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The Seal of Approval

August 14, 2007

Mr. Peter Warwick, President & CEO Thomson North American Legal 610 Opperman Drive St. Paul, Minnesota

Via Facsimile: I-651-687-1979

Dear Mr. Warwick:

I am writing to you today for your guidance. My organization, the nonprofit Public.Resource.Org, in conjunction with a number of other nonprofit corporations and universities, have set ourselves a goal of creating an unencumbered public repository of all federal and state case law and codes. This goal is not meant to compete with commercial vendors such as yourself, who perform a worthy service for the large law firms and other well-funded institutions who practice the business of law.

Rather, we wish to make this information available to a population that today does not have access to the decisions of our federal and state courts because they are not commercial subscribers to one of the handful of services such as your award-winning Westlaw tools. Codes and cases are the very operating system of our nation of laws, and this system only works if we can all openly read the primary sources. It is crucial that the public domain data be available for anybody to build upon.

As an initial contribution in furtherance of the goal of seeing all state and federal case law and codes freely available, we have begun the process of scanning the Federal Reporter, the Federal Supplement, and the Federal Appendix. We will be extracting the public domain content and republishing it on the Internet for use by anyone.

I am writing to you for guidance on the subject of where the public domain stops. It is clear that the early volumes of these compilations of the public opinions of our federal courts can be copied. But, when I search the Copyright.Gov site for "Federal Reporter", I note a systematic set of registrations by your organization, but each of those registrations says "copyright not claimed as to any part of the original work prepared by a U. S. Govt. officer or employee as part of that person's official duties."

As I am not a lawyer, I find this confusing. Likewise, in looking through the court decisions of a decade ago where West and your commercial competitors fought over the right to re-publish case law, it seems fairly clear that a large part of the publication stream is tightly interwoven into the very substance of the operations of our courts, with West serving as the either contractual or de facto sole vendor reporting on behalf of the court. While most parties seem agree that your "headnotes" are potentially copyrightable, I see no clear statement by either you or the courts about exactly what is considered public domain and what is not.

We faced a similarly ambiguous situation recently in our attempts to re-publish proceedings before the U.S. House of Representatives. C-SPAN provides the floor feeds for the U.S. Congress, but it has now been widely acknowledged that those feeds are in the public domain, and congressional committees have now begun to directly release hearing materials. The analogy to the role West has played for our courts seems quite apt, hence my letter to you today.

It is unclear to me if Thomson asserts any copyright in the Federal Reporter, Federal Supplement, and Federal Appendix, since your commercial competitors all seem to have identical databases to yours and you seem to compete on service and speed. If you are asserting copyright, and if my understanding is correct that the actual cases and even page numbers are not a bone of contention, what exactly is it that is under copyright? I ask this question in all seriousness in an attempt to see if perhaps there is no conflict at all between how you perceive your commercial activities and our publication efforts.

It has always seemed to me that companies such as Thomson North American Legal derive their value from the overall service and tools rather than through an accumulation of properties, and that your recent record growth and profits as a service business can be contrasted to the declining markets and margins of traditional publishers.

We have found with prior efforts to place government documents on-line, particularly the SEC EDGAR database and the U.S. Patent database, that the market for commercial services based on those databases actually increases once the core underlying data has been made widely available. This is because the base of potential consumers of this information has gone up dramatically, and some of those new consumers graduate to the high-end commercial services such as yours.

Even if you do consider specific portions or features of documents of specific years to have copyrightable aspects, it seems clear from reading the records of your prior intra-industry disputes that these conflicts are very much at the margins and that there is no contention that cases themselves are public.

Rather than clarifying which portions of the public record you consider "yours" and therefore (if you are correct in that view) must be redacted prior to distribution, would you consider instead simply releasing the full text of the Federal Reporter, Federal Supplement, and Federal Appendix? You have already received rich rewards for the initial publication of these documents, and releasing this data back into the public domain would significantly grow your market and thus be an investment in your future.

As a graduate student in the Indiana University School of Business, my subject of study was institutional economics, in particular issues such as antitrust, corporate governance, and the structure of regulated industries such as telecommunications. In the course of my work, I continually dove into the body of case law, but to do so had to sneak into the law school. One of the joys of the Internet is to see information previously considered the domain of a few specialists reenter the public domain and become once again relevant to all people.

Best regards,

Carl Malamud (carl@media.org)
President & CEO
Public.Resource.Org, Inc.