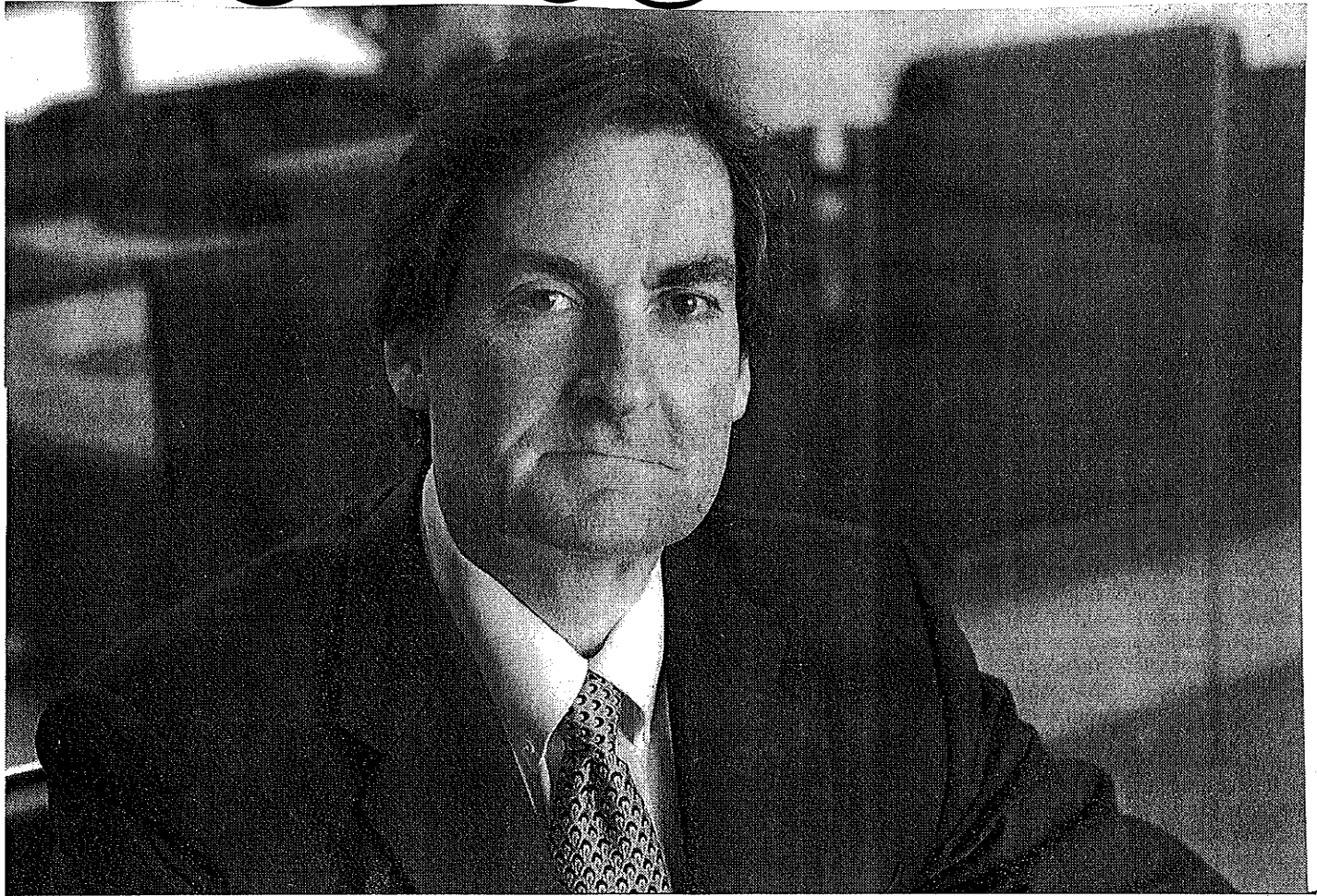


Daily Journal



ROBERT LEVINS / Daily Journal

Irvine lawyer Ed Connor is upset that courts sell appellate briefs to for-profit legal information services such as LexisNexis and Westlaw. He has asked the California Supreme Court to consider changes that would protect attorneys' intellectual property and funnel at least some of the profits to the authors, the court or nonprofit legal organizations.

When Courts Give Legal Briefs to For-Profit Firms

Lawyer's Challenge to State Supreme Court Practice Says Lexis, Westlaw Are Infringing on Copyright

By Amy Yarbrough
and Laura Ernde
Daily Journal Staff Writers

Ed Connor and his firm worked hundreds of hours to prepare an appellate brief in an employment discrimination case he took on pro bono.

He never expected someone else might be profiting from his good deed. Several months ago, the Irvine attorney learned the California Supreme Court had given his 143-page brief to the legal information service LexisNexis, which was making it available online for a fee.

"It's something that we just worked really hard on, and I didn't give permission to Lexis to put it up there," Connor said.

Connor has asked the court to consider changes that would protect attorneys' intellectual property and funnel at least some of the profits to the authors, the court or nonprofit legal organizations.

Last week, Connor wrote a letter to Chief Justice Ronald M. George and William Vickrey, who heads the Administrative Office of the Courts, suggesting the practice is opening the court up to legal challenges based on copyright law.

Connor said his first reaction was to file a class action lawsuit for copyright infringement against LexisNexis and Westlaw, another service that has also been marketing appellate briefs. "However, in an attempt to avoid litigation, we are sending you this letter to respectfully request that the Supreme Court implement a feasible and equitable solution to this problem," Connor wrote in the July 16 letter.

Copyright law experts question the need for a change in the court's practice, even though Connor might have legal grounds to challenge it.

Santa Clara University Law School professor Eric Goldman said there are legitimate legal questions about whether briefs can be copyrighted, who owns that copyright and whether

the documents are free to be distributed under the Fair Use Doctrine.

But the argument that attorneys should be compensated never gained traction — for good reason, in Goldman's view. "Where is the problem here? Is it the guy doesn't think he's getting paid enough by his client for doing this?" Goldman said. "I would like more money, but I don't see it as a problem that people aren't lining up to write me checks for my brilliance."

Goldman said copyright laws were put in place to make sure creators are compensated for their efforts in promoting the progress of science and the arts, but that rationale doesn't fit when it comes to lawyers getting paid to do the work for their clients.

A leading U.S. Supreme Court case on copyright law involving electronic databases is *New York Times v. Tasini*, (2001) 553 U.S. 483. There, the court blocked the newspaper from licensing

See Page 4 — GIVING

Giving Briefs to For-Profit Firms Comes Under Fire

Continued from page 1

the work of freelance writers to online repositories such as LexisNexis.

Andrew P. Bridges, a partner in Winston & Strawn's San Francisco office who specializes in intellectual property litigation, agreed that he didn't see a problem with the status quo. "It is an example of the potential for punctilious copyright enforcement to be very counter-productive to the very purpose of copyright law itself," he said.

Bridges said it's in the best interest of lawyers for their appellate briefs to be widely seen because it would improve the development of the law.

Unless all briefs are posted online for free, the for-profit services offer convenient access for a price, he said. "Paying for that access in my view is not outrageous," Bridges said. "It's not necessarily a sin to be making money off other people's works without paying them."

Connor, a name partner at Connor, Fletcher & Williams, said he doesn't have a problem with the briefs being made available, calling them "valuable public resources." But he argues the briefs should be used for the common good, not giv-

en away to for-profit corporations.

"The attorneys in California should not be required to increase the profit margin of Lexis and Westlaw," he said.

Under a long-standing rule, the state Supreme Court had been providing paper copies of appellate briefs to four law libraries in San Diego, Alameda County and Los Angeles counties as well as the State Law Library in Sacramento.

All of the so-called depository libraries, except for the Los Angeles County Law Library, no longer receive the paper copies but keep the information in other forms, such as microfiche, to save space.

The San Diego County Public Law Library entered into an agreement with West, the company that operates the Westlaw service, where the company would transfer its briefs to microfiche and into a database searchable at the library in exchange for receiving paper copies filed with the court.

But, Connor points out, the database is only accessible at the library, and it limits how users can search for things. Unlike the more sophisticated Westlaw database offered to paid subscribers, for example, the library system doesn't

allow keyword searches.

Like Connor, Tustin-based appellate attorney John L. Dodd says he was shocked to learn attorneys' briefs were ending up somewhere other than the depository libraries. Dodd called giving Lexis the briefs "a gift of public funds."

"Nobody from Lexis knocked on my door and said, 'Hey, we're going to use your brief,'" he said.

Connor is proposing that the courts require Lexis and Westlaw to get authors' permission before posting the briefs. Attorneys could receive royalties for their work, which they could keep or donate to the courts or the State Bar Legal Services Trust Fund, which generates money for pro bono service providers.

Dodd said he'd like to see any possible royalties go to indigent defense. "They shouldn't realize the entire profit," he said of Thomson Reuters and Reed Elsevier, the respective parent companies of Westlaw and LexisNexis. "Someone else should benefit."

Thomson Reuters spokesman Scott Augustin disputed there's a problem, writing in an e-mail to the Daily Journal that court proceedings and the documents

associated with them are open to the public. The company strives to offer its customers with "as complete a picture of the public record as possible."

"There is a long-held tradition in this country, supported by law, that judicial proceedings and related court records are presumptively open and available to the public," Augustin wrote.

LexisNexis declined to comment on the letter, since it was directed to the courts.

Beth Jay, principal attorney for the chief justice, said court staff members are carefully reviewing Connor's letter.

Despite such concerns, some say access to appellate briefs is better than ever and poised to improve.

The Supreme Court puts some briefs in select cases online free of charge and would like to post more as the budget permits, said court spokeswoman Lynn Holton.

The Los Angeles County Law Library is working on free online access to all the briefs it's received going back to 1850, when California won statehood, said Executive Director Marcia Koslov. So far, the library has scanned about 20,000 briefs from 2008 and 2009. The library will also scan any brief on request and e-mail or fax it to attorneys for a fee.

The San Diego law library's program to make the briefs more accessible is moving forward after a six-year delay, said Janet Liggett, assistant director for technical services.

"In our opinion we are doing a better job of making this available to the public than it was before," she said.

amy_yarbrough@dailyjournal.com
laura_ernde@dailyjournal.com