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May 17, 2008

Professor David Nimmer
Mr. Morgan Chu, Esq.
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Re: Nimmer and Irell & Manella Continuing Misstatements Concerning Bender v. West and the Copyright of Text of Judicial Opinions

Dear David, Morgan, Elliot:

I am following up on my letter to Morgan Chu and Elliot Brown of April 5, 2008, concerning an article in Law.Com written by Eriq Gardner, which misstated the circumstances of the Mathew Bender and HyperLaw declaratory judgment copyright litigation against West Publishing Company.[1] I have not received a response either to the letter or to my subsequent e-mail.

The Gardner article, which quoted Chu, described a single appellate decision in the Bender v. West litigation, but as you well know, there were two decisions, one about citations and the other about text.[2] Chu, as quoted in the article, seemed to conflate the two decisions and to thereby take credit for having won the judgment that West's enhanced text could not be copyrighted. This is not accurate and also obscures an understanding of the context of this case and the objectives of the parties.

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[1] "An Operating System for Law: Online Cases" By Eriq Gardner; IP Law & Business, Law.com. March 31, 2008 at http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1206700930604.

[2] The appellate decisions in the Matthew Bender litigation, cited as required by the Bluebook, are as follows:

The text appeal: Matthew Bender v. West, (2nd Cir. 1998), *aff'g*, No. 94 Civ. 0589, 1997 WL 266972 (S.D.N.Y. May 19, 1997), *cert. denied sub. nom*., West v. Hyperlaw, 526 U.S. 1154 (1999).

The citation appeal: Matthew Bender v. West Publishing Co., 158 F.3d 693 (2d Cir. 1998), *aff'g*, No. 94-Civ. 0589 (S.D.N.Y. November 22, 1996 and March 12, 1997), *cert. denied*, 526 U.S. 1154 (1999).

I had assumed the writer Eriq Gardner misunderstood what he was told by Chu.

Now, I am not so sure for, after Gardner's article, I decided to look at other commentary on the case.

To my surprise and dismay, I learned that Chu's 2008 reported statements closely paralleled and reissued the statements in David Nimmer's 2001 article in the Houston Law Review: David Nimmer, *Copyright in the Dead Sea Scrolls - Authorship and Originality*, 38 HOUS. L. REV. 1 (2001) (hereafter the "Article".)[3]

Anything written by David Nimmer in the copyright field, especially on a case where he claimed to have been counsel, will be taken seriously. Nimmer is a Professor at UCLA Law School, as well as of counsel for Irell & Manella. He is the current author for the copyright law treatise bearing his father's name, considered to be the standard reference in the field, and published by Reed Elsevier.

The Nimmer article extensively discusses the Matthew Bender litigation in as many as twenty seven pages. The Article focuses upon the HyperLaw text copyright side of the case. The article cites to the HyperLaw's text opinion twenty two times, but to the Bender-HyperLaw citation opinion only 4 times. The Article scantily, if ever, advises the reader that there were two opinions in the case: the HyperLaw text opinion and the joint HyperLaw-Matthew Bender citation opinion.

Despite addressing mostly the HyperLaw text opinion in the Article, Nimmer defines "Bender v. West" to apply only to the citation opinion and case, and then stated he was counsel for Matthew Bender in "Bender v. West" (see below.) Yet, subsequently, he inconsistently applies the term "Bender v. West" to the text case and decision as well as the citation case and decision. But, Nimmer and Irell & Manella was not counsel in the trial and appeal for the text opinion, the focus of his Article.

Just to be clear, the appeal of the citation case was an appeal from the Summary Order of Judge John Martin of March 12, 1997.[4] Judge Martin certified his November 22, 1996 citation bench opinion for appeal. I think Judge Martin's quotation is pretty clear:

> "The issue of West's copyright interest in its pagination is the only issue present in the action by Matthew Bender. While other issues are presented in the Hyperlaw action they are totally distinct from the pagination issue."

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[3] The entire article is available from the Houston Law Review at http://www.houstonlawreview.org/archive/downloads/38-1_pdf/HLR38P1.pdf. Excerpts from the article referring to the Matthew Bender case have been posted, as fair use, at HyperLaw's web site at http://www.hyperlaw.com/docs/2008/2001-excerpts-re-Bender-Hyperlaw-Nimmer-Houston-Law-Review-Article.pdf.

[4] http://www.hyperlaw.com/westlit/litdocs/1997-03-12-Summary-Order-Citation.html

Having falsely implied that Irell & Manella represented a party in the HyperLaw text case, what Nimmer neglected to state was that he and Irell & Manella and Matthew Bender were neither counsel nor party in the HyperLaw text part of the case. Nimmer also neglected to state that, by the end of the case, his client was no longer Matthew Bender, but Reed Elsevier, and, that at least from 1996, Reed Elsevier, which opposed HyperLaw on the text issue, was influential in directing the case.

Nimmer never clarifies that he and Irell & Manella were counsel only with regard to the citation part of the case. To the contrary, Nimmer conflates the two decisions in such a way as to make it appear falsely that Matthew Bender and Irell & Manella were the successful parties and counsel for both sets of decisions. Actually, Nimmer is never even very clear that there were two, rather than one, Second Circuit opinions, so intent was Nimmer on conflating the opinions.

Not only is this completely untrue, since HyperLaw and its attorneys were the only party and counsel on the text issue, Nimmer's implication is preposterous. Irell & Manella and Matthew Bender had nothing to do with the trial, appeal, and petition for certiorari concerning this issue. HyperLaw's initial complaint raised the text issue clearly and unmistakably; Matthew Bender's original complaint avoided the text issues altogether.

Indeed, the real party in interest behind Matthew Bender had become Reed Elsevier, which on the text issue took a position in the same case as amicus opposing HyperLaw. In 1997, Reed Elsevier and the Proskauer law firm filed an aggressive amicus brief before the Second Circuit opposing HyperLaw in the text case.

As disclosed in Time Mirror's SEC filings and new reports, during much of the litigation, Matthew Bender and Reed Elsevier were in a "strategic partnership" operating Shephard's. Subsequently, Reed Elsevier acquired Matthew Bender - after the appellate oral argument, but prior to the Second Circuit opinions. Certainly, when the petitions for certiorari were filed, Reed Elsevier owned Matthew Bender.

I will now provide more detail as to the foregoing statements.

Nimmer's article appears to be carefully written in such a way to not only not mention these salient facts, but to diminish if not conceal HyperLaw's part in the case. Nimmer's limited definition of, and then inconsistent use of, the term "Bender v. West" is revelatory.[5]

Nimmer's extensive discussion of the "Matthew Bender" case begins in Section IV at page 44.

[5] Nimmer states in his first footnote that Professor Craig Joyce edited the article three times.

As the section's preface, he quotes Judge Jacobs from the text appeal, providing a footnote citing the text appeal, 158 F. 3d 674, but with an incomplete citation. The citation in footnote 163 excludes the phrase *"sub nom. West v. HyperLaw"*, ignoring all standard citation rules as to citing a case where the case name is changed on appeal.[6] Had the citation been properly formed, a reader right from the start of this section would have been apprised that the party of interest in the text appeal was HyperLaw, not Matthew Bender.

Only three lines into this introductory section on page 44, Nimmer defines the term "the Bender v. West" case by citing in the footnote only to the citation case at page 693, ignoring the text opinion at 158 F. 3d 674. Footnote 165 states:

> [165.] 158 F.3d 693 (1998), *cert. denied*, 526 U.S. 1154 (1999). Along with my colleagues Morgan Chu, Elliot Brown, and Perry Goldberg, I represented Matthew Bender against West Publishing Company at all three court levels.

This would be a true statement if referring only to the citation decision 158 F.3d 693, but absolutely untrue if suggesting to a reader that Nimmer was counsel in the text decision. Nimmer had just cited the text decision as 158 F. 3d 674 in footnote 163 in a way so as to obscure HyperLaw's involvement.

Nimmer has now defined Bender v. West as meaning only the citation case for the purpose of stating that he and Irell & Manella had been counsel for Matthew Bender. This is a disingenuous definition, for Nimmer then uses the term "Bender v. West" in a

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[6] ALWD Manual, Rule 12.10(b); Bluebook Rule 10.7.2, University of Chicago Manual of Legal Citation Rule 4.2(c). Oddly, or as an attempt at covering up what he was going to do, Nimmer states in his first footnote to his Article: "

> "The citation form used in this address conforms to the author's preferences."

Nimmer provided five other "full" citations to the text case at footnotes 472, 519, 556, 686, and 710 - all of which should have included "*sub. nom* West v. HyperLaw", but did not.

There are many different citation forms - but, citation form does not mean obscuring citation substance. For example, in footnote 556 on page 114, Nimmer cites the district court text decision which led to the Second Circuit text appeal at 158 F.2 674 as follows:

> "Hyperlaw v. West, No. 94 CIV. 0589, 1997 WL 266972, (S.D.N.Y. May 19, 1997)."

Nimmer here leaves out (ignoring what any law student is taught on the first day of a legal writing course) the citation to the affirming Second Circuit opinion.

Nimmer in footnote 556 chose to refer to the district court text case below as HyperLaw v. West rather than Matthew Bender v West. By so doing, he again obscured the connection between the district court decision cited in footnote 556 and the affirming appellate opinion which he dwells on throughout the article. See discussion below.

broader sense to apply both to the citation issues as well as mostly to the HyperLaw text case where Nimmer and Bender were neither counsel nor party.

The article proceeds for 27 pages to discuss mostly the text case while conflating the two issues and decisions. It is true that a suspicious and careful reader possibly might catch that the citation to the HyperLaw text opinion in footnote 163 is slightly different than the citation to the citation opinion in footnote 165. But, even the most careful reader would not know that the appeal referred to in footnote 163 was an appeal from the district court case cited in footnote 556 on page 114, which I discuss below.

Not only were Matthew Bender and Irell & Manella quite simply not involved in the HyperLaw text case, but, indeed, in 1996, we believed Matthew Bender gratuitously provided arguments about text in an attempt to subvert HyperLaw's position by suggesting in its summary judgment motion on citation on August 5, 1996, that the text "emendations" might be copyrightable, but the copyright was unenforceable due to copyright abuse. Carl Hartmann, one of HyperLaw's attorneys, remembers the ensuing harsh conversation with Elliot after this was filed. Or perhaps, even then, Irell & Manella was planning on having it both ways. Another possibility is that Matthew Bender concurred with the point I had made in my original complaint, that the citation copyright claimed by West was a citation to cases that, even though enhanced, were not copyrightable.

Matthew Bender was then under the control or working in concert with Reed Elsevier which owned Lexis. Although Reed Elsevier clearly wished to see the overruling of the West v. Mead[7] citation ruling, it did not wish to see a ruling on the copyrightability of enhanced text.

Lexis had always worked through or supported surrogates to overturn West v. Mead. In 1992, Lawyer's Cooperative[8] was instrumental in the proposal of legislation to overturn the West v. Mead citation decision. At the hearing on this legislation, I submitted a proposal to extend the legislation to additions, corrections, and modification of judicial opinions.[9] My text proposal was met with stony silence by the assembled legal

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[7]West v. Mead, 616 F. Supp. 604 (D. Minn. 1985), *aff'd*, 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987).

[8] Lawyers Cooperative 1992 was then under the aegis of Katherine M. Downing, who in 1993 became President and Chief Executive Officer of Lawyers Cooperative.. In 1995-96, she became, President and Chief Executive Officer of Matthew Bender. During the litigation of West v. Mead, she was employed by Mead-Lexis and her responsibilities included that litigation.

[9] Irell & Manella extensively, without any attribution, used my 'work-product" consisting of my advocacy in other arenas against West including the inconsistent positions taken by West before the Wisconsin Supreme Court which was considering a public domain citation. I was the primary advocate pressing West on its inconsistent positions. In its summary judgment submission (see Nimmer's footnote 556 discussed below) Irell & Manella referred to the Wisconsin Supreme Court hearings and also pointed out that West's expert Robert Berring was a West consultant. But, it was not Matthew Bender or Irell & Manella who attacked Berring before the House Judiciary Committee and the American Association of Law Libraries for

publishers and the congressional staff (Bill Patry, interestingly, was then counsel for the committee.) Later, the Department of Justice lined up against our position on text, and, as we see, eventually, so did Reed Elsevier-Lexis.

A major reason I intervened in 1994 in Matthew Bender's case against West was that I knew the legal publishers were talking out of both sides when it came to this text copyright issue, and I feared, presciently, that the issue would be compromised in litigation between the largest legal publishers, as ultimately Matthew Bender did as to the so-called Texas-Curtis Hill action. The Matthew Bender complaint filed in February, 1994 sought very limited relief, and no relief as to West's claim to copyright to text. Unlike HyperLaw, Bender did not even have a product on the market, so there were serious justiciability issues. Bender's proposed product was limited to cases from federal courts located in New York State as stated in paragraph 13 of the complaint:

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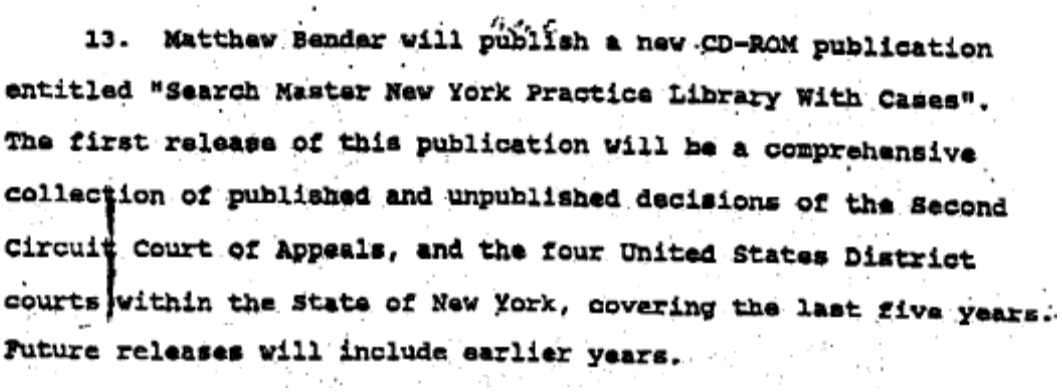
his conflict. It was not Matthew Bender or Irell & Manella who attacked Berring for the same conflict before the Wisconsin Supreme Court. Similarly, I hounded Vance Opperman and West's attorney Schatz etc. in those forums and other forums as to West's inconsistent varying position on their copyright claims to the first page citation. I do not recall Matthew Bender, Nimmer, or anyone else attacking Berring and Opperman at those times.

An example of my activities outside the litigation but related to the litigation is shown in this posting I made on the Law Library mail list on September 16, 1994, the substance of which ended up being reflected in the decisions on the text issue:

> Well, not actually so. The trial transcript in the 1988 West v. Mead trial, which was three years after the District Court preliminary injunction decision, subsequently appealed to the 8th Circuit, tells an altogether different story. An average volume of West has 1500 or so pages. The paperbound advance sheets are assembled on a pre-set scheduled (i.e., there is a Federal Reporter volume once a week). For the advance sheets, the decisions are assembled based upon what is available. A computer, albeit with control of widows etc, paginates the cases. Once the 1500 page or so limit is reached, a new volume number is assigned. Within an paperbound advance sheet volume, cases are generally but not always organized by court. But, even this arrangement does not exist in the permanent bound volume because the volumes are assemble (sic) from 2 or 3 paperbound advance sheets. The arrangement as finally appears has no usefulness or meaning, so even if one granted to you that there was some creativity, which I do not, the result of the creativity provides nothing of use (that is the order of the cases in the book had no usefulness). Indeed, the span of dates of the decisions in a typical volume spans as much as 4 or 5 months.

See posting of Alan D. Sugarman, Re: West Publishing v. Mead Data Center, September 16, 1994, at http://www3.wcl.american.edu/cni/9409/3473.html.

Notably, the silence from Irell & Manella was palpable when HyperLaw moved to recuse the first judge in the case after the judge hosed down Matthew Bender and HyperLaw in discovery determinations. Irell & Manella let HyperLaw do the dirty work, the judge recused herself, and only then, before the new judge, did Irell & Manella complain about the discovery rulings of the first judge. Basically, Matthew Bender had been a free-rider on many issues - which was fine, but, not at the expense of a rewrite of history.



13. Matthew Bender will publish a new CD-ROM publication entitled "Search Master New York Practice Library With Cases". The first release of this publication will be a comprehensive collection of published and unpublished decisions of the Second Circuit Court of Appeals, and the four United States District courts within the State of New York, covering the last five years. Future releases will include earlier years.

By contrast, HyperLaw's complaint was specific, detailed, supported by exhibits, and basically blew the entire case open. HyperLaw was actually publishing its CD - but without the West citations. HyperLaw sought to include West citation to cases from all U.S. courts of appeals in all states- a super-set of the Federal Reporter and sought to copy cases from the Federal Reporter where needed. This was a great expansion of the Bender case, and, it was two years or so later when Mathew Bender followed in HyperLaw's steps, after Reed Elsevier decided to back Matthew Bender by providing the text of the cases. Judge Martin's justiciability decision of May 1, 1996, provides no indication that Matthew Bender was obtaining text from Lexis. Judge Martin describes scanning of cases. Mathew Bender did not even have a product until June of 1995, as stated in its First Supplemental Complaint, and even that was a test product.[10]

Anyone can read Matthew Bender's unspecific vague complaint filed as Exhibit 6 to HyperLaw's complaint, and compare the Bender complaint to the complaint that HyperLaw filed four weeks later. HyperLaw's complaint became the road map for the case. HyperLaw was quite clear as to its claims on the text issues, and raised virtually all the legal issues that Bender and HyperLaw would later brief.[11] Despite Bender's difficulties in locating the court copies of decisions to scan, Bender appeared to be concerned that others might copy decisions from Bender publications, to assert the right to scan from the West reporters. But, HyperLaw challenged West head-on on this issue.

Despite the confusion sown in the Nimmer article, Matthew Bender and Irell & Manella filed no briefs or other filings in the text case - not in the motion for summary judgment,

[10] Matthew Bender filed a second action in June 1995 in the Southern District, known as the Texas product action, 95 Civ. 4496. This complaint might have included a claim as to West copyrights in text, but, Matthew Bender did not file for summary judgment on the text claims. I do not have the complaint in this case. The case was closed after the citation summary judgment was entered in November, 1996. The docket is not clear, but, as feared by HyperLaw in 1994 as to settlements, it is apparent that West and Matthew Bender entered into a confidential settlement on the text issue, if it was asserted at all in that case. The case was closed on March 14, 1997.

[11] HyperLaw's Complaint dated March 9, 1994 and Bender's Complaint dated January 31, 1994 (attached as Exhibit 6 to HyperLaw's Complaint) may be found at http://www.hyperlaw.com/westlit/litdocs/1994-03-07-HLvWest_complaint-with-ex.pdf.

not at the two day trial of the text case (although Elliot Brown observed silently from the back row), not in the form of a post-trial brief, not on the appeal to the Second Circuit and not on the petition for certiorari.

Nimmer's narrative at pages 48 and 49 of the Article is thus all the more misleading. Page 48 is devoted entirely to the text case - and contains four footnotes citing the text case. The fifth footnote, note 187, states

> "As noted above, this writer represented Bender. Refer to note 165 supra."

Because Nimmer's footnote appears on page devoted entirely to the HyperLaw's text case and is surrounded by citations to the HyperLaw text appeal, most readers would assume that Nimmer, the writer, represented Bender in the text decisions to which the entire page and other citations on the page are devoted. This is not so. Footnote 165 refers only to the citation case. This is falsehood by context. Although an accurate statement taken out of context, it is materially false in context.

On this same page 48, Nimmer states, in the continuing effort to assert that he and Irell & Manella won the text appeal the following:

> "The Second Circuit drops a footnote at this point containing two citations. The first is to a case that counsel for Bender cited both to the district court and Second Circuit.[186]"

Anyone reading this sentence would assume, quite in opposition to the truth, that: (1) in the appeal where the Second Circuit "dropped a footnote," Nimmer and Irell and Manella had filed a brief and were representing a party - and (2) the actual party in the district court and the Second Circuit (HyperLaw) had not cited the case, which, of course HyperLaw had. (See page 33 of HyperLaw's Post-Trial Brief dated March 4, 1997.[12]

Having discussed only the text case on page 48, Nimmer at the top of the very next page, page 49, discusses his involvement in the filing of "a" petition for certiorari, in the singular, to the U.S. Supreme Court for the case.

> In any event, West applied to the Supreme Court for a writ of certiorari.[189] The denial of that petition means that Bender v. West now stands as res judicata."

To be clear again: in Bender v. West case, there were **two** petitions filed by West for writ of certiorari, one as to the citation decision, and the other as to the HyperLaw text decision. Matthew Bender and Irell and Manella had **no** involvement in the HyperLaw text petition of certiorari - that was only HyperLaw. Any reader would conclude that the petition to which Nimmer refers on page 49 was the petition for certiorari for text, the

[12] http://www.hyperlaw.com/westlit/litdocs/1997-03-04-HyperLaw-Post-Trial-Brief.htm.

only matter to which the entire prior page was devoted. Not so, for the prior page was devoted entirely to an appeal that Nimmer had nothing to do with.

A reader would never know, but Nimmer on page 49 was referring to West's petition for certiorari on the different citation issue. Nimmer here had switched the subject from the HyperLaw text case to the citation case somewhere between the last line of page 48 and the first line of page 49, with no indication to the reader.

Nimmer then states in this same sentence's footnote 189 on page 49, that:

> "[O]ur client made a surprising decision -- to join in the certiorari petition to end once and for all West's 'scarecrow copyright' by which it had chased competitors out of the field."

Nimmer fails to disclose that Irell & Mineola's "client" at the time of the citation petition for certiorari in 1998 referred to in footnote 189 was no longer Matthew Bender, but Reed Elsevier. Reed Elsevier had completed its acquisition of Matthew Bender.[13] And Reed Elsevier had just finished opposing HyperLaw on the very same appeal. So, Nimmer may have wished, three years later or even at the time, that his firm and clients were supporting the text challenge of HyperLaw, but, they were not.

Let's start with the obvious facts to provide more authority to my earlier assertions:

- When Matthew Bender started the case in 1994, it was owned by the Times Mirror Company.

- Reed Elsevier in 1994 then owned and currently owns Lexis (once owned by Mead.)

- Reed Elsevier through Lexis was a party to the license agreement entered into in 1998 when the West v. Mead case was settled with a license agreement, which covered citations and text.

- Lexis would not be required to pay citation royalties to West if the Supreme Court overturned the West v. Mead citation holding.

- In the Mead-Lexis license from West for the use of West's pagination, Lexis was prohibited from challenging the citation holding of West v. Mead, thus Reed Elsevier could not have initiated a case challenging the West citations, such as the one brought by Matthew Bender.

[13] According to the Times Mirror Company 1998 10-K, the divestiture of Matthew Bender to Reed Elsevier was completed on July 31, 1998, the agreement as to which was reached on April 27, 1998 (see page 70).

- Matthew Bender filed the case in 1994 in February. No sooner was the case underway than Bender and West entered into "settlement negotiations" between June 1994 to February, 1995.

- On July 3, 1996 the Times Mirror Company and Reed Elsevier announced they would jointly acquire Shephard's from McGraw Hill as part of a "broader strategic alliance between Matthew Bender and LEXIS_NEXIS."[14] The New York Times correctly predicted that Reed Elsevier eventually would acquire Matthew Bender.[15]

- At some point, in 1996, Matthew Bender disclosed in the Bender v. West litigation that it was now obtaining the text for all of its cases on its CD-Rom product being litigated, not by scanning, but directly from Lexis, and using the search engine of Lexis's subsidiary, Folio.[16] This was a substantial change in Matthew Bender's product and case. Thus Matthew Bender no longer would have had standing to challenge the text copyrights since it was not intending to violate the claimed copyrights of West as to text, unless Lexis wanted to open the can of worms that Lexis also had copied West books. Plus, as it turned out, Matthew Bender's new masters did not want them to make such a challenge to West.

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[14] The Times Mirror Company 8-Kof October 15, 2006 at page 3 states that Times Mirror signed the agreement to purchase Shephard's on July 3, 1996 and includes the purchase agreement for Shephard's.
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[15] The Times Mirror Company 10-Q of November 5, 2006 states:

> Subject to the completion of a pending regulatory review, it is anticipated that Shepard's will be contributed, in exchange for cash, to a new 50/50 partnership between the Company and Reed Elsevier, Inc., as part of a broader strategic alliance between Matthew Bender, Times Mirror's legal publisher, and LEXIS-NEXIS, a Reed Elsevier subsidiary and provider of full-text online information services in the legal, news, business and government areas.
>
> * * *
>
> In addition, in the third quarter of 1996, Times Mirror and Reed Elsevier Inc. announced a strategic alliance which includes three elements: first, the formation of a 50/50 partnership to own and operate Shepard's; second, a long-term cross-license agreement to offer Matthew Bender publications online through LEXIS and to provide a significant portion of the LEXIS case law database through Matthew Bender's CD-ROM products; and third, the joint pursuit of other product development and acquisition opportunities. The formation of the partnership with Reed Elsevier is expected to be completed later this year, pending regulatory review.

[16] It is believed that the deal for Matthew Bender to use Lexis to obtain the text of the cases for its CD-ROM was entered into sometime around July 3, 1996. See the Times Mirror 10-Q of August 14, 1996, Page 11, 12. This is the first reference I have found as to a relationship between Lexis and Reed Elsevier. It was on August 5, 1996, that Matthew Bender filed its monition for summary judgment.

- On November 22, 1996, Judge Martin granted summary judgment to both HyperLaw and Matthew Bender on the citation issues. (HyperLaw's text ruling was not until May 19, 1997.)

- On November 27, 1996, five days after Judge Martin ruled against West on the citation issues, Times Mirror Company and Reed Elsevier PLC, continuing the evolution of their relationship, announced completion of the joint venture for Shepard's. Gary Goldstein, key witness in Matthew Bender v. West and the Bender official in charge of the litigation, was appointed General Manager of Shepard's. Effectively, Goldstein had now become a joint employee of Matthew Bender and Reed Elsevier.

- Reed Elsevier on September 9, 1997, by its law firm Proskauer, filed an amicus brief in the text appeal 97-7910 opposing HyperLaw. (The caption on the brief read "HyperLaw v. West"). This appeal was the text appeal cited twenty-two times in Nimmer's Article.

- In April, 1998, Reed Elsevier and Times Mirror announced the sale of Matthew Bender to Reed Elsevier, and the sale was consummated in July, 1998.

- The Second Circuit decision for both appeals was on November 4, 1998.

- By the time the petitions on certiorari were due to be answered in 1999, Matthew Bender was then owned by Reed Elsevier, which had already filed the amicus brief opposing HyperLaw and supporting.

Nimmer's client was in fact not Matthew Bender, but Reed Elsevier, when in 1999 Nimmer was in Israel working on the petition for certiorari (see page 49 of the Article.) Even earlier than 1998, and probably back to 1996, it is apparent that Reed Elsevier was calling the shots in the litigation. I wonder if the Second Circuit was aware when Proskauer filed the amicus brief that Reed Elsevier and Matthew Bender were in a joint venture.

When Nimmer states in footnote 556 that Bender had filed a motion of summary judgment which led to the district court's May 19, 1997 decision on the copyrightability of West's enhance text, he makes a demonstrably and material false statement:

> [556.] In a letter to HyperLaw dated October 9, 1991, West advised that "you should *carefully* compare the enclosed copy of the public domain *slip opinion* in *Mendell* [*v. Gollust*, 909 F.2d 724 (2d Cir. 1990)] to the West *case report* of the same case," claiming that "you will see that the slip opinion and case report vary *substantially* in their selection, coordination, and arrangement of material included." Exhibit 13 to Intervenor Complaint, HyperLaw, Inc. v. West Publ'g Co., No. 94 CIV. 0589, 1997 WL 266972, (S.D.N.Y. May 19, 1997) (emphases in original). In fact, comparison of the opinion portion of West's report of *Mendell v. Gollust* shows it to be letter-for-letter identical to

> the slip opinion, except for the addition of parallel citations. Declaration of Michelle Kramer, dated July 31, 1996, **filed in support of Matthew Bender's motion for Summary Judgment**, Ex., 1 at 1, *Hyperlaw v. West*, No. 94 CIV. 0589, 1997 WL 266972, (**S.D.N.Y. May 19, 1997**). (emphasis supplied).

Not only is the claim of having filed a motion for summary judgment on the May 19, 1997 text decision just plain false, the rest of this footnote is even more revealing of Nimmer and Irell & Manella's attempts at hijacking.

- First, footnote 556 states quite incorrectly in the last line that the declaration was:

  > "filed in support of Matthew Bender's motion for Summary Judgment, Ex., 1 at 1, Hyperlaw v. West, No. 94 CIV. 0589, 1997 WL 266972, (S.D.N.Y. May 19, 1997)."[17]

  Nimmer's statement is completely untrue. The decision cited was the district court decision concerning the text claims of May 19, 1997. By then, Matthew Bender was done with the district court. Matthew Bender filed no motion for summary judgment for the May 19, 1997 decision and did not participate in the trial of the issue. Nimmer seems here to claim, consistent with the other implied claims in the article that he, Irell & Manella and Matthew Bender litigated the text case and decision, but they did not. This is extraordinary: even though he names the decision as "HyperLaw v. West", Nimmer has his firm and Matthew Bender falsely claiming that this decision was a result of Bender and Irell's motion for summary judgment.

- Second, a reader of the entire Article would have no way of understanding that this decision was the decision below from which the appeal at 158 F.3d 674 was taken. In contravention of all citation rules, even common sense citation, Nimmer fails to include the citation here of the Second Circuit affirming opinion, an opinion he has cited twenty other times in his article. I would be surprised if any student editor of any major law review would accept this citation, even, if a famous professor threatened to withdraw the article from publication.

- Third, the implication in Nimmer's footnote, that Bender's provision of my correspondence to the court was some insightful contribution to the text decision, is equally absurd - and feeble. In 1991, I had an exchange of correspondence with West. These letters were so material that I attached them to my specific and

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[17] Hyperlaw v. West, No. 94 CIV. 0589, 1997 WL 266972, (S.D.N.Y. May 19, 1997), copy at http://www.hyperlaw.com/westlit/litdocs/1997-05-19-176-Martin-Order-Text.html. Judge Martin in his order of March 12, 1997 had been unmistakably clear as to Bender's non-participation in this issue when he states:

> "The issue of West's copyright interest in its pagination is the only issue present in the action by Matthew Bender."

Copy of order at: http://www.hyperlaw.com/westlit/litdocs/1997-03-12-Summary-Order-Citation.html.

> documented complaint,[18] to show that West's "enhancements" to Mendell v. Gollust were insignificant. We were very well aware of these letters, thank you. And, Judge Martin was also fully aware of the letters. They were the proverbial smoking gun through the whole case. So, for Matthew Bender to make reference to these letters in an unrelated declaration was nothing more than just getting on the bandwagon. (It is also telling the Matthew Bender was unable itself to present its own compelling evidentiary documentation.) And, then to use the unrelated declaration in a scholarly article to try to create the impression that Matthew Bender litigated the text case, is inappropriate at the very least.

More examples could be provided. Were these misstatements, despite their repetitive nature, a result of sloppiness? Did Nimmer create a deliberate misrepresentation to gain some advantage? Is it not chuztpah for this to be done in an article about originality - although I do admire the creativity?

I am not ignoring the 2008 Law.Com article apparently quoting Morgan Chu to the same effect. Morgan Chu has ignored my request that he correct the article, if he had been misquoted.

Attached are excerpts from the Article. The references to the text appeal are highlighted in yellow, and those to the citation appeal are highlighted in pink. The pink areas are in a sea of yellow highlighted text.

I await your response.

Best regards.

Sincerely

Alan D. Sugarman

cc:

Carl Hartmann
Paul Ruskin

cc by e-mail to:

ebrown@irell.com
mchu@irell.com
nimmer@irell.com24

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[18] HyperLaw's March 7, 1994 initial complaint of 210 pages with 24 exhibits may be found at http://www.hyperlaw.com/westlit/litdocs/1994-03-07-HLvWest_complaint-with-ex.pdf. A reading of the Complaint shows how gratuitous and superfluous was the Bender affidavit.