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August 28, 2007

Via Facsimile and E-Mail

Carl Malamud
President & CEO
Public.Resource.Org, Inc.
1005 Gravenstein Highway North
Sebastopol, CA 95472

Dear Mr. Malamud:

Thank you for your letter to Peter Warwick dated August 14, 2007. We appreciate both your questions regarding West's publications, which reflect an awareness of the legal issues involved, and your acknowledgement of West's contribution to the preservation and dissemination of American case law.

We have responded below, to the extent possible, to your individual questions. Our ability to provide specific "guidance" with respect to your project is, by necessity, limited. We are not in a position to offer legal advice, of course. Furthermore, it is not possible to assess to what extent there is, in your words, a "conflict" between our "commercial activities" and your "publication efforts" without being able to view and analyze the full scope of your proposed "public repository."

As an initial matter, we would like to clarify West's role as a publisher of case law. In contrast to many of the other governmental materials your organization has addressed, judicial opinions have always been made available to the public, typically in the form of slip opinions. Over the decades, first in book form, and now on the Internet, many sources other than West have made case law publicly available. For more than 100 years, West has made a substantial investment of money, time, labor, and editorial expertise to collect, edit and disseminate this body of case law. West does not, however, publish its Federal annotated reporters "on behalf of the court." For these reasons, your analogies to C-SPAN and the EDGAR database are inapposite.

Turning to the specific issues raised in your letter, West fully agrees with your position that judicial opinions themselves, as issued by the courts, are "public" and subject to no copyright protection of any kind. We also agree, of course, that some of

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West's early reporters are no longer protected by copyright – whatever the nature of their content -- because of the time limitations of the Copyright Act.

As you suggest, with respect to those reporters that are covered by active copyright registrations, West claims no copyright interest in the portions of the text that consist of judicial opinions as issued by the courts, but does claim a copyright interest in West's original contributions to the reporters. We appreciate that, in recognition of the existence of separate copyright-protected elements in West's reporters, your project plan involves "extracting the public domain content" from the reporters prior to republication.

There are essentially three categories of original work in the reporters that West believes are subject to copyright protection. The first is the West-created introductory material typically following the caption, court, and date information in each report – which consists of West's summary or "syllabus" of the opinion, followed by West's "headnotes" and key-number references to West's original research system. As you suggest in your letter, the copyrightability of this material, which is original to West, has never been seriously questioned.

The second category consists of West's editorial enhancements to the opinions, created by West's legal editors (not at the direction of the courts), which include annotations, revision and amplification of citations, and updating. With respect to the *Supreme Court Reporter* and *Federal Reporter* only, the U.S. Court of Appeals for the Second Circuit, in a 2-1 decision, rejected this claim, in *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 674 (2d Cir. 1998), *cert. denied*, 119 S.Ct. 2039 (1999). No court in any other jurisdiction has specifically addressed this issue. The rationale for a result contrary to that in the Second Circuit is set forth in Judge Sweet's dissent. *See* 158 F.3d at 689-93. The holding by the Second Circuit does not apply to any other West reporters.

The third category consists of West's selection and arrangement, within each reporter, of the individual case reports. The courts of the Eighth Circuit have consistently found that these editorial choices, which are in no way dictated by the courts, are entitled to copyright protection. *See West Pub. Co. v. Mead Data Central, Inc.*, 616 F. Supp. 1571, 1579 (D. Minn. 1985), *aff'd*, 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987); *Oasis Publishing Co. v. West Publishing Co.*, 924 F. Supp. 918 (D. Minn. 1996). The Second Circuit has not ruled on this issue but "assumed" that West's selection and arrangement of cases is copyright-protected for purposes of its decision in *Matthew Bender & Co., Inc. v. West. Pub. Co.*, 158 F.3d 693, 697 n.3 (2d Cir. 1998), *cert. denied*, 119 S.Ct. 2039 (1999).¹

¹ The Eighth Circuit courts have consistently held that this copyright in selection and arrangement may be infringed by comprehensive electronic copying of West's page numbering and page breaks ("star pagination"). *See West Pub. Co. v. Mead Data Central, Inc.* and *Oasis Publishing Co. v. West Publishing Co.*, *supra*. In a 2-1 decision, the Second Circuit reached a different conclusion; Judge Sweet's dissent provides a thoughtful analysis endorsing West's position. *See Matthew Bender & Co., Inc. v. West. Pub. Co.*, *supra*, 158 F.3d at 708-11

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I hope that these decisions will provide at least some of the guidance your letter seeks. Whether any of West's copyrights are infringed by particular uses of its publications, and whether the fair-use doctrine is applicable in any particular case, are highly fact-intensive questions that are not, as suggested above, susceptible to generalization or hypothetical speculation.

Very truly yours,

A handwritten signature in black ink that reads "Edward A. Friedland". The signature is written in a cursive style with a large initial "E" and a long, sweeping underline.

Edward A. Friedland

cc: P. Warwick