HyperLaw™

May 9, 2008

Senator Joseph I. Lieberman
Chair
Committee on Homeland Security and Governmental Affairs
706 Hart Office Building
Washington, DC 20510

RE: Public Access to Opinions of the U.S. District and Bankruptcy Courts
E-Government Act of 2002 and Reauthorization

Dear Senator Lieberman:

Enclosed is a letter sent by me on May 7, 2008 to James C. Duff, Director of the Administrative Office of the U.S. Courts and Secretary to the Judicial Conference of the U.S. Courts concerning access to the opinions of the approximately 200 U.S. district and bankruptcy Courts. HyperLaw has been involved in efforts to make federal judicial opinions accessible since 1991.[1]

The federal judiciary has made great progress in implementing the E-Government Act of 2002 as to court opinion access. Indeed, even prior to the Act, the judiciary had already taken steps to provide access to the public of U.S. Supreme Court and courts of appeals opinions. Yet, for years access to the lower court opinions has been inconsistent, if it exists at all.

Thanks to the successful implementation by the judiciary of the Case Management/ Electronic Case Filing System (CM/ECF aka PACER), all opinions are now stored in this judiciary database. The system centrally stores all documents filed in federal court actions, and judicial opinions are among the documents filed electronically. Importantly, also stored in a centralized SQL type database are metadata such as court, date of opinion, case name, docket number, and docket entry number. This database is linked to the stored digital image files of the opinions.

Public access however is limited:

[1] As founder of HyperLaw, Inc., I have argued for broader public access to judicial opinions since 1991, when HyperLaw released the first CD of United States Supreme Court opinions and then in 1993 the first CD of opinions of the United States courts of appeals. Subsequently, we were engaged in litigation with West Publishing Co. that established that West could claim copyright neither to its internal page citations nor to the text of court opinions as corrected and enhanced by West. In the 1990s, we were involved in efforts to create a public domain citation and wider dissemination of federal court opinions and met and or provided formal presentations to the Judicial Conference, Congressional committees, the Administrative Office, the American Bar Association, the Department of Justice, the Executive Office of the White House, and the American Association of Law Libraries.

HyperLaw™

- The courts have not consistently marked which of the documents on CM/ECF are written opinions, and, in many situations, orders with no substantive content are marked as opinions.

- Where courts have separate opinion web sites, the opinions are not synchronized with the opinions in the CM/ECF-Pacer database and may not include so called "unpublished" opinions.

- The opinions in CM/ECF-Pacer, and also those in some lower court opinion web sites, are hidden behind firewalls and are not indexable by public search engines such as Google and Yahoo.

- The opinions do not have persistent public file names, making indexing by Google and Yahoo impossible.

- The opinions cannot be easily downloaded in bulk by public access law sites and other lower cost providers of judicial opinions.

- Although in fact the judicial opinions are centrally stored and there is a central database, in order to access the opinions, users need to access nearly 200 different CM/ECF-Pacer sites and maneuver through multiple menus.

- Not all of the image opinion files, which are in PDF format, have a searchable text layer.

We believe that the Administrative Office should (1) take the simple steps of extracting from the master database, the subset of documents and data representing judicial opinions; (2) assign a persistent public file name to each document, and (3) then place the files with associated metadata in an open server available to the public for bulk downloading and searching by search engines.

As discussed in the attached letter, a subcommittee of the Judicial Conference in 1997 concluded that there were no legal reasons why the judiciary could not maintain such a repository. At that time, implemented systems did not exist to do this easily.

Emphatically, we do not suggest at this time that the judiciary provide search capabilities, that it adopt any official citation, or that it convert the image files to pure HTML text. Although these are worthwhile goals for the future, those issues could be a distraction and can be addressed in other contexts. The first task, without further ado, is to make the existing opinions and metadata open to the public in a simple fashion.

This should be virtually a costless exercise, especially in the context of a $400 million a year federal judiciary technology budget, since the data exists in regularized format and is just waiting to be extracted.

HyperLaw™

At the same time, we ask that judges and clerks exercise extra care in being sure that written opinions are properly designated on the CM/ECF system. To make this task easier to busy judges and clerks, we propose a new category on the system, "written orders," to permit less substantive orders to be marked as such.

Even though the Committee has already approved the E-Government Reauthorization Act, we ask that the Committee hold hearings on the judiciary and the E-Government Act. We note that the December 11, 2007 hearing explicitly did not address issues relating to the judiciary.

Thank you very much.

Sincerely,

Alan D. Sugarman

cc: James C. Duff, Director

HyperLaw, Inc, 17 W. 70 St., New York, NY 10023, 212-873-1371 www.hyperlaw.com
Alan Sugarman, sugarman@sugarlaw.com