

**Submission to Federal Trade Commission
on Behalf of Public.Resource.Org**

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EXECUTIVE SUMMARY

On behalf of Public.Resource.Org (Public Resource), we make this submission to bring to the attention of the Federal Trade Commission an issue of significant public interest: barriers to access by consumers to the laws of the land. Despite a definitive statement by the U.S. Supreme Court that edicts of government are not subject to copyright protection, Lexis and West, by far the two largest legal information services companies operating today, have contracted with various states to make their laws available only through restrictive means adorned with false copyright claims. In addition to restricting access to ordinary consumers, the copyright assertions by these technology companies—and threats of litigation over purported copyright violations—have chilled academic access and research, limited competition in markets for legal information services by raising barriers to entry and expansion by competing providers, and enabled Lexis and West to extract onerous commercial terms and valuable data from end users.

This submission provides an overview of the challenges the public, academics, and businesses face in accessing public laws, the role of the relationships between various states and Lexis and West in the current system, and outlines how the conduct of Lexis and West, in collaboration with the states, may violate the competition and consumer protection laws enforced by the Commission. This submission should be read in conjunction with the accompanying submissions, declarations, and exhibits available on Public Resource's website.¹

Public Resource requests that the Commission exercise its powers under the Federal Trade Commission Act to investigate the competition and consumer protection impacts of the current situation, and take action, including by (i) encouraging states to reverse actions that restrict public access to their laws, (ii) enjoining Lexis and West from asserting non-existent copyrights over edicts of government, and from engaging in other restrictive practices, and (iii) taking other action to eliminate bars to unfettered access to edicts of government.

¹ This submission, additional submissions, declarations, and exhibits may all be viewed at <https://law.resource.org/pub/us/case/ftc/>. A .zip file is also available to download all the materials.

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1. INTRODUCTION

Public.Resource.Org, Inc. (“Public Resource”) is a small non-profit organization that has been attempting since 2007 to post online the laws that govern this country. In 2020, more than a decade into this effort, the U.S. Supreme Court ruled that the State of Georgia and its vendor, Lexis, had no copyright interests in the Official Code of Georgia Annotated (O.C.G.A.) because it is an edict of government and thus not subject to copyright protection,² a ruling that has ramifications well beyond a single state’s code. Despite the Court’s ruling in favor of Public Resource, Lexis and West, the two largest providers of legal information services that contract with various states to publish their official codes, continue to use unfounded copyright assertions and technical roadblocks to restrict free and open public access to official codes and other legal materials.

Since the Supreme Court’s ruling, Public Resource has continued its work to make the O.C.G.A. and the complete official versions of the laws of other states freely available through its own website and in numerous other locations, without charging users, as well as encouraging others to promote open access to these materials. In response, several states have continued to assert copyright, and—in collaboration with Lexis and West—have placed obstacle after obstacle in the way of free access to the official state codes. Lexis and West have continued to assert falsely that the materials are subject to copyright, and have taken a variety of actions to limit access, including sending takedown notices to organizations who try to republish the materials, lobbying state governments to enforce nonexistent copyrights, and limiting the ability of third parties to access, download and disseminate copies of official versions of state codes.

While the focus of this submission is on official state codes, similar copyright and practical restrictions on access have been imposed over many other important edicts of government, such as court records, jury instructions, public ordinances, municipal codes, and other key legal documents. The public interest in making these materials openly and freely available is obvious: citizens should be able to know the law of the land in order to manage their personal and commercial activities and to defend against claims against them. Placing such important materials behind paywalls on the false premise that they are subject to copyright protection restricts the public’s access to those materials. Further, as discussed in detail below and in the accompanying declarations of law librarians and researchers, false claims of copyright have a chilling impact on the ability of libraries and others to provide access to the public, as well as inhibiting the use of government edicts in a wide range of academic activities. And from a commercial perspective, the restrictions inhibit the development of new and innovative competitors in legal information services markets and reinforce the market power of the two dominant technology companies providing legal information services, Lexis and West.

It is not necessary to permit Lexis and West to engage in such anticompetitive practices—in contravention of both the letter and spirit of the Supreme Court’s ruling—to ensure that states are able to compile and make available their official codes at a non-prohibitive cost. Lexis and

² *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. (2019). The full docket, including 35 amicus curiae briefs, is available at <https://www.supremecourt.gov/docket/docketfiles/html/public/18-1150.html>.

West can continue to copyright their own original material, such as case annotations to codes, so long as they are not stamped with the imprimatur of the state and form part of the “official” law. This submission challenges Lexis’s and West’s methods of restricting access to official legal materials, as well their exclusive agreements with the states that make such restrictions possible and stymie both would-be competitors and legal research innovators who would expand public access to the law.

The activities of Lexis and West, leveraging the privileged positions they have secured with the various states, in hampering public access to edicts of government fall squarely within the Federal Trade Commission’s mandate to prevent both (1) unfair methods of competition and (2) unfair or deceptive acts or practices in or affecting commerce.³ In addition to deceiving consumers, the false assertions of copyright and technical barriers these two companies impose prevent other parties from obtaining and utilizing official government materials for their own commercial, academic, or other use.

The Commission has the power to investigate and to order Lexis and West to cease and desist from perpetuating the false and deceptive representation that the edicts of government that they market as part of their legal information services are subject to copyright, and to stop conduct that raises roadblocks to public and commercial access to these materials. In addition, the Commission has the power to issue advisory opinions and advocacy letters to state and local governments regarding the arrangements they have with vendors and the implications of those arrangements and the limitations placed on these materials in regards to competition law, consumer protection, the state action doctrine, and other issues.

The Commission’s intervention here would serve an important public interest by protecting consumers and enhancing competition in legal information services markets. Advancing the Supreme Court’s 2020 decision—which was meant to ensure that official edicts of government would be free, accessible, and unencumbered by threats of prosecution for copyright infringement and unwarranted, anticompetitive technical barriers—would yield significant public benefits.

2. BACKGROUND

a. Publication of Edicts of Government

“Edict of government” is a term of art that refers to the comprehensive set of laws and legal materials (broadly defined) published in the name of the government. The term “edict of government” includes statutes, state and municipal codes, judicial opinions, administrative rulings, jury instructions, legislative enactments, public ordinances, and similar official legal

³ Section 5, FTC Act, [15 U.S.C. § 45](#).

documents. It applies to such works, whether they are federal, state, or local, as well as to those of foreign governments.⁴

For over 130 years, the government edicts doctrine has excluded edicts of government from copyright protection. The underlying principle is that no one can own the law, and that every citizen should have free access to the content of the law.⁵ In the copyright context, this means that judges, legislators, and others acting in an official capacity may not be considered the “authors” of the works they produce in the course of their official duties, and therefore that those materials are not subject to copyright protection.⁶

In practice, however, many states and private parties continue to assert copyright over edicts of government and take steps to enforce those non-existent rights. One of the principal ways that this occurs is through the collaboration of state legislatures and other government bodies with the two largest U.S. legal information services, RELX PLC and its subsidiaries and affiliates (Lexis), and Thomson Reuters Corporation and its subsidiaries and affiliates (West).

The assertion of copyright is not a meaningless act. Under the Copyright Act, penalties for copyright violations can be severe, ranging from damages and awards of attorneys fees to criminal liability.⁷ And even where potential defenses may be clear, the threat and cost of potential prosecution deters most institutions from challenging a copyright notice.

Beyond the threat of litigation, the false assertion of copyright forms the basis for state governments to confer upon private companies—overwhelmingly Lexis and West—exclusive rights to profit from the use of government edicts by placing them behind paywalls, selling physical and electronic copies, bundling this important content with legitimately copyrighted material in selling their legal information services, and generally benefiting from exclusive access to a deep well of essential legal materials.

As discussed further below, the exclusive access to state government edicts granted to Lexis and West has contributed to their significant market positions in the legal information industry at the expense of other competitors, and has enabled them to exact higher prices and more onerous contract terms from their customers. That this exclusivity is valuable to Lexis and West is apparent from their activities since the 2020 Supreme Court decision: minutes of state government code commission meetings note presentations given by Lexis regarding the decision, recording in some instances Lexis’ assertion that the decision does not apply to the particular state.⁸

⁴ U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 313.6(C)(2) (3d ed. 2021).

⁵ “Every citizen is presumed to know the law,” and “it needs no argument to show . . . that all should have free access” to its contents. *Nash v. Lathrop*, 142 Mass. 29, 35 (1886) (cited by *Banks v. Manchester*, 128 U.S. 244, 253–254 (1888)).

⁶ *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. ___, 7-9 (2019).

⁷ Chapter 5, Copyright Act 1976, 17 U.S.C. §§ 501-513.

⁸ *Decl. of Carl Malamud*, ¶ 22 and *Exhibit R-2*.

Public Resource has consistently maintained that government edicts are not subject to copyright and should be freely and easily accessible to the public.⁹ Public Resource fulfills this mission by obtaining copies of government edicts, such as official annotated state codes, and placing them on its website and on the Internet Archive, often at significant expense and effort when the source material is not readily accessible.¹⁰ For example, Public Resource recently spent \$2,929.87 purchasing the jury instructions of Ohio, Arkansas, Virginia, Indiana, and Illinois from LexisNexis¹¹, and spent \$13,454 purchasing the jury instructions for Missouri, Alabama, Nebraska, New York, Mississippi, Tennessee, Arkansas, and Colorado from WestLaw.¹² Public Resource engages in this practice openly: it informs the states that their edicts have been published on its website for all to access, and asserts that the materials are not protected by copyright.¹³ In response, Lexis, West, and the states have continued to issue takedown notices to and threaten copyright infringement litigation against Public Resource.¹⁴

b. Official Annotations to State Codes are Edicts of Government

In addition to the laws passed by a state's legislature, many states promulgate annotations to those laws. When such annotations are prepared with the involvement of government actors in an official capacity, they fall within the government edicts doctrine and do not enjoy copyright protection.¹⁵

Annotations include brief summaries of the law, as well as descriptions of key cases that demonstrate how a particular law enacted by a state legislature is interpreted and applied. Annotations usually appear following the text of the statute they interpret in annotated statutes. For example, a state code's meaning may have been interpreted by a court, and that meaning may not be obvious from a plain reading of the text as written; without the annotation regarding the court's opinion, a reader of the text may get an inaccurate representation of what the law actually is. However, annotations also include such basic elements as headings and indices. Annotations are not only useful, but in many cases essential to the public in seeking to comply with, or defend against alleged violations of, the laws.

Frequently, states designate the annotated version of their laws as the "official" version. The "official" designation is a meaningful one. First, significantly more care is given to ensuring that the "official" version is an accurate statement of the law. That means that the "official" version is typically free of grammatical or typographic errors, as well as being up to date with respect to

⁹ [Decl. of Carl Malamud](#), ¶¶ 7, 11, 21

¹⁰ [Decl. of Carl Malamud](#), ¶ 32-33.

¹¹ *Id.*

¹² [Decl. of Carl Malamud](#), ¶ 33.

¹³ [Decl. of Carl Malamud](#), ¶¶ 8, 9, 12, 14, 21, 22, 23, 25.

¹⁴ [Decl. of Carl Malamud](#), ¶¶ 14, 16.

¹⁵ *Georgia v. Public.Resource.Org, Inc.* 590 U.S. at 2. The *Georgia* case specifically addressed the Georgia Annotated Code and the manner in which that code and its annotations were prepared and endorsed by the Georgia state legislature. Although there are nuances in the way in which each state approaches code annotations, *Georgia* stands for the basic proposition that statutory annotations prepared with the involvement and imprimatur of the state cannot be copyrighted.

the most recent developments and interpretations of the law. The “unofficial” version may not always be the right version of the law, making it distinct from the “official” version of an edict of government.

While states may make access to “unofficial” edicts of government available—and in some cases, may do so for free—members of the public cannot rely upon unofficial versions. Indeed, states adopting this approach make it clear. In Alaska, for example, the version of the state code made available through the state government websites includes the notice: “This online infobase is an unofficial version of the Alaska Statutes and may contain errors or omissions. The information is provided as a convenience to the public. The State of Alaska, Alaska State Legislature, and Legislative Affairs Agency make no warranty, express or implied, of the accuracy of the information presented here. Use of the information is the sole responsibility of the user. For the official version of the Alaska Statutes, please refer to the printed version of the Alaska Statutes.”¹⁶ The official version of the code is printed by Lexis, and both Alaska and Lexis assert copyright over the official, printed version of the Alaska Statutes.

A state annotates its laws generally in one of two ways:

- A state can create the annotations itself using its own staff or hired contractors. In this type of approach, costs of creating annotations are borne by taxpayers.¹⁷
- Alternatively, states can contract with a legal information service provider, such as Lexis or West, to create annotations in return for some benefit, usually the right to sell the annotated code for profit. Instead of the state paying for the vendor’s provision of annotation services, part of the cost of creating the annotations is borne by the legal information service provider, which relies on revenue from the sale of the annotated law to end users to recoup these costs. In some states, the state retains ownership in the putative copyright in the annotations; in others, the contract between the state and the vendor purports to assign copyright to the vendor.¹⁸

Using the state of Georgia as an example, under the terms of its agreement with the state, Lexis prepares a variety of annotation material, including case notes, code section catchlines, acts and act notes, historical citations, tables, and indices.¹⁹ Once Lexis has prepared the annotations, it submits them to Georgia’s Code Revision Commission.²⁰ The Code Revision Commission is tasked with consolidating disparate bills into a singular code for reenactment by Georgia’s state legislature.²¹ Following review of the annotated code by the Commission, it is submitted to the Georgia legislature, which votes to enact the code, with annotations, as well as

¹⁶ Alaska State Legislature, 32nd Legislature (2021-2022) Alaska Statutes 2020, <http://www.legis.state.ak.us/basis/statutes.asp> (last accessed Oct. 29, 2021).

¹⁷ [Brief for Matthew Bender as Amicus Curiae](#) at 12.

¹⁸ [Brief for Software and Information Industry Association](#) at 15-16.

¹⁹ [Decl. of Carl Malamud, Exhibit R-5](#) (Lexis Contract with State of Arkansas) at Exhibit B, Tab 2, 16-18 (providing description of services provided to Georgia).

²⁰ *Id.* at 672, para. 24.

²¹ *Georgia v. Public.Resource.Org*, 590 U.S. at 2.

publish the annotated code as the official state code of Georgia.²² The annotated code, as adopted by the Georgia legislature, becomes the law.

As the Supreme Court held, “no one can own the law.”²³ This is especially true of works authored by an arm of the legislature in the course of their official duties, which are properly considered edicts of government and outside the reach of copyright protection.²⁴ Here, the Georgia legislature adopted the annotated code as part of its official duties, and therefore the annotated code is an edict of government outside the reach of copyright protection.²⁵ In 2021, in an attempt to circumvent the Supreme Court’s decision, Georgia and Lexis amended their contract to define separately “state content” and “supplemental content,” with only Lexis having editorial control over the supplemental content, which includes case annotations and research references.²⁶ However, the “Official Code of Georgia Annotated” continues to be defined as including this “supplemental content,” so that the annotated code remains an edict of government. In a similar vein, on Sept. 29, 2021, Lexis amended its contract with the state of Arkansas with the explicit aim of claiming copyright in the Arkansas Code Annotated.²⁷

Typically, the state purports to give the third-party legal information service preparing and distributing the annotated code exclusive rights to the material. In any state adopting this approach, the service (for the most part Lexis or West) has exclusivity over the annotated code to the exclusion of any competing legal information service provider.²⁸ For example, in the agreement between Lexis and the state of Georgia, Lexis is given the “exclusive right to distribute and sell” the official version of the code.²⁹ Further, the agreement requires that Lexis “assist in the defense or initiation of any actions relating to the copyright rights referenced in the [contract.]”³⁰

Twenty-eight (28) states use a third-party vendor to help develop their annotations using a similar process to that described above. Of these, the annotated code bears copyright assertions in twenty-four (24) states.³¹

²² *Id.* at 2-3.

²³ *Id.* at 7.

²⁴ *Id.* at 5-6.

²⁵ *Id.*

²⁶ [Decl. of Carl Malamud, Exhibit P-I](#) (Amendment to Publication Agreement between Lexis and State of Georgia dated January 8, 2021).

²⁷ [Decl. of Carl Malamud](#), ¶ 24 and [Exhibit R-7](#); [Exhibit R-8](#); [Exhibit R-9](#).

²⁸ Of the 27 states that used either Lexis or West to develop edicts of government, only one (Kentucky) utilized the services of both Lexis and West. The Kentucky Revised Statutes (including annotations) are made available on the website of the Kentucky legislature (without a copyright notice) as well as on both Lexis and West (each with a copyright notice). [Suppl. Exhibit 03a](#).

²⁹ [Decl. of Carl Malamud, Exhibit P-I](#) (2021 Amendment to Lexis Contract with State of Georgia) at Paragraph 8.1(a).

³⁰ [Decl. of Carl Malamud, Exhibit P-F](#) at Paragraph 6.1(d).

³¹ In addition to these states, New Mexico contracts with Blue360 Media.

State³²	Copyright Asserted	Vendor
Alabama	Yes	West
Alaska	Yes	Lexis
Arizona	Yes	West
Arkansas	Yes	Lexis
Colorado	Yes	Lexis
Connecticut	Yes	West
Delaware	No	Lexis
Georgia	Yes	Lexis
Kentucky	Yes	Lexis and West
Louisiana	No	West
Maine	Yes	West
Massachusetts	No	West
Mississippi	Yes	Lexis
New Hampshire	Yes	West
New Jersey	No	West
New Mexico	Yes	Blue360 Media
North Carolina	Yes	Lexis
North Dakota	Yes	Lexis
Oklahoma	Yes	West
Rhode Island	Yes	Lexis
South Carolina	Yes	West
South Dakota	Yes	West
Tennessee	Yes	Lexis
Texas	Yes	West
Vermont	Yes	Lexis
Virginia	Yes	Lexis

³² [Suppl. Exhibit 03a.](#)

West Virginia	Yes	Lexis
Wyoming	Yes	Lexis

c. How State Codes and Other Edicts of Government are Made Available

States make their codes available in a variety of ways, including through official government websites. However, as discussed above, several states make the official version of their state codes available only through Lexis or West. Even where the official annotated code is available on a government website, there are often limits on access that prevent promulgation of the laws. Most of those websites do not have the functionality to download the entire state code and annotations, but rather link to a PDF of specific parts of the code through section-by-section access. This prevents bulk downloading of the materials in order to include them in other legal information service offerings or otherwise republish them to provide broader access to the public.

Some states require Lexis and West to provide free access to the unofficial version of their state code. When this happens, however, Lexis and West effectively only grant the public access to what the Supreme Court referred to as the “economy-class” version of state codes.³³ As Chief Justice Roberts explained in his opinion for the Court, if a citizen “reads the economy-class version of the Georgia Code available online, he will see laws requiring political candidates to pay hefty qualification fees (with no indigency exception), criminalizing broad categories of consensual sexual conduct, and exempting certain key evidence in criminal trials from standard evidentiary limitations—with no hint that important aspects of those laws have been held unconstitutional by the Georgia Supreme Court ... Meanwhile, first-class readers with access to annotations will be assured that these laws are, in crucial respects, unenforceable relics that the legislature has not bothered to narrow or repeal.”³⁴

The practical effect of having available different versions of state laws is to create two different understandings of the law: one for those who can afford to play by Lexis or West’s terms, and one for those who cannot. In many cases, the free version of state codes is not adequate to provide true access to the law.

Lexis and West make official state codes and other government edicts available in several formats:

- Lexis and West maintain electronic platforms that allow users to access their library of materials, including official annotated state codes and other government edicts. Lexis and West typically require users to pay for access to the materials housed on the platform. Users must also agree to the terms of use imposed by Lexis and West, including terms such as digital rights management and restrictions on printing or downloading and to what uses the materials can be put, as well as terms that allow Lexis

³³ *Georgia v. Public.Resource.Org*, 590 U.S. at 17.

³⁴ *Id.*

and West to collect a user's personal data. This is the only up-to-date version of the code that is available, and it is not for sale and cannot be downloaded or used without permission from a private party, which does not grant such permission.

- Lexis and West also have exclusive rights to publish hard copy books of various official annotated state codes. These hard copy versions are often sold for hundreds, or even thousands, of dollars each, and many are published with copyright assertions throughout the book.³⁵ Once purchased, these materials are quickly out of date.
- Lexis and West have exclusive rights to publish CD-ROM versions of official annotated state codes.³⁶ These CD-ROM versions are subject to Lexis or West's terms of service, and are subject to other restrictions, such as digital rights management or restrictions on how they can be used or printed. These materials also quickly become out-of-date.
- Lexis and West also post *unofficial* and unannotated versions of state codes on the Internet, often free of charge. The unofficial version of an edict of government is often rife with typos, errors, technical errors, or incomplete information.³⁷ Access to these sites requires acceptance of terms of use which severely limit what can be done with the materials. And, especially confusing to users, these sites do not explain the limitations of the materials. For example, the so-called "free" site provided by Lexis for the State of Georgia is labelled "Official Code of Georgia Annotated" even though most of the annotations have been stripped out.³⁸

Lexis, West, and several states continue to assert copyright even over the "economy-class" version of state codes. For example, the free public version of the State of Mississippi's code, which is provided by Lexis, includes the assertion that, "Pursuant to Section 1-1-9 Miss. Code Ann., the laws of Mississippi are copyrighted by the State of Mississippi."³⁹ This warning has the effect of preventing others, including Lexis and West's competitors, from publishing the law and granting truly free access to the public.

Online electronic versions of edicts of government are distinct from print versions of edicts of government in several key ways. Online electronic versions are able to be updated more regularly and quickly than print versions; however, online electronic versions of edicts of government are often restricted by Lexis and West's licenses and other restrictive usage terms,

³⁵ [Decl. of John Joergensen](#), ¶¶ 14-16; [Decl. of Carl Malamud](#), ¶¶ 32-33.

³⁶ [Decl. of Carl Malamud, Exhibit P-F](#), Section 4.5.

³⁷ See [Decl. of Tim Stanley](#), ¶ 5.

³⁸ Confusingly, while the annotations continue to be included in the official code approved by the Georgia state legislature, in an apparent attempt to side-step the Supreme Court decision, the O.C.G.A. now states that the annotations "shall not be construed to have the imprimatur of the General Assembly." O.C.G.A. § 1-1-1(c). And Lexis continues to impose restrictions on access to the code without the detailed annotations in a manner that makes it difficult for the public to download and disseminate the material.

³⁹ Mississippi Sec. of State, Mississippi Law, <https://www.sos.ms.gov/communications-publications/mississippi-law> (last accessed Oct. 29, 2021).

preventing bulk electronic access and the ability to quickly and comprehensively download.⁴⁰ While it is much more difficult for Lexis and West to restrict a customer's usage of print materials, they can be extremely costly to purchase in the first instance, and take significant processing work if they are to be shared.

By contrast, making official edicts of government free, accessible and unencumbered by threats of copyright infringement would yield significant public benefits, including allowing citizens to learn the current law, permitting academic research utilizing the materials, and allowing competitors to Lexis and West to develop products that innovate and benefit consumers.⁴¹

d. Copyright Claims Over Other Edicts of Government

Concerns around access to government edicts are not limited to official state codes. There are many other types of edicts of government over which government bodies and the publishers with whom they work have wrongfully asserted copyright and restricted both public and commercial access. Examples include municipal codes and regulations, jury instructions, and other court records. For the same public interest reasons as official annotated state codes, such materials are not capable of being copyrighted, and obstacles to access or commercial use should be eliminated.

Municipal codes are laws, ordinances, and regulations enforced by a village, town, city, or county government. While sometimes specific codes are prepared under the auspices of private industry organizations, once adopted by a government body they become subject to the government edicts doctrine. Again, the public interest in free and open availability of such information is clear: it is important for citizens to understand the requirements and restrictions applying to, for instance, public safety in building and other contexts. As with many other important public records, however, many municipal codes are subject to invalid copyright claims by private entities and placed behind paywalls.

This is also the case for public safety codes, such as building codes, that are often adopted at the state level, but sometimes at the municipal and county level. For example, Public Resource has sought to obtain an electronic copy of California public safety codes, such as the California Electrical Code.⁴² The California Building Services Commission refused to provide Public Resource with the records because they are subject to copyright by private parties.⁴³

Jury instructions—instructions given by a judge to a jury before their deliberations—are critical documents that can have a significant impact on the outcome of a trial. Jury instructions explain the elements and principles that should guide jury decisionmaking in order to produce a robust and just outcome. Parties and their counsel have the opportunity to influence the instructions given in a particular case by proposing jury instructions to the court, typically based on prior

⁴⁰ [Decl. of Scott Burris](#), ¶¶ 8-10; [Decl. of Tim Stanley](#), ¶¶ 3-4; [Decl. of Adam Ziegler](#), ¶¶ 4-5.

⁴¹ [Decl. of Tim Stanley](#), ¶¶ 6-7; [Decl. of Adam Ziegler](#), ¶ 6.

⁴² California Code of Regulations, Title 24.

⁴³ [Decl. of Carl Malamud](#), ¶ 29, [Exhibit W-2](#).

instructions that have been effective. Some jurisdictions have “pattern” or model instructions that can be customized to particular cases. For lawyers and parties participating in jury trials in state courts, prior jury instructions are a critical resource. In many states, however, jury instructions—even though they are prepared by entities that include judges and other state officials, and even though courts may mandate their use—are garnished with invalid copyright assertions as well as terms of use, and technical restrictions. As with official codes, they are often available only through Lexis or West.

For example, as explained on the website of the Minnesota state law library, “Minnesota’s Jury Instruction Guides are published by Thomson-West. They can be found on Westlaw ... and in print as part of the Minnesota Practice Series. Unfortunately, they are not freely available on the Internet.”⁴⁴ A volunteer working with Public Resource has written to the ostensible copyright holder of the jury instructions—the Minnesota District Judges Association (MDJA)—seeking free public access to the Minnesota jury instructions. In response, the MDJA asserted that the jury instructions are not edicts of government because they are authored by volunteer active and retired judges on behalf of a non-profit entity.⁴⁵ This ignores the reality—the jury instructions are used and issued to a jury by a judge in a real-life courtroom, and they are authored in part by active duty judges, engaged in a task related to their public duties as judges. In addition, this non-profit entity has headquarters in the state courthouse. Thus, they cannot be subject to copyright. Public Resource has made similar efforts to gain free public access to the California jury instructions, which are marked with copyright claims by the Judicial Council of California.⁴⁶

Similar concerns exist with respect to other state court materials, including court dockets, filings and decisions, as well as other public records in the court system. While most such records are available to the public, some state courts have attempted to prohibit or limit any commercial or third-party use of the court data through their terms of service or service agreements, limiting bulk downloading or the use of automated systems to collect the information, and/or by claiming copyright in the materials. These restrictions limit the ability of other commercial or non-profit legal information service providers to develop, sell, or distribute products that utilize court materials, adversely impacting competition in downstream legal information services markets.⁴⁷

e. Legal Information Services

Legal information services are platforms providing access to a range of different types of legal information—codes and other laws and regulations, cases and case filings, other court-related

⁴⁴ Jury Instructions, Minnesota State Library, <https://mn.gov/law-library/how-do-i-find/jury-instructions.jsp> (last accessed Oct. 29, 2021).

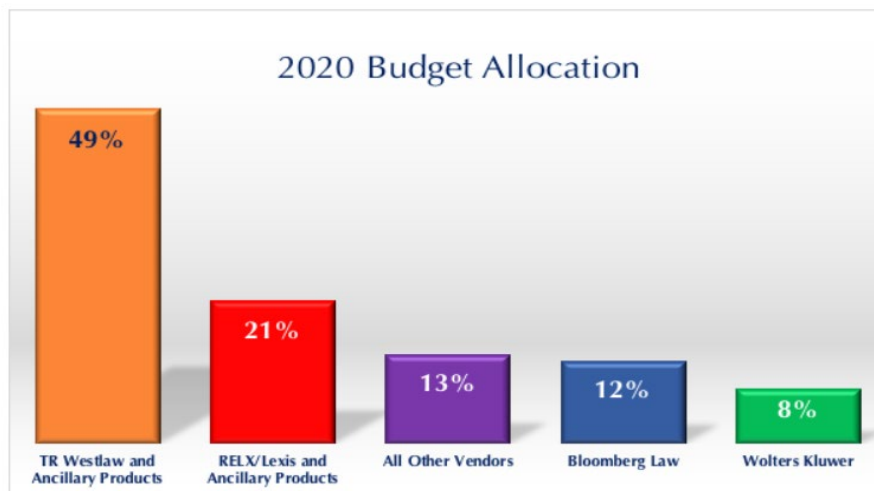
⁴⁵ [Decl. of Carl Malamud](#), ¶ 27. In addition, Public Resource has asked the Superior Court of the State of California for a writ of mandate commanding the California Office of Administrative Law and the California Building Standards Commission to produce electronic copies of the titles of the California Code of Regulations each agency is responsible for maintaining. See [Decl. of Carl Malamud](#), ¶¶ 29-30; *Public.Resource.Org, Inc. vs. California Office of Admin. Law and the California Bldg. Standards Comm’n*, 34-2021-80003612-CU-WM-GDS (Super. Ct. Cal. 2021).

⁴⁶ [Decl. of Carl Malamud](#), ¶ 28, and [Exhibit V](#).

⁴⁷ [Decl. of Joshua Blandi](#), ¶ 4.

materials, journal articles, treatises and other secondary sources, as well as original content. Legal information vendors may provide access to a broad range of different material, or focus on specific types of information or jurisdictions. Today, most legal information is accessed through electronic platforms that provide a range of value-added functionality, such as sophisticated search tools, artificial intelligence, and machine learning.

Lexis and Westlaw are by far the largest legal information vendors in the U.S. By way of example, a recent survey of the 2020 legal information budget allocation for 70 law firms shows that Lexis and West accounted for approximately 70% of their budgets:



Source: Feit Consulting 2020 Legal Information Vendor Market Survey⁴⁸

A large part of Lexis and West's success is their ability to provide access to a very broad and deep collection of legal materials, as well as an assurance of reliability. In addition to including works genuinely subject to copyright (such as many journal articles, treatises, and original content), and federal and state cases and laws that are not subject to copyright, the collections include the government edicts of those states with which Lexis or West have exclusive contracts as described above.

Based on information provided by the states over their websites or in responses to access requests, we have confirmed that West has exclusive rights in the official state codes of approximately nine states and Lexis twelve (and additionally, in Kentucky, both Lexis and West have rights to the official state code).⁴⁹ These exclusive contracts effectively grant Lexis or West a monopoly in the provision of access to the official version of a particular state's laws. Similar exclusivity exists in relation to other government edicts, such as jury instructions and various codes. These exclusive rights give Lexis or West market power in the sale of access to those edicts to lawyers and others. Competitor legal information services that do not have access to

⁴⁸ FEIT'S 2020 LEGAL INFORMATION VENDOR MARKET SURVEY: SOME SURPRISING EARLY RESULTS, available at <https://www.feitconsulting.com/feits-2020-legal-information-vendor-market-survey-some-surprising-early-results/>.

⁴⁹ [Suppl. Exhibit 03a](#).

these materials are unable to compete on an equal footing in markets for a particular state's legal information. Without access to a comparable volume of state material, other services have a significant gap in important content coverage, which cannot be filled with publicly available "unofficial" codes.

While there are several other smaller legal information services providers in the U.S.—including Justia, Fastcase, UniCourt, Legal Information Institute, American Legal, and others—none has access to as extensive a range of official state government material as Lexis or West. Because competitors to Lexis and West cannot accumulate access to enough baseline material, they cannot develop databases with a similar breadth of material without substantial cost.⁵⁰ The prohibitive cost of these fundamental data hobble potentially innovative legal services alternatives, insulating Lexis and West from competition on the basis of software tools and platforms.⁵¹ Many innovative tool and platform providers that were unable to compete due to an inability to access the core data in the edicts of government were acquired by Lexis and West, such as Lex Machina and Ravel Law (both acquired by Lexis)⁵² and FindLaw (acquired by West).⁵³

Lexis and West recognize the bar their control of state codes poses for competitors, and they take steps to maintain that control, occasionally even against the wishes of the state. One competitor, American Legal, reported that when the state of New Mexico attempted to replace Lexis with American Legal as their codification service provider, Lexis refused to provide New Mexico or American Legal with the integrated database of New Mexico state codes, and threatened litigation.⁵⁴ Ultimately, the additional costs of developing a new database of the New Mexico code annotations meant that American Legal could not meet its obligations under the contract, and New Mexico remained with Lexis even though they were dissatisfied with Lexis' services.⁵⁵

The customers for legal information services include individual attorneys and law firms, bar associations, law schools and other academic institutions, law and public libraries, businesses, non-profit organizations, media outlets, and state and federal government agencies. While subscription contracts vary in price and scope, Lexis and West include in most of its packages a foundational collection of official state cases, laws, and other government edicts, many of which purport to be exclusive to the platform. The large volume of state government edicts to which access is restricted by the false assertion of copyright has given Lexis and West exclusive control over an important collection of legal information. This puts them in a significantly superior bargaining position in relation to their customers, and has enabled them to exact price

⁵⁰ [Decl. of Scott Burris](#), ¶ 10.

⁵¹ [Decl. of Tim Stanley](#), ¶ 6.

⁵² *Id.*

⁵³ Acquired by West in 2001. Company Background, FindLaw.Com, <https://www.findlaw.com/company/company-history/findlaw-corporate-information-press-company-background.html> (last accessed Oct. 29, 2021).

⁵⁴ [Decl. of Stephen Wolf](#), ¶ 6.

⁵⁵ *Id.* at 7-8.

increases year over year.⁵⁶ Since the 1970s, the price of printed legal material has nearly doubled the rate of inflation, and the cost of legal information services has more than doubled since 1996.⁵⁷

To be sure, the Lexis and West platforms are valuable and the companies have invested significant resources in innovating and improving functionality over time. Even without being the exclusive access point to many government edicts, customers would continue to use the Lexis and West platforms for their search and other legal research capabilities, as well as immediate access to an enormous range of information from a wide variety of sources.

In negotiating contracts with customers, however, Lexis and West bargain not only on the capabilities of their platforms, but on the need to access certain materials to which only they have access. That material includes not only validly copyrighted publications, but also their deep collections of official government edicts, which do not have valid copyright. For a user needing access to the official laws of a particular state, there is no alternative but to contract with Lexis or West (whichever has the “rights” to the materials). Further, as discussed above, Lexis and West control an extensive base of government edicts that are not available through the services of their competitors. These factors confer significant bargaining leverage on Lexis and West as they negotiate contracts with customers for use of their platforms and for access to legal materials.

f. Impact of Lexis and West Practices on Law Libraries

One of the largest customer groups that interface with Lexis and West are law librarians. Many law libraries across the country execute a library maintenance agreement (or, “LMA”) that governs the terms of the relationship between the legal information service provider (i.e., Lexis or West) and the law library.⁵⁸ These contracts govern the terms of the library’s access to the materials that Lexis and West maintain.⁵⁹

LMAs include a number of contract terms that impact the ability of a law library to provide broad, equitable, and free access to edicts of government. The contract terms also limit the meaningful choices that law libraries have in order to access these materials. The result is that law libraries pay high prices, and are restricted in exactly how they may provide academics, students and members of the public with access to these materials.⁶⁰

In addition, LMAs often include a nondisclosure provision.⁶¹ These provisions prohibit law libraries from sharing the prices they pay for access to legal materials with other law libraries.⁶²

⁵⁶ [Decl. of Jocelyn Kennedy](#), ¶¶ 7-8; [Decl. of John Joergensen](#), ¶¶ 10-16; [Decl. of Carl Malamud](#), ¶¶ 12, 32-33.

⁵⁷ [Decl. of Amanda Runyon](#), ¶¶ 4-5.

⁵⁸ [Decl. of Beth Williams](#), ¶ 2.

⁵⁹ *Id.* at ¶ 3.

⁶⁰ *Id.* at ¶¶ 4-12. See also [Decl. of John Joergensen](#), ¶¶ 12-13.

⁶¹ See, e.g., [Decl. of Beth Williams](#), ¶ 3; [Decl. of Teresa Miguel-Stearns](#), ¶ 10.

⁶² [Decl. of Beth Williams](#), ¶ 3; [Decl. of Amanda Runyon](#), ¶ 14.

By prohibiting pricing transparency, Lexis and West are able to increase the prices that they charge, year over year, leaving customers unknowledgeable about whether they are being overcharged relative to other customers. One law librarian attested that when he insisted that their LMAs with West not be secret, they received significantly higher prices for materials that they needed and that were only available from West.⁶³

LMAs typically bundle together access to a broad range of legal materials.⁶⁴ But the determination of which materials are included in the bundle is effectively in the sole discretion of the legal information service provider, i.e., Lexis or West.⁶⁵ Customers are not able to customize their bundles, or to pick and choose the specific materials to which they get access.⁶⁶ Lexis and West routinely deny requests to purchase discrete sets of materials.⁶⁷ This leaves law librarians with two options: either amend their LMA, thereby increasing their fee by thousands of dollars, or forego access to key legal information that they need.⁶⁸

Relatedly, as part of their effort to increase demand for electronic materials and better control access and use, Lexis and West also charge more and more every year for access to print materials.⁶⁹ Saddled with budget constraints, law libraries shift their demand to electronic materials instead.⁷⁰ A survey conducted of academic law library expenditures from 2002 to 2007 disclosed that nearly all libraries saw a substantial increase in expenditures on electronic databases, accompanied by a decrease in overall expenditures on print materials, while at the same time there was a significant increase in the cost of print materials.⁷¹

By pushing customers to use electronic versions of legal materials, Lexis and West are able to maintain and extend significant restrictions on access to these materials.⁷² Lexis and West embed certain restrictions within their electronic versions of legal materials, such as digital rights management, paywalls, or restrictions on copying/downloading. Further, in almost all cases, a user must have access to a Lexis or West account to be able to access materials on the database. Law libraries are limited in the number of user accounts they receive, and a user account for the general public is prohibitively expensive. Thus, by shifting demand to electronic versions of legal materials, Lexis and West are better able to control how and when the materials are used.

The move to electronic access also permits extensive data collection. Pushing most usage to electronic platforms gives Lexis and West the ability to collect a significant volume of user usage

⁶³ [Decl. of John Joergensen](#), ¶¶ 12-13.

⁶⁴ [Decl. of Beth Williams](#), ¶ 3.

⁶⁵ [Decl. of Beth Williams](#), ¶ 4.

⁶⁶ [Decl. of Leslie Street](#), ¶ 8; [Decl. of Teresa Miguel-Stearns](#), ¶¶ 5-6.

⁶⁷ [Decl. of Leslie Street](#), ¶ 8; [Decl. of Teresa Miguel-Stearns](#), ¶ 5; [Decl. of Beth Williams](#), ¶ 3, 15.

⁶⁸ [Decl. of Jocelyn Kennedy](#), ¶ 7.

⁶⁹ [Decl. of Leslie Street](#), ¶ 4; [Decl. of John Joergensen](#), ¶¶ 14-16; [Decl. of Beth Williams](#), ¶¶ 11-12.

⁷⁰ [Decl. of John Joergensen](#), ¶¶ 14-16.

⁷¹ [Decl. of Amanda Runyon](#), ¶¶ 7-8.

⁷² [Decl. of Beth Williams](#), ¶¶ 11-13; [Decl. of Leslie Street](#), ¶¶ 5-6.

data, the extent of which is not disclosed in detail to their customers.⁷³ Much of this data collection appears to take place without knowledge of the users themselves, and very few law libraries have the ability to push back on such data collection, or how Lexis and West may make use of the data.⁷⁴ To the extent that a library's usage data may be helpful to it in making decisions about where to direct its limited budget, Lexis and West do not provide their customers with access or insights from the data.⁷⁵

g. Bulk Data and Legal Innovation

In addition to raising prices, the practices of the states, Lexis and West have hindered and limited legal research and development. Legal scholars and law librarians attest to the roadblocks that restricted access to edicts of government places on legal research. For example, restrictions have prevented precedential research about administrative law decisions⁷⁶ and computational analysis of laws,⁷⁷ undermined the ability to research earlier versions of the law that may have driven judicial decisions in prior cases,⁷⁸ and limited research in corporate law using the UCC.⁷⁹ Lexis and West also place artificial caps on research by maintaining the unfettered right to disable user accounts when they believe a user has accessed a particular resource “too much.”⁸⁰

For example, the Temple University Center for Public Health Law Research (CPHLR) has several projects to transform the text of law into machine-readable form to create databases to conduct research and analysis that are scientifically credible and usable by other researchers and organizations.⁸¹ CPHLR assembles databases on a wide variety of subjects of public interest and fields questions about the law from Congressional and state legislative staffers and researchers.⁸² This valuable work has been significantly hindered by the copyright restrictions (and corresponding threat of legal action) placed on the source material by Lexis and West.⁸³ In order to avoid these restrictions, CPHLR has been forced to use its resources to find other sources of information—all edicts of government—and even to hire people to retype text.⁸⁴ Temple was subjected to those restrictions even when they were building an evictions law database for the Legal Services Corporation that was requested by the U.S. Congress.⁸⁵

⁷³ [Decl. of Teresa Miguel-Stearns](#), ¶¶ 3-4.

⁷⁴ [Decl. of Teresa Miguel-Stearns](#), ¶ 9.

⁷⁵ For example, a customer could tailor its legal material selections based on data regarding actual usage by the customer's employees, students, or other users. *Id.* at 4.; [Decl. of Jocelyn Kennedy](#), ¶ 6.

⁷⁶ [Decl. of John Joergensen](#), ¶ 9.

⁷⁷ [Decl. of Michael Livermore](#), ¶¶ 2-3; [Decl. of Amanda Runyon](#), ¶12.

⁷⁸ [Decl. of Jocelyn Kennedy](#), ¶¶ 4-5; [Decl. of Kim Paula Nayyer](#), ¶ 6.

⁷⁹ [Decl. of Amanda Runyon](#), ¶ 13.

⁸⁰ [Decl. of Leslie Street](#), ¶ 9.

⁸¹ [Decl. of Scott Burris](#), ¶¶ 2-7.

⁸² *Id.* at ¶¶ 11-12.

⁸³ *Id.* at ¶¶ 9-10.

⁸⁴ *Id.* at ¶¶ 8-9.

⁸⁵ *Id.* at ¶ 9; [Decl. of Scott Burris](#), Exhibit 1, page 2.

Copyright restrictions by Lexis and West have also hindered the practice of legal informatics and computational analysis of law, which uses the tools of natural language processing and computational text analysis to use the law itself as a set of data to examine empirical questions concerning the law and legal institutions.⁸⁶ As an amicus brief of 36 computational law scholars in *Georgia v. Public.Resource.Org* stated: “Researchers engaged in the computational analysis of legal texts depend not only on access to digital legal texts, however, but also, and critically, on open access to them. This is because proprietary databases such as Lexis and Westlaw prevent researchers (even those with paid subscriptions) from downloading textual data in bulk using automated approaches.”⁸⁷

3. POTENTIAL VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

The Federal Trade Commission Act (FTC Act) prohibits “unfair methods of competition” and “unfair or deceptive acts or practices” and gives the Commission enforcement powers to prevent the use of such acts.⁸⁸

- “Unfair methods of competition” include a broad range of potential antitrust violations, including (but not necessarily limited to) conduct that would violate Sections 1 and 2 of the Sherman Antitrust Act.
- “Unfair” acts or practices are those that cause or are likely to cause substantial injury to consumers, and which are not reasonably avoidable by consumers themselves or outweighed by countervailing benefits to consumers or competition.⁸⁹ “Deceptive” practices involve a material representation, omission or practice that is likely to mislead a consumer acting reasonably in the circumstances.⁹⁰

The conduct of Lexis and West, in concert with various states, falls squarely within the Commission’s mandate to enforce the FTC Act’s prohibitions against unfair methods of competition and unfair or deceptive acts or practices. Moreover, there is a close interrelationship between consumer protection and competition concerns in this case. The states, Lexis, and West have misled and deceived consumers as to the copyright status of edicts of government, deterring use of and access to those materials, which has in turn reinforced the market power of Lexis and West in legal information services markets to the disadvantage of competitors and potential competitors in those markets. This market power has further enabled Lexis and West to engage in other practices that disadvantage consumers, such as oppressive contracting and collection of data for Lexis and West’s sole use.

⁸⁶ [Decl. of Michael Livermore](#), ¶¶ 2, 6-7.

⁸⁷ [Decl. of Michael Livermore](#), Exhibit 1, page 5.

⁸⁸ [15 U.S.C. § 45\(a\)](#).

⁸⁹ [15 U.S.C. § 45\(n\)](#).

⁹⁰ *FTC Policy Statement on Deception* (Oct. 14, 1983), available at https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

a. Unfair Methods of Competition

Set out below are some non-exhaustive examples of how the conduct described in this submission may give rise to antitrust violations under Sections 1 and 2 of the Sherman Act.

Anticompetitive Agreements

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade."⁹¹ Only those restraints that restrict competition unreasonably violate the antitrust laws.⁹² A violation of Section 1 requires proof of three elements: (1) the existence of a contract, combination, or conspiracy among two or more separate entities that (2) unreasonably restrains trade and (3) affects interstate or foreign commerce.⁹³

In this case, Lexis and West have each entered into express written contracts with a number of states that provide them with exclusive access to the states' official edicts of government. For example, Lexis and the State of Arkansas entered into a Publishing and Editing of Statutory Materials Services Agreement, effective January 1, 2019, for a term of 7 years.⁹⁴ Under the terms of the agreement, Lexis is granted "the exclusive right of sale and license" of the Arkansas Code Annotated, the official version of Arkansas' state code.⁹⁵ In addition, Lexis "shall register the copyright claim in all materials in the Arkansas Code of 1987 Annotated (the "A.C.A"), Official Edition, and all supplements and revisions to it... in the name of" the State of Arkansas's Code Revision Commission.⁹⁶

The exclusive contracts adversely impact competition in legal information services markets. As discussed above, Lexis and West dominate legal information services markets. While several other legal information services have arisen over the last few years, none of them come close to the size and scope of Lexis and West. A major limiting factor is their inability to include in their collections the official edicts of government of many states. For example, Justia, one of the

⁹¹ [15 U.S.C. § 1](#).

⁹² See *Standard Oil Co. of New Jersey vs. United States*, 221 U.S. 1, 58 (1911). After reviewing the legislative history of the Sherman Act and common-law rules relating to restraints of trade, the Court concluded that Congress did not intend to prohibit contracts that caused insignificant or attenuated restraints of trade but only those agreements "which were unreasonably restrictive of competitive conditions." *Id.* The Supreme Court has repeatedly reaffirmed the principle that § 1 prohibits only unreasonable restraints of trade. See, e.g., *California Dental Ass'n v. FTC*, [526 U.S. 756, 769-81](#) (1999); *NYNEX Corp. v. Discon, Inc.*, [525 U.S. 128, 133](#) (1998); *NCAA v. Bd. of Regents*, [468 U.S. 85, 98](#) (1984); *Professional Eng'rs*, [435 U.S. at 687-91](#) (1978); *Continental T.V., Inc. v. GTE Sylvania Inc.*, [433 U.S. 36, 49](#) (1977).

⁹³ See, e.g., *Realcomp II, Ltd. v. FTC*, [635 F.3d 815, 824](#) (6th Cir. 2011); *In re Ins. Brokerage Antitrust Litig.*, [618 F.3d 300, 314-15](#) (3d Cir. 2010); *American Ad Mgmt. v. GTE Corp.*, 92 F.3d 781, 788 (9th Cir. 1996); *Maric v. St. Agnes Hosp. Corp.*, [65 F.3d 310, 313](#) (2d Cir. 1995).

⁹⁴ [Decl. of Carl Malamud, Exhibit R-5](#) (Agreement between Arkansas and Lexis), Section 2, at 1.

⁹⁵ *Id.*, (Attachment A: Request for Proposal), Section 3.2, at 12.

⁹⁶ *Id.*, (Attachment A: Request for Proposal) Section 1.32, at 9-10. Details of the express contracts between Lexis and West on the one hand and the states of Arkansas, Georgia and Mississippi on the other can be found [here](#) as Exhibits to Carl Malamud's Declaration.

larger legal information service competitors, is only able to include unannotated, unofficial versions of the laws of the states discussed above.⁹⁷

For many customers, there are no realistic alternatives to Lexis and/or West: other services lack the coverage and guarantee of access to accurate official information that Lexis and West have by virtue of their exclusive access to a significant volume of state laws and related material.⁹⁸ On the basis of their exclusive control over this fundamental content, Lexis and West have significant bargaining power and have been able to increase prices year-over-year for their services.⁹⁹

The agreements between Lexis and West and the various states have clearly limited competition. Competitors are not able to grow and effectively compete with Lexis and West because of Lexis and West's effective monopolies over access to large swaths of official edicts of government through the false assertion of copyright.¹⁰⁰ The inability to include such material in competing offerings makes it nearly impossible for smaller legal information services to compete with Lexis and West.

Lexis and West use discounts on materials to foster exclusive dealing arrangements that prolong and promote their continued market power. Discounts can be used to create exclusive dealing arrangements by preventing customers from moving to competitors or by barring market entrants.¹⁰¹ Notably, the Third Circuit in *LePage*, citing *Microsoft*, found that a discount scheme aimed to knock out a competitor is anticompetitive.¹⁰²

John Joergensen, law librarian at Rutgers University, describes Lexis and West's use of discounts on products to entrench its customer base.¹⁰³ Mr. Joergensen notes that he feels compelled to enter into expensive LMAs with Lexis and West, which cost the Rutgers library between \$40,000 and \$80,000 per year.¹⁰⁴ Mr. Joergensen notes that these LMAs commit institutions to buying access to certain materials in exchange for significant discounts on other materials¹⁰⁵, including materials to which users need access. In addition, the LMAs often require that the customer agree to a nondisclosure provision preventing customers from disclosing the prices they pay for these materials.¹⁰⁶ Mr. Joergensen notes that when he pushed back on this

⁹⁷ [Decl. of Tim Stanley](#), ¶ 3.

⁹⁸ [Decl. of Kim Paula Nayer](#), ¶¶ 3, 5.

⁹⁹ [Decl. of John Joergensen](#), ¶ 16.

¹⁰⁰ *Id.*

¹⁰¹ ALD 1-2C(d).

¹⁰² *LePage's Inc. v. 3M*, 324 F.3d 141, 159 (3d Cir. 2003).

¹⁰³ [Decl. of John Joergensen](#), ¶ 1, 12.

¹⁰⁴ *Id.* at ¶ 11.

¹⁰⁵ *Id.* at ¶ 12.

¹⁰⁶ *Id.*

nondisclosure provision, Lexis and West appeared to effectively punish him by removing the discounts and charging Rutgers more for access to these materials.¹⁰⁷

Lexis and West also seek to maintain their control over the legal information services market by bundling their content.¹⁰⁸ By tying access to the official versions of edicts of government to other products, Lexis and West are able to impose additional costs on consumers and increase profits for themselves. By conditioning access to official edicts of government on the sale of other products, Lexis and West also lock in customers to using their services. This prevents other competitors from selling access to other legal material, thereby thwarting competition in the market.

Monopolization

Section 2 of the Sherman Act forbids monopolization, attempted monopolization, and conspiracy to monopolize.¹⁰⁹ Monopolization claims require proof of two factors: (1) monopoly power in the relevant market; and (2) use or maintenance of that power to engage in exclusionary conduct.¹¹⁰

There are several facts from which a court could infer that each of Lexis and West have monopoly power in various legal information services markets. Lexis and West are the two largest providers of legal information services in the United States, collectively controlling at least 70% of the legal information services market. As discussed above, for many states, either Lexis or West is the exclusive provider of access to official edicts of government. Lexis and West have leveraged their respective monopolies over certain states' materials to increase prices and force customers to accept disadvantageous contract terms.

Lexis and West each have contracts with several states that grant them exclusive rights to access and distribute the states' official edicts of government.¹¹¹ These contracts enable Lexis and West to exclude competitors from some legal information services markets and otherwise diminish their ability to compete.¹¹² Either Lexis or West has the exclusive right to publish official state codes in approximately 27 states. Even though Lexis' and West's assertions of copyright in official state codes are baseless, the threat of a lawsuit discourages competitors from copying and publishing the content and making it available as part of their service offerings.¹¹³ Lexis and West thereby effectively completely foreclose competitors from competing for the significant

¹⁰⁷ *Id.* at ¶ 13. Further, *United Shoe*, a seminal market power case, bases much of its monopolizing conduct on a combination of market power and loyalty discount structure extraordinarily similar to the terms described to us in a declaration from the librarian of Rutgers' law library. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 320 (D. Mass. 1953).

¹⁰⁸ [Decl. of Leslie Street](#), ¶ 8.

¹⁰⁹ 15 U.S.C. §2.

¹¹⁰ *United States v. Grinnell*, 384 U.S. 563, 570 (1966).

¹¹¹ [Decl. of Carl Malamud, Exhibit R-5](#) (Attachment A: Request for Proposal), Section 3.2, at 12.

¹¹² [Decl. of Tim Stanley](#), ¶ 3-5.

¹¹³ *Id.* at ¶ 4.

number of users of legal information services that need access to the official code of a particular state.

Lexis and West recognize the importance of their exclusive access to official state codes and actively seek to protect their control over these key inputs to their services. As noted above, Lexis and West have been closely involved in encouraging the states to resist demands for free access and to vigorously defend against attempts to undermine the basis for copyright protection.¹¹⁴

The ostensible exclusivity of Lexis and West’s access to important state government laws may also have given them leverage to engage in unfair contracting practices, imposing restrictions on their customers’ ability to negotiate pricing or the scope of materials covered by their contracts. It also enables them to insist on access to user data. Control of such information confers significant advantages in developing and targeting legal information products and services, further entrenching Lexis and West’s market power, as well as raising possible consumer protection concerns.

Sham Litigation

Lexis and West’s assertion of baseless copyright claims could also be viewed as misuse of the litigation process to limit competition. The conduct undertaken by states like Arkansas in concert with Lexis and/or West depends upon the assertion of an (invalid) intellectual property right—copyright in the state legal materials. The protection of the “right” to these legal materials is backed, ultimately, by the threat of a copyright infringement suit against anyone who doesn’t agree to their terms of use.

A copyright infringement suit is immune from antitrust challenge unless it is (1) “baseless,” meaning no “objective litigant could conclude that the [infringement] suit is reasonably calculated to elicit a favorable outcome,” and (2) the baseless lawsuit conceals “an [subjective] attempt to interfere directly with the business relationships of a competitor.”¹¹⁵

The DOJ & FTC’s joint 2017 Antitrust Guidelines for the Licensing of Intellectual Property also state (with citations to relevant case law) that “[t]he Agencies (DOJ/FTC) may challenge the enforcement of invalid intellectual property rights as antitrust violations.”¹¹⁶ While this statement is focused on the attempted enforcement of a patent obtained by fraud on the Patent and Trademark Office, the principle applies equally to invalid copyright assertions.

¹¹⁴ [Decl. of Carl Malamud](#), ¶ 24 and [Exhibit R-7](#); [Exhibit R-8](#); [Exhibit R-9](#) (amending contract with Lexis to claim copyright in Arkansas Code Annotated).

¹¹⁵ *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., Inc.*, [508 U.S. 49, 60-61](#) (1966) (citations omitted).

¹¹⁶ *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, [382 U.S. 172, 176-77](#) (1965); *Am. Cyanamid Co.*, [72 F.T.C. 623, 684-85](#) (1967), *aff'd sub. nom. Charles Pfizer & Co. v. FTC*, [401 F.2d 574](#) (6th Cir. 1968); *see also Michael Anthony Jewelers, Inc. v. Peacock Jewelry, Inc.*, [795 F. Supp. 639, 647](#) (S.D.N.Y. 1992) (holding that the enforcement of copyrights obtained by fraud on the Copyright Office could similarly violate antitrust law).

Especially in the wake of a 2020 Supreme Court decision emphatically declaring annotations in a state code to be uncopyrightable edicts of government, and the continued efforts by the states and their chosen vendors nevertheless to assert copyright and prevent access, the Commission should investigate whether Lexis and West have made bad faith assertions of alleged copyrights that they should know are baseless, and whether Lexis and West have used these assertions to impede competition in the market for online/electronic versions of official edicts of government or legal services markets more broadly.

Lexis and West are not Protected by State Action Immunity

While the Commission may seek information from state actors and seek to encourage state governments and their agencies to eliminate restraints on competition, ultimately decisions about how the state conducts itself cannot be challenged under the antitrust laws. Lexis and West, however, are private parties and not protected by the state action immunity doctrine. They do not meet the requirements for protection under the state action immunity doctrine. Nor are they protected by the fact that the party with which they have entered into anticompetitive agreements may be subject to that protection.

Third party contractors, like Lexis and West, are considered private/nonsovereign actors for the purposes of state action immunity analysis.¹¹⁷ Limits on state-action immunity kick in when “the State seeks to delegate its regulatory power to active market participants, for established standards may blend with private anticompetitive motives in a way difficult even for market participants to discern.”¹¹⁸ Under *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,¹¹⁹ state action immunity applies to non-state actors only if (1) there is a clearly articulated policy to displace competition; and (2) the state exercises active supervision over the policy or activity. Mere approval by the state of “particular anticompetitive conduct” is insufficient to justify state action immunity.¹²⁰

The state action doctrine immunizes anticompetitive policies that are the intentional or foreseeable result of state or local government policy.¹²¹ While “[t]here is no such conspiracy exception” to the state action doctrine,¹²² the Supreme Court in *Parker* explicitly noted that a state cannot give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.¹²³ Further, in *North Carolina State Board of Dental Examiners*, the Court noted that “while the Sherman Act confers immunity on the States’ own

¹¹⁷ A private/nonsovereign actor is one whose actions “do[] not automatically qualify as that of a sovereign state itself.” *N.C.State Bd. of Dental Examiners*, [574 U.S. at 505](#) (citing *Hoover v. Ronwin*, [466 U.S. 558, 567-68](#) (1984)).

¹¹⁸ *Id.*

¹¹⁹ [445 U.S. 97](#) (1980).

¹²⁰ *Ticor Title Ins. Co.*, [504 U.S. 612 at 637](#) (1992).

¹²¹ *Parker v. Brown*, [317 U.S. 341](#) (1943).

¹²² *City of Columbia v. Omni Outdoor Advert., Inc.*, [499 U.S. 365, 374](#) (1991).

¹²³ *Parker*, [317 U.S. 341 at 351-52](#).

anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a nonsovereign actor.”¹²⁴

In this case, the requirements of the *Midcal* test are not met. Merely contracting with a state to provide annotations to state codes does not clearly articulate any intent to displace competition in legal information services markets. It also is not clear that states are actively supervising relevant activities of Lexis and West. While state agencies may supervise Lexis and West when creating and endorsing annotations, there is no evidence that state officials are supervising the ways in which Lexis and West subsequently restrict access to official edicts of government, contract with customers, or threaten copyright infringement actions against competitors. Absent such active oversight by the state in these activities, the supervision prong cannot be met, and the actions of Lexis and West are not immune from antitrust scrutiny.

b. Unfair or Deceptive Acts or Practices

There are several aspects of Lexis and West’s conduct that could violate Section 5’s prohibition on unfair or deceptive acts or practices:

1. Despite the Supreme Court’s decision confirming that no copyright exists in edicts of government, Lexis and West place copyright notices on their publications of edicts of government, and send takedown notices to organizations—including Public Resource—that republish edicts of government. Lexis and West mislead the public, academic institutions, and competitors into thinking that they hold valid intellectual property rights over these edicts of government. Further, these practices are deceptive in that Lexis and West represent themselves as holding intellectual property rights that are in fact non-existent.
2. Lexis and West impose restrictions on the official versions of edicts of government, including by erecting paywalls, embedding digital rights management software into the material, or otherwise applying methods that prevent the public from freely accessing and using the law. This is unfair to citizens, who are entitled to have access to and understand the laws applying to their personal and business conduct.
3. As Chief Justice Roberts stated clearly, if a citizen reads the free, “economy-class” version of a state’s code, it would be natural for that person to assume that they were reading the current version of the law.¹²⁵ But that person’s belief may be wrong, and they may be relying on an outdated version of the code and, more importantly, an inaccurate version of the law. This is a consumer deception of the highest order.
4. Finally, Lexis and West collect user data—including personal identifying information—but do not disclose the types of data that they collect or how they use it. Even when

¹²⁴ [574 U.S. 494, 505](#) (2015).

¹²⁵ *Georgia v. Public.Resource.Org, Inc.*, [590 U.S. ___, 17](#) (2019).

requested, Lexis and West refuse to provide this data to their customers, who could benefit from using this data to tailor the materials to which they request access.

Faced with the threat of legal action for copyright infringement, people seeking to utilize government edicts for research, to guide personal or business activities, or for commercial use have complied with Lexis and West's demands and restrictions. By doing so, customers end up paying higher prices for access and are restricted in how they can use these materials. In addition to raising costs, this conduct has hindered activities such as legal research and analysis that would benefit consumers. Further, when accessing materials through Lexis and West's services, consumers agree to onerous and restrictive terms and conditions that could force them to disclose personal identifying information or otherwise restrict how they use these materials. Such terms raise serious privacy and consumer protection concerns, and the Commission has the authority to investigate this conduct and potentially intervene.

4. COMMISSION ACTION

The Commission has several tools at its disposal to investigate and ultimately remedy the anticompetitive and damaging conduct described above. Below are our suggestions for what kind of injunctive orders the Commission might consider.

a. Stop False and Misleading Copyright Assertions on Edicts of Government

Lexis, West, and any other third party publisher of edicts of government should not be permitted to continue to assert copyright claims on edicts of government. Restrictions on use and distribution of electronic versions of edicts of government should not be permitted.

b. Prevent the Imposition of Restrictions on Accessing and Downloading Edicts of Government

Lexis and West's restrictions on accessing and downloading copies of edicts of government for any use should be enjoined. If these vendors are to remain contractors with respect to edicts of government for one or more states, the Commission should require them to make all such edicts available in bulk and other usable formats for other competitors and end users.

c. Investigate Potential Anticompetitive and Unfair Practices by Lexis and West

The FTC should investigate (i) the contracting practices of Lexis and West, including the use of nondisclosure agreements, and the ways in which these contracting practices impose higher costs on customers; and (ii) the ways in which Lexis and West collect and use consumer usage data, including any potential violations of consumer privacy laws.

d. Clarify the Edicts of Government and State Action Doctrines for State and Local Governments

The FTC should issue an advisory opinion addressed to state and local governments on both the edicts of government doctrine and its implications for antitrust and consumer protection law, and the limits of the state action doctrine.

Submitted to the Federal Trade Commission this 29th day of October, 2021.

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