

Declaration of Jocelyn Kennedy in Support of Public.Resource.Org

I, Jocelyn Kennedy, declare as follows:

1. I am the Executive Director of the Harvard Law School Library. I have been at Harvard Law School for five years, and have been a law librarian for sixteen years. I have personal knowledge of the facts stated in this declaration and know them to be true and correct. I could competently testify to them if called as a witness. The opinions expressed in this declaration are my own, and may not necessarily be the opinion of Harvard Law School or its affiliates.

2. In my many years of working as a law librarian, I have witnessed Lexis and West continue to grow more dominant in the field of legal research. It is also my belief that relying solely on Lexis and West to provide access to legal materials is detrimental to overall goal of proper legal research.

3. Both Lexis and West are often the official publisher of edicts of government (e.g., annotated state codes). This means, in order to access the "official" law, one must have access to either Lexis or West online system or access to a print collection of the primary law. Note also that as Lexis and West are the publishers of the official print version of the primary law, public law libraries are burdened with maintaining both a print and digital collection to meet the needs of the public. In addition, the licenses for Lexis and West for academic law libraries are restricted to law school community members, which then requires the library to purchase either public access to West and Lexis or the print material, or both. This erects a barrier to access in itself, because a user login to either database can be prohibitively expensive and is often not a realistic option for individual citizens. In the case of an individual citizen without access to a public law library, this erects a barrier to access in itself. Individual user licenses can be prohibitively expensive and is often not a realistic option.

4. But, even from the perspective of a law librarian or someone with a membership, Lexis and West restrict the materials available in a way that negatively impacts the ability to perform proper legal research. For example, both Lexis and West regularly update state codes and regulations, replacing the content and removing

outdated or prior versions of particular edicts of government. So, for example, take the state of Georgia. Georgia has designated that its official state code is the annotated state code, and Georgia contracted with LexisNexis to provide the annotations to the state code. If Georgia made changes to its state code this year, then Lexis would update the version of the Georgia annotated state code on its platform, but the prior version would disappear and be completely inaccessible.

5. This may seem like a harmless exercise, but I assure you it is not. Because the annotated code is designated the official code and is only accessible through Lexis, Lexis alone controls who can access the official version of the code. If someone needed to check a prior version of the official code, it would be virtually impossible to do so using an electronic database. So, for example, if a law clerk wanted to cite check a legal brief submitted to a court that cites a prior version of the annotated Georgia code, the clerk would not be able to check it for accuracy without access to prior a prior print version. As you can see, this can have a significant real-world impact on the development and potential outcome of a case.

6. Lexis and West are also able to use their enormous market power to significantly leverage negotiations in their favor. One particular area where they do this is with respect to usage statistics. Harvard Law School students and faculty frequently use both LexisNexis and Westlaw, including a number of databases and resources found on both platforms. Lexis and West both refuse to share this information with us. It would be very helpful to have this information so that we could understand where to focus our resources and to identify which legal materials are of most import to our students and faculty. It is my belief that Lexis and West know that law libraries will continue to subscribe to their services, despite their unwillingness to provide use statistics. We regularly make purchase and retention decisions based on our knowledge of the use of a resource. It is impossible to make data driven decisions regarding Lexis and West. It is my believe that Lexis and West know that they can refuse to provide this information because they know, above all else, we need them more than they need us. I also am unaware of any privacy notice that either platform serves on users to make them aware

that they are engaging in such data collection, which worries me from a privacy standpoint.

7. Throughout my career as a law librarian, I have also noticed that Lexis and West use their significant negotiating power to vary pricing to each individual library. For example, before joining Harvard, I worked as a law librarian at the University of Connecticut Law School. My budget was significantly less than my budget at Harvard Law School. Knowing this, Lexis and West attempted to impose their contract terms on me and force me to enter into an LMA which would then restrict my ability to make changes to my print collection. LMAs offered deep discounts, but created inflexible agreements. In order to provide our public patrons with appropriate resources and retain control of a fluctuating budget, we did not enter an LMA and did not enjoy the same discounts as libraries who had LMAs. It is my belief that we paid a higher price for resources than those who entered LMAs. As a public educational institution, the University of Connecticut Law School had an obligation to make primary law materials available and accessible to the public. It is my belief that Lexis and West, only through their uneven bargaining power, were able to impose these restrictive terms on the use of legal research materials.

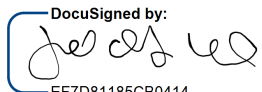
8. While the Harvard Law School Library has access to greater resources, Harvard is the exception, not the rule. Regardless, the law library does have a budget and regularly makes purchasing decisions to remain in that budget. Lexis and West are able to lock-up users at law schools, libraries, law firms, and other businesses across the country because very few customers are able to successfully negotiate their boilerplate restrictive terms out of the contracts. Thus, it is my belief that the effect of Lexis and West's market power is far-reaching.

9. Ultimately, this inability to freely and broadly access primary sources of law without relying heavily on Lexis or West significantly impacts the ability to perform proper legal research. It is critical for researchers to have access to both current and historical versions of edicts of government. As stated earlier, this is particularly, but not exclusively, burdensome to the general public. There are legitimate research reasons for

lawyers, law firms, government agencies and courts to make use of the editorial additions to resources within Lexis and West. However, where access to the annotated versions of edicts of government are controlled by private publishers, this can have a detrimental impact on pro se litigants and individual citizens. Access to the law should not be determined based on the ability to pay. To do so has a deleterious effect on individual citizens, in particular those who are economically disadvantaged.

I declare that the foregoing is true and correct.

Executed on 8/17/2021 in Cambridge, Massachusetts.

/s/  _____
JOCELYN KENNEDY