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Go West, Young Thomson!

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On February 26th, Toronto-based Thomson Corp. — reputedly the world's largest publisher of information for professional markets, including lawyers — announced plans to acquire the well-known legal publisher, West Publishing Co., for \$3.4 billion. Since that time, consumer groups, law librarians, and competing legal publishers have voiced alarm. Competitors claimed they would be shut out of the market, while customers feared higher prices and fewer choices. Perhaps because law books are something they understand, state and federal antitrust enforcers initially leapt into action, but the ultimate effect of their efforts is debatable.

Antitrust Enforcers Take Action

In early April of this year, the U.S. Department of Justice issued a "second request" to Thomson and West, a sort-of civil subpoena seeking more information on their competitive positions. At the same time, the attorney general's offices of California and several other states also began examining the proposed alliance.

Under the Hart-Scott-Rodino Act, merging companies must file notification with the U.S. Justice Department and the Federal Trade Commission if the company to be acquired has more than \$15 million in assets. The government then has 30 days to decide either to let the transaction go forward, to challenge it in court, or to launch a further investigation (by making a "second request"). The test of legality for a merger is set forth in Section 7 of the Clayton Act, which prohibits mergers and acquisitions of stock or assets that may "substantially lessen competition" or tend to create a monopoly in any line of commerce.

The Initial Settlement Agreement

On June 19th, the Justice Department and the attorneys general of seven states filed in court a complaint outlining the antitrust risks posed by Thomson's purchase of West and simultaneously announced that they had reached a settlement with Thomson. Under the proposed settlement, Thomson would divest 51 book products and the Auto-Cite electronic database, extend certain copyright licenses currently held by Lexis-Nexis for five years, and allow other competitors to buy licenses to use West's page-numbering system.

Under federal antitrust procedures legislation known as the Tunney Act, however, the government cannot settle an antitrust suit that involves a "consent decree" of the kind proposed in the West-Thomson deal without seeking court approval. The court in turn must determine whether the settlement is "in the public interest," after soliciting public comment.

Lexis Enters the Fray

On September 12th, Lexis-Nexis — a division of Reed Elsevier Inc. and currently the No. 3 player in the U.S. legal research industry — filed papers in federal court opposing the settlement. The main thrust of the Lexis-Nexis filing is that, after the merger, there ought to be an alternative legal research system of significant size that can compete with the West-Thomson alliance. Lexis' solution would be to order complete divestiture of the most important Thomson research materials — particularly *American Law Reports* (ALR) and *American Jurisprudence 2d* (Am Jur) — to insure an alternative to West-Thomson in the field of enhanced caselaw and codes.

Librarians Are Heard From

Attached to the Lexis submission were affidavits of two law librarians: Prof. Mary Brandt-Jensen of the University of Mississippi and Kendall F. Svengalis, the Rhode Island state law librarian. Prof. Brandt-Jensen's affidavit states that, "After having read the Proposed Final Judgment and much of the comment upon it, I find only a charade that pretends to exercise the [Justice] Department's role in protecting the consumer." Arguing in favor of divestiture of the ALR system, the affidavit states that "Publishers pay far more attention to what the competition is doing than they pay to what their users actually ask for. Without the competition between two giants, there will be no more pressure to add more value for the same or a lower price in order to win the competition's customers."

The Svengalis affidavit argues that the merger "will have greater impact on competitiveness in the legal publishing industry than any other event in this century." Dr. Svengalis, author of the *1996 Legal Information Buyer's Guide & Reference Manual*, is reportedly a national expert on pricing patterns of law books and believes that "having, at a minimum, two competing methods of gathering legal information is critical to the competitiveness of this market." Complete divestiture of Thomson's Lawyers Cooperative is, in his view "the minimum acceptable solution 'within the reaches of the public interest'."

The Judge Steps Aside

In a remarkable development shortly after the Lexis filing, HyperLaw, Inc. (a small CD-ROM publisher) brought to the attention of U.S. District Judge Charles R. Richey — who was scheduled to rule on the legality of the settlement — that his book, the *Manual on Employment Discrimination and Civil Rights Actions* in the Federal Courts, is published by a company that is now a part of the Thomson Corporation (Clark Boardman Callaghan), and that accordingly he appeared to have a business relationship with one of the parties. Judge Richey promptly recused himself, and the matter was assigned to Judge Paul Friedman on Sept. 18th.

West-Thomson Sweeten the Deal

A few days after Judge Richey's recusal, on September 24th, the Justice Department announced that the proposed consent decree would be changed to reduce the license fees that competing publish-

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ers would have to pay to use West's page numbering system. This aspect of the proposed settlement was one of several terms that had been criticized. The original proposal set the license fee at 9 cents per 1,000 characters in the first year, rising to 13 cents after three years, but small CD-ROM publishers said the rates were prohibitive and would not encourage new competitors. Under the new proposal, the first-year rate would be cut by more than half to 4 cents per 1,000 characters, rising to a maximum of 9 cents over seven years.

The Page Numbering Issue

To put this issue into perspective, we need to take a step back and understand the issue of page numbering. West, for a number of years, has claimed that other publishers infringe on West's compilation copyright if they show where West's page breaks fall in the text of court opinions. Even though the court opinion itself is not copyrighted, West's claim is that its choice of pagination is protectible. The federal appellate court in St. Paul, Minnesota (West's hometown) so ruled back in 1987 in a suit brought by West against Mead (which owned Lexis-Nexis at the time). Some argue that this holding is now wrong in light of the Supreme Court's 1991 decision in Feist Publications, Inc. v. Rural Telephone Service Company.

To end the Minnesota suit, Lexis entered into a settlement with West in 1988 to pay a license fee to include the West pagination on its computerized case service — which competes with West's own computerized service. Other publishers that wish to reprint cases with the West pagination must either pay a license fee or risk being sued. A case raising this copyright issue is currently pending in New York: Matthew Bender & Co. and Hyperlaw, Inc. v. West Publishing Co., 94 Civ. 0589 (S.D.N.Y.). (See *ATG*, this issue, p. 43.)

Surprisingly, on August 5th, the U.S. Department of Justice announced that it intended to file an *amicus curiae* brief on behalf of Matthew Bender and HyperLaw, arguing that West's page numbering is not copyrightable. The *amicus* brief — which has now been filed — states "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 Nation Reporter System volumes."

The "Public Interest" Hearing

On September 30th, Judge Friedman held a hearing on the proposed consent decree. Curiously, despite the many global criticisms of the settlement, there was virtually no discussion during the two-and-a-half-hour hearing of the overall impact of the merger or the adequacy of the divestitures required by the consent decree. Rather, discussion focused on one aspect of the page license agreement and the mechanics of the divestiture of Auto-Cite.

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the fish form is to portray its own appearance, and that fact is enough to bring it within the scope of the Copyright Act. (65 USLW 2033)

West Publishing Company was back in court recently and below are synopses of two cases involving, first, copyright of its page numbering system and, second, whether the publisher of a product (Hyperlaw, Inc.) containing star pagination references to West's reporters, had a reasonable expectation of suit by West against Hyperlaw. Think you are confused now? Read on ...

Judge Friedman expressed discomfort approving the mandatory license agreement for West's pagination because of the clause that requires licensees to waive any challenge to West's copyright claim during the period of the license. He noted his doubts that West had a viable copyright claim to its pagination after the Supreme Court's Feist decision (the issue raised in the Matthew Bender/HyperLaw case). At the end of the hearing, Thomson's lawyer said that Thomson would drop the waiver clause.

Lexis-Nexis's lawyer argued that Thomson is violating both the proposed consent decree and an agreement with Lexis because it is not fully divesting the Auto-Cite case history database. Thomson says it must keep a copy of the database because it is used for other internal editing purposes, so Lexis argued that Thomson is only granting a license rather than making a full divestiture. Lexis' attorney also contended that Thomson had agreed earlier this year to sell off the ALR series along with Auto-Cite if it sold the latter.

The judge held off on ruling to give Thomson and the government time to propose several changes to the agreement. Subsequently, briefs on various issues were filed by all parties, including Lexis. At the time of this writing (November 30th), the court has still not ruled on the proposed consent decree.

An Alternative Approach

The West pagination issue which lies at the heart of much of the dispute may become a passing fancy. On August 6th, the American Bar Association overwhelmingly passed a resolution calling for state and federal courts to develop a standard, "format neutral" citation system. If adopted by the judiciary, West's pagination would become irrelevant (at least for future cases). For example, a format neutral citation for a federal court of appeals decision might read: Smith v. Jones, 1996 5Cir 15, 18. "1996" would refer to the year of the decision; "5Cir" to the U.S. Court of Appeals for the Fifth Circuit; "15" would indicate that it was the 15th decision released by the court that year; and "18" would be the paragraph number where the cited material could be found.

Conclusion

From the point-of-view of librarians and other purchasers of legal materials, it is an open question whether the concessions exacted from West/Thomson by the Department of Justice will effectively reduce the spectre of diminished competition (and consequently higher prices) in the marketplace that the merger raises. Perhaps the day of the legal encyclopedia — not to mention the print medium itself — is drawing to a close, and it hardly matters what West and Thomson do. Perhaps the future lies entirely in electronic caselaw "published" directly by courts in a neutral format. We'll just have to wait until time turns the next page of our story.

Matter Copyrightable

Oasis Publishing Co. v. West Publishing Co.

In this case, the Court determined that West Publishing's method of arranging cases in its reporter system, including its pagination, is an original creative endeavor entitled to copyright protection, and inclusion of its internal page breaks in competitor's CD-ROM product is not considered "fair use" under the Copyright Act.

Oasis Publishing Co. publishes the statutes and cases of several states, including the State of Florida, on CD-ROM. At issue is West Publishing's *Florida Cases*, a bound product which is a reprint of the Florida decisions as they appear in the *West Southern Reporter*,

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