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THE DANGER OF BOOTSTRAP FORMALISM IN COPYRIGHT

Alfred C. Yen*

I. INTRODUCTION

I am reticent about identifying the “worst” intellectual property case ever. Although there is value in discussing superlatives (even negative ones), I have a general sense that preoccupation with rank ordered lists has become counterproductive.¹ I will, however, use the space so kindly afforded me by this law journal to discuss *West Publishing Company v. Mead Data Central, Inc.*,² a case that exhibits an unfortunate form of legal reasoning that I call “bootstrap formalism.”³

Intuitively, “bootstrap formalism” is the expansive reading of a legal claim without adequate doctrinal or policy support. Bootstrap formalism is formalism because it uses the logical implications of legal rules to reach a given result.⁴ I have added the term

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¹ Consider two examples that legal academics know only too well—the U.S. News and World Report annual ranking of law schools and the Chicago-Kent Annual Survey of Scholarship. Both rankings offer interesting and valuable information. However, it is only too easy for people who should know better to become overly concerned with how they or their institutions fare by these idiosyncratic measures of quality.

² 799 F.2d 1219, 230 U.S.P.Q. (BNA) 801 (8th Cir. 1986) [hereinafter *West v. Mead*]. I am not the first writer to write critically about this case. For other analyses, see L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719 (1989); James H. Wyman, Comment, *Freeing the Law: Case Reporter Copyright and the Universal Citation System*, 24 FLA. ST. U. L. REV. 217 (1996).

³ Bootstrap formalism may well be troubling if used in other areas of the law as well. However, I will restrict my claim made here to copyright law since *West v. Mead* is a copyright case.

⁴ For discussions of formalism, see Catharine Pierce Wells, *Holmes on Legal Method: The Predictive Theory of Law as an Instance of Scientific Method*, 18 S. ILL. U. L. J. 329, 329-30 (1994) (describing Langdellian formalism as based on logical deduction, resting on distinctly legal premises, and finding that proper application of legal reasoning insures a uniquely correct result for every legal case); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 180-81, 184-185 (1987) (defining formalism as “the use of deductive logic to derive the outcome of a case from premises accepted as authoritative” and describing positive economic analysis of law

“bootstrap” because bootstrap formalism stretches legal rules to the point that they offer little support for the result reached. Thus, an opinion exhibits “bootstrap formalism” when 1) it recognizes a legal claim by relying on a plausible, but logically questionable, application of doctrine and 2) the opinion has little, if any, discussion of the relevant policy issues that might otherwise support its strained application of doctrine.

Bootstrap formalism is particularly undesirable in copyright because it paves the way for making copyright rights broader than they should be. Copyright rights are clearly limited in their scope by statute,⁵ and these limits exist because unlimited copyright rights would not optimally advance the progress of science and art, nor would they be consistent with a proper balance between the natural rights of authors and those who read and use copyrighted works.⁶ Ideally, copyright doctrine would contain rules that clearly define the limits required by copyright theory. If that were the case, formalism would be an excellent method for avoiding the overextension of copyright law. Following the rules would be tantamount to following copyright’s theoretical limits. However, copyright doctrine is notoriously vague. It is possible to interpret copyright very broadly, but it is not at all certain that such broad interpretations properly limit copyright’s scope.⁷ Formalism

as the modern exemplar of formalism in common law); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) (generally supporting the idea that legal reasoning as applied to rules controls the outcome of cases).

⁵ See 17 U.S.C. § 102 (1994) (defining the scope of copyright rights) and § 106 (specifying the rights granted to a copyright holder).

⁶ The primary theoretical basis for American copyright law is the belief that copyright provides a necessary incentive for the production of desired works. See U.S. CONST. art. 1, § 8, cl. 8 (authorizing Congress to pass copyright legislation “to promote the Progress of Science and useful Arts.”); *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 18 U.S.P.Q.2d (BNA) 1275 (1991) (implicitly recognizing the importance of limiting the scope of copyright in order to promote the public interest). A secondary theoretical basis is the belief that copyright is a property right that the creator of a work deserves as a matter of natural law. For explanations of how these theories require limits on the scope of copyright law, see Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990); Wendy J. Gordon, *An Inquiry into the Merits of Copyright Law: The Challenges of Consistency, Consent and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989).

⁷ For example, it is possible to interpret copyright law so that almost any kind of borrowing constitutes copyright infringement. See Alfred C. Yen, *A First Amendment Perspective on the Idea / Expression Dichotomy and Copyright in a Work’s “Total Concept and Feel”*, 38 EMORY L.J. 393 (1989).

therefore provides a poor method for avoiding the overextension of copyright because the formal plausibility of a particular interpretation of copyright provides little comfort about the propriety of the result reached. Bootstrap formalism therefore creates the danger of carelessly expanding copyright law to the detriment of the public interest.

II. *WEST PUBLISHING COMPANY V. MEAD DATA CENTRAL*

The case of *West Publishing Company v. Mead Data Central*⁸ provides an excellent example of bootstrap formalism and its dangers. The facts of the case are quite familiar.

For years, the plaintiff West compiled and published the written opinions of state and federal courts in its "National Reporter System."⁹ Each of West's volumes contained the text of the opinions, headnotes, synopses and citations.¹⁰ West also checked the accuracy of citations in the opinions and assigned opinions to particular volumes in its system, depending primarily on a court's identity (e.g., state v. federal) and geographic location.¹¹ West claimed copyright in each volume of the series.¹²

The defendant Mead Data Central owned and operated the LEXIS on-line legal research service.¹³ LEXIS competed directly against West in the publication of case reports.¹⁴ In June of 1985, Mead announced plans to add "star pagination" to the LEXIS service by inserting page numbers from West's National Reporter System into LEXIS case reports.¹⁵ This would tell LEXIS users the precise West page number on which the text of reported opinions appeared.¹⁶ Without star pagination, LEXIS users who desired pinpoint cites had to look the relevant opinion up in an actual West reporter. The addition of star pagination obviated the need for such action.¹⁷

⁸ 799 F.2d 1219 (8th Cir. 1986).

⁹ *Id.* at 1221.

¹⁰ *Id.* at 1221-22.

¹¹ *Id.*

¹² *Id.* at 1222.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1222, 1228.

West recognized that star pagination might reduce demand for its case reporters and brought suit,¹⁸ claiming that Mead's addition of star pagination infringed West's copyright in its case reporters.¹⁹ West moved for a preliminary injunction, which was granted by the District Court.²⁰ Mead then appealed to the Eighth Circuit, which affirmed in an opinion that rested almost entirely on a formalistic application of copyright doctrine with no significant discussion of copyright policy.²¹

III. WEST V. MEAD AS BOOTSTRAP FORMALISM

A. A FEW COPYRIGHT BASICS

The identification of *West v. Mead's* bootstrap formalism starts with a brief review of the basic doctrine governing the scope of copyrightable subject matter and the specific rights protected by the copyright law.

Section 102(a) of the Copyright Act grants copyright protection only to "original works of authorship."²² Courts have interpreted this phrase to mean works whose creation involves a modest level of creativity in their selection and arrangement of otherwise uncopyrightable things.²³ Thus, a book is copyrightable because its text is the creative selection and arrangement of otherwise uncopyrightable individual words. Anthologies of works and compilations of facts are also copyrightable, as long as their selection and arrangement involves that same minimal level of creativity.²⁴ However, the facts contained in a compilation may

¹⁸ *Id.* at 1228.

¹⁹ *Id.* at 1222.

²⁰ *Id.*

²¹ *Id.*

²² 17 U.S.C. § 102(a).

²³ *Feist v. Rural Telephone Co.*, 499 U.S. 340 (1991).

²⁴ See 17 U.S.C. § 103 (1994); *Feist*, 499 U.S. at 349; *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547 (1985) ("the creation of a nonfiction work, even a compilation or pure fact, entails originality"); *Childress v. Taylor*, 945 F.2d 500, 505 n.3, 20 U.S.P.Q.2d (BNA) 1191, 1193-94 n.3 (2d Cir. 1991) (discussing copyright in anthologies); *Eckes v. Card Prices Update*, 736 F.2d 859, 863, 222 U.S.P.Q. (BNA) 762 (2d Cir. 1984) (discussing the originality requirement). For more in depth analysis, see Alfred C. Yen, *The Legacy of Feist: Consequences of the Weak Connection Between Copyright and the Economics of Public Goods*, 52 OHIO ST. L.J. 1343 (1991).

not be copyrighted because, according to the Supreme Court, people do not creatively author facts.²⁵

Section 102(b) of the Copyright Act further limits the scope of copyright protection by specifically excluding from protection certain items, regardless of whether they might be "original works of authorship." This list includes ideas, methods of operation, and discoveries.²⁶ The Act excludes these items because the free dissemination of ideas and processes assures a good supply of raw material for discussion and future creative efforts.²⁷

Finally, Section 106 of the Copyright Act sets out the specific rights owned by copyright holders. Contrary to popular belief, not every use or reference to a copyrighted work results in infringement. Instead, copyright owners control only the rights to reproduction, the creation of derivative works, public display, public performance, and distribution.²⁸

B. *WEST V. MEAD'S* USE OF COPYRIGHT DOCTRINE

The doctrines laid out above make the weakness of the claim against Mead quite apparent. Although West clearly has copyrightable material in its reporters (i.e. the headnotes and synopses of the cases), the items borrowed by Mead are of doubtful copyrightability. The LEXIS offerings at issue were the full text opinions of judicial decisions. West could not possibly claim copyright in those opinions because West did not author them. As for the provision of star pagination, it would seem that Mead had simply reported an uncopyrightable fact (i.e. pinpoint cites) to its subscribers. Even if one argued that Mead had borrowed the sequencing of West's pagination, it is hard to see how starting with page number one and continuing in sequence amounts to copyrightable authorship.²⁹

²⁵ See *Feist*, 499 U.S. at 347. See also *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1369 (5th Cir. 1981).

²⁶ 17 U.S.C. § 102(b) (1994).

²⁷ See *Feist*, 499 U.S. at 349-50; *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488, 221 U.S.P.Q. (BNA) 1140, 1142 (2d Cir. 1984).

²⁸ 17 U.S.C. § 106 (1994).

²⁹ See *Feist*, 499 U.S. 340 (1991) (denying copyright to the alphabetical ordering of names in a phone book).

The Eighth Circuit's response to these problems amounts to a clever, but strained, application of copyright doctrine. The court denied that West's claim depended on copyright in facts or the Arabic numbering system.³⁰ Instead, the court stated that West's selection and arrangement of cases was sufficiently creative to support copyright and based its analysis on whether star pagination somehow infringed copyright in that arrangement.³¹

In concluding that star pagination did infringe West's selection and arrangement of cases, the court noted that a LEXIS user could use star pagination to reproduce an entire West volume. The user would do this by viewing the first case in a West reporter through LEXIS. Star pagination would then reveal the final page number of the first case, and by implication the page on which the next case would start. The process would then be repeated over and over until the user had reconstructed the identity and sequencing of all the cases in a given West reporter.³² The court went on to state that even if this reconstruction were not possible, infringement would still occur because star pagination would "enable LEXIS users to discern the precise location in West's arrangement of the portion of the opinion being viewed."³³

Even if one accepts the court's assertion that West's selection and arrangement of cases is copyrightable,³⁴ the logical weakness of the court's reasoning is easy to see. The court appears to be stating that star pagination infringes the copyright holder's right to make copies of a copyrighted work.³⁵ However, Mead never makes the purportedly infringing copy because, as the court notes, the copy would be made only if a LEXIS user took specific purposeful steps

³⁰ *West*, 799 F.2d at 1227.

³¹ *Id.*

³² *Id.* at 1227-28.

³³ *Id.* at 1227.

³⁴ One could easily dispute whether West's selection and arrangement of cases is sufficiently original to support copyright. After all, West's selection includes all published opinions, and that is hardly original. As for West's arrangement, division by state, geography and jurisdiction does not seem terribly creative or original either. See *Feist*, 499 U.S. at 362 (denying copyright because plaintiff's selection and arrangement was ordinary and "garden variety").

³⁵ The court never identifies the reproduction right specifically, but its claim that a LEXIS user could recreate the selection and arrangement of a West volume follows the contours of a claim about reproduction rights.

to accomplish the task.³⁶ If Mead itself never commits the act of infringement, it is hard to see how provision of star pagination to LEXIS users amounts to the same thing. Indeed, the true infringer would appear to be the LEXIS user who used LEXIS to reproduce a West volume.³⁷

The court's claim that the mere provision of jump cites constitutes infringement is equally weak. As noted earlier, the provision of jump cites appears to be the straightforward communication of facts, and facts are clearly not copyrightable subject matter.³⁸ The court's response appears to be that the provision of a single jump cite would be permissible, but that Mead's provision of all jump cites constitutes the appropriation of West's entire arrangement of cases.³⁹ There are two possible ways to interpret this argument.

First, the argument could mean that Mead's provision of all jump cites allows the reproduction of West's selection and arrangement of cases. If this is the correct interpretation, all of the objections previously laid out apply.

Second, the argument could mean that Mead has infringed West's copyright in a compilation of the numbers assigned to each page of text. This assertion has a number of serious problems. As an initial matter, it is not at all clear that West ever created such a

³⁶ *West*, 799 F.2d at 1227-28.

³⁷ Perhaps West could have argued (and it did not do so) that the provision of star pagination made Mead liable for the user's infringement on either a vicarious liability or contributory infringement theory. However, this claim would also have had serious problems. First, either theory requires that some user actually make the infringing copy, and there was no evidence that any user had ever done so. Second, defendants will not be held liable for contributory infringement unless they know that an infringement is likely to occur, and the cost of reproducing a West volume in the manner suggested makes it highly unlikely that such reproductions will occur. See *West*, 799 F.2d at 1227 (noting that the expense would make reproduction unlikely); *Religious Tech Ctr. v. Netcom*, 907 F. Supp. 1361, 37 U.S.P.Q.2d (BNA) 1545 (1995) (discussing contributory liability). Third, vicarious liability is imposed only if the vicariously liable defendant has control over the behavior of the infringing actor, and Mead did not have such control over its users. See *Shapiro v. Green*, 316 F.2d 304, 307, 137 U.S.P.Q. (BNA) 275 (1963) (discussing vicarious liability), *Religious Tech Ctr.*, 907 F. Supp. 1361 (discussing same). Fourth, the fact that LEXIS and star pagination were susceptible to numerous noninfringing uses makes contributory liability highly unlikely. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 220 U.S.P.Q. (BNA) 665 (1984) (declining to find vicarious or contributory infringement where the consumer might use the product to make unauthorized copies).

³⁸ See *supra* note 25 and accompanying text.

³⁹ *West*, 799 F.2d 1228-29.

compilation. Although West assigned a number to each page of text, it never collected those assignments and presented them in a coherent fashion. There is no work entitled "Page Number Assignments of the West Reporter System." Additionally, even if the necessary compilation exists, it does not embody the modicum of creativity required to support copyright. After all, West simply takes the first page of each volume and starts with the number one, followed by the second page with the number two, and so on. This is precisely the same sort of ordinary arrangement that failed to support copyright in *Feist*.⁴⁰ Finally, even if the compilation somehow supported copyright, Mead did not borrow the copyrightable aspects of the compilation. Copyright subsists in the creative selection and arrangement of a factual compilation.⁴¹ West's decision to report all the page numbers of its case reporters is not creative (indeed, it represents no selection at all), so Mead's copying of those same page numbers cannot lead to infringement. Thus, the arrangement of West's page numbers is the only possible basis for infringement, but LEXIS does not present cases (and therefore pages) to Lexis customers in the same order as West's case reporters do. Mead is therefore unlikely to have borrowed anything copyrightable from West.

C. THE WEAKNESS OF *WEST V. MEAD* AND THE PROBLEMS OF BOOTSTRAP FORMALISM

The foregoing analysis shows that *West v. Mead* stands on a logically strained application of the copyright doctrine. The court's opinion claims that the rules and principles of copyright doctrine compel the result reached when there are very strong arguments to the contrary. When one considers the fact that courts grant preliminary injunctions only when there is "at least a reasonable likelihood of success on the merits,"⁴² the court's decision seems even weaker. At the very least, this case was not one that reasonably favored the plaintiff.

⁴⁰ *Feist*, 499 U.S. 340 (finding factual compilation of white pages uncopyrightable in part because the alphabetical ordering of the names was not original).

⁴¹ See *supra* note 23 and accompanying text.

⁴² See *Atari Inc. v. North American Philips Consumer Elec. Corp.*, 672 F.2d 607, 613, 214 U.S.P.Q. (BNA) 33 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982) (setting forth standard for granting preliminary injunctions).

The dubious nature of the Eighth Circuit's formal reasoning raises questions about whether the court decided *West v. Mead* correctly. To be sure, formal reasoning alone can provide strong justification for a judicial decision, so the objection here is not with the court's reliance on formalism per se. However, when a court applies rules in a way that "pushes the envelope" of acceptable interpretations, as the Eighth Circuit did in *West v. Mead*, formalism provides a weak justification because the eyebrow raising nature of the court's reasoning signals an error in outcome, and not a correct decision. Stretched interpretations of doctrine may be correct, but it is difficult to justify them on the basis of formal reasoning alone. Something else, perhaps an appeal to the policy behind a set of legal rules, is necessary.

The *West v. Mead* opinion nicely illustrates how bootstrap formalism can harm the public interest. The court clearly understood that its decision would protect West's position as the dominant supplier of case reports. Star pagination would obviate the need for some consumers to purchase printed West reports. Preventing star pagination would therefore preserve West's market position or allow West to collect a license fee from Mead Data in return for those sales.⁴³

However, the mere possibility that West would lose sales of its case reporters is not, in and of itself, a reason to stretch copyright doctrine so that West's competitors become copyright infringers. As many have described, it is copyright's offer of a limited monopoly in an author's creative work that encourages an author to produce. This implies that copyright is sensibly interpreted to create and protect only competitive advantages in the exploitation of works created by authors. It makes no sense to protect competitive advantages in things not created by authors because those competitive advantages provide little, if any, incentive to produce new authorship. This explains why the copyright statute protects only "original works of authorship."⁴⁴

Consider now the sources of West's market advantage in the sale of case reporters. The typical West reporter contains summaries of the cases, headnotes, and references to West's key numbering

⁴³ *West*, 799 F.2d at 1228.

⁴⁴ 17 U.S.C. § 102(a) (emphasis added).

system. Consumers sometimes purchase West reporters to enjoy the benefits of these items. However, these items are not the only reasons that a consumer might buy West case reporters. At least nine states, five federal circuit courts, and ten federal district courts require citation to the West National Reporter System.⁴⁵ Moreover, citation rules promulgated in *The Bluebook: A Uniform System of Citation* (the "bluebook") generally require primary or parallel citation to the West National Reporter System.⁴⁶ Lawyers therefore face the practical requirement of buying West reporters in order to cite cases properly.

Brief reflection shows that copyright sensibly protects only the first of these competitive advantages. West clearly created its summaries, headnotes and key numbering system. Copyright ought to protect the economic advantages that flow to West from the sale of these items because it is precisely those advantages that encourage West to create and disseminate creative authorship. If West were to stop putting its summaries, headnotes and key numbering references in its case reporters, the competitive advantage discussed would largely disappear. Consumers would have little reason to prefer a West reporter over another reporter. The texts of the reported opinions would be the same.

⁴⁵ The states requiring citation to West's National Reporter System are Delaware, Indiana, Iowa, Kentucky, Mississippi, Oklahoma and Tennessee. DEL. SUP. CT. RULES 14(g); IOWA RULES APP. PROC. 14; KY ST RCP 76.12(4)(g); MISSISSIPPI SUP. CT. 28.; OK CT. R AND P II Rule 3.5(C); TENN CT. RULES, R. OF APP. P. 27(h); NY CPLR Rule 5529(e); WA R RAP 10.4(g). The Federal Circuit Courts requiring such citation are the D.C., First, Third, Eleventh and Federal Circuit Courts of Appeal. See GEN. RULES OF THE U.S. CT. OF APP. FOR THE DIST. OF COL. CIR. 11(b); RULES OF THE U.S. CT. OF APP. FOR THE FIRST. CIR. Rule Loc.R.28.1; RULES OF THE U.S. COURT OF APP. FOR THE THIRD. CIR. 21(1)(A)(i); RULES OF THE U.S. CT. OF APP. FOR THE ELEVENTH CIR. 28-2(j); RULES OF THE U.S. CT. OF APP. FOR THE FED. CIR. 28(e). The Federal District Courts requiring such citation are the Central District of California, Eastern District of California, District of Delaware, District of Nevada, Western District of Oklahoma, Eastern District of Oklahoma, Northern District of Oklahoma, Eastern District of Tennessee, Middle District of Tennessee, and Eastern District of Washington. See LOCAL RULES FOR THE CENT. D. OF CAL. 3.9.3; LOCAL RULES FOR THE EASTERN DIST. OF CAL. 134(d); LOCAL RULE FOR THE DIST. OF DEL. 3.2C(6); LOCAL RULES FOR THE DIST. OF NEV. 130.4(b); LOCAL RULES FOR THE WEST. DIST. OF OK 13(E); LOCAL RULES FOR THE EAST. DIST. OF OK. 13(e); LOCAL RULES FOR THE NORTH. DIST OF OK. 14.E; LOCAL RULES FOR THE EAST. DIST. OF TENN. 3.7.4; LOCAL RULES FOR THE MIDDLE. DIST. OF TENN. 8(c)(3); LOCAL RULES FOR THE EAST. DIST. OF WA. 7(g)(1). See also Wyman, *supra* n. 2, at 229-230 (explaining how litigants are required to cite to West's National Reporter System.).

⁴⁶ See *The Bluebook Uniform System of Citation*, table T.1 (16th Ed. 1996).

By contrast, West did not create the rules and conventions that require litigants to cite West reporters. Therefore, it makes no sense for copyright to protect economic advantages that flow to West from these requirements. Regardless of whether West's reporters contain summaries, headnotes or key numbering references, consumers still have to buy West case reporters because there is no other way to obtain the cites they have to use. Maintaining this economic advantage through copyright therefore enriches the West Publishing Company without providing any incentive for the creation and dissemination of authorship. Consumers are locked in, no matter what West does.

The foregoing analysis provides the necessary framework to determine whether *West v. Mead's* bootstrap formalism served the public interest. If the decision prevented others from selling or distributing West's case summaries, headnotes and key numbering references, then the decision served the public interest. If, on the other hand, the decision converted requirements about the form and method of citation into a West monopoly over the sale of case reporters and the provision of legal cites, then the decision did not serve the public interest. Of course, it is abundantly clear that West sued Mead because it did not want LEXIS users to obtain official cites without buying West reporters. Mead never offered any of West's summaries, headnotes or key number references on LEXIS, so there is no way that the Eighth Circuit's decision preserved West's monopolies over those items. Thus, the only thing accomplished by the *West v. Mead* decision was the preservation of the competitive advantage West enjoyed simply because it published case reports from which courts direct litigants to cite. *West v. Mead's* bootstrap formalism therefore harmed the public interest.⁴⁷

⁴⁷ Some may argue that West might have stopped providing case reports without protection from LEXIS' competition, and that the Eighth circuit correctly decided the case. There are many reasons to doubt this conclusion. First, the print market for case reporters remained unchanged and vital. Even though on-line research has taken away some demand for printed case reports, many lawyers and libraries still maintain printed case report collections. Second, West itself can compete for its own share of the on-line case report market, and it has by providing the Westlaw service. Moreover, West can use the competitive advantage it owns in its summaries, headnotes and key numbering system against others in this market. Third, it is doubtful whether copyright incentives are necessary at all to ensure the provision of case reports. Courts have always been reluctant

IV. CONCLUSION - LEARNING FROM THE PROBLEMS OF WEST

The mistake in the *West v. Mead* opinion is clear. The opinion uses bootstrap formalism to justify a copyright claim with practically no analysis of the copyright policy or public interest issues at stake. By doing so, the opinion uses copyright law to protect economic advantages that bear little relation to the objectives of copyright law, thereby harming the public interest.

The court's mistake is particularly interesting and important to note because, although the Eighth Circuit probably did not realize it at the time, *West v. Mead* offers an early glimpse of the analytical problems courts will face in the coming electronic information age. West enjoyed overwhelming dominance in the market for case reports, but new technology offered competitors an opportunity to challenge West. The on-line provision of case reports allowed LEXIS customers to have access to huge numbers of cases without having to devote significant physical space to libraries. Also, computerized research tools made on-line research more convenient than searching for cases in printed reporters. West understandably perceived the threat to its economic position and sued to protect itself.

Without question, the story written by West and Mead will be retold many times in the years to come. The coming information age relies heavily on the use, reuse and recycling of information, some of it copyrighted material. Moreover, the centerpiece of this age, the Internet, operates by literally making and distributing copies of copyrighted material.⁴⁸ All of this use, reuse, recycling

to grant monopolies in case reporting. See *West*, 799 F.2d at 1224-26; see also *Wheaton v. Peters*, 33 U.S. 591, 668 (8 Pet.) 8 L.Ed. 1055 (1834) ("no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right"); Robert Berring, *On Not Throwing Out the Baby: Planning the Future of Legal Information*, 83 CALIF. L. REV. 615, 618 (1995). See also AMERICAN ASSOCIATION OF LAW LIBRARIES' GOVERNMENT RELATIONS POLICY (1992) (regarding the dissemination of government information). Nevertheless, case reports have always been available.

⁴⁸ Andy Johnson Laird, *The Anatomy of the Internet Meets the Body of the Law*, 22 U. DAYTON L. REV. 465, 469 (1997); Trotter Hardy, *Computer RAM "Copies": A Hit or Myth? Historical Perspectives on Caching as a Microcosm of Current Copyright Concerns*, 22 DAYTON L. REV. 423, 452 (1997); Kenneth D. Suzan, Comment, *Tapping to the Beat of a Digital Drummer: Fine Tuning U.S. Copyright Law for Music Distribution on the Internet*, 59 ALB. L. REV. 789, 796 (1995).

and copying makes it easy for those who own intellectual property to make claims against those exploiting new information technology. Without question, some of those claims will be justified. At the same time, however, it is important to realize that “novel” claims that stretch the envelope of copyright (like West’s claim against Mead) should not be blithely accepted as clever adaptations of old principles to new facts. Indeed, it is precisely those claims that present the possibility of bootstrap formalism that harms the public interest. In those situations, courts need to scrutinize the claims being advanced to see if they are justified. If they fail to do so, the mistake of West will be multiplied, and consumers as well as producers will pay higher prices in a slower and poorer information age.

