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February 17, 1981

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ATTORNEY GENERAL OPINION NO. 81- 48

Richard D. Ross  
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Supreme Court of Kansas  
3rd Floor  
Kansas Judicial Center  
Topeka, Kansas 66612

Re: Courts--Reporter of Supreme Court and Reports--  
Copyright of Appellate Court Reports

Synopsis: The Reports of the decisions of the Kansas Supreme Court and Court of Appeals may be copyrighted as compilations. However, any such copyright cannot cover the opinions of the judges and justices or other material prepared by them in the discharge of their judicial duties. The copyright protection afforded the Reports is limited to the Appellate Reporter's own work and labor in the production of the Reports.

The publication of advance sheets without copyright notice under copyright laws existing prior to January 1, 1978, resulted in forfeiture of the copyright on the material contained therein, which cannot be revived by subsequent publication in copyrighted volumes of the Reports. However, the publication of advance sheets without copyright notice after that date under current copyright laws does not constitute a forfeiture, and the works are protected from infringement as long as they are properly registered within five years after first publication. Neither one of these circumstances affects the validity of the copyright of the Reports as a compilation of preexisting material, but the copyright can only cover new and original material contributed by the reporter.

The use made of the Reports by West Publishing Company and K-Bar Research, Inc., pursuant to licensing agreements,

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has not resulted in forfeiture of the copyright protection afforded the Reports. Cited herein: K.S.A. 20-206, K.S.A. 1980 Supp. 20-211, 17 U.S.C.A. §§1, 3, 10, 19, 102, 103, 106, 405, P.L. 94-553, U.S. Const., Art. I, §8.

\* \* \*

Dear Mr. Ross:

On behalf of the Kansas Supreme Court, you have inquired regarding the copyright on the reports of the decisions of the Kansas Supreme Court and Court of Appeals (hereinafter collectively referred to as "Reports"). You indicate that an individual has inquired of Chief Justice Schroeder as to the propriety of microfiching the Reports (particularly the older volumes), with a view toward selling them. This individual suggests that microfiching the Reports would make them more readily available and less expensive.

You also note that the individual making such inquiry questions whether the Reports may be copyrighted, since they are made up of judicial opinions. Furthermore, he questions whether the copyright protection still subsists or if it has been forfeited by the publication of the material in advance sheets which do not contain a copyright notice. He also inquires whether the use of the Reports by West Publishing Company or by K-Bar Research has caused a forfeiture of the copyright. It is in light of these questions that you have sought our assistance.

Initially, it is to be noted that Article I, Section 8 of the U.S. Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." It is pursuant to this power that Congress has enacted and from time to time amended copyright laws, which currently provide that "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C.A. §102(a). As noted in Banks v. Manchester, 128 U.S. 244, 252, 9 S.Ct. 36, 32 L.Ed.425 (1888): "No authority exists for obtaining a copyright, beyond the extent to which Congress has authorized it."

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Pursuant to K.S.A. 20-206, the appellate reporter is directed to copyright each volume of the Reports "for the use and benefit of the state of Kansas." It has long been recognized by the courts that law reports may be copyrighted. Wheaton v. Peters, 8 Pet. 591, 11 Curtis Dec. 223, 8 L.Ed. 1055 (1834). However, the copyright protection of such works is limited to the parts which represent the reporter's or publisher's own work and labor in the production and does not cover the opinions or other material prepared by the judges in the discharge of their judicial duties. Wheaton v. Peters, supra 8 Pet. at 666; Banks v. Manchester, supra 128 U.S. at 253-254; Callaghan v. Myers, 128 U.S. 617, 647, 9 S.Ct. 177, 32 L.Ed. 547 (1888); and State v. Mitchell, 105 Mont. 326, 339, 340, 74 P.2d 417, 424, (1937). The reporter's contributions to the law reports are covered as being "original works of authorship" and, therefore, within the scope of 17 U.S.C.A. §102(a). Callaghan v. Myers, supra 128 U.S. at 650. However, it has been held that a judge acting in his judicial capacity in preparing a syllabus, statement of case and opinion is not an author or proprietor so as to be able to authorize or assign a copyright in the material. "Judges . . . can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors." Banks v. Manchester, supra 128 U.S. at 253. This determination is generally said to be based on public policy considerations. It is believed that judicial opinions should be open for publication to anyone, since the judge's work is actually the exposition and interpretation of existing laws, which are binding on everyone. Banks v. Manchester, supra 128 U.S. at 253.

In light of these decisions, it is apparent that the copyright on the Reports cannot cover or protect the opinions, syllabi and other material prepared by the justices or judges. However, the Reports can be copyrighted as compilations of preexisting material in accordance with 17 U.S.C.A. §103(b), which states:

"The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply an exclusive right in the preexisting material."

Accordingly, the various certificates of copyright registration for recent volumes of the Reports you provided us indicate that copyright protection has been sought for each such volume as a compilation work,

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where the "author" is the Official Reporter, the "preexisting material" includes the judicial opinions and syllabi and the copyrightable "material contributed by the author" includes indexes, tables, the actual compilation and other similar material prepared by the reporter. However, even though such new and original work contributed by the reporter may be afforded copyright protection, we are unable to provide you with an unequivocal opinion as to the extent of copyright protection afforded the state by the copyrights obtained on volumes of the Reports published to date. Our uncertainty in this regard is due primarily to the fact that the advance sheets published for many of these volumes may contain new and original material contributed by the reporter that is subsequently included in the respective volumes of the Reports. It is our understanding that none of the advance sheets published for any of the volumes of the Reports has been copyrighted. Hence, the entirety of the material in the advance sheets becomes "preexisting material" within the meaning of 17 U.S.C.A. §103(b), and absent a copyright, even the new and original work contributed by the reporter to the preparation of advance sheets is in the public domain.

To comprehend the possible effect that publishing the advance sheets without copyright protection may have on the copyrightability of material in volumes of the Reports, it must be recognized that the copyright laws underwent substantial revision by the 94th Congress (P.L. 94-553). With a few exceptions, the sections in the revised title took effect on January 1, 1978. Because of the difference between the revised and prior laws regarding abandonment or forfeiture of copyright protection, there may be a corresponding distinction as to the copyrightability of the material in volumes of the Reports published before and on or after January 1, 1978.

Prior to the recent copyright laws revision, in order to secure a statutory copyright, the author was required to publish the work with a proper notice of copyright thereon. See 17 U.S.C.A. §10 (1947). Conversely, a general publication of the work without substantial compliance with the notice requirements set forth in 17 U.S.C.A. §§1 and 19 constituted an abandonment or forfeiture of any copyright protection and a dedication to the public of the work. Trifari, Krussman and Fishel, Inc. v. B. Steinbery-Kalso Co., 144 F.Supp. 577 (S.D.N.Y., 1956). Furthermore, publication of the work prior to any attempt to copyright it not only caused a forfeiture of copyright protection at the time, but also vitiated any copyright subsequently obtained thereon. Davis-Robertson Agency v. Duke, 119 F.Supp. 931 (Ed.Vir., 1953) and Deward and Rich, Inc., v. Bristol Savings and Loan Corp., 120 F.2d 537 (4th Cir., 1941).

Therefore, based on the foregoing, it is our opinion that the publication of the advance sheets without a copyright notice, prior to January 1, 1978, constituted a forfeiture of the copyright on the material contained therein. Furthermore, the fact that such material was later published in the Reports, which do contain a proper notice of copyright, does not affect the uncopyrightable nature of the material previously published in the advance sheets. See 17 U.S.C.A. §3 (1947).

While publication of the advance sheets without any notice of copyright prior to January 1, 1978, constituted a forfeiture of any copyright protection and a dedication to the public of the material contained therein, publication of the advance sheets without a copyright notice on or after that date may not have caused such forfeiture. Under the new copyright act, omission of the notice does not necessarily result in forfeiture. 17 U.S.C.A. §405(a)(2) provides:

"(a) Effect of Omission on Copyright.--The omission of the copyright notice prescribed by sections 401 through 403 from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if--

. . . .

"(2) registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered . . . ."  
(Emphasis added.)

Therefore, it would appear that the publication of the advance sheets without the proper notice after January 1, 1978, does not result in a forfeiture of the copyright, as long as registration is made within five years of the date of publication. However, it also is apparent that the difference between the prior and existing copyright laws in this regard may be a distinction without meaning with respect to those advance sheets which already have been published since January 1, 1978. As required by K.S.A. 1980 Supp. 20-211, advance sheets are "printed for distribution and temporary use until the reports themselves are issued." Thus, as concerns those advance sheets which have been supplanted by published volumes of the Reports, it would seem improbable that compliance with the above-quoted provisions of 17 U.S.C.A. §405(a)(2)

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can be achieved, since publication of additional copies thereof in which the requisite notice may be placed has been obviated by publication of the corresponding volumes of the Reports.

The fact that the material in the advance sheets is later published in the Reports which are copyrighted is not going to change the uncopyrighted status of the advance sheets, since 17 U.S.C.A. §103(b), which deals with the scope of copyrights on compilations, states in pertinent part: "The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in preexisting material." Therefore, the fact that the material is later published in the Reports is not going to fulfill the subsequent registration requirement of 17 U.S.C.A. §405(a)(2). However, the fact that the Reports contain both material which is not copyrightable along with new and original material which is copyrightable does not impair the validity of the copyright on any volume of the Reports as a compilation. Baldwin Cook Co. v. Keith Clark, Inc., 383 F.Supp. 650 (D.C.Ill., 1974). However, the copyright only covers and protects the new and original material in the Reports themselves. 17 U.S.C.A. §103(b); Kipling v. G.P. Putnam's Sons, 120 F. 631 (N.Y., 1903).

Notwithstanding the foregoing statutory provisions and judicial interpretations, we are unable to provide you with a definitive opinion as to the scope and extent of the copyright protection enjoyed by the Reports. To do so would require a factual determination of the copyrightable material contained in each of the volumes thereof. As to those volumes for which advance sheets were published, such determination would necessitate a comparison of the material in the advance sheets and the corresponding volumes of the Reports to ascertain the extent of the new and original material contributed by the reporter to each of the published volumes. In that regard, it should be recognized that if the material contributed by the reporter to the publication of uncopyrighted advance sheets is altered by the reporter in such a way as to constitute new and original material upon its inclusion in the bound volumes of the Reports, such material may enjoy copyright protection. Again, however, this must be determined on a case by case basis.

Finally, it is our opinion that the use made of the Reports by West Publishing Company and K-Bar Research, Inc., has not resulted in a forfeiture of the copyright protection afforded the Reports. Such

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use has been in accordance with specific permission of the reporter, either through agreement or copyright license. Pursuant to 17 U.S.C.A. §106, a copyright owner may reproduce or authorize the reproduction of a copyrighted work in copies, and may distribute or authorize distribution to the public of such copies. These statutory authorizations would certainly appear to validate the use made of the Reports by these private corporations.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



W. Robert Alderson  
First Deputy Attorney General

RTS:WRA:phf