

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 96-2887

OASIS PUBLISHING CO., Appellant,

vs.

WEST PUBLISHING CO., Appellee.

Unofficial Transcript of Oral Argument on March 10, 1997

By Mr. Rojas:

May it please the Court, my name is Jose Rojas. Along with Tamara Carmichael, John Henneberger and Bruce Little, I represent the appellant, Oasis Publishing Company, a publisher of statutes and case law on CD-ROM, from Lincoln, Nebraska

The issue this case presents, Your Honors, is whether a publisher's reports of court decisions containing factual reference to another publisher's page numbering system but not featuring the same arrangement, infringes the other publisher's compilation copyright in that arrangement. This case is governed squarely by the United States Supreme Court decision in Feist Publishing vs. Rural Telephone. That was a 1991 decision that made it clear that the Constitution of the United States requires, in order to have copyright protection, originality. The Supreme Court set forth a two-part test to determine whether or not there can be copyright infringement, and in that decision it said that you have to have, (a) a valid copyright, and (b) a copying of constituent elements that are original. So without originality, there is no violation, and without copying, there is no violation.

Now, this case involves page numbers, because the only facts in this record that are uncontroverted, the uncontroverted affidavit of the President of Oasis, is the arrangement that West puts forth in Florida Cases will not, will not be duplicated or embedded in the disc. The CD-ROM is read-only memory, it cannot be modified or altered; it will not be duplicated in that disc. The only thing that that disc will contain is a practical reference to where in the West product, the particular page or particular piece of text, happens to be located. That being the case, you have to consider whether or not the pagination that is going to be included in the Oasis disc is an original constituent element that has now been copied under the Feist test. The answer is real simple. You don't even have to go beyond this Circuit; just look at your own decision in the Toro case.

In *Toro*, the 8th Circuit said that where you have the accidental wedding of numbers, which in that case was lawn mower replacement parts, that that did not exhibit the type of originality that was required, even, even under the white pages, "sweat-of-the-brow" standard that then applied that is no longer good law after *Feist*. But even under that standard, this Circuit said the mere generation of numbers without rhyme or reason, without showing the type of product, without showing any meaning to what that number was associated with, was insufficient to merit copyright protection.

In *Feist*, the Supreme Court made clear that machine-generated numbering, or machine-generated action, mechanized action, would be insufficient. Here, West, as it must, in fact, concedes that they do not claim copyright to the pagination, per se. Yet, that is the only thing that is copied and included in the Oasis product. Now, what is it that West then says? West says, "Well, the pagination should be in any case prohibited or protected because it reflects the arrangement that is in the product." The "arrangement" is what now is the supposedly original element for purposes of this appeal. We don't challenge that because the bottom line is we don't copy that arrangement. The question then is, does that page number gain protection because it is on the same compilation that contains an arrangement that may be original...

Question from Bench:

What do you mean, the "arrangement" that West claims it has copyrights to?

By Mr. Rojas:

It is an arrangement of placing decisions in order where they take Florida cases, they put the Supreme Court decisions and gather them together and put those first, then they take the decisions of the districts and, the ones that they consider to be important enough to merit writing a headnote for, they put separate and they group those together...and they still put them chronologically, but they group those together ahead of the ones that are simply per curiam, affirmed, or of less importance, which in turn go ahead of the tabled dispositions of...like certs denied and so forth.

We did question below whether or not even that exhibited the sufficient creative spark to merit copyright protection, but we did not raise that here simply to focus our issue because the bottom line is, we are not going to copy that arrangement anyhow. And it is important to understand the technology here, because the CD ROM is a medium, it is something you put into...just like a music CD that you play in your computer; I'm sorry, on your CD player at home for music. The fact that you might tell that disc to play music in a certain order that is different than the order in which the music is recorded, meaning you might change the arrangement in which the music is played, does not mean that you have changed in that disc the order in which the music is contained. And the same thing here.

The arrangement that will be in Oasis' disc is an arrangement that has nothing to do with West. In fact, there is no reason to have the West type of

arrangement because it is completely meaningless when you have the technology of the CD-ROM. The importance is to have access to where a case is, and the reason for reference to the pagination (one of the issues we raised is the system issue) is to have access to the law, because if you publish in a book without putting some page numbers, which are no more than machine-generated, and that is stipulated in the stipulation of facts here, machine-generated, automated straight numbering, the Roman numeral system, 1-2-3-4-5, and which volume follows which other volume, and it puts the number on the page. The only real value that that number has is that it allows Your Honors and us as practitioners to say, "Go to volume 348 of Southern 2d at Page 445, and you can find case `x'." Because without that, the arrangement would still be there, that case would still follow or precede one with a jacketed memorandum or with a headnote or whatever, but you wouldn't be able to find it, you would have to thumb through to try to find this case. But the number does not signify whether or not the case is a criminal law case. It does not signify that it is even a jacketed memorandum case. It does not signify anything, except that it is on that page and in that particular location in a book. And that is simply not what the Constitution of the United States permits to be copywritten. And Feist has made that abundantly clear here.

Question from Bench:

How do we distinguish the Mead case?

By Mr. Rojas:

The Mead case, first of all, was decided two to one, it was on a preliminary record. The 8th Circuit went out of its way to make reference to the fact that it was a preliminary, tentative decision, it was decided before the Supreme Court has now given us the guidance in Feist, and it was really an issue of first impression at that time. Since then, we have also had at least two courts look at the issue, one of which was the Southern District in New York, in Matthew Bender, which we provided a copy as supplemental authority, where this exact same issue was squarely addressed by Judge Martin and he rejected West's position, granting summary judgment for Matthew Bender; and likewise in the District of D.C., Judge Friedman in an antitrust matter involving the purchase of West by Thomson, where the court questioned the validity of West v. Mead after Feist and the dubious nature of the copyright that West claims.

Question from Bench:

Is Mead inconsistent with Feist?

By Mr. Rojas:

Yes, it is. The reasoning in Mead is based essentially on the Hutchinson case, which is a white pages telephone directory case, which is a "fact by association" type of protection. In other words, even though that court acknowledged that the actual arrangement was not being copied, only the pagination was being copied, the court said, well because it is part of this compilation, and this compilation is entitled to protection, and since there is a lot of industrious effort that goes into putting together this collection,

everything that is associated with it, especially when you are not just taking an isolated page or two, but all the pages, would be a violation of that type of industrious collection.

Question from Bench:

In effect, do we have, to rule in your favor, would we have to say that... As you know, one panel of this court cannot overrule another panel. Do we have to say that Feist is, in effect, overruled?

By Mr. Rojas:

No, you need not do that, for the simple reason that this court made clear that the Feist decision was only tentative. It was not. I'm sorry, that the Mead decision was only tentative and was not of permanent or lasting value. In fact, the court had expected the decision to come back, but it was settled, so it never came back on a complete record. The court went out of its way to mention the fact that there was a scant record that did not provide a really full basis, and the dissent by Judge Oliver, who was sitting by designation, had made clear his discomfort in not having that type of complete record, especially as to an issue of whether these numbers are generated by machine. In this case, we do have a record, it is complete, and there is no question from the testimony and from the stipulations that this is simply a machine-generated numbering system without any rhyme or reason, as in *Toro*, without any relevance to any meaningful aspect, and that, in essence, it is a "system", and systems Congress has addressed specifically in 102(b) and said a system is not copyrightable. Because when you boil it down to the bare essentials, really, the value of that numbering system, of the numbering of the pages in the West volume, is the system of access to the law. It is the system of citation. It is the system that Shepard's uses to allow us to determine if a case has been subsequently cited or reversed or questioned, without which that process would not work. It is a system which laws, governments and courts require, as they do in Florida, practitioners to cite to it, as the Blue Book requires practitioners in courts to refer to in order to have the cite system for the common law system to be operative. Without that system, it would be like having the forest and the trees, and if nobody is out that to see it or benefit from it, it doesn't have much value. There would be some real due process implications, which were recognized by the First Circuit in the *BOCA* case, of having that type of ruling.

I see that my time is up. The Department of Justice is going to speak for four minutes, and I reserved some rebuttal.

By the Court:

You are Mr. Nicholson?

Argument of Amicus Curiae By Mr. Nicholson:

I am, Your Honors. Good morning to you.

The position of the United States in this case is that the Supreme Court decision in *Feist* compels the conclusion that *Oasis'* proposed compilation of

Florida cases with star pagination will not copy West's arrangement, and so will not infringe any copyright that West may have in its arrangement of cases. We think there are three principles established by Feist that govern here: First, Feist made it clear that copyright in a factual compilation is thin; second, there is no copyright protection for the effort of compilation, and so there is no validity to the so-called "sweat of the brow" doctrine that undergirds this court's pre-Feist decisions in cases like *Hutchinson Telephone*, *Mead Data and United Telephone*, and third, when a rival, such as Oasis, publishes a compilation of the same factual material, there can be no infringement, I quote the Supreme Court here "so long as the competing work does not feature the same arrangement." Application of these principles, we believe, requires reversal here. West's only copyright claim that is pertinent, at least in this dispute, is to its arrangement of the Florida cases. But it is undisputed that Oasis will arrange its cases differently, and so, to use the Supreme Court's phrase, Oasis will not feature the same or even a similar arrangement as West.

Question from Bench:

But doesn't the star pagination then lead you back to West's arrangement?

By Mr. Nicholson:

The star pagination indeed would enable you, using CD-ROMs should you wish, to recreate West's arrangement, but the Supreme Court, after all, in Feist said that what counts is whether, in fact, the arrangement that the rival has in its competing work features the same arrangement. It is not a question of whether a user could take the material and arrange it. For example, I suppose that somebody who has a deck of cards could be said potentially to have the arrangement of all sorts of bridge hands that might be recorded in the morning paper, you know, Schewgold's Bridge column (well that's perhaps a bad choice since the obituary of Mr. Schewgold's was in the paper this morning), but in the utility of it, there is not an element that the copyright law concerns itself with. The Supreme Court focuses our attention (and again, the Supreme Court's words), "there can be no infringement so long as the competing work does not feature the same arrangement."

Question from Bench:

But couldn't there be, and wouldn't there often be a use of it without recreating it? You say you can take the star pagination and recreate, but wouldn't there be many instances of use...]

By Mr. Nicholson:

Oh, I think there might well be uses. I understand the utility of Oasis' product is that, in point of fact, you will have the cases arranged as they arrange them. A very different arrangement, at least as it appears on the CD-ROM from what I understand, but there will be indications there will be stars to indicate where the jump pages are as well as, of course, the actual cite, the parallel cite, to indicate the title page. But again, Your Honor, as things are arranged, and we are dealing only with compilation copyright here, after all, which deals only with such originality as there may be in the arrangement, that what the

Supreme Court has told us to look at is what on this CD ROM is the arrangement. As Mr. Rojas says, and as I think there is no dispute among the parties, and I think the District Judge accepted this as well, there is, in fact, no similarity, no sameness between Oasis' arrangement and the arrangement that the West people use in their Florida cases. And that being so, there is no copying and hence no infringement.

Unless there are any further questions, Your Honors, my time has expired and I want to save time for Mr. Rojas' rebuttal. Thank you.

Appellee?s

Argument By Mr. Musilek:

May it please the court, my name is Joe Musilek. Along with Brad Anderson, my partner, we represent West Publishing Company here today.

The District Court properly noted below that there are four issues involved in this case. However, only three of those issues are before this court. The first issue was the issue of whether or not West's arrangement of Southern Reporter established sufficient creativity to meet the standard for copyright protection set by the Supreme Court in Feist, and I would like to make it clear that all Feist is, is a standard of originality case. It is not a copying case. There was no issue in Feist. It was agreed and acknowledged that the telephone directory infringer, or alleged infringer, had copied the original work's arrangement. The case turns in the Supreme Court on the fact that the arrangement, being a garden-variety alphabetical arrangement of names and addresses in a telephone directory, was not copyrightable. But Feist says nothing about what is enough to constitute copying if you start with the assumption that you have a copyrightable arrangement. And here, in this court, that is where we start our analysis because, on an unchallenged factual reference, the District Court found that West's arrangement of Southern Reporter far exceeded the low threshold set by Feist.

Question from Bench:

Where does pagination fit into the copyrightable arrangement?

By Mr. Musilek:

It fits into the second issue that's addressed by the court. At the District Court, the second issue of course is copying, and that is where the parties are focusing their attention here today before you. Oasis stood up here and said they are not copying the West arrangement, and yet, if you step back a second and think about what they are going to do, there is no dispute about how you start to paginate. You sit down with a copy of the West book, the West volume, and you look up the first Florida case in that volume, then you find it on the Oasis database, you then insert the West series name, the West volume where West reported that case appears in the West book, you insert the first page where that case begins in the West book, and then thereafter you insert every page break as it appears in the West book and every page number. So, what they are going, is taking the expression of the arrangement, because that is how the

arrangement of West work is accessed. Oasis tries to say that accessing an arrangement is somehow different from copying it, but it is one and the same. The Second Circuit in the CCC case addressed a similar issue, where they had used car valuations and the defendant tried to say well we are simply taking facts and we are simply telling people what the other publication came up with as a value for the car.

Question from Bench:

I thought you had agreed that pagination, per se, is not copyrighted?

By Mr. Musilek:

Yes, absolutely. The Arabic numeral system is not copyrightable. We have a different situation here. Let me use this analogy; this makes it clear. If I were to take the 85 restaurants in St. Paul and use my subjective judgment to order them, according to from best to worst, as I believe they should be, so that the number one rated restaurant was the best and the number 85th was the worst, that subjective arrangement would clearly be copyrightable. Now, if Oasis came and copied my arrangement and tried to sell it, that would clearly be an infringement. It would be no defense for Oasis to say, wait a minute, I have taken the same restaurants, but I have arranged them alphabetically, but I just put next to each restaurant in brackets the number to where it corresponds to where you have arranged them numerically, and then to say all I took from you was numbers! I didn't copy your arrangement, I arranged mine alphabetically. Well, of course, this court would not spend five minutes with that sort of a defense. Instead...

Question from Bench:

That's not quite the situation we have here, though. You are talking about a selection as to which was best and which was worst. If they put in the cite to the page of the report on which they appear, would be a more apt analogy rather than how you ranked them, ranked the restaurants. If you put the ranking in a guide that had 100 pages and they showed that the third in alphabetic order was on page 39, that does not correlate to your originality arrangement.

By Mr. Musilek:

It does as I see it because mine would all be on one page, I assume, and the list would be organized and arranged by numbering them on a left-hand column. Similarly, here, and look at it another way, it's use the Bridge deck, the deck of cards analogy the Department of Justice used, saying that sure you could take the cards and you could recreate the Bridge hands in the paper, but you can only do that by using the paper, you cannot do that without looking at the paper. What Oasis is doing is permanently imbedding all of the information that expresses the arrangement, it's not just page numbers, it's all of the information, the series name, the volume number, page breaks and the page numbers, using them all together in a permanent fixed force on their CD-ROM, so that you can, without ever going back to the West book, just with the Oasis CD-ROM, recreate the arrangement. That's why Congress in the 1976 Copyright Act specifically included a definition of "copy" so there would not be a dispute

over whether or not that constituted a copy. And what the statutory definition of copy says is, it is a copy if it can be perceived, communicated or reproduced, either directly or with the aid of a machine. No one is denying here that the Oasis CD-ROM, with the use of a computer, of course, would allow someone to perceive the West arrangement and to recreate it, therefore, we have a copyrightable arrangement by agreement in this court, and we have copy by pure, undisputed fact.

Question from Bench:

But can't you recreate it based upon the fair use of the citation? You already agreed that people can use the citation, so you can recreate that document by use of the citation.

By Mr. Musilek:

Using the parallel citations, you can do a rough ordering of the documents. It does not give you as much information as star pagination, so star pagination is a more detailed analysis of the West arrangement. The point is that is how you look at a fair use analysis, that is the next step. Once you have the copyrightable arrangement that is infringed by copying, you have to look and see if the infringement is excused by fair use. What Oasis wants to do is say just look at, you know, West concedes that use of parallel citations is a fair use, so just look at the additional data we are taking. Just look at the fact that we are adding just the internal page numbers, but that's not the way you do it, and the analogy I used in my brief is the cliché of the straw that broke the camel's back. No one is assuming that one straw broke the camel's back, it's the totality of the straw that is placed on the camel. Here you have to look at the totality of what is taken. It's the parallel cite combined with the star pagination, superimposed on the cases, that entirely replicates the West arrangement and transforms it from a citation source, which was good for West, to a supplanting use which makes it lose under a fair use analysis because the Supreme Court has said the fourth factor in the fair use analysis, the effect on the work, the original work, is the most important factor. Now it's not the only factor, and the District Court did a very good job of looking at all four various factors.

This is not a fair use case. This is a non-transformative commercial copying. The Supreme Court in *Campbell* said you cannot stop when you find it is a non-transformative commercial use, you have to look at all the factors, but it did say that that can be an important factor. Of course, the District Court below looked at all four factors and any argument that it did not is simply belied by reading the District Court Opinion.

Question from Bench:

But you give them the fair use of that citation, because otherwise your product would be useless, but you won't give them the star pagination because that is the way you can keep control over your product.

By Mr. Musilek:

No, our product is not useless without acknowledging a fair use of parallel citations. Our product, when used by our users is very useful because, of course, it has the arrangement in our product. What the parallel citation does, and why West will exact a fair use, is it refers people to the West book. Its purpose is to allow you to go to the West book. If someone says I have found a case and I have it reported in two places, I've got it in U.S. Patent Quarterly and I have it in Federal Reporter, and the person you are talking to says well I only have it in Federal Reporter, what is that cite, you can give it to them. They can look it up and they can find it using a West book. So it enhances the value of West book. If you have star pagination, people stop using the West book altogether, they simply use the work that contains both arrangements.

Question from Bench:

But the point cite; you need the star pagination for it, to give the point cite, correct? If I want to say the page on which the quote is taken from, I've got to have the page, not just the parallel citation?

By Mr. Musilek:

Yes, and at the point at which you start doing that, then you start making such a substantial use of the West arrangement, that you are replicating it and you are supplanting the use of the West work. You no longer need the West work. It is not fair. And that's the whole point, I think, of the fair use analysis. Oasis tries to sort of get around the fair use analysis by saying look at the equity. What has to be kept in mind here, the equities are not the equities they try to raise. This is not a case about access to the law. There is plenty of access to the law in this country. This is a case about a commercial publisher wanting to piggyback on a highly desirable and advantageous feature of the West publication. It is featuring its product. That's the whole point. In the 1994 business plan of Oasis, which is referred to in the District Court opinion, Oasis makes the very important point that with a star-paginated CD-ROM, they will be able to sell it to customers as replacing shelves and shelves of books. Oasis knows full well that when it star paginates, it takes a huge step beyond parallel citation to take a position where it can argue that it will replace the original work. That is not a fair use.

Question from Bench:

It does not have all the other things that West does in a reporter system, so it cannot replace those books.

By Mr. Musilek:

It can for some users, who will adopt a cost-saving and purchase the Oasis product and give up the head notes and give up the synopsis and the key numbers in order to have the cases in at least the West arrangement. So they get something of West for free, for a lower price than if they bought the West product.

Question from Bench:

But again, the arrangement, how do you respond? Or perhaps you have and it has just slipped by me. How do you respond to Mr. Nicholson's argument that there is no similarity between the arrangement, that Oasis (and I'm putting words in his mouth that weren't there) couldn't care less about the arrangement.

By Mr. Musilek:

It is useless to try to look at the physical arrangement of material on a CD-ROM disc. You can't read it with the human eye. So the way they are put on the disc, means nothing. The only actual arrangement of the material on the disc is the West arrangement. It has no arrangement outside of the West arrangement for any actual user of the product.

Question from Bench:

Maybe I don't understand. What is the arrangement we are talking about.

By Mr. Musilek:

It is where in the West print reporter decisions and parts of decisions are found, as arranged by West, and for our purposes, we are talking about 60% roughly of Southern Reporter volume, which is the percent that encompasses Florida decisions.

Question from Bench:

You said that the originality of the arrangement that you discussed earlier would take a case that had more importance, or less importance, or some you noted and some that you would what you have just now said is your arrangement is something different.....

By Mr. Musilek:

No, Your Honor, what I am saying is the way that that subjective arrangement is expressed is through the use of a series name, a volume number and a page number. In other words, West could also, I suppose, have every case arranged the same way, using it's subjective criteria about cases where they have had notes to be followed by lesser cases, to be followed by tabled decisions, and numbered them and said that, you know, 1 through 600, such as CCH does with its paragraph numbering to designate each falling case, but what West does to express its arrangement, which is a acknowledged to be creative, it uses citation to a West series name, volume number and then page number. But that is how you access, it is how you use the West arrangement, is with that expressive information. They are not pre-existing facts, they do not exist like telephone numbers and addresses do, whether or not West compiles them. The Supreme Court recognized that and it made a distinction between the pre-existing fact of telephone numbers and addresses in the arrangement. It did not find that an alphabetical arrangement was a system or that it couldn't be used, it simply found that in a situation of a telephone directory, it was such an age-old practice that it wasn't creative.

Question from Bench:

Sort of like the age-old practice of chronologically...I mean, not chronologically, but paginating them.

By Mr. Musilek:

That is a system. That is a system of using volume numbers and series and all that. What this court said in *Toro*, which I think is instructive, and the court in *West v. Mead* had *Toro* in front of it and had no problem in distinguishing it there, either. It is not a system. People are free to use a system of series names, volume numbers, and page numbers. For instance, United States Patent Quarterly reports the 2d Circuit decision in *Lipton* the same way West reports it, that is, with the same kind of a system, using a volume number, series, title and page numbers, but it is its own unique expression of it. It is Volume 55, USPQ page 620, where West's report of that would be Volume 35, Federal Reporter 3d, Page 225. They are different expressions. The expressions are protectable, not the systems. This is not a case about West trying to monopolize the law or monopolize a citation system, or a numerical system. It is West's expression of its arrangement that is copied, permanently embedded on the Oasis disc.

My last point. I didn't hear Oasis mention much about it because I assume it understands the weakness of the argument, but it really does not matter whether West is official or not in Florida. West has retained all its copyrights; that is undisputed. Every one of the contracts contains those kinds of restrictions, and so the only issue for this court is whether or not, if West has the copyright, it is entitled to enforce it. There has been nothing cited to this court that says that being designated official by the Supreme Court of Florida, or having contracts to provide copies of the Southern Reporter offprint to the State of Florida divests West of any copyright right.

Question from Bench:

So if we contracted out all of our services to private corporations and said they could keep a copyright, we could prevent people from accessing the public records of this country?

By Mr. Musilek:

No, that's because at that point you have an agency relationship, I would suggest, with who you contract out to make your decisions and the courts have been clear since *Callahan v. Meyers* that there can be no copyright in the work of judges. And so whether you do it yourself or have your clerks do it or have someone you bring in to do it, that work product would be a judicial decisions which would be law which would not be copyrightable. This is not talking about the decisions themselves. What is at issue here is West's proprietary arrangement of the decisions, not the decisions, not the text of the decisions. Thank you.

Rebuttal by Mr. Rojas:

Your Honors, the pagination system in West's Reporter tells you no more about

their arrangement than does the numbering system in the Toro case about the parts. And I think the analogy made by West is very illustrative about the St. Paul 85 restaurants. If they rank a restaurant as number one, well number one there has meaning...it means somebody felt that it was the best restaurant. But if, in this case, you have 348 So. 2d 447, it doesn't tell you if it is a criminal law case, it doesn't tell you if it is even a fully jacketed memorandum case which they consider to be significant. It doesn't tell you anything, except that that is the page where it is located. The analogy would be that this restaurant appears on West's Compendium of St. Paul Restaurants at page 3. But that would not tell you anything other than on what page it appears.

I do want to mention something because I think this is critical to the decision in this case, and that is, copying of the arrangement, whether or not the arrangement is embedded, is defined by statute and West has raised it. In Section 101 of the Statute, and they conveniently read only the second half of the definition and omit the first half, which is put together with an "and" - that's conjunctive. And I'll read it to the court. Section 101 says, "copies are material objects other than phonorecords in which a work is fixed by any method now known or later developed and from which the work can be perceived, reproduced or otherwise communicated." West says if you can perceive or somebody could communicate the arrangement by cross-referencing to the internal pagination, that makes it so. And I'll talk about that with the Sony case for a moment, which says that the fact that some other user might be able to do that does not constitute infringement, with the Betamax case. But, the statute says the work must be fixed on the disc. So the same work that has to be perceivable, and that's the second part of the "and," first must actually be fixed. And that means more than a transitory duration. This is CD-ROM, that's why I pointed that out to the court at the beginning. Optically embedded. It cannot be rearranged and somebody searches it just like that music CD, you are not rearranging the database to put it into the West order, you are simply viewing it, perhaps, if somebody wanted to go through that ridiculous exercise of trying to review it in the West order, but it would never be fixed on that disc. The work in question here is the arrangement. That arrangement would never be fixed on the Oasis disc. And I think that is dispositive in this case.

Now, West talks about, and they admit, that the pagination is really access and it is a system. Exactly, it's an access, it's a system, it's like the Lotus method of accessing the menu commands, the 1st Circuit held was one. It's a system, it is not copyrightable, the Supreme Court affirmed it on a 4-4 split, but nevertheless, the ruling in the 1st Circuit is that.

Now, in this court, the fact that Feist has come out, the Supreme Court has questioned the validity of, called into question the validity of the underlying precedent for West v. Mead means that you are free. You do not have to have an en banc determination here to rule in favor of Oasis. In your own decision in Three Boys Houseboat Vacations, Ltd. vs. Moritz, you are free, when it has been questioned by the Supreme Court, to proceed and rule as that new precedent now calls.

And finally, the official status, I didn't mention this not because we don't think it is important, but because I had no time in my oral argument. It is extensively addressed in the brief. Article I, Section 24 of the Constitution of the State of Florida provides that all documents generated by or in connection with the work of the government, including the courts, are part of the public record. That very same public policy that counsel for West acknowledged is there, that where there is an agency between a government report, that the product cannot be copywritten, applies here. Because West has a contract with the State of Florida pursuant to a statute of the State of Florida, 25.381, which requires the state to enter the contract, the Supreme Court and the Attorney General, with West, every year, and West is even named by name in this statute, to be the publisher of the official decisions of the State of Florida. And that being so, this is the only authoritative, the only access that the citizens and the courts have to the common law of the State of Florida. And that is not imposed on West unilaterally. I think *West v. Mead* had said without a record before it that "we don't believe that West would act as an employee or as an agent of any state." There, there was no record. Here we have the record, and the record shows that they definitely do and, in fact, the 1985 contract with Florida says, "West, party of the first part, being the official reporter of the State of Florida" and that's in the record. They acknowledge that, they signed that contract. And they, by undertaking that duty--what good is it to have the law in the books without the access--so they have to provide the access. I see my time is up.

By the Court:

Well, the case has been well briefed and well argued and the case is submitted.