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Copyright Suit Takes Swipe At Westlaw's Practices

Proposed class action challenges research giant's use of attorneys' briefs

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The legal document that West Hartford attorney David J. Heinlein saw on the Westlaw database looked familiar. That's because he had written it. Heinlein didn't think it was right that the legal research giant was profiting from his efforts. So he took two steps.

He copyrighted the brief he had written in 2003 as part of a lawsuit against Home Depot.

And he sued Westlaw, claiming copyright infringement.

With the help of his attorney, Heinlein hopes to obtain class action status and get an injunction to stop Westlaw from publishing lawyers' legal briefs online and then essentially receiving payment for them through a subscription service. "This is going to be a very interesting case and it's very hard to predict what's going to happen," said Michael Blake, an IP lawyer in Milford, who is not involved in this case.

In February, in a New York federal court, two other lawyers filed a lawsuit against both West Publishing and LexisNexis making essentially the same claim — that the digital collection and sale of their publicly filed legal briefs and memoranda violate U.S. copyright laws. Their suit, too, seeks class action status.



Hartford IP attorney Curtis Krechevsky said Westlaw and LexisNexis will likely argue that they have a 'fair use' right to put attorneys' briefs into their databases, a defense often used by news organizations.

"Anyone who has authored briefs has been infringed upon regardless of whether the lawyer has obtained a registration with the copyright office," said Heinlein's lawyer, Jonathan M. Starble, of Starble & Harris in Avon. "Heinlein did obtain [copyright] registration on an authored work before filing suit. However, it is our position even those who have not obtained registration have rights that are being violated and those rights can be addressed in our class action."

Starble explained that federal statute provides that judges cannot copyright their public, written legal decisions. "By contrast, briefs, memos and pleadings are not sources of law. Nothing strips them of their copyright protection," said Starble.

Starble said Westlaw typically posts a PDF photocopy of the legal document as well as a second version in a word-processing format such as Microsoft Word. He said the specifics as to how

those documents are selected by Westlaw and obtained will be a focus of discovery during the pre-trial phase of the lawsuit.

A lawyer for West Publishing Corp., owned by Thomson-Reuters, Terence J. “Terry” Gallagher, of Jones LLP in Stamford, said he could not comment on the pending lawsuit. The defendants have not responded yet in court to either suit. Starble said he’s filed a motion that would combine his suit with the New York case.

Gregory A. Blue, the plaintiffs lawyer in the New York case, told the *Law Tribune* he was unaware a similar suit in Connecticut had even been filed. Blue said both research providers —Westlaw and LexisNexis — were profiting from lawyers’ legal memos by selling the very same documents back to the lawyers producing the briefs in the first place.

Blue said lawyers “are getting nothing for it.” He said “people get blinded” by digital media and think they can take whatever they want. He said if the works were sold in a bookstore the perception would be different.

“The analogy that comes to me is, what if West or Lexis had decided to put out a series of books of the best legal briefs in the United States and sell them in Barnes & Noble?,” said Blue. “People would clearly see they’re ripping off the authors of the briefs. It’s really no different because it’s in an electronic form and is really more egregious because they’re doing it on a more massive scale.”

Digital Age Issue

Lawyers specializing in copyright infringement seemed to think the lawsuits made viable claims but predicted the plaintiffs were in for “an uphill battle.”

Curtis Krechevsky, an IP lawyer at Cantor Colburn in Hartford, said a lawsuit like this is a product of its times. “This wouldn’t have been feasible in the pre-digital age,” said Krechevsky. “The ability to access and search through in lightning speed huge amounts of data relevant to

you, that’s only something that’s developed in the last 20 years.”

Krechevsky explained that in defending the two lawsuits, West Publishing and LexisNexis would likely argue that their publishing of the content in question is a “fair use.”

“So that even if copying is involved it’s not found to be a violation if it’s OK under the fair use defense,” said Krechevsky. The fair use defense typically works in instances of news reporting and research, he noted. “I could see the defendants saying, ‘Well, this is simply allowing people to perform research,’” Krechevsky said.

Further, he said the court would look at what, if any, financial impact the research companies’ policies have on lawyers who write the briefs.

“That’s going to be a real question; is there a market being supplanted by what Westlaw and LexisNexis are doing?” said Krechevsky. “Aside from what they earn as an attorney, I haven’t heard of anybody making a living saying, ‘I’ve got this great brief and I’m willing to make it available to you.’”

Another factor that could play in the minds of a judge with this dispute is the possible headache that could follow if it were determined that the legal briefs were subject to copyright.

“My gut’s telling me the court probably won’t grant him the relief [the plaintiff is] seeking,” said Blake, the IP lawyer in Milford. “I think it’d make the legal process grind to a halt if you had to worry about copyright issues every time you file a pleading... It’d be a real burden on the legal system.”

Krechevsky agreed. He said you could end up seeing each state’s judicial branch issue local court rules that if an attorney files a brief or other legal document in support of your lawsuit, the attorney agrees that a license is given for anyone else to use the material. And if someone doesn’t agree to those terms, then they can’t file

the lawsuit in that jurisdiction.

Overall, Krechevsky characterized the lawsuits as an “uphill battle.”

“My gut reaction is that this is a stretch and there are a number of ways a court could say either this is a fair use or most of the people are ineligible because they never bothered to get a copyright,” Krechevsky said.

Both lawyers, though, agree it’s worth a shot. “I think this guy has a reasonable argument,” said Blake. “Westlaw and Lexis have deep pockets so there is a lot to be gained from winning a lawsuit against them.”•