's conduct in a concurrent proceeding now on appeal from the United States District Court for the District of Minnesota to the Eight Circuit—*Oasis Publishing* v. *West Publishing Co.,* CV3–95–563. In that action, West has taken a dramatically contrary stance regarding the conditions under which justiciability is established for the purpose of obtaining an advisory ruling in its forum-of-choice regarding a hypothetical product.

In *Oasis,* plaintiff Oasis Publishing, Inc., a CD–ROM publisher, initiated suit against West in the United States District Court for the District of Florida seeking a declaration that West does not have a copyright in the page numbers contained in Florida court decisions published in West's *Southern Reporter* and that Oasis' intended use of star pagination to West's *Southern Reporter* in Oasis' planned CD–ROM product will not infringe West's copyright. West responded to the *Oasis* complaint by moving to dismiss the declaratory judgment claim for lack of a justiciable controversy and alternatively to transfer the action from Florida to the District of Minnesota. Before ruling on West's motion to dismiss, the court granted West's motion to transfer the case to the District of Minnesota.

Once West succeeded in transferring the *Oasis* case to Minnesota, West withdrew its motion to dismiss for lack of a justisiable controversy. It did so even though there had been no intervening change in the facts or law. But West did not simply withdraw its motion. Rather, it entered a stipulation filed with the Minnesota court in which it dismissed ''with prejudice'' from its answer the affirmative defense that the case was not justiciable and all allegations in West's answer based upon that defense. In other words, once West successfully transferred the case to Minnesota, West not only withdrew its motion challenging justiciability, but actively attempted to expunge the issue from the record.

After West in effect stipulated to jurisdiction, the parties submitted cross-motions for summary judgment on Oasis' copyright declaratory judgment claim. Just four weeks after oral argument, West's jurisdictional strategy to obtain a favorable opinion from its forum-of-choice paid off. The Minnesota court followed the much-criticized *West* v. *Mead* and granted West's motion for summary judgment. *See Oasis Publishing Co.* v. *West Publishing Co.*, 924 F. Supp. 918, 925–926 (D. Minn. 1996). In rendering its opinion, the court below never examined the existence of subject matter jurisdiction.[7]

In sum, a comparison of West's actions in response to Matthew Bender's New York declaratory judgment actions with its stance in the *Oasis* case suggests that West's simultaneous assault on jurisdiction outside the Eighth Circuit and attempted stipulation to jurisdiction in the Eighth Circuit is based on a deliberate strategy to confine examination of its alleged copyright in star pagination to courts in the Eighth Circuit. This strategy decreases the likelihood that the *Mead* decision will be critically examined, and increases costs for potential challengers of West's copyrights who must engage in lengthy jurisdictional fights against a well-heeled and aggressive adversary.

In its recently filed opposition to Matthew Bender's motion for summary judgment in *Matthew Bender* v. *West*, West has taken its game playing to new heights—contending, despite numerous public statements to the contrary, that it has a copyright interest in the initial parallel citations (i.e., the cite to the first page of a case) in the National Reporter System that may be infringed when

West v. Mead was a ''substantial departure'' from ''150 years of settled contrary precedent.'' Testimony of Ralph Oman, *Exclusion of Copyright Protection for Certain Legal Compilations: Hearings on H.R. 4426 Before the Subcomm. on Intellectual Prop. and Judicial Admin.*, 102nd Cong., 2d Sess., Serial No. 105 at 6, 12 (1992). He further elaborated that even if that ruling had been consistent with previous doctrine, its reliance on sweat-of-the-brow considerations means that *Feist* ''tolled the death knell'' for *West v. Mead. Id.* at 6. In fact, the Copyright Office labeled H.R. 4426 ''unnecessary legislation'' on the basis that the old Eighth Circuit ruling represented bad law post-*Feist. Id.* at 31.

[5] On August 20, 1996, the Department filed a memorandum *amicus curiae* on behalf of the United States in *Matthew Bender & Co., Inc. v. West Publishing Co.*, 94 Civ. 0589 (JSM) (S.D.N.Y.) arguing that *West v. Mead* ''rests on the discredited 'sweat-of-the-brow' theory of copyright and cannot be reconciled with *Feist.* * * * [T]o follow the *[West* v.] *Mead* analysis is to eviscerate *Feist*, with substantial, and undesirable, consequences for the progress of science and art in the modern technological era.'' Memorandum of United States of America as Amicus Curiae at 10–11 (filed August 20, 1996). The Department's brief is discussed in greater detail below.

[6] To underscore West's desperation to avoid a decision outside the Eight Circuit, West originally took the remarkable position in *Matthew Bender* v. *West* that the action should be dismissed, or transferred to Minnesota, on the ground of improper venue because West—the nation's largest legal publisher—purportedly ''does not do business in the Southern District of New York.'' *See* Report of parties' Planning Meeting dated March 8, 1994 at 6.

[7] On appeal, neither party in *Oasis* intends to discuss the threshold jurisdictional issue. West is attempting to cover up its attempted manipulation of the District of Minnesota's jurisdiction by refusing to consent to Matthew Bender briefing the issue to the Eighth Circuit. *See* Letter of Joseph Musilek to Elliot Brown, dated July 22, 1996 (''West Publishing Company, like Oasis, has no objection to Matthew Bender filing an *amicus curiae* brief in the Eighth Circuit on the merits of the appealed issues. However, West does not consent to an *amicus* brief on any jurisdictional or justiciability issue.'')

a competitor uses such citations.[8] *See* West Publishing Company's Memorandum of Law In Opposition To Plaintiff Matthew Bender & Company's Motion For Summary Judgement at 5 (''West has *not* conceded that copying of first page citations by Matthew Bender is non-infringing.'') (emphasis original). West apparently wishes to backtrack from its admissions and leave the door open to suing a competitor for infringement based on its use of initial parallel citations.

In the summary judgment proceedings in *Matthew Bender* v. *West,* the Department filed an *amicus curiae* brief in that suit on behalf of the United States arguing, that ''Bender's star pagination to West's National Reporter System does not infringe any copyright interest West may have in the arrangement of the National Reporter System.'' Explaining why the Department had taken the unusual step of filing an *amicus* brief at the district court level in a copyright action, the Department explained,

The United States has a substantial interest in the resolution of the issue discussed in this Memorandum. It has numerous responsibilities related to the proper administration of the intellectual property laws and to advancement of the public interest. The standards for copyright protection embody a balance struck between protecting private ownership of expression as an incentive for creativity and enabling the free use of basic building blocks for future creativity * * *. The United States therefore has an interest in properly maintaining the ''delicate equilibrium'' * * * Congress established through the copyright law.

The interest of the United States in ensuring the proper preservation of that balance also reflects the fact that it has primary responsibility for enforcing the antitrust laws, which establish a national policy favoring economic competition as a means to advance the public interest. Moreover, the United States is a substantial purchaser of legal research materials of the kind at issue in this case.

Finally, the United States has recently taken actions relating to the issue discussed. On June 19, 1996, the United States, together with seven states, filed an antitrust suit challenging the acquisition of West Publishing Co. by The Thomson Corp., together with a proposed settlement of that suit. Part of that settlement requires Thomson to license to other law publishers the right to star paginate to West's National Reporter System. *United States* v. *The Thomson Corp.,* No. 96–1415 (D.D.C. filed June 19, 1996), Proposed Final Judgment, 61 Fed. Reg. 35250, 35254 (July 5, 1996). In announcing the settlement, the U.S. Department of Justice stated:

Today's settlement, with its open licensing requirement, does not suggest * * * that the Department believes a license is required for use of such pagination. The Department expressly reserves its right to assert its views concerning the extent, validity, or significance of any intellectual property right claimed by the companies [West and Thomson]. The Department also said that the parties agree that the settlement shall have no impact whatsoever on any adjudication concerning such matters.

U.S. Dept. of Justice, Press Release No. 96–287, at 3–4, 1996 WL 337211 (DOJ) *2 (June 19, 1996). This memorandum asserts those views.

Memorandum of United States of America as Amicus Curiae, *Matthew Bender & Co., Inc.* v. *West Publishing Co.,* 95 Civ. 0589 (JSM) (S.D.N.Y.) at 1–2 (citations omitted) (''U.S. Amicus Memorandum'').

As a result of West's substantive positions and procedural game playing, potential competitors in the primary and secondary legal product markets, use star pagination at the risk that they will be sued by West for copyright infringement. The Department recognizes this reality. *See* Competitive Impact Statement, 61 Fed. Reg. 35250, 35261–62 (July 5, 1996) (''[E]xisting or potential participants in the markets for primary law products cannot offer products with star pagination without the threat of costly infringement litigation.''). As the former President and COO of Thomson Electronic Publishing, testified before Congress in 1992 on behalf of numerous Thomson legal publishing entities,[9] the *West* v. *Mead Data Central* ''decision has made it commercially impossible for Thomson or anyone else to publish, with page number citations, the decisions of the lower federal courts * * *.'' *Exclusion of Copyright Protection for Certain Legal Compilations: Hearings on H.R. 4426 Before the Subcomm. on Intellectual Prop. and Judicial Admin.*, 102nd Cong., 2d Sess., Serial No. 105 at 82 (1992) (testimony of Kathryn M. Downing); *see also* Gary Wolf, *Who Owns the Law?,* Wired 98, 138 (May 1994) (''West's provisional victory [in *West Publishing*] has kept other electronic publishers at bay.'').

From an antitrust perspective, West's repeated, even dogged, attempts to assert its baseless copyright have greatly reduced competition by erecting a huge barrier to entry in legal publishing markets.

Neither the Department Nor the Court Should Approve the Final Judgment Unless It Is Modified To Preclude The Merged Entity From Enforcing its Alleged Star Pagination Copyrights

In light of the foregoing, the deficiency in the Proposed Final Judgment's remedy to West's star pagination claims becomes apparent.[10] The Complaint recognizes that West's assertion of its claim that star pagination infringes its copyright has an anticompetitive effect by serving as a barrier to entry into the relevant markets. *See* Complaint ¶¶ 32, 43. The Department further recognizes that West's copyright claim is baseless. *See generally* U.S. Amicus Memorandum. Yet, the Department has not taken the obvious and desirable step of removing that barrier by forbidding West from asserting its baseless copyright interest as a tool to stifle competition. This failure flies in the face of the Department's recognition that West's copyright claim is baseless. It also deviates from the remedies the federal government has demanded in other merger cases. *See, e.g., Hoechst AG: Proposed Consent Agreement,* 60 Fed. Reg. 49609, 49611 (September 26, 1995) (filed by FTC); *United States* v. *Borland Int'l. Inc.,* 56 Fed. Reg. 56096 (October 31, 1991). In both *Hoechst AG* and *Borland, Int'l.,* the government conditioned approval of the merger on the consent of the merging entity not to enforce an intellectual property right. In neither of those instances did the government dispute the validity of the intellectual property at issue. One is therefore left to wonder why the government has chosen to settle for less where it believes that the intellectual property interest asserted is invalid.

Matthew Bender believes that the Department should not let Thomson/West consummate their merger unless Thomson/West agrees that it will not seek to enforce any star pagination copyrights.[11] In its

[8] West's counsel have repeatedly admitted that no such copyright interest exists. *See, e.g.,* Statement of West's outside counsel, James E. Schatz, Transcription of American Association of Law Libraries 1995 Annual Meeting at Pittsburgh, Pennsylvania, July 15–20, 1995 at 14 (''West has made it very clear it has no objection to, never has, doesn't now and never will to the use of initial West citations, the volume and first page number by other publishers or by anybody else.''; ''[T]he initial citations are in the public domain because West has no objection to anybody using them. West has said that for a long time. West has basically said that since 1876.''); Transcript of Hearing, *In the Matter of the Amendment of Supreme Court Rules: Electronic Archive of Appellate Opinions, Rules and Orders,* Case No. 95–01 (March 21, 1995) at 114:6–8, 118:13–14 (''The volume and first page number of every case report published by West is in the public domain.''; ''West's volume and initial page number are matters of public domain'') (testimony of West's counsel Brady Williamson); Supplemental Brief of West Publishing Co., *In the Matter of the Amendment of Supreme Court Rules: Electronic Archive of Appellate Opinions, Rules and Orders,* Supreme Court of Wisconsin, Case No. 95–01 (April 3, 1995), at 8 (''Since West has no objection to the use of initial citations to its case reports, even by its competitors, those initial citations are effectively 'in the public domain.' '').

[9] Ms. Kathryn M. Downing testified on behalf of Thomson Professional Publishing, Lawyers Cooperative Publishing Company, Clark Boardman Callaghan Company, Bancroft-Whitney Company, Research Institute of America Inc., Warren, Gorham and Lamont and Thomson Electronic Publishing. In 1995, Ms. Downing left Thomson to serve as Matthew Bender's CEO.

[10] Neither the Complaint, the Proposed Final Judgment nor the License addresses the use by competitors of initial parallel citations to West's National Reporter System. This is not surprising given West's public statements that initial parallel citations are in the ''public domain.'' Nevertheless, in light of the position that West has taken in *Matthew Bender* v. *West,* the Department should put an end to this game playing and not approve the merger unless Thomson/West agrees that it will never assert that any of its rights have been infringed by a competitor's use of initial parallel citations.

[11] Recent reports suggest that Thomson has done a complete flip-flop on this issue. Thomson previously backed legislation to amend the U.S. Copyright Act that would have removed the star pagination barrier by clarifying there is no copyright in the volume and page numbers of judicial reporters. *See generally Exclusion of Copyright Protection for Certain Legal Compilations: Hearings on H.R. 4426 Before the Subcomm. on Intellectual Prop. and Judicial Admin.,* 102nd Cong., 2d Sess., Serial No. 105 at 91 (1992) (Thomson supports legislation because it ''would overrule the *West [v. Mead]* decision and

Competitive Impact Statement, the Department recognizes that, in light of the proposed Thomson/West merger, it is critical to lower the barriers to entry in legal publishing markets to maintain the vigorous competition that currently exists. 61 Fed. Reg. at 35263. Moreover, Matthew Bender believes that the maintenance of vigorous competition after the consummation of the Thomson/West merger requires elimination of the barrier to entry caused by the erroneous assertion of the star pagination copyright for reason not mentioned by the Department in its Competitive Impact Statement. By merging West's virtual monopoly position in enhanced primary law products with Thomson's capability in secondary law products, the merged Thomson/West entity will be able to use its market power in the enhanced primary law product markets to gain an unfair competitive advantage in the secondary law product markets. No longer will West have to develop its own secondary law products. Instead, Thomson/West will be able to marry West's primary law products with Thomson's secondary law products to create products that competitors in the secondary law product markets cannot match without the right to use West's star pagination. The newly achieved strength of Thomson/West in the secondary law product markets will thus greatly increase the anticompetitive effects of continued attempts to enforce West's star pagination copyright.

For these reasons, the Thomson/West merger presents a compelling example of the need to condition government approval of a merger on an agreement not to enforce an alleged intellectual property right. The merger here, like the mergers in *Hoechst AG* and *Borland Int'l*, increases concentration in already concentrated markets. However, unlike those cases, the intellectual property right at issue is baseless, and the merger itself increases the harm from assertion of the intellectual property right.

The Department is apparently under the impression that the proposed mandatory license will fulfill the objective of removing the barrier to entry caused by West's assertion of the star pagination copyright. For several reasons, the Department is wrong. First, the terms of the license are so onerous that few, if any, competitors of West will be able to take advantage of it. As noted in the letter submitted to the Department by Lexis-Nexis, the pricing is very high (of course, any fee for what even the Department recognizes is a non-existent right is too high). Indeed, if the information cited by Lexis-Nexis is correct, the price is being set at a level that West negotiated as a settlement after its courtroom victory in *West* v. *Meed*.[12] In light of the Supreme Court's decision in *Feist,* it is inconceivable that West could insist on that high a royalty again.[13] The license is also not absolute. West apparently can still challenge a licensee's use of star pagination if West contends that the licensee has not made its own selection, coordination and arrangement of cases. *See* License at ¶ 1.03.[14] And, as discussed more fully below, the license contains at least two terms that will reduce, not enhance, a licensee's ability to compete with Thomson/West in the marketplace. *See* License ¶ 1.04 (which effectively requires a licensee to preview its products for Thomson/West) and ¶ 3.01 (requiring the licensee not to challenge West's copyright during the term of the license). Matthew Bender submits that, under these conditions, the Department cannot and should not rely upon the mandatory license feature of the Proposed Final Judgment as a vehicle for preserving vigorous competition in legal publishing markets following a Thomson/West merger.

Finally, Matthew Bender notes that the Proposed Final Judgment will actually result in positive injury to third parties who compete with the merged Thomson/West entity. The star pagination License Agreement mandated by Section IX of the Proposed Final Judgment effectively requires licensees to provide West with an advance description of the product or service in which they intend to include star pagination. *See* License ¶ 1.04. Thomson/West will thus be in a position to modify its products to address the enhancements offered by its competitor even before its competitor's product can be sold. Not only will this give Thomson/West a competitive advantage over the particular competitor seeking a license, but it will also give an advantage over other competitors in the market who will have to wait until the new product is sold to develop a competitive response.

The star pagination license also results in positive injury to third parties who compete with Thomson/West because it provides that ''[d]uring the term of this Agreement, Licensee (i) shall respect and not contest the validity of the copyrights claimed by Licensor in Licensor's arrangements of case reports in NRS Reporters as expressed by NRS Pagination; * * * .'' License § 3.01. This provision will effectively prevent a licensee form challenging West's copyright.[15] This not only harms the licensee by subjecting it to an expensive, highly restrictive license for a non-existent copyright, but it harms all competitors of Thomson/West and all consumers of legal research material because it reduces the likelihood that an effective court challenge will be mounted that invalidates West's copyright claims. Thus, the Proposed Final Judgment simultaneously fails to take the opportunity that now exists to remove the artificial barrier to entry caused by West's improper assertion of its star pagination copyright and diminishes the likelihood the problem will be solved later by private litigation.

For the reasons stated in this letter, Matthew Bender urges the Department not to approve the proposed Final Judgment without modification to prohibit Thomson/West from enforcing any alleged star pagination copyright. In the event that the Department does give its approval, Matthew Bender urges the Court to recognize the positive injury to third parties caused by the proposed final judgment and to refuse to approve it absent the same modification.

Sincerely,

James Imbriaco,

Associate General Counsel, and General Counsel, Professional Publishing, The Times Mirror Company, 780 Third Avenue, 40th Floor, New York, New York 10017.

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enable Thomson and others to publish . . . primary legal texts.'') (Testimony of Kathryn Downing). West's then outside counsel and later president, Vance K. Opperman, proving yet again the lengths to which West will go to protect its sham copyright, outrageously derided the bill as an attempt by Canadian Thomson to rob an American company's assets. *See, e.g.,* Prepared Statement of Vance Opperman, *id.* at 159 (''Perhaps more disturbing is the motive of the primary proponent of H.R. 4426, Lord Thomson and his foreign-based Thomson conglomerate. We have all witnessed past efforts by foreign firms, acting under the guise of the U.S. subsidiaries they have bought up, to alter or dismantle fundamental American laws for their own profit and at the expenses of American jobs and prosperity.''); *see also* Testimony of Minnesota Congressman James Ramstad, *id.* at 5 (''The legislation being considered today represents an effort by one of the largest and most powerful foreign conglomerates in the world, led by an English lord, to win in the U.S. Congress what it knows it cannot win in the courts.''). The prospect of merger appears to have caused Thomson to adopt West's views on star pagination. *See* Vera Titunik, *That Was Then, This Is Now,* American Lawyer 21 (April 1996) (quoting Thomson's general counsel Michael Harris as saying, ''We believe star pagination is copyrightable''). Accordingly, Matthew Bender expects that Thomson will continue West's aggressive assertion of claims that star pagination infringes West's copyrights.

[12] The problem is exacerbated by the term calling for a payment of fees for every ''format.'' License ¶ 2.03. This means that licensees will have to repay fees each time they make their content available in a new format, so that the CD–ROM, HDCD and Internet versions of a work each will require a repayment of fees for the same data. This provision will discourage licensees from servicing their installed base as it migrates to new formats and act as a barrier to providing products in all but the most popular formats.

[13] Nonetheless, West has already demonstrated, in a brief filed in the *Matthew Bender* v. *West* litigation, that it will attempt to use these License terms against adversaries by contending that the royalties are ''rates which the Antitrust Divisions approved as commercially reasonable,'' and that ''the negotiation of the Proposed Final Judgment *does resolve any possible antitrust concern regarding the availability of star pagination licenses to West competitors.*'' West Publishing Company's Memorandum Of Law In Opposition To The Memorandum Of The Antitrust Division Of the Department Of Justice As *Amicus Curiae* at 1 (filed August 26, 1996) (emphasis added).

[14] West has left the License intentionally ambiguous as to whether it applies if a licensee creates a compilation of cases that West contends mirrors West's selection of cases. For example, if a licensee created a compilation that contains the same selection of opinions as found in West's *Federal Reporter* (i.e., all published federal appellate opinions), West could contend that those opinions were not independently ''selected for reporting by Licensee,'' ¶ 1.03, and therefore are beyond the purview of the License.

[15] There is some question about whether this provision is enforceable. *Compare, Lear* v. *Adkins,* 395 U.S. 653 (1969) (a patent case invalidating on public policy grounds the doctrine of ''licensee estoppel,'' i.e., the doctrine that a licensee may not challenge the validity of the licensed patent), *with Saturday Evening Post Co.* v. *Rumbleseat Press, Inc.,* 816 F.2d 1191, 1200 (7th Cir. 1987)(allowing enforcement of a no contest clause in a copyright license). *Rumbleseat* in turn has been criticized by the leading copyright commentator. *See,* 3 Melville Nimmer & David Nimmer *Nimmer on Copyright* § 10.15[B]).

James Imbriaco,

Counsel for Matthew Bender & Company, Inc., a wholly-owned subsidiary of The Times Mirror Company.

Irell & Manella LLP,

Morgan Chu, Alex Wiles, Elliot Brown.

Morgan Chu,

Counsel for Matthew Bender & Company, Inc.

Alexander Wiles,

Counsel for Matthew Bender & Company, Inc.

Elliot Brown,

Counsel for Matthew Bender & Company, Inc.

CD Law

August 29, 1996.

Craig W. Conrath,

Chief, Merger Task Force, Antitrust Division, United States Department of Justice, Suite 4800, 1401 H. Street, N.W., Washington D.C. 20530

Re: Thomson Acquisition of West: Public Comment re Proposed Final Judgment

Dear Mr. Conrath: I have reviewed the Antitrust Division's July 5, 1996 filing in the Federal Register with respect to the above-referenced matter (61 Fed. Reg. 35250). Please consider this letter responsive to that request for public comment.

I founded CD Law, Inc., of Seattle, Washington, in 1989. We publish case law, statutes, administrative law, and other Washington State legal materials on CD–ROM and on the Internet. Our computer-assisted legal research products are exclusively digital, not print.

We compete directly with West Publishing in the Washington legal CD–ROM business. To a lesser extent, we compete with Michie Publishing, the Reed-Elsevier subsidiary, which publishes a CD–ROM for Washington. Additionally, we have a somewhat unusual short-term contract with Lawyers Cooperative Publishing (''LCP'') to produce headnotes that are used in their Official Washington Reports. Given these facts, I have been in a unique position to observe the state of the Washington legal publishing market. My comments are based on six years of first-hand experience competing with the largest legal publishers in the United States.

In a nutshell, I feel that the proposed final judgment not only will do nothing to preserve competition in Washington State, but that in fact it will reduce competition and do grave damage to the market for legal materials in Washington. This is true even though Washington was one of three states given the option to rebid their official court reports. The acquisition eliminates competition for enhanced case law reports in Washington, and will adversely impact the market for competing electronic products. I strongly urge the Department of Justice to withdraw its consent to the Proposed Final Judgment and deny the Thomson Corporation permission to acquire West Publishing. Failing that, the DOJ should at a minimum require Thomson to divest Lawyers Cooperative Publishing as a precondition of the purchase of West.

The following pages detail my objections to the Proposed Final Judgment and the proposed pagination licensing agreement. While my focus in this letter is primarily on Washington State, my objections also extend to matters of a more national scope.

I. Thomson and West Competed Vigorously for the Contract to Publish the Official Washington State Reports

As the Department of Justice's filing in the Federal Register on July 5, 1996 recognizes, Washington State is one of at least nine markets in which the HHI measure of market concentration presumptively raises antitrust concerns. The post-merger HHI increase in Washington (996) is substantially above the number (100) that raises the presumption. As I indicated in a previous letter to DOJ, the Washington State legal publishing market is pervaded with anti-competitive practices that include predatory pricing, exclusive contracts for certain legal materials, and tying agreements. The DOJ consent decree does little or nothing to prevent or ameliorate these practices. A brief review of recent developments in the Washington State legal publishing business made these facts clear.

a.) Washington Case Law Was Published by the State From 1982–1995

A Washington state agency known as the Commission on Supreme Court Reports published the printed Washington case law from 1982 to June 30, 1995. The printed advance sheet annual subscription to the Washington Reports were sold by the Commission at an ''an cost'' basis: $52.50 per year for the Supreme Court Reports and $52.50 per year for the Court of Appeals Reports in advance sheet form. Bound volumes cost $19.50 for ''current volumes'' (recently issued volumes) and $22.50 for older volumes.

b.) The Official Washington Reports Were Privatized in 1995

In early 1995, in response to funding cuts by the 1994 Legislature, the Washington Supreme Court decided to privatize the publication of the Washington case law. The Office of the Administrator for the Courts in Olympia, WA issued RFP #95055, which called for bids on a combined print and CD–ROM version of the Official Washington Reports. Both West Publishing and Lawyers Cooperative Publishing (''LCP''), a Thomson subsidiary, bid on the job.

c.) ''Cost Comparison'' Analysis by Court Reveals West/Thomson Competition

Lawyers Cooperative Publishing and West Publishing submitted the two lowest bids for the print version of the Washington case law. I enclose a sheet labelled ''Cost Comparison'' that breaks down each vendor's response to the RFP. The Cost Comparison information was compiled by the Office of the Administrator for the Courts. Their telephone number in Olympia, Washington is (360) 705–5239.

d.) West Cut Prices by Over $40.00 per Volume in Attempt To Win Washington Bid

At the time of the RFP, West published a competing set of printed Washington case law volumes titled ''Washington Reporter.'' The cost for West's volumes was and is $57.62 per bound volume and $97.38 for advance sheets. Compare that price with their bid of $17.50 plus $2.75 shipping for bound volumes in response to the RFP.

e.) Competition led to substantially lower consumer prices in Washington

The successful vendor on the RFP was Thomason subsidiary Lawyers Cooperative Publishing (''LCP''), who began publishing the Official Washington Reports effective July 1, 1995. As the Cost Comparison shows, there was significant competition between LCP and West. As a result of this competition, Washington lawyers and law firms are now paying $9.00 per year less for advance sheets and $5.50 less for bound volumes than they were when the Reports were published by the State.

II. The Acquisition Eliminates ''Enhanced Case Law'' Print Competition in Washington, and Thereby Significantly Undermines Competing Electronic Publications

a.) The Official Publisher May Claim Copyright in the Washington Headnotes

Under the terms of the contract to publish the Washington Reports, the official publisher is allowed to claim copyright in the headnotes produced for the State of Washington. The DOJ recognizes that ''. . . a sophisticated editorial staff would be needed to create the headnotes and summaries . . .'' (*See* Complaint, at ¶ 31.) From first-hand experience, I know that headnotes and case summaries are both useful and expensive to produce.

b.) The printed Official Reports control the electronic market

My company entered into a short-term contract with Lawyers Cooperative Publishing whereby we draft the official headnotes for the Washington case law and fax them to the Reporter of Decisions in Olympia, WA. The headnotes are then reviewed by the Washington Supreme Court and Court of Appeals, finalized, and returned to us. We then send the headnotes by e-mail to LCP. Under the terms of our contract with LCP, LCP retains the copyright to the headnotes, while we retain the right to use these headnotes in our electronic products during the term of the contract. LCP paid us a flat sum for the time period in question. The contract ends in mid-December, 1996. This will leave Thomson/West the only vendor of enhanced case law for Washington.

The upshot is that a competing publisher (my company, CD Law) is now authoring and using the official Washington headnotes in our *unofficial CD–ROM product,* while the copyright to the headnotes is held by LCP and used in their *official print product.* The presence of the official Washington headnotes in our product is a definite sales advantage for my company. We have been told by LCP executives that their company is in a dilemma as to how to market a competing CD–ROM product against us (as they are required to do by their contract with the State of Washington) given this factual situation.

I believe that Thomson/West will seek to gain a competitive advantage against us by not renewing our contract. We will be forced to attempt to compete with Thomson/West with an unenhanced case law product. As the

DOJ recognizes, ''[U]nenhanced case law publications . . . are not substitutes for enhanced case law.'' Complaint, at ¶ 24. The practical lesson is this: Whoever controls the right to publish the Official Washington Reports also controls the headnotes. Whoever controls the headnotes can, to a large degree, control the marketplace in the CD–ROM Market.

c. There are virtually no publishers capable of competing with West/Thomson

If the West/Thomson merger is approved, there will be no competition for enhanced case law in Washington. Should the Washington Supreme Court decide to exercise its option to rebid the Washington Reports, there is only one other publisher that has the expertise, printing presses, capital, trained staff, and know-how to produce an enhanced case law product for Washington: Michie Publishing Company.

However, Michie has met with very limited success in Washington with is CD–ROM case law product. And according to Kendall Svengalis' ''Legal Information Buyer's Guide & Reference Manual,'' Michie publishes enhanced print *case law* products in a tiny handful of states, far fewer than the combined West/Thomson entity. From what I can determine, I believe it is unlikely that Michie would bid on the Washington Reports should they be rebid, or be the successful vendor if they did bid. Similarly, the other company that bid on the Washington RFP, Darby Publishing of Georgia, publishes enhanced case law in only one state. Both Michie and Darby's bids were significantly higher than West and LCP's.

My company, CD Law, is certainly not a potential competitor with West/Thomson for the official printed Washington Reports. We simply do not have the ability to produce a competitively priced print product. While we were the lowest bidder on the CD–ROM side of the Washington RFP, we were far and away the highest bidder on the print side. It is not reasonable to assume that a company the size of mine can compete effectively with a company like West/Thomson for printed enhanced case law legal materials. Both West and Thomson enjoy enormous economies of scale in producing numerous print publications that cannot be duplicated by smaller publishers like CD Law. If the acquisition is permitted to go through, there would be no effective check on Thomson's ability to engage in below-cost pricing and eventually to charge monopoly prices for its products.

d. Print concentration will destroy competing digital products

Given these facts, it is a foregone conclusion that West/Thomson will control the market for enhanced case law materials in Washington. The only remaining competitor will be my company, CD Law, whose CD–ROM product will lack headnotes and case summaries, and Michie, who has to my knowledge sold very few, if any, of its CD–ROM product for Washington State. As the DOJ pointed out in ¶ 22 of its Complaint, ''Full-text searching of primary law on an online legal research service or a CD–ROM is a partial substitute for the enhanced primary law materials sold by each of the parties. It is not a good substitute, for most users and most uses, because full text searching does not provide users with the editorial analysis of the West or Thomson enhanced primary law products.'' (Emphasis added.)

III. Predatory Practices Will Continue Unabated With This Final Judgment

a. Exclusive Contracts

Since 1963, West Publishing has enjoyed an exclusive contract with the Washington Committee on Pattern Jury Instructions, which is charged with publishing our State's Jury Instructions. West used the threat of litigation to force the Washington State Bar Association (''WSBA'') to remove the Washington Pattern Jury Instructions from the WSBA's ''LAW BBS,'' a Bulletin Board Service run by the WSBA that contains miscellaneous Washington legal materials to the Bar and to the public. When my company approached West Publishing for a license to reproduce these materials, West offered the materials to my company for $7,000 plus $3,500 in ''annual fees.'' I enclose a letter from James Schatz, West's counsel, as Exhibit Two.

As Schatz's letter indicates, West would *not* agree to license the notes, comments or other materials written by the Committee. It is these analytical materials, none of which were written or enhanced by West, that make the Pattern Jury Instructions useful. Interestingly, West sales representatives have sent out mailings indicating that *they give* away the Washington Pattern Jury Instructions *without charge* to CD–ROM subscribers (see copy attached as Exhibit Three).

West's proposed $10,500 license for the Washington Pattern Jury Instruction contains about 800,000 bytes of data or about 400 pages, which easily fits on to one floppy disk. If this is indicative of the licensing agreements that we can expect from the new West/Thomson consortium, I think that ''higher prices and reduced product quality'' noted in the Competitive Impact Statement has been vastly understated.

West Publishing also paid $25,000 to purchase an exclusive contract to republish Washington Jury Verdicts. The sum was paid to a Washington company called Jury Verdicts Northwest. These are just two examples of exclusive contracts paid for by monopoly profits.

b. Predatory Pricing and Tying Practices

West charges $30 per month for updates to its Washington case law CD–ROM. I believe that this is one of the lowest charges in the United States by West and that this figure is below their cost of production. West also waives monthly access charges to its online service, Westlaw, for its Washington CD–ROM subscribers. Finally, West has recently announced that effective April 1, 1996, it will provide access to the latest Washington case law and statutes ''*at no extra charge.*'' To quote the direct mail piece. ''[T]he new online update service comes with no increase in your regular subscription charge.'' See copy of mailing, attached as Exhibit Four. Ordinarily, West charges on the order of $175 per hour to access these same materials. This is yet another indication of below-cost pricing.

The practice of tying print, CD–ROM, and online services together at or below cost make it very difficult for smaller publishers to compete in the market place. I have no reason to believe that the tying practices, below cost and/or predatory pricing now engaged in by West will be improved after the Thomson takeover.

The Department of Justice and the Attorney General of the State of Washington have done nothing in the Proposed Final Judgment to address these concerns, all of which were documented in previous filings with the Department of Justice.

c. Meaningless Divestiture Assets in Washington

Thomson was required to divest the ''Washington Trial Handbook'' as part of the consent decree. Evidently, this is a Bancroft Witney publication. Before I started CD Law, I practiced law in Seattle for six years. I never once heard of this publication or used it. In the nearly seven years I've been in the legal publishing business I have never seen this title on anyone's bookshelf. It is not in any sense a meaningful divestiture item and will do nothing to preserve competition in Washington State.

IV. Other Concerns

I have other concerns with the proposed consent decree that are less provincial. The fact that DOJ required West to license its pagination is fine, but the cost ($.09 per 1.000 characters in the first year) is prohibitive for all but the biggest publishers. The fact that the pagination license agreement prevents the licensee from disputing copyright claims held by West/Thomson is odious. The fact that arbitration is held in Minnesota if disputes arise under the proposed license gives Thomson an unfair home advantage.

The root of my objection to the proposed licensing agreement is that the fact remains that there is great uncertainty in the validity of the West pagination copyright. I believe that putting such an expensive premium on what the Department of Justice evidently does not itself believe to be a valid copyright will result in few, if any, pagination licenses being issued. It is therefore a meaningless gesture.

In my opinion, the Department of Justice should have litigated this proposed acquisition. The DOJ amicus brief filed in the *Bender v. West* action in the Southern District of New York is indicative that someone at DOJ wanted to litigate one or more of the issues presented in this merger/acquisition. As indicated in the DOJ filing in the Federal Register on July 5, 1996, the Antitrust Division is free to withdraw its consent to the proposed Final Judgment, and I urge it to do so now.

V. Conclusion

If I were to suggest one single action that would allay most if not all of my concerns, it would be to require the complete divestiture of Lawyers Cooperative Publishing from the proposed West/Thomson conglomerate. That would have the practical effect of requiring the two biggest state law publishers in the United States to continue to do what they have done in the past: compete vigorously, to the great advantage of the American legal community and citizens.

Sincerely,

Scott Wetzel

Enclosures

This chart could not be reprinted in the Federal Register, however, they may be inspected in Suite 215, U.S. Department of Justice, Legal Procedures Unit, 325 7th St., N.W., Washington, D.C. at (202) 514–2481 and at the Office of the Clerk of the United States District Court for the District of Columbia.

Schatz Paquin

Lockridge Grindal & Holstein P.L.L.P.

May 10, 1996

VIA FACSIMILE #206/624–8458

Mr. Scott Wetzel,

CD Law, Inc., Suite 1610, 1900 Second Avenue, Seattle, WA 98104

Dear Scott: West has now had a chance to consider your request and is willing to grant CD Law a license to include the civil and criminal jury instructions contained in its *Washington Pattern Jury Instructions* publications on CD Law's Washington CD–ROM product. This would not include the notes, comments or any other contents of such publications. West would be willing to provide the jury instructions to CD Law in electronic form (800,000 plus characters), and to provide complete new electronic forms (i.e., all jury instructions whether or not changed) every time a pocket part (containing new or revised jury instructions) or a new edition of either publication is published. West would be willing to grant this license for an initial fee of $7,000 and annual fees of $3,500 over a reasonable term, all subject to reasonable mutually-agreed contract terms.

If you are interested in pursuing this matter, please get back to me with any other specific contract details you desire such as length of agreement, any timing details, etc. I look forward to hearing from you.

Very truly yours,

Schatz Paquin

Lockridge Grindal & Holstein P.L.L.P.

James E. Schatz.

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Broad and Cassel

Attorneys at Law

August 27, 1996

Mr. Craig W. Conrath,

Chief, Merger Task Force, Antitrust Division, United States Department of Justice, 1401 H Street, N.W., Suite 4000, Washington, DC 20530

Re: Proposed Consent Decree Between *United States of America v. The Thompson Corporation and West Publishing Company* Publication dated July 5, 1996, Our File No. 17666.0001

Dear Mr. Conrath: This firm represents Oasis Publishing Company, Inc. Oasis is a Nebraska corporation, whose business is the publication of court decisions and statutes on CD–ROM. Pursuant to Section V, Oasis notifies you of its opposition to the proposed Consent Decree for two (2) primary reasons. First, Oasis objects to the decree in that such decree would add legitimacy to West's assertion, contrary both to age-old precedent and to recent trends, that its copyrights extend to the pagination of its reports. Oasis submits to you, as it is currently arguing in the United States Eighth Circuit Court of Appeal, that West does not have such a copyright. Unfortunately, the proposed license agreement that is part of the settlement would inappropriately require a licensee to recognize West's claim of copyright to the pagination, as a condition of such license.

Second, the proposed licensing fee caps set forth in the Consent Decree are prohibitive to competitors like Oasis, whose market niche would primarily be the users of low-cost, unenhanced, primary law materials. For example, in Florida during 1995, West published Volumes 647 through 668 of *Florida Cases*. The approximate total number of pages for that year was 7,787, with each page containing roughly 3,710 characters. Assuming a similar number of pages and characters for each year since the beginning of *Florida Cases,* 1949, the *annual* license fee for this information could be as high as $2,566,247.00 (at $.09 per 1,000 characters) or $3,706,846.20 (at $.13 per 1,000 characters)—a ridiculously and prohibitively excessive amount. These estimates show, at a minimum, that entry into the market at a level which would permit competition with West/Thomson would be a monumental hurdle that few, if any, could overcome, based on the proposed maximum licensing fees set forth in the proposed consent decree.

On the basis set forth herein, Oasis urges withdrawal of the Consent Decree, and submits that such decree would create an improper guise of legitimacy for West's continued monopolistic conduct and an illusory solution to the significant barrier to market entry that currently exists as a result of West's claims. Oasis respectfully suggests that any settlement should require Thomson/West to stop asserting any claim of copyright to the pagination of its reporters, as a condition to the Merger.

Sincerely,

Jose I. Rojas, P.A.,

For the Firm, Attorneys for Oasis Publishing Company.

Broad and Cassel

Attorneys at Law

August 30, 1996.

Mr. Craig W. Conrath,

Chief, Merger Task Force, Antitrust Division, United States Department of Justice, 1401 H Street, N.W., Suite 4000, Washington, D.C. 20530.

Re: *Oasis Publishing Company* v. *West Publishing Company,* Our File No. 17666.0001

Dear Mr. Conrath: This letter is sent in follow-up to our letter dated August 27, 1996 for the purpose of clarifying the calculations set forth therein.

The Consent decree requires that the license fee be paid *each year.* Therefore, based again on 1995, wherein a total of 7,787 pages were published in *Florida Cases,* and which contained pages including an average of 3,710 characters per page, the license fee (for data needed from 1949 through 1995) would total approximately $119,603.22 (at $.09 per 1000 characters) or $172,760 per year (at $.13 per 1000 characters), each year. Moreover, this fee paid to West would increase every year as more and more volumes are added. As stated in our August 27, 1996 letter, this amount is prohibitive to a company like Oasis, and would not only discourage competition, but effectively prohibit it.

If you have any questions, or need additional information, please call.

Very truly yours,

Jose I. Rojas, P.A.,

For the Firm.

American Association of Legal Publishers

September 3, 1996.

Mr. Craig Conrath, Esq.,

Chief, Merger Task Force, Antitrust Division, U.S. Department of Justice, Suite 4800, 1401 H Street, NW, Washington, DC 20530

Re: Pending Settlement of West/Thomson Merger

Dear Mr. Conrath: The American Association of Legal Publishers (AALP) submits these comments in response to the July 5, 1996 announcement in the Federal Register for comments on the proposed settlement of the merger of West and Thomson Publishing Companies. We are limiting our comments to two barriers to competition of great concern to AALP members: (1) the unavailability of an archive of judicial decisions as discussed in paragraph 30 of the Department's complaint in this matter, and (2) the proposed license agreement to make West's internal pagination in an opinion available to other legal publishers.

AALP is a trade association of small legal publishers and creators of computer software used in electronic legal research materials. Our members produce products in print, CD and online. A copy of our Statement of Principles is attached.

Many of our members have submitted statements directly to your office. One member, International Compu Research, Inc. is submitting its statement herewith. It is Exhibit 1 hereto.

Access to an Archive of Judicial Opinions

To produce a meaningful and useful primary or secondary legal research product, a publisher must have access to an archive of judicial decisions. Although there is no agreement as to how extensive the archive should be, most publishers seek as much depth as possible and consider 35 years to be a minimum. For state and federal supreme courts, a complete archive of all judicial opinions issued is considered desirable while a less complete archive of lower court opinions may be acceptable. However, as long as there is one publisher offering a complete archive of all opinions issued by a particular court, competitors offering less are at a severe disadvantage and must sell their product for a lower price.

It is widely believed that anyone can easily obtain judicial opinions. For example, Judge Gladys Kessler of the Federal District Court for the District of Columbia in her January 16, 1996 memorandum opinion in the case of *Tax Analysts* v. *U.S. Department of Justice,* 913 F. Supp 599 (D.D.C. 1996).

''And as Defendants properly point out, the public may still obtain public-domain material—i.e., non-West formatted material—from the government directly for nominal copying costs (e.g. through the clerk's office in a courthouse).'' 913 F. Supp 605.

In this quote, the ''Defendants'' to which Judge Kessler is referring are the Civil Division of the U.S. Department of Justice and defendant-intervenor West Publishing Company.

In paragraph 30 of its complaint in this matter, the Antitrust Division of the Department of Justice states that ''Past and/or current opinions simply are not available from many courts, and in many others, obtaining access is costly and time-consuming.'' Since reading this paragraph, AALP has spent considerable time, energy and funds trying to obtain a copy of an original decision issued by judges in a specific case in the following federal district courts:

Southern District of New York
District of New Jersey
District of Delaware
Eastern District of Pennsylvania
Middle District of Pennsylvania, Erie Division
Western District of Pennsylvania
District of Maryland
District of Columbia
Eastern District of Virginia, Richmond Division
Eastern District of Virginia, Newport News Division
Eastern District of South Carolina, Florence Division
Northern District of Illinois, Eastern Division
Southern District of Iowa, Central Division

There are three ways to obtain materials from closed cases. They are to purchase them from a commercial search service, have them sent to the federal district court in which the case was venued and go to the federal records center in which the file is stored. AALP tested all three methods.

Opinions from three closed files were ordered from Prentice-Hall's document location service on August 12, 1996. One of the opinions from a federal district court in Illinois was received in about 18 days at a cost of $65.50 for a 6 page opinion. The other two decisions requested from the federal district courts in South Carolina and Iowa were not received by September 3rd and AALP was advised it would take an additional one to three weeks to obtain these cases. See Affidavit A attached.

Five files were requested from the Federal District Court of Maryland in Baltimore. Only one file was ever available. AALP was not told until almost three weeks after the request was made that the other four files were in the archives in Philadelphia. See Affidavit B attached.

A total of 10 cases were reviewed at Federal Records Centers (FRC). Three cases reviewed at the FRC in New Jersey were from the Federal District Court of New Jersey and the desired opinions were available. However, the FRC in New Jersey also stores closed files from federal courts in New York and they constitute a significant portion of reported cases. This FRC only permits a visitor to review 3 closed files per day, so any effort to obtain many cases will take a very long time, perhaps years, or have to involve many persons working simultaneously. See Affidavit C attached. Seven closed files from federal district courts in Virginia, Delaware and Pennsylvania were reviewed at the FRC in Philadelphia and two of the files did not contain the desired opinion. In one case, none of the materials concerned the case except for a cover sheet. See Affidavit D attached.

Two cases had to be obtained from federal archives in New York and Philadelphia and those efforts were successful, see Affidavits B and E. The minimum charge is $6 per order and beyond that the cost is .25 per page copied.

Major impediments exist in obtaining the closed file numbers, called accession numbers, needed to access a case located in a federal records center. District Courts in Washington, DC, Pittsburgh and New York City only supply this information by mail or to visitors. In several cases the information from F. Supp was incorrect, so the court could not provide AALP with an accession number. See Affidavits F, G and H. The Eastern Division of the Federal Districe Court of Philadelphia took almost 3 weeks to provide an accession number and even then was not sure it was correct. See Affidavit I. It also can take several phone calls before the correct person is reached, is available and finds the required numbers.

Further, when first investigating how to obtain access to closed files, AALP received a wide variety of information, much of which was false or confusing. Affidavits L through T report on these efforts concerning nine other district courts not discussed nor listed above.

Proposed License Agreement

AALP is strongly opposed to the proposed licensing agreement for several reasons. First and foremost the license agreement only covers access to West's internal page numbers. However, given the difficulties described above in obtain judicial opinions and the failure of the Department to remedy this situation, page numbers are a secondary concern. A page number is meaningless if one does not have the text to put on the page.

If by some miracle a publisher obtained the text, one must then confront a licensing agreement which, as proposed, could serve as a textbook example of a contract of adhesion. The agreement in its entirety favors West and emasculates the licensee. Among the most onerous portions are the following:

Article 1 The purpose of the license—to lower barriers to competition—is totally undermined by only licensing original compilations and West's right to determine what is an original compilation. This would eliminate any possibility of a licensee's product competing with an existing West product, such as Oasis Publishing Company's attempt to create a Florida product of judicial decisions. Competition occurs between an existing product and a new version of it, but this agreement gives West the authority not to license a competing product.

The list of reporters subject to the license should include all West state reporters where it claims a proprietary right or does not. For each state reporter listed in the license agreement, West should state whether or not it claims a proprietary right.

A licensee should be required to disclose to West only the most general ideas about the proposed use of the licensed materials. As written, Section 1.03 requires the licensee to provide the largest legal publisher in the world with advance notice of a new product, just the type of information a company wants to keep secret. Given that West always wants to keep secret everything it does or signs, it can certainly understand another publisher's reluctance to tell West its new product plans. Instead, the agreement should provide that the license is for the use of the licensed materials in professional quality materials to be used by the legal profession and others doing research. Products lacking an appropriate professional approach will be subject to revocation of the license with an arbitration in the home state of the licensee or in Washington, DC if revocation is contested.

Section 2.03 *License Fees*—The fee is too high for a small publisher to afford. It is clear to AALP that this fee was developed without an understanding of the economics of legal publishing. Mr. Conrath called me in late June to discuss the proposed settlement and said ''the fee is less than Lexis pays West''. That may be true, but Lexis is a rich giant compared to 99 percent of all other legal publishers. If the proposed fees are not reduced by at least 75 percent, AALP members have told me that no publisher will be able to afford them.

Further, the fee should be paid by a publisher only once and not each year for each product, so if a publisher issues print and CD products with a case, he pays two license fees per year. There should be no license agreement for a publisher using fewer than 5,000 opinions. Royalty payments should be payable upon publication for all licensees.

Section 3.01 *Copyrights*. This section requires competing publishers to renounce their First Amendment right to express their opinions about the Licensor's alleged copyright during the term of the license. AALP cannot believe the U.S. Department of Justice would consent to or recommend such an onerous provision, particularly one which limits a person's constitutionally-protected rights under any circumstances, much less in connection with a license agreement for page numbers to judicial opinions, even opinions which discuss and uphold the First Amendment. In the grand scheme of life in a democracy, access to West's internal page numbers are trivial compared to the First Amendment, so the quid pro quo proposed is all the more surreal.

Article 4 AALP opposes all efforts to make the agreement confidential. Since the basic terms are going to be approved by the federal court reviewing this matter, the agreement is already public except for the individual details concerning each licensee. Under no circumstances should a licensee who consents to a secret agreement receive a better deal than one who does not.

Section 6.07 *Arbitration.* This agreement is being issued under the supervision of the U.S. Department of Justice and is being reviewed and approved by the Federal Court for the District of Columbia, both entities located in Washington, D.C. Thus, all arbitration concerning this agreement should occur in Washington, D.C. under the auspices of the American Arbitration Association and should consist of a three person panel, one each selected by the Licensee and Licensor and one selected by the antitrust division of the Department. Under no circumstances should arbitration occur in Minnesota, West's home state and where it exerts a major influence over the business and legal community and the employment opportunities and financial security of thousands of families. If Washington, DC is not acceptable, arbitration should occur in the home state of the licensee.

For all of the reasons listed above, AALP requests the Department of Justice to change the terms of the proposed settlement to truly lower barriers to competition in the legal publishing industry.

Sincerely,

Eleanor J. Lewis.

Attachments

American Association of Legal Publishers

Statement of Principles

1. Our legal system depends on prompt, unrestricted publication and dissemination of the law.

2. The members of the American Association of Legal Publishers have joined together to support the common interests of legal publishers to promote and encourage publication and dissemination of the primary sources of the law upon which our legal system depends, as well as publication and dissemination of information and guidance about the law.

3. Publication and dissemination of the law should not favor one medium (such as print) over another (such as electronic).

4. The judicial opinions, statutes, regulations, and administrative rulings of the United States, and each of its states and subdivisions, are the property of the public. Notices relating to such documents, and all amendments to such documents, are also the property of the public.

5. All judicial opinions, statutes, regulations, and administrative rulings, and all notices and amendments relating thereto, should be made easily available to all, on an equal basis, by the originating court, legislature, or agency, with only such charges as are necessary to defray the actual costs of dissemination.

Steps To Carry Out the Principles

1. Judicial opinions, statutes, regulations, and administrative rulings should be identified by means of a vendor-neutral, public-domain citation system.

2. The official version of a judicial opinion, statute, regulation, or administrative ruling should be the version first released to the public by enrolling clerks and similar judicial and administrative officers, either in print or electronically. Changes should thereafter be made only by means of written orders filed with the same office as the original judicial opinion, statute, regulation, or ruling.

3. Courts and other agencies should number the paragraphs in the opinions, rulings, and similar legal documents that they issue, in accordance with an agreed set of rules, so as to facilitate pinpoint references to those opinions, rulings, and similar documents.

This letter could not be reprinted in the Federal Register, however, they may be inspected in Suite 215, U.S. Department of Justice, Legal Procedures Unit, 325 7th St., N.W., Washington, D.C. at (202) 514–2481 and at the Office of the Clerk of the United States District Court for the District of Columbia.

State of Maryland

County of Montgomery

I, Eleanor J. Lewis, upon my oath state

1. I am the Executive Secretary of the American Association of Legal Publishers.

2. On Monday, August 12, 1996, I called Prentice Hall Legal and Financial Services in Washington, DC, 292/408–3120, and spoke with Mr. Freddie Collins. I ordered a copy of the judge's original opinion from three closed federal district court cases which I had selected from various volumes of Federal Supplement. The three opinions I wanted were:

1. Opinion of December 19, 1961 in the case of Rakowsky v. U.S.A., case number 59 C 984 in the US District Court of Illinois, Northern District, Eastern Division.

2. Opinion of November 5, 1962 in the case of Layton James v. Atlantic Coast Line Railroad Company, Civ. A. No. 7854 in the US District Court of South Carolina, Eastern District, Florence Division.

3. Opinion of February 2, 1962 in the case of John Moeller et als, V. ICC, USA, et als, Civ. No. 4–1166 in the US District Court of Iowa, Southern District, Central Division.

3. On August 12th I received the attached 3 pages confirming my order and estimating I would receive the requested materials by August 14th.

4. On August 27, 1996 I recieved the requested Illinois decision and a bill for $65.50 (copy attached) for these materials.

5. During the last two weeks of August I called Mr. Collins periodically to determine the status of my order. I spoke to Mr. Collins or Ms. Gloria Barry and was told that in South Carolina, ''the correspondence traveled to Florence to get the decision but it wasn't there so she was going to Columbia, SC to obtain it.'' I was told on August 29th by Mr. Collins that the correspondent had determined the South Carolina case was in the archives in Atlanta and it would take another 7–10 days to obtain it.

I was told by Ms. Barry the Iowa opinion was unavailable as of August 30th; it would take another 3–4 weeks to obtain it.

6. I understand if any statements made by me are knowingly false, I am subject to punishment.

Eleanor J. Lewis,

Sworn to and subscribed before me this 3rd day of September 1996.

State of Maryland,

County of Montgomery.

Karen Klitsch,

Expires 7/1/97.

CSC Networks, Prentice Hall Legal and Financial Services

Status Report

Date: August 12, 1996.
To: Ms. Eleanor Lewis, American Association of Legal Publishers.
From: Freddie Collins/plb.
Fax No.: 301–652–2970.
Order #: 050280.
Client Ref: Not Provided.
Pages: 1.

Re: Interstate Commerce Commission USA, et al.

The following is a schedule of an estimated turn around for copy(s) ordered on the above named subject(s). Should you have any questions regarding these requests, please feel free to contact us.

IA U.S. District Court, August 14, 1996.

This fax is also to verify the spelling of the debtor(s) and the jurisdiction(s).

CSC Networks, Prentice Hall Legal and Financial Services

Status Report

Date: August 12, 1996.
To: Ms. Eleanor Lewis, American Association of Legal Publishers.
From: Freddie Collins/plb.
Fax No.: 301–652–2970.
Order #: 050280.
Client Ref: Not Provided.
Pages: 1.

Re: USA.

The following is a schedule of an estimated turn around for copy(s) ordered on the above named subject(s). Should you have any questions regarding these requests, please feel free to contact us.

IA U.S. District Court, August 14, 1996.

This fax is also to verify the spelling of the debtor(s) and the jurisdiction(s).

CSC Networks

Status Report

Date: August 12, 1996.
To: Ms. Eleanor Lewis, American Association Of Legal Publishers.
From: Freddie Collins/plb.
Fax No: 301–652–2970.
Order #: 050280.
Client Ref.: Not provided.

Pages: 1.

Re: Atlantic Coast Line Railroad

The following is a schedule of an estimated turn around for copy(s) ordered on the above named subject(s). Should you have any questions regarding these requests, please feel free to contact us.

SC U.S. District Court, August 14, 1996.

This fax is also to verify the spelling of the debtor(s) and the jurisdiction(s).

CSC Networks

Description	Amount
Client Reference: Not Provided	
Our Order Number: 050280 015	
Order Date: 08/12/96	
ILUCOO UCC WORK IN ILLINOIS, U.S. DISTRICT COURT ...	$1.00
ILUDSC COUNTY FEE DISBURSEMENT ...	8.00
ILUC83 IN-HOUSE UCC COPIES—PER PAGE ...	1.50
ILU36S CORRESPONDENT FEE—COPY REQUEST ...	20.00
ILUC69 SERVICE FEE-COPY REQUEST ...	20.00
IL601 OVERNIGHT DELIVERY ...	16.00

Thank you for using CSC Networks.

Freddie Collins.

State of Maryland

County of Montgomery

I, Eleanor J. Lewis, upon my oath state:

1. I am the Executive Director of the American Association of Legal Publishers.

2. On August 9, 1996, I sent the attached letter and a check for $125 to the Federal District Court for the District of Maryland, requesting access to 5 closed cases which I had selected from various volumes of Federal Supplement.

3. On August 19th, I received a phone message from Laverne Haynes of the Court saying the ''case you want, number 77–1217, is at the Court for your review.''

4. On August 20, I called 410/962–2600 and asked to speak to Ms. Haynes; after several transfers I ended up in the Bankruptcy Court. The man there told me there is something wrong with the phone system and people on hold for the District Court frequently end up in the Bankruptcy Court. He told me to hang up and call again which I did. This time I reached Ms. Haynes' voice mail and I left a message explaining I requested 5 cases and wanted to review all of them during the same visit.

5. Ms. Haynes called me back on August 20th and left a message that she did not know when she called me that I had requested 5 cases, but now she had my letter in front of her. She said the ''other cases are very old and will take some time to get; they may not let them out of the archives because of their age; we will call you when we know more about this.'' I never again heard from Ms. Haynes or any one else concerning this matter.

6. On August 29, 1996 I went to the Clerk's Office of the Federal District Court in Baltimore to review the files I had requested. Only one case was there; the 1977 case of Warren Slater 6366 v. Ralph William. I reviewed the case and found the opinion in the file which I copied at a cost of .50 per page. I also paid $25 for having the file sent to the Court.

7. I asked the woman helping me, Ms. Evaleen Gibbons, when I could see the other 4 cases I had requested. She said they were very old cases and were in the archives; they will not come to the Court. She said the employee in the clerk's office dealing with the archives rotates weekly, but as far as she knew, the old cases will never be sent to the Court. She called and let me speak to the Archives about these cases and they told me I must provide them with the case name and file number and they will tell me the cost of the materials I want. I can then send them a check for minimum of $6.00 and receive the materials by mail.

I understand if any statements made by me are knowingly false, I am subject to punishment.

Eleanor J. Lewis,

Sworn to and Subscribed before me this 3rd day of September, 1996.

State of Maryland,

County of Montgomery.

Karen Klitsch,

Expires 7/1/97.

Eleanor J. Lewis, Esq.

August 9, 1996.

Clerk,

U.S. District Court, 101 West Lombard Street, Baltimore, MD 21201

Re: Obtaining Access To Old Cases

Dear Sir or Madam: Enclosed is a check for $125 to cover the cost of your obtaining from the Federal Records Center 5 closed case files which I will then review in your offices. The files I want to review are:

1. Englehardt v. United States of America et al., Civ. A. No. 3276, decided on January 18, 1947 in the Federal District Court of Maryland.

2. David Nathaniel Harris v. Warden Maryland Penitentiary, Civ. A. No. 13030, decided on January 17, 1962 by Judge Chesnut in the Federal District Court of Maryland, Civil Division.

3. Royal Indemnity Company v. Aetna Insurance Company, Civ. A. No. 13970, decided on July 15, 1964 by Judge Winter in the Federal District Court of Maryland.

4. Mercantile-Safe Deposit and Trust Co. v. United States of America, Civ. No. 15254, decided on June 1, 1966 by Judge Thomsen in the Federal District of Maryland.

5. Warren Slater 6366 v. Ralph William, Civ. No. T–77-1217, decided on November 3, 1977 by Senior Judge Thomsen in the Federal District Court of Maryland.

I am eager to review these files as soon as possible so your prompt cooperation in this matter is appreciated.

Sincerely,

Eleanor J. Lewis

State of Maryland

County of Montgomery

I, Eleanor J. Lewis, upon my oath state:

1. I am the Executive Secretary of the American Association of Legal Publishers.

2. On Wednesday, August 14, 1996, I called the Newark Office of the Federal District Court for New Jersey to request access to 3 closed case files. I was told to call the Court's Trenton Office at 609/989–2065.

3. I called Trenton and made my request to the woman who answered the phone. I request 3 cases in which opinions were rendered in 1965, 1979, and 1986. She said ''these are old cases and not on the computer.'' I asked her what were the earliest cases on the computer and she said ''1991.'' She took all identifying information, case name and docket number, about the cases and me and said she would call me back. When I had not heard from her in over 3 hours, I again called Trenton.

4. I spoke with Mark and told him I wanted accession numbers for 3 closed cases. He said just a minute and then started to find the information for the 1979 and 1986 cases on the computer. For the 1965 case, he left the phone to get a book and then returned and gave me the information. He said he was uncertain the information for the 1965 case was correct. He also warned me not to go to the Federal Records Center until they call and confirm they have the cases I want to review.

5. I called the Federal Records Center (FRC) in Bayonne, NJ at about 3:45 PM on August 14 to make an appointment to review the New Jersey cases. In an earlier call I had been told I could only review 3 files per visit. I provided them with the information Mark had given me for the cases.

6. On August 15th I received a call from Mrs. DePalma of the FRC informing me the FRC does not have the 1965 case. It has been sent to the Federal Archives office in New York City and I should call them, 202/337–1300.

7. On August 16th I called the Federal Archives in New York City and requested the judge's opinion in the 1965 case. I was told I either must go to their office in New York City or send them a letter with all the relevant information and a check for $6.00, their minimum charge per order. They charge for copying at the rate of .25 per page. I explained to the man that I might come in on Monday, August 19th, so he took the identifying information from me by phone and told me to call on Monday to confirm they have what I requested. If they do, I could come get it or obtain it by mail.

8. On August 16th I called Mark at the Trenton Office of the New Jersey Federal District Court and requested the identifying information for another closed NJ case so I will review 3 cases when I go to the FRC. He provided me with the information. I then called the FRC to request the case; they said it would be available to me on August 19th.

9. On August 19th, I drove to the FRC in Bayonne, NJ. It is a few miles from Exit 14A of the New Jersey Turnpike. I was shown to a table where the 3 cases I wanted were waiting for me. I went through each file and found the decision I wanted in each case and had copies made for .50 per page. The staff does the copying, one request at a time and then prepares a bill for each visitor. During the two hours I was there reviewing files, I observed there was always one employee, Mrs. DePalma, helping visitors who are

looking at files. This employee is also answering the phone, taking phone orders for records, copying files, preparing bills and obtaining payments. Very occasionally, a second staffer, Maureen, was helping Mrs. DePalma.

10. When I paid Maureen for my copies, I asked her again how many cases per visit I could review. She replied ''you are limited to 3 cases per day because we are so busy.'' I asked if I could see more cases per visit and she said ''No.''

11. On August 20th, I called the Federal Archives in New York City to obtain the decision of the 1965 case which was not at the FRC in Bayonne. I told the person who answered about my call on August 16th and that the decision would be at the desk waiting for me. The man, Greg Plunges, put me on hold and then returned to say it was not at the desk. He took the case information and said he would look for it and call me back. He called me back within an hour and told me he had the decision dated June 8, 1965. He instructed me how to send him the $6 check he must receive before he sends me the opinion. I mailed him the required letter and check on August 20th. I received a copy of the decision by mail on August 30th.

I understand if any statements made by me are knowingly false I am subject to punishment.

Eleanor J. Lewis.

Sworn to and Subscribed before me this 3rd day of September, 1996.

State of Maryland

County of Montgomery

I, Eleanor J. Lewis upon my oath state:

1. I am the Executive Director of the American Association of Legal Publishers.

2. On Wednesday, August 14, 1996, I called the Federal Records Center (FRC) in Philadelphia to make an appointment to see some closed files. I had selected these cases from various volumes of Federal Supplement and then called each federal district court in which they were filed to obtain the closed accession numbers. I was transferred to the phone of James Kent and I left a message on his voice mail. When I did not receive a return call within a few hours, I called twice more during the day and left a message asking how to make an appointment.

3. Late on August 14th, Mr. Kent left me a message explaining what I must do to obtain cases from the FRC and telling me to fax my response to the FRC. However, he did not provide me with the fax number.

4. I called Mr. Kent the evening of August 14th and left a message asking him to give me the fax number to which I should fax my response. He called me back on August 15th and provided the fax number. I faxed the list of cases I want to review to the FRC on August 15, 1996; a copy is attached. The cases I requested came from district courts in Delaware, Pennsylvania and Virginia.

5. I never received a response to my fax, so on August 20th, I called Mr. Kent. He said he had never received my fax and put me on hold. He then returned and said my fax had been received and the files were waiting for me at the FRC in Philadelphia. He said I should have been called and told they were available and would be available through August 30th. He gave me directions to get to the facility.

6. On August 29th I traveled to the FRC in Philadelphia. The building exterior does not have a street number or name, so I was not sure I was in the right place.

7. I was shown to a room where the 7 cases I had requested were in a pile. I examined each file, looking for the judge's opinion of the date specified in the Federal Supplement case I had selected. I found the opinions for case numbers 1, 3, 4, 5 and 7 in my memo.

For case number 2 in my memo, Wolkind v. Selph, filed in 1979 in the Federal District Court of Virginia, Eastern District, Richmond office I was given a file that contained 12 pages concerning the case, but did not include an opinion. Also in the file was a 26 page opinion from the Eastern District of Pennsylvania concerning a case related to the case of Brown v. Cameron-Brown, Civil Action #78–0838–R, venued in the Richmond Office of the Federal District Court of Virginia.

For case number 6 in my memo, Stewart Aviation Co. v. Piper Aircraft, filed in 1973 in the Federal District Court of Pennsylvania, Middle District, Scranton Office, the file I was given had the right name, but only contained a cover sheet concerning the case I wanted. All the other documents in the file were from a 1968 case between the same parties which was filed in the Federal District Court of West Virginia, Northern District. A copy of one of these documents is attached.

8. I then explained to David Weber, the FRC employee on duty, that I would probably need to look at thousands of old files and could they accommodate such a request. He said it would be easiest if I could group my requests in the order in which the cases were closed by each court, since they are closed in batches and each batch is filed together. By grouping them in such a manner, I would reduce the time needed to find the files. I explained that might not occur, since I am requesting cases from different courts in different states. He said they would try to accommodate my needs and I should start by requesting 50 cases at a time and provide them with as much advance notice as possible.

I understand if any statements made by me are knowingly false, I am subject to punishment.

Eleanor J. Lewis.

Sworn to and Subscribed before me this 3rd day of September 1996.

American Association of Legal Publishers

August 15, 1996.

To: James Kent, Federal Records Center, Philadelphia
From: Eleanor J. Lewis
Re: Obtaining Access To Closed Federal Court Files

I want to come to the Federal Records Center in Philadelphia and review and copy portions of the closed case files listed below. Please contact me by phone or fax to confirm you have these files available for my review, so I review them within the next 10 days.

Thank you for your cooperation in this matter.

1. Case File Number 76–2961
   Case Name: William Heigler v. William Gatter et al.
   FRC Accession Number: 021–830091
   Location Number: D–11–025–5–1
   Box Number 144
2. Case File Number 79–0311–R
   Case Name: Henry L. Wolkind v. Willard P. Selph
   Accession Number: 021–81–0037
   Location Number: E 3808576
   Box Number 13
3. Case File Number 88–692
   Case Name: Young v. West Coast
   Accession Number: 021–94–0049
   Location Number: E 4004546
   Box Number 45
4. Case File Number 4720
   Case Name: Grossman v. Cable Funding Corp
   Accession Number: 021–84–0006
   Location Number: 87301311
   Box: 2 through 5 of total of 48
5. Case File Number 76–37–NN
   Case Name: Peggie Ann King v. Gemini Food Services
   Accession Number: 021–81–0011, subgroup NNV
   New Location: E–30–065–2–1
   Series Description—CIV CS FLS (closed 1980)
   Box Number 3
6. Case File Number 73–717
   Case Name: Stewart Aviation Co. v. Piper Aircraft
   Accession Number: 021–77–0001
   Location Number: C–26–027–2–1
   Boxes: 112 and 113 of 117 boxes
7. Case File Number 80–86
   Case Name: Metropolitan Life Insurance Co. v. Debra P. McCall et als
   Accession Number: 021–87–0097
   Location Number: A0905353
   Box: 7 of 17

This page could not be reprinted in the Federal Register, however, they may be inspected in Suite 215, U.S. Department of Justice, Legal Procedures Unit, 325 7th St., N.W., Washington, D.C. at (202) 514–2481 and at the Office of the Clerk of the United States District Court for the District of Columbia.

This page could not be reprinted in the Federal Register, however, they may be inspected in Suite 215, U.S. Department of Justice, Legal Procedures Unit, 325 7th St., N.W., Washington, D.C. at (202) 514–2481 and at the Office of the Clerk of the United States District Court for the District of Columbia.

State of Maryland, County of Montgomery

I, Eleanor J. Lewis, upon my oath state:

1. I am the Executive Director of the American Association of Legal Publishers.

2. On Wednesday, August 14, 1996, I called the Pittsburgh Office of the Federal District Court of Pennsylvania, Western Division and spoke with Mr. Keith Anderson. I told him I wanted to obtain the closed case numbers for a case, so I could review the cases in the Federal Records Center in Philadelphia. He said that information could

not be given over the phone and he does not have a fax machine. I could only receive that information from him by mail.

3. I then provided him with the information for a case with a decision rendered on October 4, 1968. He immediately responded ''that decision is over 25 years old. The case is in the Federal Archives in Philadelphia, call 215/597–3000.'' I thanked him and hung up.

4. I promptly called the Federal Archives in Philadelphia and was connected to Dr. Plowman. I told him what case I wanted. He asked what I wanted and I said I want a copy of the judge's decision. He responded, ''opinions are not necessarily included in the case file. They are not required to be in the closed file.'' He took my name and number and said he would see what he could find.

5. Dr. Plowman called me back within an hour and reported he had found the case and had the decision. If I would send a check for $6 he would send me a xerox of the decision. I sent him the required check and letter on August 14th. I received a copy of the decision by mail on August 21st.

I understand if any statements made by me are knowingly false, I am subject to punishment.

Eleanor J. Lewis.

State of Maryland, County of Montgomery

I, Eleanor J. Lewis, upon my oath state:

1. I am the Executive Director of the American Association of Legal Publishers.

2. On Wednesday, August 14, 1996, I called the Federal District Court of New York, Southern District, in New York City and asked for the closed case numbers for some closed files, so I could go look at the files in the Federal Records Center. I was connected to a man who told me I must come to Room 370 at 500 Pearl Street in New York City to obtain the information or send a letter and they will respond in writing. When I said I needed to get the information quickly and I am in Maryland, I was told I must speak to the supervisor, Rosemarie Fugnetti. I was connected to her phone but was unable to leave a message because her voice mailbox was full.

2. I then called the clerk's office again and explained I could not leave a message for Ms. Fugnetti. They told me she was at lunch and I should call back in an hour.

3. I called an hour later and spoke with Ms. Fugnetti on August 14, 1996. She repeated that the court only provides closed file numbers to people coming to the court house or inquiring in writing. They do not accept faxes and they do not respond by fax because they do not have a fax machine in her office. She said I could send her a FED EX letter and she would respond by FED EX if I pay for the response or they would mail the response by regular mail the day they receive it.

4. On August 14th, I sent Ms. Fugnetti a Fed Ex letter requesting the closed file numbers for 4 opinions. She responded on August 15th, providing me with the information I requested.

5. I was unable to review these files from the Federal Records Center in New Jersey on August 19th because they only permit a visitor to look at 3 files per day and I had already requested 3 files from the New Jersey Federal District Court.

I understand if any statements made by me are knowingly false, I am subject to punishment.

Eleanor J. Lewis.

State of Maryland, County of Montgomery

I, Eleanor J. Lewis, upon my oath state:

1. I am the Executive Director of the American Association of Legal Publishers.

2. On August 15, 1996, I called the Federal District Court for the District of Columbia to obtain the closed file numbers for several closed cases from which I wanted to obtain a copy of the judge's original decision. I had selected these cases from various volumes of Federal Supplement. A telephone tape recording provides information about extension choices, but none of them concerned closed files, so I didn't talk to anyone.

3. On August 22nd, I traveled to the Court clerk's office and requested closed file numbers for 3 cases from Bryant. He asked me to wait and returned with the information I needed in about 10 minutes.

4. I explained to Bryant that when I called the court I could not find an extension that dealt with such requests. He said I should call 202/273–0520. I asked if I could obtain closed case numbers over the phone. He said, ''No, you must come in to get them or write.'' He told me the closed files for this court are stored in Suitland, MD.

I understand if any statements made by me are knowingly false, I am subject to punishment.

Eleanor J. Lewis.

State of Maryland, County of Montgomery

I, Eleanor J. Lewis upon my oath state:

1. I am the Executive Director of the American Association of Legal Publishers.

2. On Wednesday, August 14, 1996, I called the Wilmington Office of the Federal District Court of Delaware and requested the closed file numbers for 3 cases with opinions rendered in 1968, 1973 and 1991 from Ms. White. She took the information the case name and docket number from me and said she would call me back with the closed case numbers.

3. Ms. White called back about 2 hours later.

A. She provided me with the closed case numbers needed to obtain access to the 1991 case. I reviewed this case on August 29th at the Federal Records Center (FRC) in Philadelphia and found the opinion I wanted.

B. For the 1973 case, James Gerity, Jr. v. Cable Funding Corp., Civil Action #4720, decision rendered on November 6, 1973, according to 372 F. Supp. 64, she had a problem. The Court records showed that docket number corresponded to the case of Grossman v. Cable Funding Corp, decision rendered on June 30, 1978. She said her docket sheet showed there were many decisions made after November 6, 1973 and that ''this is a research project'' I took the information she had. On August 29th I reviewed this file at the Philadelphia FRC and found the opinion I wanted.

C. For the 1968 decision of McMilin v. USA, case #1906, decision rendered on September 26, 1968 by Judge Steele and amended on September 30, 1968, Ms. White said she had a problem. According to her records this is the case of Albright v. USA; it concerns a suite to refund taxes; the complaint was filed on July 1, 1957 and a stipulation and order was entered on May 15, 1958 by Judge Caleb Layton. She said the file was sent to the archives on December 1, 1987. She said this case was so old that its records were not automated and she had to go to another location to obtain this information. She could not provide me with any information concerning my originally requested case—McMilin v. USA—so I was unable to acquire a copy of the decision from any source.

I understand if any statements made by me are knowingly false I am subject to punishment.

Eleanor J. Lewis.

State of Maryland, County of Montgomery

I, Eleanor J. Lewis, upon my oath depose and state:

1. I am the Executive Director of the American Association of Legal Publishers.

2. On Wednesday, August 14, 1996, I called the Richmond Office of the Federal District Court of Virginia, Eastern District to obtain the closed case numbers for 3 cases.

3. I provided the woman with the information I had obtained on each case from the West's Federal Supplement, including the case name, case number, date of decision and name of the judge.

4. The woman put me on hold and then provided me with the following information:

A. For the case with a decision rendered in 1979, she went to the archive book and found the closed case information and gave it to me.

B. For the case of Frank A. Principe et al. v. McDonald's Corp et al., 463 F. Supp. 1149 (1979), Civ. Action #78–0606–R, decision rendered on January 16, 1979 by Judge Warriner, the Court records show that this is the case of Kennedy v. Stacy, a prisoner claim. She said she would investigate this matter and get back to me.

On August 15th and 16th I received a call from the court, from either Mrs. Grant or Mrs. Hatton, telling me they were looking for the information. On August 20th I called and spoke with Mrs. Grant; she said she would investigate if the information were found and call me. She called me back on August 20th and said the case I wanted, Principe v. McDonald's is Civil Action #78–601, not 606. She then provided me with the closed case numbers I need to obtain the case at the Federal Records Center in Philadelphia and the exact box in which I would find the opinion dated January 16, 1979.

C. For the case of Wolkind v. Selph, Case No. 79–0311–R, I was provided with the accession numbers. I sent them to the FRC on August 15th and went to the FRC on August 29th to review the file. The Wolkind v. Selph decision of July 10, 1979 amended on August 15, 1979 was not in the file but there was an opinion from a case from the Eastern District of Pennsylvania in the file. It appeared to be related to another case from the Richmond court, the case of Brown v. Cameron-Brown, Civil Action #78–0838.

I understand if any statement made by me are knowingly false I am subject to punishment.

Eleanor J. Lewis.

State of Maryland, County of Montgomery

I. Eleanor J. Lewis, upon my oath state:

1. I am the Executive Director of the American Association of Legal Publishers.

2. On Wednesday, August 14, 1996, I called the Philadelphia Office of the Federal District Court of Pennsylvania, Eastern District and requested the closed case numbers for several cases. I was transferred to the file room and told I must come in person to obtain that information. I explained I was far away and could not do that. I was told to call back and talk to the supervisor, Mr. Clewlie, who was not in the office at this time.

3. I called back about 90 minutes later and spoke with Mr. Clewlie who agreed to send me the information by fax. He said it was easier than calling. I provided him with the following case information.

USA v. William Henry Burdick, Criminal No. 22487, decision rendered on May 31, 1968 by Judge Weiner. I obtained this information from 284 F. Supp 685.

4. Mr. Clewlie called me back within two hours on August 14th and told me he was going to have to ''look up this information and it will take some time.''

5. On August 27th I called Mr. Clewlie about this matter because I had not heard from him. I was told he was out for the week; I should call back on September 3rd.

6. I called Mr. Clewlie on September 3rd, but no one answered his phone, so I called the court clerk and asked to leave a message for him. Since he does not have voice mail or a secretary, they took the message. About 2 hours later, Bill Jones called and asked what I wanted. I told him I needed the closed case number for a file. He took the information and called me about 30 minutes later with the closed case numbers. He said, the closed case numbers he gave me are very old and may not be correct, ''but this is all we have''.

I understand if any statements made by me are knowingly false, I am subject to punishment.

Eleanor J. Lewis.

State of Maryland, County of Montgomery

I. Eleanor J. Lewis, upon my oath state:

1. I am the Executive Director of the American Association of Legal Publishers.

2. On Wednesday, August 14, 1996, I called the Newport News Office of the Federal District Court of Virginia, Eastern District, and spoke with Mrs. Graham. I requested the closed case numbers for one case with a decision rendered in 1976. I had selected the case from a volume of F. Supp. Ms. Graham took the information, put me on hold and then returned in a few minutes with the identifying information, including information contained in a February 1996 letter providing the new location of the file in the Federal Records Center (FRC) in Philadelphia.

3. I requested the case from the FRC on August 15th.

4. I went to the FRC on August 29th and reviewed the file, finding the opinion I wanted.

I understand if any statements made by me are knowingly false, I am subject to punishment.

Eleanor J. Lewis.

State of Maryland, County of Montgomery

I. Eleanor J. Lewis, upon my oath state:

1. I am the Executive Director of the American Association of Legal Publishers.

2. On Wednesday, August 14, 1996, I called the Erie office of the Federal District Court of Pennsylvania, Western District and spoke with a woman.

3. I provided her with the case name and docket number for a case in which the judge rendered a decision on March 6, 1981, in the Erie court. I found this case in a volume of F. Supp. She put me on hold for a few minutes and then returned with the closed numbers I need to obtain the case at the Federal Records Center (FRC) in Philadelphia.

4. On August 15th I requested the case from the FRC.

5. On August 29th I went to the FRC and reviewed the file, finding the opinion I wanted.

I understand if any statements made by me are knowingly false I am subject to punishment.

Eleanor J. Lewis.

State of Virginia, County of Arlington

I, Allyson E. Manson, upon my oath state;

(1) I am a law student at the University of Virginia. In July and August of 1996 I am working part-time as a legal intern for the American Association of Legal Publishers.

(2) On August 9, 1996, at approximately 3:50 p.m., I called (903) 592–1212, the Clerk's office for the U.S. District Court for the Eastern District of Texas. I spoke with Mike Lantz.

(3) I asked Mr. Lantz how I could obtain opinions rendered in 1968 and 1978 in his district. He responded that his office retains original files for six months to one year. After one year, files are sent to the Federal Records Center for twenty years. Then the original file is destroyed. Mr. Lantz indicated that a case from 1968 may be difficult to obtain.

(4) Mr. Lantz said that the charge would be $15 per case without a case number. The Clerk's office looks at the docket sheet to see when that opinion was sent to the Records Center. Next the Clerk's office codes your request onto a sheet which is sent to the Records Center.

(5) Mr. Lantz indicated that it would take a while to research and find these cases. He offered to fax me information on search procedures.

I understand that if I made any knowingly false statements that I am subject to punishment.

Allyson E. Manson.

State of Virginia, County of Arlington

I, Allyson E. Manson, upon my oath state;

(1) I am a law student at the University of Virginia. In July and August of 1996 I am working part-time as a legal intern for the American Association of Legal Publishers.

(2) On August 9 at approximately 4:30 p.m. I called the Clerk's office for the U.S. District Court for the Western District of Texas at (210) 472–6550. I spoke with Wayne Garcia.

(3) I asked Mr. Garcia how I could obtain opinions rendered in 1968 and 1978 in his district. He responded that any search for the case numbers of documents older than five years would incur as $15 fee. He then explained that there would be a $25 retrieval fee incurred when the document was obtained from the Federal Records Center. Mr. Garcia made it clear that each case required a separate request and incurred a separate fee.

I understand that if I made any knowingly false statements that I am subject to punishment.

Allyson E. Manson.

State of Virginia, County of Arlington

I, Allyson E. Manson, upon my oath state;

(1) I am a law student at the University of Virginia. In July and August of 1996 I am working part-time as a legal intern for the American Association of Legal Publishers.

(2) On August 8, 1996 at approximately 2:45 p.m. I called (318) 676–4273, the Clerk's office of the U.S. District Court for the Western District of Louisiana. I spoke with Nancy Lundy.

(3) I asked Ms. Lundy what the procedures would be for obtaining a copy of Louisiana District Court decisions from 1968 and 1978. She responded that I would need a case number or the name of the case. She added that cases from 1978 would probably be on microfilm at the Clerk's office. All cases after 1977 have been put on microfilm there.

(4) Any cases rendered prior to 1977 would have to be retrieved from the Federal Records Center in Fort Worth, Texas.

(5) Ms. Lundy explained that I would need to send a written letter to the Clerk's office to request documents. The Clerk's office then retrieves documents from the Federal Record Center. A $25 retrieval fee would be charged for each case, and it would cost fifty cents a page to copy the documents.

(6) Ms. Lundy explained that if I called and requested an opinion, it would take a week to ten day before the Clerk's office received the document. I could expect the document within two weeks.

I understand that if I made any knowingly false statements that I am subject to punishment.

Allyson E. Manson.

State of Virginia, County of Arlington

I, Allyson E. Manson, upon my oath state;

(1) I am a law student at the University of Virginia. In July and August of 1996 I am working part-time as a legal intern for the American Association of Legal Publishers.

(2) On Thursday, August 8, 1996 at approximately 4:00 p.m. I called (503) 326–5412, the Clerk's office for the U.S. District Court of Oregon. I spoke with Kathy Wright.

(3) I asked Ms. Wright how I would go about getting a copy of two judicial opinions rendered in her District, one in 1968 and one in 1978. She responded that it would be difficult to locate the case without a case number. To locate a case number one must go through a list of them on microfilm to

ensure that the number matches a particular case. Case files more than two years old are moved to the Federal Archive in Seattle, Washington. Ms. Wright explained that I would need to fill out a form at the courthouse to request the record.

(4) Ms. Wright stated that she believed that judicial decisions are destroyed after twenty years.

(5) To retrieve a file, the clerk's office charges $25. Copying is an additional fifty cents a page or fifteen cents a page if the customer copies it herself.

(6) I then called the number Ms. Wright had given me for the Federal Archive, which actually turned out to be the number for the Federal Records Center. I spoke with a Mr. Rick Hall. Mr. Hall said that if I requested documents from the Records Center, they could be retrieved within one hour. However, there would be a retrieval fee of $35.

(7) I then asked Mr. Hall how long Federal District Court decisions were kept at the Records Center or the Archive. He responded that there is a national publication entitled *Schedule for the Disposition of U.S. District Court Documents.* I asked him if I could get a copy of pages from the book concerning the disposition of Federal District Court opinions. He talked for a while about the distinction between criminal and civil opinions and opinions of historical and non-historical value. He then explained that it is not his job to send out copies of those documents, and he explained that all District Court clerk's offices should have this volume, and I could obtain copies from them.

I understand that if I made any knowingly false statements that I am subject to punishment.

Allyson E. Manson.

State of Virginia, County of Arlington

I, Allyson E. Manson, upon my oath state;

(1) I am a law student at the University of Virginia. In July and August of 1996, I am working part-time as a legal intern for the American Association of Legal Publishers.

(2) On Thursday, August 8, 1996 at about 2:10 p.m. I called (303) 844–3433, the Clerk's Office of the U.S. District Court of Colorado. I spoke with Cathy Hasjord.

(3) I told Ms. Hasjord I wanted to get a copy of two judicial opinions, one rendered in 1978 and the other rendered in 1968 in Colorado's district court. She responded that if they are still in existence they are not in the Clerks' Office. Ms. Hasjord stated there are two ways to get a copy of these opinions:

A. She indicated that the Clerk's Office could get it for $25.00. She indicated that I could look on the docket sheet and determine what portions I wanted. Each page would cost fifty cents to copy. I asked if this could be done by mail. She said that it could with several mailings. She indicated it would be better to review the case by showing up at the office.

B. Ms. Hasjord indicated that I could also call the Federal Records Center directly.

I understand that if I made any knowingly false statements, I am subject to punishment.

Allyson E. Manson.

State of Virginia, County of Arlington

I, Allyson E. Manson, upon my oath state:

(1) I am a law student at the University of Virginia. In July and August of 1996, I am working as a legal intern for the American Association of Legal Publishers.

(2) On Thursday, August 8, 1996 at approximately 2:20 p.m., I called (208) 334–1361, the Clerk's office of the U.S. District Court of Idaho. I spoke with the Clerk's assistant.

(3) I told her I wanted to get a copy of original judicial decisions rendered in 1968 and 1978 in Idaho's Federal District Court. She responded that I would need to come to the office and go through the card index to determine the location of those files.

(4) She told me that it would cost $25 to review the file. Copying would cost an additional twenty-five cents a page.

(5) I asked her if we could do this by mail. She told me that I could send a letter to the clerk's office with my request. Upon receipt of my request, the clerk's office would need 7 to 10 days to retrieve the document.

I understand that if I made any knowingly false statements that I am subject to punishment.

Allyson E. Manson.

State of Virginia, County of Arlington

I, Allyson E. Manson, upon my oath state;

(1) I am a law student at the University of Virginia. In July and August of 1996 I am working part-time as a legal intern for the American Association of Legal Publishers.

(2) On Thursday, August 8, 1996 at about 1:00 p.m. I called (602) 514–7100, the Clerk's Office of the U.S. District Court of Arizona. I spoke with Cathy Gerchar.

(3) I told her I wanted to get a copy of two judicial opinions, one rendered in 1978 and the other rendered in 1968 in Arizona's district court. She asked me for the case number. I told her that I did not have a case number; I was trying to find out the procedures my supervisor would follow to locate an original file and specifically a judicial decision from the Arizona district court. She explained that the clerk's office only keeps decisions for three years. Earlier decisions:

A. Decisions between three and 1969 are kept at the records center. To get something from the Records Center, one would have to come to clerk's office to fill out a copy request. The Clerk's office would then get the file from the Federal Records Center, and I could obtain a copy from them.

B. Ms. Gerchar indicated that if the decision was rendered prior to 1969, the decision had probably been moved from the Records Center to the Federal Archive.

(4) I asked how much it would cost to retrieve this file. Ms. Gerchar explained that there is a $25 file fee, which covers expenses related to file retrieval.

(5) I asked Ms. Gerchar how long it would take to get a judicial opinion from the clerk's office if it was rendered in 1978. She responded that it would take between two and seven working days, depending on whether it was located in the Records Center or the Federal Archive.

(6) I requested the number of the Record Centers and the Federal Archive. Ms. Gerchar gave me both numbers: (714) 360–2631 for the Records Center, and (714) 360–2641 for the National Archive.

(7) I called the number Ms. Gerchar had given me for the National Archive at approximately 1:15 p.m. and found that it had been disconnected.

(8) Next, I called the Federal Records Center at approximately 1:15 p.m. on August 8, 1996 and spoke with Mr. Mike Kretch. I asked him how I could retrieve records directly from his office. Mr. Kretch suggested that I call in to request a file. He also said that to retrieve the file, I had to provide him with the:

Accession number, box number, location number, file number.

Mr. Kretch indicated that I needed to make a trip to look at the file and decide what portions I needed copied. The Center is located in Laguna Niguel, California. It costs fifty cents a page to copy the document.

I understand that if I made any knowingly false statements that I am subject to punishment.

Allyson E. Manson.

State of Virginia, County of Arlington

I, Allyson E. Manson, upon my oath state;

(1) I am a law student at the University of Virginia. In July and August of 1996 I am working part-time as a legal intern for the American Association of Legal Publishers.

(2) On Thursday, August 8, 1996 at approximately 3:30 p.m. I called the Clerk's office of the U.S. District Court for the Eastern District of California at (916) 498–5415. I spoke with Ms. Dung Duong.

(3) I asked Ms. Duong how I would go about obtaining opinions rendered in 1968 and 1978 in her district. She responded that I needed a case number, and that I would be required to pay a $25 retrieval fee.

(4) Ms. Duong added that I could either pay a fifty cent per page copying fee or pay an independent contractor to copy the material.

(5) Ms. Duong said that it would take ten mailing days for the documents to reach me.

(6) I called the independent contractor for a price comparison and I talked to a Kendall Allbright. He said that it would cost thirty-two cents a page to copy any documents I requested.

I understand that if I made any knowingly false statements that I am subject to punishment.

Allyson E. Manson.

State of Virginia, County of Arlington

I, Allyson E. Manson, upon my oath state;

(1) I am a law student at the University of Virginia. In July and August of 1996 I am working part-time as a legal intern for the American Association of Legal Publishers.

(2) On Thursday, August 8 at approximately 5:00 p.m. I called (415) 522–2000, the Clerk's office for the U.S. District Court for the Northern District of California. I spoke with Christee Scqueilia.

(3) I asked Ms. Scqueilia how I could obtain opinions rendered in 1968 and 1978 in her district. She responded that I would need to provide her with a case number and the judge's initials.

(4) She also said that it would cost $25 to retrieve an opinion. Opinions cannot be copied at the courthouse, but may be copied through an independent contractor. Ms. Scqueilia said that there was no way I could

get an opinion mailed to me from the courthouse.

(5) Mr. Scqueilia added that early opinions could be obtained through the Federal Archives in San Bruno, California.

(6) It would take three to four days for the clerk's office to get a document retrieved from San Bruno.

Allyson E. Manson.

This letter could not be reprinted in the Federal Register, however, they may be inspected in Suite 215, U.S. Department of Justice, Legal Procedures Unit, 325 7th St., N.W., Washington, D.C. at (202) 514–2481 and at the Office of the Clerk of the United States District Court for the District of Columbia.

Atty. Craig W. Conrath, Chief, Merger Task Force,
U.S.D.O.J., Antitrust Division, 1401 H. Street, Suite 4000 N.W., Washington, D.C.

Dear Mr. Conrath: I am a retired lawyer. I write this letter in regard to the proposed Thomson-West merger solely on my own behalf as a consumer and citizen.

I do not think the merger agreement should be approved. The Department's conditions are insufficient to protect competition.

My objections are these:

1. Failure To Create Viable Competition

Legal publishing has a synergy when a publisher produces law for multiple jurisdictions. Publishers attempt to address the market by creating ''systems'' that are consistent and easy to use for consumers, and allow the same methods to be used to find law from a variety of sources. In addition there are substantial economies of scale in the editing and production processes.

The consent decree envisions selling some of the products of Lawyer's Cooperative, but not the ''system'', and not the key products, AmJur and ALR that allow the creation of a system. The result is a series of isolated products that will not compete effectively with West's system and are of questionable viability in the marketplace.

2. Ineffective Remedies for Citations

The proposed license agreements has a price for use of West's citations that would foreclose its use by any small or new competitors. The only competitor who could afford the flat pricing would be a large one. But the merger eliminates the only large competitor who does not already license West's system. In effect, nothing is accomplished.

Though the prohibition against challenging the validity of West's dubious copyright claims are frequently found in licensing agreements, it traduces the purpose of the merger conditions and is inconsistent with the Department's stated position on copyright of citations.

3. Ineffective Remedies for Markets that Become Monopolies

Wisconsin currently has two competitive official reporters of Wisconsin case law, West and Lawyer's Cooperative. After the merger it will have one—there will be no competition. The consent decree's remedy is to allow the Wisconsin Supreme Court to renegotiate its contract. Since West will be the only serious publisher available in the market why would renegotiating the contract do anything? A cynic might comment that it would give West an earlier opportunity to exercise its monopoly power.

Indeed, the situation in Wisconsin is somewhat more acute. Lawyer's Cooperative has taken the position that its cites are public domain as is the text of the decisions. West takes a contrary opinion. So with the loss of Lawyer's Cooperative, we lose access to public domain law in Wisconsin for small peripheral publishers.

Finally, I must point out that West is a well known ''politically connected'' company. Its CEO was a key early supporter of Pres. Clinton's first campaign in Minnesota and recently Treasurer for Sen. Feinstein's reelection campaign. West has made many contributions to political campaigns.

The Department certainly should not treat differently a politically connected company—West has an absolute right to participate in politics. However, in such a case it is important that the Department explain fully and adequately its reasoning so that the Department's decisions can be understood to be free of political taint. This the Department has not done in this case. It fails to reveal or address the degree of concentration left after its proposed conditions. It fails to reveal its reasoning or motives for the conditions, It fails to reveal the course of negotiations.

On the face of it, this is a merger between major competitors in a highly concentrated industry. In appearance it is not a merger that should be approved. Failure to adequately address why the Department is approving it, and why the conditions adequately protect competition leaves the Department open to criticism.

Yours Sincerely,

John Lederer.

August 30, 1996.

Mr. Craig Conrath, Chief, Merger Task Force
U.S. Department of Justice, Antitrust Division, Merger Task Force, 1401 H Street NW, Suite 4000, Washington, DC 20530.

Dear Mr. Conrath: I write in response to the proposed Final Judgment And Competitive Impact Statement issued by the Justice Department in the case of United States of America vs. The Thomson Corporation and West Publishing Company.

The proposed Final Judgment is deficient on numerous counts and fails to provide any meaningful relief to consumers of legal information in the United States. In support of this contention, I wish to raise the following points:

(1) Divestiture of the fifty-one titles which comprise the major portion of this tentative agreement will have no appreciable or measurable impact upon the competitiveness of the legal publishing industry as a whole. At least thirty-five of the fifty-one titles are of little significance in the broader marketplace. Many of these titles are small, state specific titles with only local appeal. In fact, the presence of these thirty-five titles in the list leads one to suspect that they are Thomson-West cast-offs, jettisoned to make the list and its impact appear larger than it really is. Titles such as Kentucky Probate PSL and Louisiana Successions, for example, are insignificant even in their local markets, let alone when viewed from a national perspective. The cumulative impact of Thomson-West divesting thirty-five such titles will do virtually nothing to enhance the competitiveness of the market for legal information in the United States.

(2) The proposed Final Judgment also requires the divestiture of several major primary law or finding aids for those states in which Thomson-West would control all such existing titles. While one would expect any agreement to prevent these obvious examples of total market domination, it should be observed that the major impact of these divestitures will be limited to these particular states and those major law libraries with national collections of such primary law or finding aids. In addition, price inflation in both the initial and supplementation costs for these titles have been far less egregious than the price inflation which has characterized secondary materials. Viewed from the perspective of the average consumer of legal information, these titles will have little impact on the market as whole. For the New York attorney, for example, the proposed final judgment will impact only the market for enhanced statutory law and one minor title, New York Wills and Trusts. Once these titles have been acquired, the attorney will face a market largely dominated by Thomson-West (or what has now been named the West Legal Publishing Group).

(3) The agreement also forces the divestiture of several major primary law products, the most significant of which are the United States Code Service, U.S. Reports, L. Ed., and the U.S. Digest, L. Ed. Collectively, these titles have previously comprised major components of Lawyers Cooperative's Total Client-Service Library System, the only significant alternative to West's Key Number System of legal research. Divestiture of these titles will preserve virtually intact Thomson-West's future control of both systems of legal research. The Total-Client Service Library system will simply substitute the United States Code Annotated, West's Supreme Court Reporter and West's Supreme Court Digest in place of the three former Lawyer's Cooperative products.

Moreover, divorced from the system of which they were an integral part, the three Lawyers Cooperative titles will fade in importance, both as tools of legal research and in market position. The legal publishers who may consider buying these titles must be cognizant of the risks involved in purchasing titles whose subscriber lists will inevitably shrink when they become independent publications. While one could anticipate a potential publisher incorporating citations to these titles in its secondary law publications, this will still not result in the creation of a third legal research system to challenge the domination of Thomson-West. The only way to break this total domination of legal research systems would be to force Thomson-West to divest itself of Lawyers Cooperative Publishing Company in total.

(4) The proposed final judgment makes no serious attempt to address the impending

domination of the market in secondary law materials by Thomson-West. As a result of its steady stream of acquisitions over the past 17 years, the Thomson Corporation will control slightly more than 50% of the leading secondary law titles published in the United States. This statement is based on an analysis of the titles used for twenty years by Bettie Scott in her Price Index for Legal Publications, published, until recently, in the Law Library Journal, and an analysis of the 533 treatises included in my own Legal Information Buyer's Guide and Reference Manual 1996 (I should add, parenthetically, that the titles selected for inclusion in my book were made on their individual merits between March and July of 1995, prior to the announcement by West that it was putting itself up for sale). The percentage of secondary law titles to be controlled by Thomson-West will constitute approximately 51% of the titles in Scott's list and approximately 53% of the titles included in my list.

Only seven national secondary titles of any significance are included among those titles to be divested by Thomson-West, and only two of these are larger sets which command a significant market presence (Corbin on Contracts and Appleman, Insurance Law). These seven titles represent only 1.3% of the 533 treatises titles reviewed in my book, hardly enough to cause even a ripple in the overall control which Thomson-West will exercise over the secondary law marketplace.

A recent examination of the budget of our own Rhode Island State Law Library revealed that 47% of our current expenditures are earmarked for Thomson-West publications. However, because standing orders to approximately 75% of the secondary law materials published by Thomson have been suspended due to steeply rising supplementation costs (and now updated sporadically), this figure could easily exceed 65% of our budget were all titles on standing order.

The proposed Final Judgment leaves only six publishers of secondary law materials to challenge Thomson-West's hegemony: Anderson Publishing, Aspen Law & Business, Matthew Bender, Little Brown, Michie, and Wiley Law Publications; however, the revenues of Matthew Bender, the leading publisher in this group, probably exceed those of the remaining five publishers. Matthew Bender has increased prices so significantly in the past eight years that many attorneys in small law offices have sought alternative publications, most of which are published by Thomson or West. In other words, given that fact that most attorneys will seek to avoid the extraordinarily high costs associated with Matthew Bender treatises, Thomson-West's control of the market will be even greater than the 51–53% included in the above cited publications.

According to the Justice Department's Competitive Impact Statement, Section B. 2.:

Thomson and West compete vigorously on the basis of price for both enhanced primary law products and secondary law products. Thomson and West look almost exclusively to each other in making pricing decisions and promoting both their enhanced primary and secondary law products in the relevant markets, and consumers have benefited from this competition. Thomson and West also compete directly on the basis of quality. The quality of Thomson's and West's enhanced primary and secondary law products has improved as a result of such competition. Unless restrained, the proposed acquisition would allow the combined entity unilaterally to raise prices without the threat of a new entry into these markets by a third party (emphasis mine).

These statements notwithstanding, this proposed Final Judgment does little to restrain a merger which will almost certainly result in a unilateral raising of prices, particularly for secondary law materials. There are, quite simply, too few major national titles on the divestiture list to have any appreciable impact on this eventuality. I predict that, within 3–5 years, we will witness a significant increase in the supplementation cost of West's secondary law publications as they are increased to the level of the competing Thomson titles. When the effects of these price increases are felt throughout the law library community, we will witness even greater shrinkage of collections as library budgets are more completely consumed by supplementation costs of a smaller number of titles. West, which was the one major safe haven for those law libraries and other customers anxious to avoid the more aggressive pricing of Matthew Bender and the Thomson Companies will then have nowhere to turn. The past history of Thomson prices increases provides ample evidence to substantiate this belief (see Appendices to the American Association of Law Libraries letter from Patrick Kehoe previously submitted to your Division).

(5) The proposed Final Judgment also permits, but does not require, states to reopen bidding of the three state contracts to publish official state reporters. While this requirement is a necessary one, it is my view that such rebidding for the reports of only three states will have only marginal effect upon the market. Pricing of official reports has not been a significant problem for consumers of legal information in the past and it is unlikely that it will be in the future, particularly in light of the fact that these reports constitute only a small percentage of the average lawyer's expenditures for legal information. Consumers should be more concerned about future price increases for enhanced primary law or secondary law materials.

(6) Finally, the proposed Final Judgment also requires Thomson to license the use of star pagination in the National Reporter System to other legal publishers. In the absence of the ultimate resolution of the claim which West asserts over star pagination, this proposed Final Judgment cannot be said to provide any meaningful relief to consumers of legal information. The licensing fees are simply too high to permit any but the most well-financed publishers to use West star pagination.

Robert Oakley, Director of the Georgetown University Law Library, conducted preliminary calculations of the cost of licensing star pagination from the West Publishing Company. Based on the cost of $.09 per 1000 characters, he calculated that it would cost a potential licensee approximately $541.00 annually for each volume of the Federal Supplement, or approximately $495,000.00 annually for the entire Federal Supplement. New entrants who might arise to challenge Thomson-West by developing value-added secondary materials to either print or CD–ROM will simply find the entry costs too onerous. And existing publishers, such as Matthew Bender, will be forced to pay the high licensing fees to use star pagination in its own secondary materials or run the risk of litigation for copyright infringement. In the current environment, Thomson-West is not only well positioned in the print field, but is in a superior position to develop enhanced CD–ROM products which combine expert analysis with the relevant primary law cases and statutes. This agreement provides no relief in this regard.

In light of the above, I believe that the court can do no less than find that this proposed Final Judgment is not ''within the reaches of the public interest.'' In my view the Justice Department has failed to provide consumers with any meaningful relief in this proposed merger and leaves them little better off than if it had taken no action at all. Many of the titles on the divestiture list are obvious Thomson-West cast-offs and of little significance. Furthermore, Thomson-West have it within their power to negate the loss of the only three major national titles on the list (U.S.C., L.Ed. and U.S. Digest, L.Ed.) by incorporating its competing titles (U.S.C.A., S. Ct. Reporter, and U.S. Supreme Digest) into the Total Client-Service Library System. In my view, the divestiture of Lawyers Cooperative, in total, is the minimum acceptable solution ''within the reaches of the public interest.'' This would at least ensure that the only two major legal research systems remain in separate hands.

Thomson-West have agreed to this proposed Final Judgment because it leaves the fruits of their merger virtually intact and grants them dominant control of the marketplace. Consent decrees which do not protect the public interest, cannot, by definition, be effective tools of antitrust enforcement. I urge the court to reject this proposed Final Judgment.

Sincerely,

Kendall F. Svengalis,

State Law Librarian.

Inner City Press—Community on the Move

August 30, 1996.

U.S. Department of Justice,

Antitrust Division, Attn: Mr. Craig W. Conrath, Chief, Merger Task Force, 1401 H Street, N.W., Suite 4000, Washington, D.C. 20150

Re: Comments Opposing the Currently Proposed Final Judgment in *United States v. The Thomson Corporation and West Publishing Company*

Dear Mr. Craig W. Conrath and others: On behalf of Inner City Press/Community on the Move and its affiliates and members, including myself (collectively ''ICP''), I am submitting these comments in opposition to the currently Proposed Final Judgment in United States of America v. The Thomson

Corporation and West Publishing Company. The Proposed Final Judgment was published in the Federal Register of July 5, 1996 (61 FR 35250), along with a statement, pursuant to 15 U.S.C. § 16(b)–(h), that public comments received within sixty days will be considered, both by the Department of Justice (''DOJ'') and by the District Court Judge, before any final determination. These comments are timely.

There are serious questions of antitrust law here at stake, questions that go beyond the stunningly elevated Herfindahl-Hirschman Indices (''HHIs'') for numerous product markets, and the requirements that Thomson-West license their page citation system to competitors. The more fundamental issue, given that the anticompetitive effects (and effects that would fly in the face of the purpose(s) of the antitrust laws, see infra) that would clearly result from this merger, is why the Department appears to have accepted as a given that it must allow this combination, and has only, in ICP's view, played around the edges in securing relatively minimal divestiture and other purportedly mitigating actions, as a condition for settlement. The Proposed Final Judgment states, at XV, that its ''[e]ntry * * * is in the public interest.'' ICP dispute this, for the reasons set forth below.

Section 7 of the Clayton Act, 15 U.S.C. § 18, prohibits mergers where ''the effect may be to substantially lessen competition.'' The market for legal and legal-economic information and research resources is already hyper-concentrated and anticompetitive. ICP is submitting these comments from its perspective/position as a small scale not-for-profit ''consumer'' of legal and legal-economic information and research resources, a grassroots community and civil rights group with far from unlimited resources, which needs access to legal and legal-economic information in order to pursue its public interest mission of combatting redlining and other discriminatory practices by banks and other financial institutions. Of most concern to ICP is what the Proposed Final Judgment refers to as the ''comprehensive online legal research services'' (hereinafter, the ''COLRS'') product market.[1] West already monopolizes this product market, as well as a number of other product markets. There is simply no doubt that a combination of Thomson, which is a producer/compiler of much of the content of the (only two) ''comprehensive online legal research service'' providers, would substantially (further) lessen competition in this product market. Absent meaningful and sufficient mitigation, the proposed combination runs afoul of Section 7, and cannot be allowed.

The Competitive Impact Statement (the ''Statement'') appears to acknowledge that there are only two competitors in this product market: West and Lexis-Nexis. The Statement, 61 FR at 35262, recites some, but not all, of the harm that would result from this combination. What is most lacking in the Department's discussion (and perhaps analysis) is a recognition of how over-concentrated and anticompetitive this product market already is.[2] The Statement implies that if the Department and Thomson-West merely seek to ''maintain the level of competition that existed between WESTLAW and Lexis-Nexis before the acquisition.'' the minimally modified proposal can legitimately be said to be ''in the public interest.''

As a general matter, mitigation efforts such as these are, at best, only partially successful. Where even the goal of the mitigation effort is only to ''maintain the level of competition that existed * * * before the acquisition'' (see supra), and that level of competition was already insufficient, and the market already over-concentrated—the mitigation effort would not vindicate, or be consistent with, the pubic interest.

All that the Department proposes, to purportedly ''maintain the level of competition that existed * * * before the acquisition,'' is that Thomson ''divest itself of Auto-Cite and extend the terms of existing licences of [the] Investext. ASAP and Predicasts databases to Lexis-Nexis.'' 61 FR at 35263. This proposed mitigation is entirely insufficient. For example, it formalizes (or ensures) oligopoly in the COLRS product market. Whereas the Department has implied that the Consent Decree would give competitors alternative means of entry into the market, the proposed requirement that Thomson license only three databases, and only to Lexis-Nexis, would ensure anticompetitive duopoly deep into the 21st century. Additionally, the number of databases required to be licensed is absurdly low. Furthermore, the duration[3] of the option to extend is too short; nowhere is it explained why the Department apparently believes that there will be more than the current two competitors in the COLRS product market in five years time (in fact, the proposed Final Judgment makes continuing duopoly more likely).

Accepting, rejecting, or modifying this Proposal Final Judgment involves basic choices about the goal(s) of antitrust law. The Department's focus here, in the COLRS product market, appears to be on the rights of WESTLAW's (one) competitor, rather than on the interests of consumers of COLRS products. The interest of the public (said alternately, the public interest) must take precedence. Although protection and fostering of competition is a goal of antitrust law, this goal is a means to the wider objective of promoting (and protecting) the interests of the consuming public. *See, e.g., United States* v. *Western Electric Co.*, 578 F. Supp. 668 (D.D.C. 1983).

This Proposed Final Judgment reflects a trend in which the Department[4] appears to begin with the presumption that any merger, no matter how presumptively anticompetitive, can or must be approved, as long as a few concessions are obtained and can be announced. Many of the original goals of the Sherman and Clayton Acts, and of the 1950 Cellar-Kefauver Amendments, goals which are still vital and needed, appear to have been forgotten. Perhaps a combined Thomson-West would be more efficient[5]—but what showing (or requirement) is there that these efficiencies will be passed along to consumers? This is unlikely, given that, for example, in the COLRS product market, WESTLAW has only one competitor, and the Proposal Final Judgment would only more deeply imbed this anticompetitive duopoly. Madisonian concerns about the dangers of concentration of power are also particularly relevant here, given that the concentration would be not in some strictly consumer product, but in access to information, the lifeblood and prerequisite be to participatory democracy.[6]

As noted above, ICP is a non-profit consumers' and civil rights advocacy organization, which needs access to legal research services, including online, to perform its mission. Our society has become increasingly technological and fast-paced. Citizens groups such as ICP, which, under various statutory schemes, provide a counter-balance to the economic and political powers that increasingly dominate the policy making process, cannot meaningfully perform their functions without rapid access to legal precedent, scholarly and news articles, etc. Where the market for these is allowed to become ever more concentrated, driving prices to levels entirely unaffordable to any but the largest corporate litigants/lobbyists, the adverse effects extends beyond even those that flow from anticompetitive pricing in other consumer markets. Allowing a monopoly in toothpaste, or in pharmacies, may be one thing: such concentration may diminish both allocative efficiency and

[1] The Department's definition/delineation of the COLRS product market appears arbitrary. It is called the ''comprehensive online legal research services'' product market, and yet the primary mitigation proposed involves a option for Lexis-Nexis to extend its licenses for three ''non-legal'' data bases: Investext, ASAP and Predicasts. As further explained *infra*, WESTLAW and Lexis-Nexis have a duopoly for the provision of a number of not specifically ''legal'' resources, which are necessary for consumers/public interest groups to advocate. Requiring only that Thomson extend licenses on three data bases, and only to one competitor does not mitigate the foreseeable harm, even as described in the Department's own presentation. The current Proposed Final Judgment should be rejected.

[2] Interestingly, the Statement does not set forth the HHI for this comprehensive online legal research services product market. Exhibit C of the Statement provides HHIs for nine primary law product markets, all of which exceed, often by a power of five or more, the DOJ's own definition of an over-concentrated market. The HHI for the COLRS product market is even higher; ICP questions is that is not among the reasons for the omission of this HHI from the Statement. The HHI for the COLRS product market, as the DOJ defines it, must be entered into the record before the Court.

[3] *See* 15 U.S.C. § 16(e)(1).

[4] And other agencies with antitrust jurisdiction, including, for example, the Federal Reserve Board as to bank holding company mergers, *See infra*.

[5] Emphasis on ''[p]erhaps''—*see generally*, Robert Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 Hastings L.J. 65 (1982).

[6] ICP stands ready to brief these wider issues, in connection with the Section 16(f) proceedings it is urging the court to begin. Given the unique ''products'' this proposed merger and consent decree involve—the law, and information necessary for effective public participation—full consideration of the Proposed Final Judgment should involve more than mere technocratic (*e.g.* HHI) battle of the numbers. *See infra*.

consumer welfare. But the effect is limited in the first case, to a single personal hygiene product, and in the second, to a set of these. Where access to the law, and to the background sources which alone allow citizens groups to advance their (and the public's) interest, becomes monopolized and anticompetitive, the adverse effects reach even those who do not use these COLRS services, or are not even aware of them.

The Statement, at 7, argues that the Court must almost automatically accept this proposed Final Judgment, as long as it is ''within the range of acceptability or is within the reaches of public interest.'' 61 FR at 35264, citing *United States* v. *American Tel. and Tel. Co.*, 552 F. Supp. 131, 150 (D.D.C. 1982), affd sub nom. *Maryland* v. *United States*, 460 U.S. 1001 (1983), If that is the standard of review that the Court here adopts,[7] ICP formalizes its contention that this Proposed Final Judgment is beyond the range of acceptability, and is not within the reaches of the public interest. Not only would this Proposed Final Judgment allow and legitimize the current overconcentration and anticompetitive behavior in the COLRS product market—it would make such concentration worse, and thereby injure the public interest. This product market unique impinges on and directly affects the ''public interest,'' even the way(s) in which the ''public interest'' is determined.

The Antitrust Procedures and Penalties Act (the ''APPA'') 15 U.S.C. § 16(b)–(h), provides a convenient example of the way in which Congress defers or assigns many policy debates within our society to proceedings, subject to public notice and comment, in which consumers can assert their interests, and confront the arguments of large corporations which seek to maximize returns by (virtually) any means necessary. To illustrate the harms created by the current overconcentration in the COLRS product market, which overconcentration this Proposal Final Judgment would not only not address, but would make worse, consider the following:

As the Department's Statement notes, APPA authorizes the use of procedures beyond a mere review of the Statement and (written) Response to Comments to make the required ''public interest'' determination. *See* 61 FR at 35264, and 15 U.S.C. § 16(f). Imagine a citizens/consumers' group such as ICP seeking to participate in such proceedings, without access to COLRS (that is, without access to WESTLAW or Lexis-Nexis). Both Thomson-West, and the Department, have instantaneous access to online legal research; a single database search using key words will produce (most) all relevant precedents, and other supporting information. One might assume that the staff or members of the consumers group, priced out of the monopolized COLRS market, could simply visit a law library and conduct their research in books, by hand, using Shepards volumes, indices of law reviews, perhaps searching hard copy newspapers on microfilm. On personal knowledge, such a process is exceedingly time consuming, and is not realistic in connection with proceedings under the federal Community Reinvestment Act, Bank Merger Act, Clean Air Act (or APPA). The citizens/consumers group, priced out of the anticompetitive COLRS market, would not realistically be able to effectively present its view of the ''public interest;'' in all likelihood, the corporation's (and, surprisingly, the Department's) competing view of the public interest would prevail, and become a new precedent for applicants for further anticompetitive mergers. This ''incremental corp-ocracy'' prediction might seem too extreme—if it were not precisely what is happening in our society.

ICP urges the court, in order to make its determination under Section 16(e), to use the procedure(s) specified in Section 16(f), particularly those in Section 16(f)(3). ICP and its members, including its executive director, are ''interested persons or agencies;'' their participation would serve the public interest. ICP is aware that Judge Richey on July 31, 1996 denied a motion by Tax Analysts to participate in the proceedings, even as an amicus curiae. West's counsel stated that ''Tax Analysts is disingenuous to say they're intervening to protect the public interest. They're intervening because they lost the lawsuit, and now they're trying to get what they lost in the lawsuit through another means.'' [8] ICP wishes to emphasize that it is not a competitor with West or Lexis-Nexis, that it is in fact not even a for-profit entity. ICP has had experience in the COLRS product market, in the use of these products in order to advocate in public proceedings, and has had experience with the Department's antitrust reviews of proposed mergers beyond this one (*see infra* this letter). Summary disposition on this Proposed Final Judgment, considering only the Complaint, the Statement, comments thereon, Response to Comments and the (perhaps revised) Proposed Final Judgment—would be inappropriate, given the issues raised by this proposed transaction,[9] and the Proposed Final Judgment.

* * * * *

ICP wrote to the Department, attention Assistant Attorney General Bingaman, on June 3, 1996, setting forth its opposition to the proposed Thomson-West acquisition, and stating, *inter alia*, that

[I]n seeking * * * to advocate for the public interest, and for the interest of the predominantly low income and minority residents of the South Bronx and Harlem, ICP has become aware of the harmful effects of West's and Thomson's current oligopoly control of the market for legal and legal-economic information.

Thomson at present owns, *inter alia*, the American Banker, the Regulatory Compliance Newsletter, Lawyers' Cooperative Publishing, Sheshunoff Information Services, etc.; West, of course, is the ''proprietary'' publisher of most relevant case law, and owns the Westlaw data base, containing not only case law, but an extensive business and legal news date base, including the Dow Jones and Associated Press wire services. It is virtually impossible to effectively advocate without access to these resources; however, due to the hyper-concentration of this market, the price for such products is inordinately high. This proposed acquisition would further concentrate this already anticompetitive market. The adverse effect would not only be to further raise prices—the acquisition, without mitigation or divestiture, would effectively exclude such consumers as ICP from the market, and thus would serve to protect, preserve and exacerbate other injustices and anticompetitive behavior in the society.

ICP is a public interest advocate not only in the field of fair lending and civil rights, but also in the antitrust field. For example, ICP extensively documented the prospective anticompetitive effects of the ongoing Chase-Chemical merger, for consumers in the New York area, particularly in Bronx County. Such advocacy, including antitrust advocacy, by those most injured by the many mergers proposed these days—that is to say, small small business associations, community and consumers' groups—is virtually impossible without access to the legal and legal-economic information which West and Thomson control. Any further concentration in this market, any further raising of prices, would silence more voices in society, and thus set off a chain of adverse consequences.

For your information, I recently contacted West Publishing, [on behalf of ICP and of the New York State Reinvestment Alliance, to which ICP belongs], in order to inquire whether West has any program or provision for granting access to Westlaw and other West resources to non-profits, particularly grassroots civil rights and consumers' groups, at reduced or waived fees. I was told that West does not have any such program or provision; nor does West intend to implement such a program or provision. I attempted to explain why such a program would be both productive and in a sense incumbent upon West, both because of its central position in the legal field, and in view of its proposed acquisition and merger with one of its few competitors, Thomson. I was told that the idea would be ''passed along,'' but not to expect any changes, in the near future if at all, because West does not change anything without much study. This deliberativeness does not, however, appear to extend to pricing decisions.

With all due respect, I must also say that ICP is troubled by the DOJ's long standing inter-relation with West, particularly the selection of West as the DOJ'S legal-materials supplier after, largely due to West's anticompetitive behavior, the DOJ abandoned its ''Juris'' project.[10] *See generally*, Thomas

[7] In terms of the proper standard of review, ICP refers the court to, *e.g.*, *Esco Corp. v. United States*, 340 F.2d 1000, 1965 CCH Trade Cases ¶ 71365 (9th Cir. 1965), providing that proposed consent degrees must be scrutinized carefully and approved, both as to form and content, by the court before entry.

[8] Connecticut Law Tribune, August 5, 1996.

[9] *See, e.g.*, editorial in the New Jersey Law Journal of August 5, 1996, at 26: ''The antitrust implications of such an arrangement are so obvious that one might have wondered what courageous attorney gave the first opinion that the DOJ would permit the transaction.''

[10] August 30 note: ICP is aware that on August 5, 1996, the Department sought to intervene in the case of Matthew Bender & Co. Inc and HyperLaw

Continued

Scheffey, ''Too Close for Comfort? States Study West-Thomson Merger, '' Texas Lawyer, April 1, 1996.

ICP regrets submitting these comments (presumably) late in the DOJ's review of the the Thomson-West proposal. I telephoned a DOJ Antitrust staffer I have come to know in the course of ICP's bank merger advocacy work; after several days, this staffer informed me that the Thomson-West proposal was being review not by his unit, but by the ''Merger Task Force.'' Soon thereafter, I attempted to call, and did in fact leave a message for, the Merger Task Force lawyer to whom the staffer had referred me. I did not receive any response for more than a week. I left a second message, in response to which the lawyer informed me that he was not at liberty to tell me the status of the Department's review, but that we could submit our comments by mail to 1401 H Street (which we are hereby doing). While I understand that the DOJ's review is not as formalized as, for example, the reviews conducted by the Federal Reserve System in connection with bank or bank holding company proposed mergers, nevertheless I believe the DOJ should attempt to better inform the affected public, especially the ''retail'' and low and moderate income segment thereof, of pending DOJ merger reviews, such that the DOJ can receive, and consider, comments from those who stand to be most affected—not only to pay a higher price, but to be effectively priced OUT of the market.

Thomson's West proposal is particularly troubling, because of the ripple-effect a price raise / further concentration in the relevant product markets can have. It is one thing for the ''lower'' end of the consumer market for baby wipes, diapers, toothpaste, etc. to be affected by paying higher prices—and it is an entirely different thing for whole segments of our society to be further excluded from legal and legal-economic information, with which alone these segments of society can attempt to participate in public processes and advocate for their interests. This is a particularly important product market, because it involves the raw material which citizens need in order to participate in a Constitutional democracy.

For the Court's information, the Department did call ICP on the day the Proposed Final Judgment was released, and faxed ICP a copy of its six page June 19, 1996 press release. The difficulty of many of those affected by proposal that the DOJ must review in providing information to the DOJ does not appear to spring from any lack of civility on the part of DOJ staff—it is the result of the DOJ current implementation of APPA and other provisions, or perhaps of the drafting of these provisions themselves. With all due respect, however, ICP has noted, in connection with its advocacy efforts during bank merger applications proceedings, that corporate applicants are invariably represented by counsel who appear to have a high degree of familiarity with regulatory staff (including, for example, addressing their letters to DOJ staff on a first name basis, which leaves the public, with less ''access,'' with the sense that approval, perhaps with relatively minor mitigation, is a foregone conclusion). ICP has not been privy to Thomson's communications with the DOJ;[11] these observations are drawn from other DOJ antitrust reviews, including the recent review (which resulted in a finding of no likely anticompetitive effect) of the Chase Manhattan-Chemical merger. However, as I hope this comment has made clear, concentration on the legal research services product market threatens to have not only anticompetitive, but also anti-participatory and frankly undemocratic ramification, much more so than other consumer products industry mergers the Courts may review.

The Proposed Final Judgment is inadequate; despite the mitigation proposed, the combination of Thomson and West is not in the public interest. ICP urges the Court to use the procedures authorized in 15 U.S.C. § 16(f), and to conduct at least a hearing, and perhaps a full trial, on the Complaint filed by the Department on June 19, 1996, and the foreseeable effects of this proposed merger more generally.

If there are any questions about this comment, or any need for follow up (including further participation in this proceeding), please do not hesitate to contact the undersigned, by telephone at (718) 716–3540, by fax at (718) 716–3161, or by mail at 1919 Washington Avenue, Bronx, New York 10457.

Thank you for your attention.

Matthew Lee,

Executive Director.

September 3, 1996.

Craig S. Conrath, Esq.,

Chief, Merger Task Force, U.S. Department of Justice, Antitrust Division, 1401 H Street, Suite 4000, N.W., Washington, DC 20530

Via fax 202–307–5802

Re: *United States v. The Thomson Corporation and West Publishing Company* Case No. 1:96CV01415 (U.S. District Court for the District of Columbia)

Dear Mr. Conrath: This letter presents the comments of the Consumer Project on Technology (CPT) on the Proposed Final Judgment in the above referenced case. CPT is a project of the Center for Study of Responsive Law. CPT was created by Ralph Nader in 1995. We maintain a page of the World Wide Web which describes our activities, at: http://www.essential.org/cpt.

When the Proposed Final Judgment (PFJ) was first made public, CPT made comments to several news organizations expressing satisfaction with the proposed divestitures, while expressing reservations about the economic terms of the compulsory license agreement. After having the opportunity to more closely examine the PFJ, we reiterate our concerns about the onerous economic terms of the compulsory license, and we express our additional concerns about the proposed divestitures. It is our opinion that the PFJ does not adequately protect the public interest, and that the proposed merger should not be permitted.

Proposed Divestitures

CPT was pleased see that the divestiture would include the U.S. Code Service (USC), the U.S. Reports, Lawyers Edition (L.Ed.), and Auto-Cite, three important Thomson valued-added services which compete with products currently offered by West Publishing. However, legal publishers and law librarians have expressed persuasive concerns about omissions in the list of divested products, and raised questions about the viability of USC and L.Ed., if Thomson does not also divest its American Law Reports (ALRs) and American Jurisprudence 2d (Am Jur).

At the heart of the problems over the enhanced legal products that will be divested are the issues of economies of scope in publishing and the inter-related nature of the various value-added products. The USC, L.Ed., and Auto-Cite products rely upon access to research and analysis from ALRs in a fundamental way, and to exclude the ALRs from the products to be divested will greatly diminish the value of the products which are divested.

The economies of scope issue is also important. Other legal publishers do not believe that USC and L.ED. are economically viable, if they are spun off without the ALRs and Am Jur products, because of the lower cost of producing the products jointly, as compared to the stand alone cost of producing enhanced case analysis. These publishers believe the PFJ will create a set of ''product fragments'' which cannot succeed economically on their own.

CPT did not fully appreciate the importance of the ALRs and Am Jur publications at the time the PFJ was announced, and we would like the record to reflect our views after having the opportunity to more closely examine the agreement.

A third area of concern is the implementation of the divestitures. Reed-Elsevier, the owner of Lexis-Nexis, has held discussions with Thomson to determine what assets will actually be sold. While we do not have access to the confidential documents that have been shown to Reed-Elsevier, we do know that Reed-Elsevier believes that Thomson intends to retain the Auto-Cite trained staff and database, along with the exclusive rights to integrate Auto-Cite with the ALRs and other Thomson products. It is one thing to divest a trademark plus copies of the database and software, and yet another to divest a product as a going concern. If Thomson effectively guts the product and sells the service in name only, the purpose of the divestiture will be undermined. Potential bidders on these products have apparently raised these issues with DOJ.

The Compulsory License

In a June 19, 1996 press release, the DOJ emphasized the fact the PFJ would require Thomson to ''openly license'' West's page numbering system under a system of

Inc. v. West Publishing Co., in the U.S. District Court for the Southern District, apparently to argue against West's claim that its page citation system is protected by copyright law. *See* Connecticut Law Tribune, August 12, 1996. This is laudable, but does not resolve the issues in the COLRS product market discussed in this comment.

[11] Nor has ICP seen the defendants' filings required by 15 U.S.C. § 16(g).

''capped'' fees. In fact, the proposed compulsory licensing system seems to permit very little new entry into the market for primary source case law with the use of the West citation. Basically, publishers who seek licenses must agree to purchase the right to use the citation for each and every case that is cited, in each and every product that is published, in each and every year the product is sold. A publisher who licenses the citation to a single case for use in CD-ROM and online products would have to pay twice for the citation, and renew the payment year after year, with fees increasing each year. The costs for those licenses are very high.

According to publishers, typical federal circuit court opinions run from 20 to 40 thousand characters, and U.S. Supreme Court cases often exceed 150 thousand characters. The PFJ requires publishers to pay 9 cents per thousand characters in the first year, increasing to 13 cents after two years, with annual increases for inflation. Thus, for a 30 thousand character opinion, Thomson will receive $3.90, for each product where the opinion is published, in every year the product is sold. This is a very high price to pay simply to publish the law of the land.

These ''capped fees'' are also likely to be the minimum fees. This particular fee structure sets very high hurdles for entry into the market. The fee structure is strongly biased in favor of the largest competitors to Thomson, and strongly prejudiced against small businesses. Of course, the most important competitor to a foreign owned Thomson/West is foreign owned Lexis-Nexis. Lexis-Nexis will surely license the citations. But the proposed compulsory licensing system makes it nearly impossible for many of the innovative American small technology firms who are seeking entry into this market to obtain the citations and become effective competitors. This is a kind of reverse industrial policy that will hurt consumers and American small businesses.

These fees must be paid by anyone, including not-for-profit institutions. The license agreement is written in such a way that the subscribers must agree to the terms of the license, and Thomson must approve the license, making it extremely unlikely that the citations will ever be available for browsing on the Internet.

We are concerned that the compulsory license agreement will have the perverse effect of adding credibility to West's assertions of copyright to the text and citations of federal court opinions, without providing the public with any real improvements in access to legal information.

For these reasons, we urge DOJ and the court to reject the PFJ, and we urge the DOJ to bring and antitrust case against West Publishing which addresses the serious anticompetitive problems in the market for legal information.

Sincerely,

James P. Love,

Director, Consumer Project on Technology.

This letter could not be reprinted in the Federal Register, however, they may be inspected in Suite 215, U.S. Department of Justice, Legal Procedures Unit, 325 7th St., N.W., Washington, D.C. at (202) 514–2481 and at the Office of the Clerk of the United States District Court for the District of Columbia.

Bartlett F. Cole

September 3, 1996.

Ms. Janet Reno,

Attorney General of the United States of America, 10th and Constitution Avenue N.W., Washington, D.C.

Re: Attention to Monopoly in Legal Publishing

Dear Ms. Reno: The undersigned has been in private practice of Civil law since 1940 (except for overseas duty in the Navy in WW II). Law books have been a substantial part of my overhead. Currently I maintain in my office a complete set of CJS and Wests Oregon Digest Second. When I need additional information I go to the Multnomah County law library here in Portland Oregon. Ms. Jacque Jurkins, the Librarian there has written in the Oregon State Bar Bulletin that Thomson will control 100% of law encyclopedias and 100% of State Digests. She also writes that this will lead to increased prices. I enclose a copy of her article.

Please give serious consideration to blocking this monopoly.

I would say that the President of Thomson has tipped his hand in his letter of June 28, 1996. He says: ''Nothing will change in the *near* term''.

Over the years West has spent millions of dollars on art shows, and artists, and in sending annual calendars to its customers. Since my Federal income tax, my State income tax, and my Portland Oregon business tax all go to support art, artists, and art shows I don't think we need to have to pay more for our law books so West can support whom it feels like.

A few years back Multnomah County opened a brand new building with jail space and additional court rooms. West saw fit to send many of its original paintings to decorate the first and second floor with paintings which it had acquired. One of these paintings bore the title ''A Mugging''. The painting was in fact a murder going on by one individual with a sharp knife in which another individual was shown cut and bleeding. In my humble opinion a very poor subject for a building of Justice.

West does not have a very good reputation for accuracy. A few years back they came out with a paperback index to CJS. This was supposed to be put out on an annual basis so they could have reference to the pocket parts. I found a subject completely omitted and wrote to them about it. I also wrote to them about the extremely poor printing on the pages because ink from one side ran through the paper to the other side. They admitted the mistake in writing but brushed me off.

Please let me know if you are willing to block this monopoly or not, At this time we have a First Lady in the White House who has been a practicing lawyer also. If you are not going to do anything, I need to write to her.

The Bible is the inspired word of God. I enclose for your personal use a pamphlet entitled ''King of Kings'' which has helped me understand the Bible.

Sincerely,

Bartlett F. Cole,

Attorney at Law.

Bartlett F. Cole

September 3, 1996.

West Publishing Corporation,

Attn: Mr. Brian H. Hall, President, PO Box 64779, St. Paul MN 55164

Re: West Annual Calendar

Dear Mr. Hall: I have your form letter dated June 28, 1996 promising no change in the near term. Jacque Jurkins, librarian where I go when my office library is insufficient, predicts that you are likely to increase prices. I enclose a copy of her editorial published in a recent issue of the Oregon State Bar Bulletin.

If you think it is presumptive of me, a sole practitioner way out here in Portland Oregon, to write to you about your annual calendar please recall what scripture says:

Rebuke a wise man, and he will love thee

* * *

Teach a just man, and he will increase in learning.

Proverbs 9:8,9

Eliminate Nonessentials

Mr. Hall, one of the ways you could keep costs down is to eliminate your support of art, artists, art shows, and forever cancel your annual West calendar. I have written to your Mr. Orell G. Piper and frankly told him that I have never seen—in my over fifty years of law practice—a West art calendar hanging in any lawyers office. Frankly, Mr. Hall, I am *required* to support art, artists, and art shows by my income tax to the Federal, State and local governments. I really don't need to support every time I pay for one of your books.

The Bible is the inspired word of God. I enclose for your personal use a pamphlet entitled ''King of Kings'' which has helped me understand the Bible.

Sincerely,

Bartlett F. Cole,

Attorney at Law.

Where Have All the Publishers Gone?

By Jacque Jurkins

On February 26, 1996, we saw the end of a legendary, 124-year old U.S. publishing institution, with the news release, ''West Publishing to Join Thomson in $3.425 Billion Transaction.'' This sale, marked the latest and perhaps the greatest acquisition of an American legal publisher by Thomson Professional Publishing, a Canadian-British corporation. It is something akin to Ford and General Motors merging.

The Thomson Corporation consists of three major business units: travel companies in the UK; 140 newspapers in the United States and Canada; and an international publishing group. The latter in turn is split into six divisions, most notably the Thomson Professional Publishing Group, to whom the assorted American law book companies report.

Since 1979 Thomson has acquired at least 10 American legal publishers in addition to West, including: Callaghan & Company

(1979); Clark Boardman (1980); Warren, Gorham & Lamont (1980); Lawyers Cooperative (1989); Bancroft-Whitney (1989); Research Institute of America (1989); Maxwell Macmillian, formerly Prentice-Hall, (1991); Counterpoint Publishing (1994); Information Access (1994); Barclays (1995); and Shepard's/McGraw-Hill, treatises only (1995).

These acquisitions and the subsequent reorganization of traditional product lines have created no end of confusion for law book consumers as they struggle to keep up with the new lineup of publishers and products. Publications once received from Lawyers Cooperative Publishing (Lawyers Coop) may now come from Clark Boardman Callaghan (CBC) or any one of the publishers owned by Thomson; publications received from Shepard's have been transferred to Lawyers Coop or CBC.

If the sale is approved by the Department of Justice—and at this point in time no one believes it will not be approved—Thomson will control: 100 percent of the national legal encyclopedias (CJS and Am.Jur.2d); 100 percent of the annotated federal codes (USCA and USCS); 100 percent of the commercial U.S. Supreme reporters (Supreme Court Reporter and Lawyers Edition); 100 percent of the U.S. Supreme Court digests; 80 percent of the national legal forms sets (West Legal Forms, Am.Jur.Forms and Nichols Cyclopedia of Legal Forms); 76 percent of the state legal encyclopedias; 50 percent of the major American legal treatises and student case books; the entire National Reporter System; 100 percent of West state, regional, Decennial and topical case digests; 25 annotated state codes; and WESTLAW LawDesk and numerous CD–ROM products.

Prior to the sale, there was significant overlap in the publications of West and the Thomson Group, giving the customers a choice of titles from which to choose. The merger of the two companies will almost certainly reduce competition through the elimination of overlapping publications. Will the consumer have a choice of either CJS or Am.Jur.2d., USCA or USCS, Supreme Court Reporter or Law Edition? Doubtful.

The reduced competition is likely to lead to increased prices. Based upon the history of prior Thomson acquisitions, consumers of legal publications should be prepared for significant price adjustments to former West publications. The cost of the annual supplementation to Am.Jur.2d rose from $584 in 1987 to nearly $1,500 in 1994 following Thomson's acquisition of Lawyer's Coop in 1989. Shortly after Thomson created the new entity, Clark Boardman Callaghan in 1992, the supplementation frequency doubled for Couch on Insurance and Costs rose from $133 in 1992 to $695 in 1995. West charged $256 for the 1995 annual pocket parts to West's Legal Forms, while CBC charged $842 for the 1995 supplementation to Nichols Cyclopedia of Legal Forms, comparable form set. One can only speculate as to what the annual supplementation to West's Legal Forms is likely to cost in the future, particularly since it is well recognized in the publishing industry that Thomson paid as much as three times the going rate for its acquisitions and will need to recoup its investment.

The reduced competition also has resulted in less local customer services and fewer local sales representatives. (Perhaps some customers will not find this a loss.) No longer can one deal with a sales rep. No longer can one lean on the sales rep to straighten out a confused billing or take back an unwanted publication. Instead, there are the telemarket callers.

Lawyers, judges and law students cannot perform legal research or study law without reference to one or more of these publishers' research sources either on line or in hard copy format. Yet very few lawyers are aware of the Thomson acquisitions and even fewer have any understanding of the ramifications and profound effect they will have on everyone in the legal community.

West Publishing Corporation

July 18, 1996.

Mr. Bartlett F. Cole,

1201 S.W. 12th Avenue, Rm. 305, Portland, Oregon 97205–1705

Dear Mr. Cole: Mr. Hall wanted me to thank you for your greeting, and also asked me to respond to your letter of July 1 regarding the 1995 West Calendar.

Over the last twenty years West has encouraged the participation of American artists by supporting one of the nations major invitational art shows. Through ''WEST ART & THE LAW'' West has received much recognition, and was even presented the National Business in the Arts Award. The artwork which you enclosed was highlighted and selected by a panel of nationally recognized individuals from the arts community.

We recognize in art, as well as other subjects, taste, judgments, perceptions vary with each individual. We did receive several letters, such as yours, expressing displeasure with that particular picture. Our intentions were not to offend any group of individuals by this particular selection, but to support art. The artwork for our 1997 West Calendar is called ''City Hall''. It's more related to the legal profession, and I hope you won't mind if we send you one as it becomes available.

I also wanted to thank you for the literature you enclosed. I personally believe the Bible is the inspired word of God, but I had never seen or read it in the comic book format. It was interesting.

Thank you again for interest.

Sincerely,

Orell G. Pieper,

Marketing Department.

West Publishing

June 28, 1996.

Dear Customer: I'm very pleased to announce that The Thomson Corporation has acquired West Publishing. As a result of this acquisition, we have combined two Thomson companies, Thomson Legal Publishing, and West Publishing to form a new company, West Information Publishing Group. This merger has successfully passed review by the Department of Justice.

The new company is now unquestionably the preeminent provider in legal publishing and will offer great benefits to the industry. We now have the potential to provide more integrated products and services—products that will be easier to use, more timely, and will incorporate cutting-edge technologies. In addition, our licensing of Star Pagination to third parties will provide greater public access to primary case law by broadening the number of vendors who utilize the product.

In terms of the sales support, customer service, product enhancements, billings, and other services you expect from West Publishing Company, nothing will change in the near term. All operational details will remain the same for the remainder of 1996. If you have any questions, please don't hesitate to call your customer service representative.

You are a valued customer, and your satisfaction is at the top of our priority list. I look forward to our enhanced ability to serve you in the future.

Respectfully,

Brian H. Hall,

President, West Information Publishing Group.

[FR Doc. 96–25030 Filed 10–10–96; 8:45 am]

BILLING CODE 4410–01–M

DEPARTMENT OF JUSTICE

Office of Justice Programs

Office of Juvenile Justice and Delinquency Prevention; Agency Information Collection Activities: Proposed collection; Comment Request

ACTION: Notice of information collection under review; State Juvenile Corrections Organization Survey.

The proposed information collection is published to obtain comments from the public and affected agencies. Emergency review and approval of this collection has been requested from OMB by November 1, 1996. The emergency approval is only valid for 90 days and during this period a regular review of this collection is also being undertaken. Comments are encouraged and will be accepted until December 10, 1996.

Request written comments and suggestions from the public and affected agencies concerning the proposed collection of information. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;