

Are Legal Briefs Copyrightable: Yes or No and Why It Matters

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Cases like A& M Records v Napster have pitted lawyers in their professional capacity as advocates against each other in the on-going conflict over the scope of copyright protection in a digital age. But with the emergence of electronic filing at the courts which will facilitate the collection and resale of attorney briefs these copyright issues will impact lawyers on a far more personal level.

Electronic filing in combination with Internet technology creates a new mechanism for the systematic compilation, indexing and distribution of electronic data bases of briefs filed in court proceedings much in the same way that LEXIS or Westlaw have long gathered judicial and administrative agencies decisions for legal research purposes. A number of companies have emerged, such as Briefreporter.com, Briefserve.com and Juritas.com which compile briefs electronically and make them available for view or sale via websites. At the same time, in contrast to judicial opinions which are non-copyrightable public domain materials available for the taking, the weight of authority suggests that legal briefs qualify for copyright protection which remains intact even where briefs are made part of the public record.

Thus, at these nascent stages of a potentially new source of legal research materials, we lawyers face an important choice. Should we defend any existing copyright interests in briefs which could have the effect of impeding the efficient compilation of briefs into useful research databases by commercial providers? Or should we decline to enforce our copyright interests or expressly surrender legal briefs to the public domain which would expedite collection the compilation of briefs by commercial providers but at the same time would enable them to profit from

attorney work product by charging fees to access briefs from their databases. Ultimately, the course which we choose will have implications on the availability of legal briefs for research purposes for many years to come.

B. Copyright Issues

1. Requirements of the Copyright Act

Legal briefs meet the three basic requirements for copyright protection under the Copyright Act. These three requirements are: (1) originality, (2) inclusion in one of the eight statutorily identified categories of works identified by the Act, such as literary works which encompass all writings and (3) fixation in a tangible medium. See 17 U.S.C. § 102. The originality criteria as defined by the United States Supreme Court mandates that a work reflect some modicum of creativity. Feist v. Rural Telephone Publications, 499 U.S. 340 (1991). Thus, copyright protection does not apply to works such as phonebooks which merely list or compile non-copyrightable facts without any creativity devoted to their organization or selection. By contrast, legal briefs satisfy the originality requirement if not in the fairly standardized legal writing style or listing of cases (which as discussed *infra* are non-copyrightable public domain), then at least in the expression of arguments, legal reasoning and selection of persuasive judicial authority provided in support of those arguments.

Moreover, legal briefs would also qualify for copyright protection as derivative works which include annotations of and revisions to the underlying work. See 17 U.S.C. § 103. Minor revisions to an underlying work will not give rise to valid copyright interests as shown in Bender v. West Publishing, 158 F.3d 674 (2nd Cir. 1998). There, the Second Circuit denied West's claim for copyright protection of public domain judicial opinions compiled in West Reports, finding that

West's addition of page cites and attorney names constituted minor revisions and did not transform the reporter cases into copyrightable derivative works. However, legal briefs do not simply compile judicial cases with little more. Rather, briefs typically analyze cases at length and distinguish them from each other with the resulting arguments substantially departing from the underlying cases on which they are based.

Most likely, briefs would not be considered to be pure forms of ideas, procedures or methods of operation which are otherwise exempt from copyright protection. 17 U.S.C. § 102(b). For example, business forms do not qualify for copyright protection because the layout of the form reflects a procedure or method of operation. See e.g., Lotus Development Corporation v. Borland Int'l, 49 F.3d 807 (1st Cir. 1995). Thus, while the skeletal format of a brief mandated by court's rules, e.g., division of the brief into discrete sections such as Jurisdiction or Statement of Facts is not copyrightable since it merely implements the court's own procedures, the original content expressed in those sections would likely remain protected by copyright.

Similarly, courts do not extend copyright protection in cases where an idea merges with the expression such that no other way exists to convey the idea for example, as in the case of a set of contest rules See e.g., Morrissey v. Proctor and Gamble, 379 F.2d 675 (1st Cir. 1967). Yet, notwithstanding the restrictive parameters governing a brief's format, attorneys retain sufficient flexibility over content to convey ideas in a variety of ways as evidenced by the wide variations running through the primary and amicus briefs filed in court proceedings even though many take the same position.

Under Section 201 of the Copyright Act, the author of the brief (or the attorney) holds the copyright, not the client unless in a situation such as one where in-house counsel drafted a brief for

the employer- corporation. In this scenario, the brief would most likely be considered a work for hire and the corporation would retain the copyright. 17 U.S.C. § 201(b)

2. Government Works, Public Domain

The three potentially strongest grounds for exempting briefs from copyright protection lie in either the government works exemption in the Copyright Act and the concept of public domain.

Under Section 105 of the Copyright Act, copyright protection does not apply to any works by the United States government (but not state government). Thus, all legal briefs by U.S. Attorneys offices and federal agencies are automatically excluded from copyright protection.

Alternatively, many believe, perhaps mistakenly that briefs join the public domain and lose copyright status by virtue of their inclusion in the public record in a court proceeding. Not so. As one district court explained, if...theory that [filing in public record transforms document into public domain] were accepted, James Joyce's *Ulysses* would lie within the public domain because the United States prosecuted the book...a generation ago. Marvin Worth Production v. Superior Films, 319 F. Supp. 1269 (S.D.N.Y. 1970)

In addition, briefs most likely would not lose copyright protection where they are incorporated by reference into judicial opinions at least, under the somewhat controversial holding in Veek v. Southern Building Code, Docket No. 99-40632 (5th Cir. February 2, 2001) which is now subject to a request for rehearing *en banc*. In Veek, the Fifth Circuit, over a vigorous dissent, narrowly found that an individual's web posting of a professional trade association's model building code infringed the association's copyright notwithstanding that the model code had been incorporated by reference into regulations enacted by numerous municipalities statewide. The court acknowledged that the municipal regulations, which referenced the model codes qualified as public

domain since due process requires that citizens have notice of their legal obligations and because the materials were prepared by the government at taxpayer expense and thus owned by the public. see also Building Official and Code Administration v. Code Technology Inc., 628 F.2d 30 (1st Cir. 1980). But the court decided that as a matter of policy, the model codes should remain distinct from the public domain. The court reasoned that enforcement of copyright interests in the model codes would continue to give private associations a profit incentive to innovate and develop codes for use by governments and that this goal outweighed any due process rights to know the law, which the court deemed minimal anyway based on the specifics of the record showing that access to the codes remained readily available for inspection at municipal government offices. See Veek v. Southern Building Code, Docket No. 99-40632 (5th Cir. February 2, 2001). With regard to legal briefs, any potential due process concerns related to their access are far more tenuous than the very real concerns in Veek Judicial decisions and not the underlying briefs (which are typically forgotten once an opinion is rendered) form the exclusive basis of common law and legal precedent, whereas model codes incorporated by reference into statutes become part and parcel of the law to which citizens remain accountable.

4. Fair Use

At best, in most cases, the filing of a brief in the public record can be regarded as an implicit license for fair use. See e.g., Smit, Make a Copy for the File..., 46 Baylor Law Rev., 1 (1994) (delineating the scope of fair use for documents filed in court proceedings). Fair use does not vitiate copyright protection but rather allows use of copyrighted materials without permission notwithstanding the copyright. For example, once a brief is filed, attorneys clearly can make limited copies to send to clients or to distribute to other attorneys in the firm working on the case or can quote

large passages of the brief in their own brief to rebut or critique arguments.

But would a broader use of briefs — such as collecting and posting briefs at a website with for-fee access or binding briefs into a book for resale without permission — constitute fair use? The Copyright Act describes four factors for evaluating fair use, including whether the use is commercial or non-profit, nature of copyrighted work, portions of work used and effect on market for copyrighted work. 17 U.S.C. § 107. With respect to briefs, both the nature of the work and the effect on the market for copyrighted work weigh in favor of considering commercial sale of briefs a fair use. First, whereas copyright law was intended to provide a profit incentive to individuals to use their creative talents, attorneys need no such incentive to produce legal briefs. Rather, the prime motivation for drafting briefs stems from lawyers' ethical obligation to zealously represent clients as well as the rules of the courts which mandate the filing of written briefs. Recently, a federal court relied in part on the distinction between voluntary and compulsory creation, refusing to enforce a county agency's claimed copyright in taxpayer maps against a commercial provider which acquired the maps and resold them for profit. The court noted that the agency had a statutory duty to prepare the maps rather than a commercial interest which could be adversely impacted. See County of Suffolk v. Experian Information Solutions, Docket No. 99 Civ. 8735 (S.D.N.Y. July 21, 2000), appeal pending Docket No. 00-9169 (2nd Cir. 2001). In short, given that attorneys have, at a minimum, a professional obligation to write briefs, posting briefs on-line would not discourage attorneys from drafting briefs by removing the profit incentive and thus, such a use might be deemed fair.

In a similar vein, the market for attorney services would not be adversely affected if briefs were posted on-line — in contrast to, for example, the way in which record sales might decline as a

result of free exchange of music in the Napster case. While briefs can offer insight into legal research, legal proceedings are sufficiently fact specific that briefs cannot be recycled and re-filed wholesale by an individual, rather, the market for the attorney's services would remain intact, thus suggesting that the use is fair. (although arguably, clients would only be willing to pay lower rates if much of the research for a given case was already prepared for a previous brief).

On the other side of the coin, consider a situation where an attorney representing clients of minimal resources files a brief which is subsequently resold through a commercial service. That attorney's brief would benefit other attorneys, including potential adversaries while the attorney who drafted the brief might not be able to afford to access the research service. Use of the brief without permission in this type of instance seems inherently unfair.

C. Enforcing Copyright for Briefs: Yes, No or Middle Ground?

Although attorneys hold copyright interests in briefs, vigorous enforcement of those interests may pose a barrier to efficient collection of briefs into a comprehensive database when electronic filing is implemented, thereby increasing the cost of access to such a service. Certainly, a company could still obtain an attorney's permission each time it seeks to include a brief in its database; in fact, Briefreporter.com, the oldest of the on-line brief services does just that. However, Briefreporter.com also does not include all filed briefs in its database but only those associated with cases deemed legally significant by staff experts. Moreover, all of these steps identifying cases, obtaining permission are far more costly than a system where electronically filed briefs are transmitted into a database automatically as is currently done with the issuance of judicial decisions. In addition, the existence of potential copyright problems might deter other providers from entering into market for compiling and reselling briefs, thereby minimizing competition and increasing the cost of the service.

On the other hand, asking attorneys to expressly surrender briefs to the public domain upon filing would not necessarily yield a better result. Although treating briefs as public domain would invite numerous providers to compile and resell briefs without restriction, other problems could result. For example, in the event that Congress were to pass data base protection legislation such as the Information Antipiracy Act considered last term, the brief databases compiled by commercial providers would themselves obtain copyright protection. Thus, once a provider compiled a database of briefs which attorneys committed to the public domain, the legislation would prohibit anyone else from taking that information from the database to start their own competing service. This contrasts the Second Circuit's result in Bender v. West Publishing, 158 F.3d 674 (2nd Cir. 1998) where the court allowed Hypertext, a competing provider to scan West's cases from its database of reporter cases into its own service.

More troubling, however, is the plan of many state courts to use outside vendors for electronic filing and storage; these vendors will have immediate and unfettered access to electronic briefs, thus giving them a leg up over other potential competitors seeking to compile brief databases. Where briefs have no copyright protection, these vendors can sell those briefs without restriction while using their exclusive access to electronic filings to keep other competitors out and keep prices up — much as West and LEXIS did for many years. This result is undesirable and unfair — particularly where an attorney's own briefs may be included in a database accessible by others but which the attorney's clients lack the resources to access themselves.

C. Conclusion

Ultimately, whether or not we lawyers enforce or forego our copyright interests in legal briefs, we must take steps to ensure that at a minimum, broad and inexpensive (or free) access to legal briefs

for research and client representation remains available. Some courts have already taken these steps: the Eighth Circuit now posts all attorney briefs filed with the court and the Northern District court of California's local rules on securities litigation go so far as to require all parties filing documents to post them at an Internet site which places no restriction on any person's ability to copy or download any of the materials free of charge. Civil Local Rule 3-7A(d), <http://securities.stanford.edu/pslra/ndcal/locrules.html>. In addition, courts should not enter into any exclusive arrangements with outside vendors to file or store electronic briefs unless such vendors agree to make any compiled databases of briefs available to competitors for their respective use.

Admittedly, granting broad access to legal briefs for research purposes does not completely solve potential copyright problems. Lawyers may choose to enforce copyright interests in briefs thereby slowing the collection of briefs into databases or making the process of collection more expensive. But where briefs are made available for fair use for research, lawyers have less to gain from asserting copyright interests. At the same time, broad and non-exclusive access to legal briefs would mean that lawyers would always have a viable alternative to any costly commercial brief database services which would more easily emerge if copyrights in briefs went unenforced. Perhaps in this way, we lawyers can stake out our own middle ground in the debate over the scope of copyright in the digital age which has eluded so many other interest groups.

