

## Conceiving, Creating, and Publishing a Legal Reference Work Designed for Electronic Delivery: A Brief History of *Martin on Social Security*

### Author's Prefatory Note

In the late 1980s, West Publishing Company (West), then a privately held U.S. corporation and proprietor of Westlaw, and Mead Data Central (MDC), the owner of LEXIS, were locked in fierce combat. The principal battle focused on LEXIS's insertion of page numbers drawn from West's print National Reporter System (NRS) throughout their online cases. The companies' copyright and antitrust litigation over that practice was finally settled. Settlement took the form of a confidential cross-licensing agreement executed in the summer of 1988. Case law was not, however, the only field of contest. Both competitors saw the importance of including a comprehensive collection of state statutes as part of their online services. Through acquisition of the Michie Company in 1988, MDC obtained publication contracts for at least as many state legislative codes as West held. The 1988 cross-licensing agreement apparently addressed each other's use of the competitor's statutes as well as NRS pagination.

During this same period, the two companies also had their eyes on CD-ROM technology as an alternative or complement to their online services. West had entered into a software development project with Wang Laboratories in anticipation of CD-ROM publication. MDC, through its new Michie subsidiary, was focused on a new software product developed by a Utah company, in which one of the principals was an early LEXIS employee.

CD-ROM distribution of legal materials offered a number of advantages over the online delivery systems of that period. The microcomputer revolution of the 1980s had put machines capable of reading CD-ROM discs in law offices and law schools. CD-ROM data storage capacity made it possible to deliver a full legal information resource for a jurisdiction (New Mexico's primary law was released on CD in 1990) or covering a discrete field of law like Social Security on a single disc. Placing all that data directly at the researcher's computer provided response times far superior to the online speeds then prevalent. Finally, when coupled with capable software, CDs enabled a set of functions and a degree of integration with a researcher's note-taking and writing that the online systems – stuck as they were with legacy data, mainframe software designed to communicate through dedicated terminals, and users reluctant to let go of the familiar – were years away from realizing.

For over a decade starting in the late 1980s, I pursued the vision of creating a complete reference for an important area of law practice, designed from the ground up for dissemination on CD-ROM. The field of this dream was Social Security law. The journey to its realization was arduous. This was due, in part, to the rapidly changing technical environment, but even more it was the result of seismic shifts then occurring within law publishing, print and electronic. As I observed in a much later article which drew upon the experience, the project “provided (during the years running from 1988 through 1999) a bruising education in the shifting priorities and fortunes and consequent turbulence within the commercial legal information sector.”<sup>1</sup> This account covers that dimension of the experience as well as the project's technical and conceptual challenges. It leaves for another telling the effect of the lessons

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<sup>1</sup> Peter W. Martin, Possible Futures for the Legal Treatise in an Environment of Wikis, Blogs, and Myriad Online Primary Law Sources, 108 L. LIB. J. 7, 15 (2016).

learned on the establishment and early history of the Legal Information Institute upon which they had great influence.

The personal files referenced in the footnotes, along with many others generated in the course of this endeavor, are now in the custody of the Cornell University Archives and can be reviewed there.<sup>2</sup> Those that originated in and were retained in digital format can be found online in eCommons, Cornell's digital repository.<sup>3</sup>

## I. The Path Leading toward this Strange Ambition

### *A. Earlier Thoughts of a Conventional Treatise on Social Security Law*

During the late 1970s my research and writing focused on Social Security law. In a trio of articles published in the *Cornell Law Review* I explored the legal and policy questions surrounding: a) Social Security benefits payable solely on the basis of marital relationship,<sup>4</sup> b) the complicated relationship between Social Security benefits and federally funded welfare programs aimed at the elderly poor,<sup>5</sup> and c) different ways the program's benefit formula had been adjusted by Congress, over the years, with the aim of keeping benefits up-to-date.<sup>6</sup> Ultimately, my interest in the field led me to submit book proposals to a number of publishers.<sup>7</sup> By the time any of those publishers expressed interest, I found myself Cornell Law School's dean, lacking time for such a commitment.

In late 1982, a Cornell Law School graduate<sup>8</sup> did succeed in recruiting me to prepare the chapter on survivors benefits for a *Social Security Practice Manual* that the National Organization of Social Security Claimants' Representatives had contracted to assemble for Matthew Bender. In collaboration with a talented law student,<sup>9</sup> I completed the initial assignment, but when time came to update the chapter, following the manual's publication in 1984, I declined.<sup>10</sup> I simply hadn't the time.

### *B. Discovery of Desktop Computing*

During my eight-year term as dean, microcomputers invaded the American home and professional office. On the Cornell campus and among U.S. law schools, our law school led others in employing desktop computers for administrative tasks, in linking them through a local area network, and in

<sup>2</sup> Box 2 of the Peter W. Martin papers, Kroch Library Rare & Manuscripts (Non-Circulating) Archives 18-1-4325.

<sup>3</sup> Law School Faculty Papers, Martin, Peter W., <https://ecommons.cornell.edu/handle/1813/57173>. An integrated inventory of all relevant files, paper and electronic, organized by date, is to be found at: <https://ecommons.cornell.edu/handle/1813/60134>.

<sup>4</sup> Peter W. Martin, *Social Security Benefits for Spouses*, 63 *Cornell L. Rev.* 789 (1978).

<sup>5</sup> Peter W. Martin, *Public Assurance of an Adequate Minimum Income in Old Age: The Erratic Partnership between Social Insurance and Public Assistance*, 64 *Cornell L. Rev.* 437 (1979).

<sup>6</sup> Peter W. Martin, *The Art of Decoupling: Keeping Social Security's Promise Up-to-Date*, 65 *Cornell L. Rev.* 748 (1980).

<sup>7</sup> See correspondence with West, LCP, and Little, Brown and Company (copies on file).

<sup>8</sup> Letter from James Gillespie, Jr. to Peter W. Martin, Dec. 22, 1982 (copy on file).

<sup>9</sup> I was joined by Myra Malkin who was credited as co-author of the chapter and with whom I split the author compensation of \$30 per page.

<sup>10</sup> See letters from Peter W. Martin to NOSSCR coordinator Michael Glancy dated Feb. 20, 1984 and April 30, 1984 (copies on file). The work is still published by Matthew Bender and maintained by NOSSCR.

creating incentives that encouraged faculty members to embrace their use for research and professional writing. Those initiatives reflected a strong personal interest and enthusiasm.

The manuscript of the Social Security practice guide chapter noted above, submitted to Matthew Bender in May 1983, was written on my family's first computer, an Apple II Plus, loaded with rudimentary word processing software. For those who did not ride the personal computer wave through the 1980s, it should probably be explained that this experience fell far short of contemporary computer-based writing. The II Plus screen offered only a tiny window on text (24 rows of 40 characters) and was incapable of displaying lower case, let alone different fonts or font sizes. Format had to be entered in encoded form. In short, this was a long way from "what you see is what you will get (WYSIWYG)" word processing. Printing out the stored text was the only way to be sure of what one had composed. The principal, and conceivably only, advantage that this early combination of hardware and software offered over an electronic typewriter was ease of revision. One didn't have to retype major sections to make a small insertion, word change, or deletion. Since publishers were not, at that time, set up to receive or return documents in electronic format, manuscript submissions and later editorial revisions had to be transferred on paper, rekeyed, and then proof read against the original.

### *C. Proposals for Adding a Database to or Building One within the Cornell Law School Network*

In February 1985, following exploratory conversations with key administrators of the West Publishing Company the prior summer, I proposed a joint study to West. Pointing to Cornell Law School's leadership in the installation and use of networked microcomputers, my proposal argued that the school would be an ideal partner for studies of the potential role of computers in facilitating the work of lawyers and improving legal education. From West I sought both financial support and "an educational database for local storage and access" with which students could work, employing "the same search vocabulary and strategies as they would with the parent data base." As envisioned, the complete "information and communication system" had the following elements:

- A legal database for students similar to those they would use as professionals (Westlaw and LEXIS). This database might be a portion of Westlaw or LEXIS limited to certain topics or jurisdictions or periods so as to be useful to students mastering legal analysis and research methods but no competitive threat to commercial services. It might also be a test version of decentralized data systems which West and Mead will need to design for large firms. Finally, the database would include materials prepared at the school for particular courses.
- A collection of all computer assisted instruction exercises assigned or available to students. These would include exercises distributed by the Center for Computer Assisted Legal Instruction (CALI), exercises prepared at Cornell by faculty and students, and software supporting particular lawyer work like estate planning.
- A means for student-faculty and faculty-student communication over papers, memoranda, drafting exercises and other course assignments.
- The school's principal method of exchanging and posting information on course assignments and special events (bulletin board and electronic mail functions).

- Accessibility to faculty and students, in dorm rooms, offices, homes and apartments via Cornell's high-speed telecommunications system then being installed by AT&T Information Systems.<sup>11</sup>

West responded with polite interest. The company was "not able to discuss ... details of [its] efforts in this area" but acknowledged that Cornell might be an attractive testing ground.<sup>12</sup> The "efforts" alluded to turned out to be a joint venture with Wang Laboratories that produced the "Premise" platform for the CD-ROM products which West introduced in the late 1980s. By May 1987 that project had progressed to the point that the two companies invited me to a demonstration at Wang Laboratories in Lowell, Massachusetts.<sup>13</sup> A letter summarizing my reactions contains a reference to features I would want as an author "of treatise-like material for this medium."<sup>14</sup>

The following month my approach to West took on an overt personal dimension.<sup>15</sup> I proposed "the preparation and ongoing maintenance of a CD-based legal reference work which would include author-produced text (treatise-like material), all underlying primary legal texts (statutes, regulations, less formal agency issuances, judicial decisions), with associated West headnotes, keynumbers, etc., and perhaps selected other secondary material." As I explained, this proposal was grounded on a "conviction ... that the preparation of text designed specifically for CD publication when combined with author/expert responsibility for the multiple connections between texts (author-prepared, statute, regulations, decisions) made possible by embedded references and for preformulated queries, as well, can produce a far more powerful demonstration of the medium than will be achieved by transporting works prepared for print over to CD."<sup>16</sup> Understanding that such a work would be novel, a second part of my proposal contemplated preparation of "an authoring system for West, prospective West authors, and law firms or other entities that desire to prepare private libraries using the West/Wang system." This would, I elaborated, entail documenting my own work and laying out a process sufficiently "author friendly" that legal experts, without special computer skills, might be able to prepare material for CD publication.<sup>17</sup> Anticipating a return to full-time faculty status in the summer of 1988, the proposal foresaw devoting academic year 1987-88 to scoping, defining, and creating the necessary contractual framework.

The marketing people at West were skeptical about a "made from scratch" CD-ROM product. They favored an approach to the new medium led by the company's established titles and targeting legal fields with larger potential markets than those I was prepared to undertake. In a letter dated October, 16, 1987, I summarized the earlier proposal and indicated a small set of alternative topics for my proposed reference. The letter provoked a meeting at West and the suggestion that I collaborate with the author of an existing work in adapting it to the new medium. That idea and the revelation, during the ensuing discussion, that the software environment West and Wang had created lacked authoring tools that could be employed on a standard workstation cooled my interest in working with West. (At

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<sup>11</sup> Letter from Peter W. Martin to William Lindberg, Westlaw School Administrator, John Niemeyer, Directing Editor of Computerized Services, and Charles E. Shapiro, Manager/Westlaw Special Projects, West Publishing Co., Feb. 8, 1985 (copy on file).

<sup>12</sup> Letter from William H. Lindberg to Peter W. Martin, March 21, 1985 (copy on file).

<sup>13</sup> PWM, Notes on Wang Visit, May 11, 1987 (copy on file).

<sup>14</sup> Letter from Peter W. Martin to Ri Regina, Wang Laboratories, Inc., May 19, 1987 (copy on file).

<sup>15</sup> Agenda, Meeting with West, June 10, 1987 (copy on file).

<sup>16</sup> Letter from Peter W. Martin to Bud Shapiro, West Publishing Co., July 10, 1987 (copy on file).

<sup>17</sup> *Id.*

that point their system's link-preparation required processing on a mainframe system, and the index enabling full-text search had to be assembled by a third-party service bureau. West and Wang had no plan to bring the latter process to an author's or editor's desktop computer.)

One final attempt to work with West took a much looser form. This proposal sought the primary law data necessary for a comprehensive Social Security law reference, use of the West software, and a license to publish the resulting work either independently or with some entity other than a direct competitor, reserving to West a "first right to publish."<sup>18</sup> Meanwhile, however, I had begun investigating other sources of sponsorship for my proposed experiment in digital authorship.

#### *D. Enter NCAIR*

In November 1987, the National Center for Automated Information Retrieval (NCAIR) solicited grant applications from legal academics. Qualifying projects had to involve research bearing on "the application of computer technology to legal education and to the practice of the profession."<sup>19</sup> This non-profit, established by the legal and accounting professions in 1966, had assisted Mead Data Central (MDC) during the infancy of LEXIS in securing tax and other federal legal materials.<sup>20</sup> Royalties flowing to NCAIR from its contract with MDC created a pool of funds from which the center made grants during the late 1980s and early 1990s.<sup>21</sup>

Following discussion with NCAIR's manager about whether and how to proceed, on December 3 I submitted a letter of intent to submit a proposal. The letter acknowledged that my proposal would seek support on a far larger scale than prior NCAIR grants. I asked for guidance on whether that would put it beyond consideration or alternatively for an indication of "what level of support for what cost elements NCAIR might be able to provide ... [to] assist me in figuring out what other forms of support I should ... be seeking."<sup>22</sup>

That December 1987 letter described the proposed project in terms that built upon the earlier discussions with West Publishing Company. It didn't want for ambition:

... I plan to prepare (and subsequently maintain) a CD-based legal reference work which would include author-produced text (treatise-like material), all underlying primary legal texts (statutes, regulations, less formal agency issuances, judicial decisions), and perhaps, selected other secondary material. Making use of hypertext development software (most likely Guide, distributed by Owl International) this work would link all that material in ways designed by the author. It would have, as a consequence, the capacity of a treatise, annotated statute and regulation, and annotated [case] reports. For legal questions within its purview, it would aim

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<sup>18</sup> Letter from Peter W. Martin to Bud Shapiro, West Publishing Co., Jan.20, 1988 (copy on file).

<sup>19</sup> "Dear Colleague" letter from Timothy C. Leixner, Chairman of the Board, National Center for Automated Information Retrieval, Nov. 26, 1987 (copy on file).

<sup>20</sup> Edwin M. Jones, The National Center for Automated Information Retrieval and Its Role in Electronic Legal Research, 15 *Jurimetrics* 79 (1974).

<sup>21</sup> In 1998 NCAIR, by then National Center for Automated Information Research, distributed its last funds to establish the International Center for Automated Information Research at the University of Florida. See University of Florida Foundation,

<https://www.uff.ufl.edu/giving-opportunities/007097-international-center-for-automated-information-research/>.

<sup>22</sup> Letter from Peter W. Martin to Ann Brownell Sloane, National Center for Automated Information Retrieval, Dec. 3, 1987 (copy on file).

to be a complete legal research tool – somewhat like the most comprehensive of the BNA or CCH services.

My firm conviction is that the preparation of text designed specifically for CD publication when combined with author/expert responsibility for the multiple connections between texts (author-prepared, statute, regulations, decisions) made possible by hypertext software can produce a far more powerful realization of this new medium than will be achieved by merely transporting works prepared for print over to CD. In addition to author created hypertext links, I envision an information product that would allow full-text search and retrieval using both preformulated and user defined or modified queries.

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My interest in this project derives in large part from a belief that CD text and associated data represent a new and more powerful way to communicate legal expertise to the profession. Print publishers and those who write articles or monographs on law topics follow well established patterns in producing such works – patterns that are carefully articulated and proven. The preparation of reference material and the linking of statutes, regulations, and decisions in this new form require building new patterns.

My aspiration is that the Social Security reference I prepare will furnish a prototype for other works in other fields. If the reference is as effective as I imagine, it may quite naturally serve as a model. In future, though not part of this proposal, I envision providing guidance to others beyond the building of a prototype.

As I build (and subsequently maintain) the Social Security reference, I plan, simultaneously, to outline and document a process that others can follow. This process should be as clearly marked out as that for book writing. It should be so “author friendly” that no special computer expertise would be required of a legal expert who undertakes to prepare material for CD publication.<sup>23</sup>

In response, the NCAIR executive committee committed a sizable grant, contingent on a number of important points. They wanted assurance that adequate additional funding was available, that access to the necessary primary law data could be gained, and that a satisfactory copyright agreement could be reached among all participants, including NCAIR and any publisher.<sup>24</sup> I responded to these concerns,<sup>25</sup> and NCAIR initiated discussion with Mead Data Central (MDC) about its interest in the project, both as data source and potential publisher.<sup>26</sup> By the end of March 1988, MDC and I were in serious discussion over contract terms.<sup>27</sup> At a meeting of the NCAIR executive committee in mid-May, I presented an

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<sup>23</sup> Letter from Peter W. Martin to Ann Brownell Sloane, National Center for Automated Information Retrieval, Dec. 3, 1987.

<sup>24</sup> Letter from Ann Brownell Sloane, Manager, National Center for Automated Information Retrieval to Peter W. Martin, Jan. 13, 1988 (copy on file).

<sup>25</sup> Letter from Peter W. Martin to Ann Brownell Sloane, National Center for Automated Information Retrieval, Feb. 23, 1988 (copy on file).

<sup>26</sup> Letter from Ann Brownell Sloane, Manager, National Center for Automated Information Retrieval to Peter W. Martin, March 1, 1988 (copy on file).

<sup>27</sup> Letter from Susan K. Alexander, Mead Data Central to Ronald W. Staudt, Secretary, National Center for Automated Information Retrieval, March 22, 1988 (copy on file).

overview of the proposal.<sup>28</sup> A follow-up letter furnished additional detail about my work plan.<sup>29</sup> NCAIR's formal grant letter came the following month,<sup>30</sup> accompanied by notification that I had been named the first recipient of the David J. Dixon Research Fellowship.<sup>31</sup>

## II. Mead Data Central as Data Source and Publisher

### A. *The Agreement*

In June 1988, following assurance by NCAIR that it would not assert "any ownership interest" in the work supported by its grant, Mead Data Central committed to a set of terms that included its being both the project's data source and its publisher and exclusive distributor in print, online, and using CD-ROM technology.<sup>32</sup> Our letter agreement stipulated that the royalty arrangements would be "tantamount to a normal authors royalty."<sup>33</sup> As MDC had no experience contracting with authors it fell to me to educate them about the royalty terms in my colleagues' treatise publication contracts with West Publishing Company and Little Brown.<sup>34</sup> It was not until October that we reached full agreement and executed a detailed contract. That contract's core provision set out the parties' undertaking and a tight time schedule:

Martin will record and deliver the Treatise and [associated statutes, regulations, agency rulings, court opinions, and other materials] to MDC for transfer to a CD-ROM. MDC will select and provide or acquire from others the necessary software with appropriate functional capabilities ... for operating the CD-OM.... Martin will prepare new menus, and text or data connections ("Links") that are implemented by the Software between related items on the CD-ROM, and prepare the data for necessary indexes for the Treatise and Materials. All of the foregoing shall be completed and recorded on a CD-ROM mater disc by January 1, 1990, provided a copy of the text of the Treatise and Materials shall be made available to MDC by September 1, 1989.<sup>35</sup>

The copyright provisions distinguished between the treatise, links, a process description that it called for, and subsequent revisions to them, in all of which my copyright ownership was acknowledged, and the material furnished by MDC.<sup>36</sup> The contract granted MDC of "an exclusive, worldwide right and license" to use the author-produced content online or in other forms.<sup>37</sup> Concerning marketing it

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<sup>28</sup> Letter from Ann Brownell Sloane, Manager, National Center for Automated Information Retrieval to Peter W. Martin, May 18, 1988 (copy on file). NCAIR Presentation, May 13, 1988 (copy on file).

<sup>29</sup> Letter from Peter W. Martin to Ann Brownell Sloane, National Center for Automated Information Retrieval, May 23, 1988 (copy on file).

<sup>30</sup> Letter from Ann Brownell Sloane, Manager, National Center for Automated Information Retrieval to Peter W. Martin, June 20, 1988 (copy on file).

<sup>31</sup> Letter from Timothy C. Leixner, Chairman of the Board, National Center for Automated Information Retrieval to Peter W. Martin, June 24, 1988 (copy on file).

<sup>32</sup> Letter from Susan K. Alexander, Mead Data Central, to Peter W. Martin, June 15, 1988 (copy on file).

<sup>33</sup> *Id.*

<sup>34</sup> *See* letter from Peter W. Martin to Art Fakes & Sue Alexander, Mead Data Central, Aug. 2, 1988.

<sup>35</sup> Letter from Peter W. Martin to Susan K. Alexander, Mead Data Central, Oct. 19, 1988 (copy on file); Social Security Law Database Development and Distribution Agreement, Oct. 28, 1988 (copy on file).

<sup>36</sup> *Id.* 3.1.

<sup>37</sup> *Id.* 4.1.

provided: "Martin acknowledges and agrees that MDC has had [sic] complete freedom and discretion over whether, when, and how to market, distribute, disseminate or discontinue marketing the Database and Updates, except that MDC intends to distribute the Database and Updates on CD-ROM providing an acceptable Product is developed by Martin."<sup>38</sup> Finally and importantly, the contract stated that "if MDC discontinues distribution of the Database and Updates through any method or on any media [following the contract's expiration or termination] then MDC agrees to consider permitting Martin to license MDC provided materials so that he may seek another method of distribution. MDC's permission will not be unreasonably withheld."<sup>39</sup>

### *B. Initial Progress Assembling and Organizing the Content*

Quarterly reports to the National Center for Automated Information Retrieval (NCAIR) and my own working notes log the project's early progress. (My final report to the NCAIR board took the form of a presentation at its meeting in May, 1990.)<sup>40</sup> In July 1988 I met with Jack Simpson, president of Mead Data Central (MDC), Jim Roemer, Vice President for Legal and Government Information Service, Bruce Rhoades, Vice President for Systems and Technology (under whom responsibility for development of the necessary software was lodged), as well as those with whom I would be working on a regular basis. These included Sue Alexander, charged with CD-ROM development, her boss, Kathryn Downing, Director of Development and Operations for the Legal division, and John Holt, who with Rhoades was working on CD-ROM software.<sup>41</sup>

Immediately following that meeting, I prepared a detailed functionality document that described the "types of moves and searches" that I envisioned users being able to execute.<sup>42</sup> A companion "work plan" outlined my tasks and timetable for the balance of the year.<sup>43</sup>

Work on the treatise and associated databases began at once. Working off a range of sources I outlined the entire treatise, mapping out its many topics so that coding of the associated primary material (notably the Social Security decisions of the federal courts) could begin. In accordance with the July work plan, this coding proceeded in stages: first, family benefits, then, retirement benefits, and lastly, disability benefits. I began assembling an inventory of cases falling within the scope of the work and in the process developed a more complete sense of their number and how they were distributed among these broad categories. The case inventory, maintained in a metadata database, was assembled from Westlaw and LEXIS. I compiled case names, citations, and basic content information from both. With Westlaw the process began with the categories reflected in the company's Key Number system and Social Security Reporting Service, dropping cases that did not fit within the scope of my project (Medicaid and Medicare, for example). With LEXIS, I employed searches that utilized section references to the Social Security Act and regulations, combined with key words.<sup>44</sup> The results led me to revise my estimate of the total number of decisions that would need to be loaded on the CD from 4,000 to 6,000-8,000. I

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<sup>38</sup> *Id.* 4.2.

<sup>39</sup> *Id.* 14.1.

<sup>40</sup> See letter from Ann Brownell Sloane to Peter W. Martin, May 24, 1990 (copy on file).

<sup>41</sup> PWM, Notes on MDC meeting, July 18, 1988 (copy on file).

<sup>42</sup> PWM, Functionality Specification, Social Security Treatise and Database, July 19, 1988 (copy on file).

<sup>43</sup> PWM, Work Plan, July 20, 1988 (copy on file).

<sup>44</sup> PWM, Analysis of Database, Oct. 14, 1988 (copy on file).



calculated, however, that the increase did not pose a capacity issue.<sup>45</sup> Working from a solid base collection, limited to the five-year period 1983-1988, I devised and used a pair of LEXIS searches to extend that collection reach back to the program's earliest days and also to produce a weekly report on all new Social Security decisions. The first of those searches was framed so as to retrieve relevant cases with a high degree of precision, yielding few if any false positives. The second, structured to exclude all cases retrieved by the first, reached broadly. Its results required extensive weeding.<sup>46</sup> A student research assistant compared the results to the existing population of cases already in my working database and entered the new ones.

This data work required local software tools capable of holding, manipulating, and annotating case information pulled from the two online services. MSDOS options were limited, but by 1988 there were some reasonable choices. I used Notebook II by Pro/Tem Software of Palo Alto to build and maintain the inventory of cases falling within the project's scope. Designed for text, rather than numeric data, it accommodated text fields of unlimited size. It also permitted bulk data entry of properly coded text files. This allowed me to dump data to such a text file, make global changes using a text editor and macros, and then recompile. Although Notebook II lacked full-text search capability, until I had a local, working collection of cases in full text that was not a serious shortcoming. When that time came, I turned to ZyIndex by ZyLab, having also experimented for a while with Lotus Magellan.

In October 1988, Mead Data Central and I were approaching an understanding on the terms of our working relationship.<sup>47</sup> By then I had completed and subsequently revised an outline of topics and subtopics to be covered.<sup>48</sup> Working from it, I had built a partial prototype using the Guide hypertext platform.<sup>49</sup>

In a meeting with key MDC personnel on December 5, I used that prototype to demonstrate the state of my progress and to illuminate a series of issues concerning the final product that we needed to address (*e.g.*, how to flag decisions that subsequent developments had rendered obsolete). I also reported on my work plan for the first half of 1989 and sought to pin down how a full-text library of the decisions falling within the scope of the project could be delivered to me.<sup>50</sup> By December, I had a base inventory of the federal court decisions falling with the scope of the project since the establishment of Social Security and a reasonable estimate of the balance (a projected total of between 6,000 and 8,000). MDC promised to furnish full-text data on all them. I had also established a process for updating that foundational decision-set. It employed saved searches that ran every week on LEXIS.

Work on writing the substantive portions of the treatise and identifying the supporting links to statute, regulations, and decisions proceeded on into 1989.<sup>51</sup> Pursuit of the appropriate CD-ROM software with MDC staff also continued. The mechanics of securing full-text case data from LEXIS for a working collection and MDC's addition of Social Security Rulings to its electronic collection were also subjects of

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<sup>45</sup> *Id.*

<sup>46</sup> PWM, Eclipse searches, Jan. 13, 1989.

<sup>47</sup> Letter from Peter W. Martin to Ronald W. Staudt, Oct. 3, 1988 (copy on file).

<sup>48</sup> PWM, Social Security Outline, Section Numbering Scheme, July 25, 1988 (copy on file); PWM, Social Security Outline, Section Numbering Scheme, Aug. 30, 1988 (copy on file).

<sup>49</sup> PWM, Notes organizing for MDC meeting, Nov. 9, 1988 (copy on file).

<sup>50</sup> PWM, Notes on Meeting with Mead Data Central on Dec. 5, 1988 (copy on file).

<sup>51</sup> Peter W. Martin, Report to Ronald W. Staudt, NCAIR, March 2, 1989 (copy on file).

ongoing joint effort.<sup>52</sup> In April 1989, I created a list of the work both parties needed to accomplish. Revisions of that document in July and late November noted the responsibility for and status of each item.<sup>53</sup>

### *C. The Search for a Suitable Software Platform*

Alongside my work with LEXIS content people, I explored software options for the Social Security CD with MDC's technical staff. They and I were in agreement that the platform emerging from the West/Wang joint venture, called "Premise," could and should be surpassed, but that, like it, the software for MDC's discs had to include both hypertext functions and full-text search.

We were keenly interested in hypertext software called Guide. Soon after Owl's Guide was released for MS Windows in 1987,<sup>54</sup> I had begun experimenting with it.<sup>55</sup> (In 1987 Apple was giving away its own graphical programming system, HyperCard, which had some hypertext features.) In November 1987, I requested and received the contract terms and specifications for a version of Guide specifically designed for commercial publication on CD-ROM.

Guide offered three kinds of links that, ultimately, shaped my approach to data architecture: expansion links (which I came to call exploding detail links), pop-up links, and jump links. Guide also had significant deficiencies. The commercial product had no mechanism that I could discover for importing structured text or (even more importantly) for exporting a complete, decompiled version of the data file for further manipulation. (Nor did Apple's Hypercard.) Guide also lacked full-text search capability. The only software that combined full-text search and hypertext was a new Microsoft DOS product named FOLIO Views. It also allowed export, process, and reimport. First released in late 1988, Views was described to me at an MDC meeting that December.

In March 1989, the LEXIS point person on the software search was shown a combination of Guide with a search engine.<sup>56</sup> The following month, in response to my own comparative evaluation of FOLIO Views, he wrote that the LEXIS team was "planning to continue the use of Guide until we determine the ultimate product platform for both users and creators. ... Our efforts are to pick (or build) the ultimate based on all that is available."<sup>57</sup>

In June 1989, I prepared an expanded prototype using Owl's Guide, which Mead Data Central inscribed on a CD-ROM.<sup>58</sup> The LEXIS technical team, working with Owl personnel, developed a "requirements report" in September 1989. It laid out the functionality needs of both an authoring environment and the delivery system, the latter being the user software (Owl's Guide Reader coupled with a full-text retrieval engine) to be bundled with the data.<sup>59</sup> A full set of functional specifications for such a composite

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<sup>52</sup> Letter from Peter W. Martin to Ann Brownell Sloane, April 26, 1989 (copy on file).

<sup>53</sup> PWM, Inventory of Work to be Done - Writing Editing, Database Enhancing (April 24, 1989, updated July 12, 1989 and again, Nov. 30, 1989) (copies on file).

<sup>54</sup> See [https://en.wikipedia.org/wiki/Guide\\_%28hypertext%29](https://en.wikipedia.org/wiki/Guide_%28hypertext%29).

<sup>55</sup> Letter from Peter W. Martin to Peter Moodie, Mar. 15, 1989 (copy on file).

<sup>56</sup> Email from Pat Guiant to Peter W. Martin, March 28, 1989 (copy on file).

<sup>57</sup> Email from Pat Guiant to Peter W. Martin, April 15, 1989 (copy on file).

<sup>58</sup> Letter from Peter W. Martin to Ann Brownell Sloane, Sept. 18, 1989 (copy on file). Copy of the disc, Peter W. Martin, Social Security Law (LEXIS 1989) (copy on file).

<sup>59</sup> Jon Boring & Phil Cooke, Requirements Report for LEX-Guide, Sept. 7, 1989 (copy on file).

“LEX-Guide” product was completed that October.<sup>60</sup> The search engine identified as the prime candidate for combining with Guide was a product named Fulcrum.<sup>61</sup>

The anticipated release of Windows 3.0, scheduled for the early part of 1990, posed a timing problem. Guide (like other Windows-based software) would have to undergo major revision in order to run properly under the new operating system. That work was not likely to be finished until 1991. The consensus at LEXIS as reported to me was to proceed with a somewhat less ambitious combination of the existing version of Guide with search software rather than suffer a year’s delay in the release of the Social Security disc.<sup>62</sup> An email to me dated November 20, 1989 stated: “The decision was made last week to ... put together a good combination of the existing OWL product and Fulcrum for release to the market next year.”<sup>63</sup> The same message reported that Dan Davidson, who “had been part of the technical evaluation and direction” had been assigned the responsibility and funding to develop the platform.<sup>64</sup>

#### *D. Assembling the Necessary Development Hardware*

The standard law faculty computers of the period, IBM PCs and their functional equivalents, lacked the data storage capacity necessary for working with roughly 100 megabytes of decision text plus another 40 of full-text index. Neither the NCAIR grant nor the contract with Mead Data Central provided funds for computer hardware. An IBM equipment grant administered by Cornell University supplied the necessary machines.<sup>65</sup> I applied for and received several computers of the IBM PS/2 line, each with a “write once read many” (WORM) drive (a function now performed by CD-R and DVD-R). One served as my personal development machine. Three others were available for specialized tasks and for student assistant use during the summer of 1989 and beyond. The challenge of fitting these components and the software I was employing together was non-trivial. As I explained in July 1989:

ZYindex [the full-text indexing software I was employing] works with the WORM, but it required the following trick. I built the indices on the 80 [my PS2/80 machine]. So that I didn't have to surrender my machine to indexing I ran that operation under Windows 386 (which will not recognize the WORM). I indexed the files on the 80's hard disk which I told ZYindex was drive D, having assigned D to C before getting underway. The resulting indices which look for files on drive D, I then copied to the 50 [a second PS/2 computer]. It will run ZYsearch under Windows 286 with a PIF that says it needs 448K and Windows 286 recognizes the WORM drive. I am elated at having conquered the mountain but angered at the fates that placed it in my path.

As for CD-Rom, its dos extensions do not like DOS 4.0. Consequently, I get it to work by having a 3.3 boot disk that I feed the A drive when I want to use the CD-Rom.<sup>66</sup>

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<sup>60</sup> Functional Specification for LEX-Guide (Oct. 9, 1989) (copy on file).

<sup>61</sup> Email from Pat Guiant to Peter W. Martin, Nov. 20, 1989 (copy on file).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See IBM Makes \$8 Million Equipment Grant to Cornell, Cornell Chronicle, July 5, 1984.

<sup>66</sup> Memorandum from Peter W. Martin to Tom Bruce, July 2, 1989 (copy on file).

### *E. Continuing and Documenting the Development Process*

Through the winter of 1989 I raised a series of issues with the MDC content team. These included:

- what to do about district court decisions that had not been published in West's print reports, some of which were available on LEXIS, others of which were only on Westlaw, and still more of which were published in a CCH specialty service
- how to flag recent developments in the field
- whether to include a medical-legal reference work useful to those handling disability-based claims
- which Social Security Rulings to incorporate and how to secure them.

In June 1989, the same month that I constructed a prototype CD using Owl's Guide, I prepared a document for myself and LEXIS outlining the hardware and software tools that I or any other author of such a reference would need.<sup>67</sup> That was combined with a generalizable development plan. This "tools and process" document emphasized the need for a complete working collection of the primary law materials. It specified the data format in which LEXIS would need to furnish those materials, as well as all updates. They should, I wrote, be delivered in "generic word processor format including the LEXIS field delimiters and LEXIS thumbprint [unique identifier], with one record (decision or statute section) per file and a file naming convention that allows the mind and eye to determine what material the file contains (in all cases where possible)."<sup>68</sup>

During the summer of 1989, a second installment of the NCAIR grant paid for four student assistants who devoted most of their time to coding my working collection of Social Security decisions against a detailed outline of treatise sections.<sup>69</sup> Working under my supervision, using computers provided under the IBM equipment grant and a set of database tools, they added multiple topic codes to the record for each case. A data inventory completed at the end of the summer<sup>70</sup> recorded substantial progress on document identification, acquisition, and coding against the treatise's topical structure.

In January 1990 I delivered a complete list of the decisions that, as of that date, belonged in the Social Security database. Since my review of potential cases was not limited to the LEXIS database, the process identified a good number of decisions it did not contain. LEXIS personnel had begun acquiring them. Those still missing in January were identified on that list.<sup>71</sup> Because of their importance to the project, MDC undertook to collect and digitize the body of Social Security Rulings. They were added to LEXIS in February 1990.<sup>72</sup>

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<sup>67</sup> In June 1989, Davidson and Baker met with me in Ithaca, Baker having been charged with developing an author's toolkit, among other things.

<sup>68</sup> PWM, *The Tools and the Process*, June 5, 1989 (copy on file).

<sup>69</sup> PWM, *Treatise Organization*, Aug. 4, 1989 (copy on file); *Student Coding Instructions*, 1989 (copy on file).

<sup>70</sup> PWM, *Data Inventory*, undated but clearly reporting the situation at summer's end, 1989 (copy on file).

<sup>71</sup> Memorandum from Peter W. Martin to Bill Baker, Jan. 18, 1990 (copy on file).

<sup>72</sup> PWM, *Notes on Jan. 19, 1990 Meetings in Dayton* (undated) (copy on file).

### *F. The Emergence of a (to Me) Surprising Pagination Problem*

More or less coincident with the company's 1988 agreement with me, MDC settled litigation with the West Publishing Company that arose out of its inclusion in LEXIS of the pagination drawn from print law reports published by West. West claimed copyright infringement. The parties negotiated a settlement, publicly announced on July 21, 1988.<sup>73</sup> The terms of that settlement allowed MDC to insert West's pagination in LEXIS, but at the same time, it, in effect, acknowledged West's ownership claim, since Mead agreed to pay a large but undisclosed fee for the right to do so.<sup>74</sup> The licensing agreement also permitted LEXIS to use West's statutory compilations for a number of states.<sup>75</sup>

That settlement ultimately proved to have major consequences for my CD-ROM project. Given the secrecy surrounding the terms of the West license, it took a long time for word of a critical limit to reach me and the MDC employees working on the CD-ROM initiative. Based on press accounts I had assumed that the settlement had opened the door for inclusion of National Reporter System pagination in all court decisions that would be part of the Social Security CD.<sup>76</sup> At a meeting with MDC personnel in July 1989, I learned otherwise. Nancy Nash of MDC's counsel's office explained, in strictest confidence, that MDC's license to place West pagination within decisions was limited to its online system.<sup>77</sup>

In successive meetings, I pressed for some work-around.<sup>78</sup> There were, I explained, two aspects to the problem. The first concerned the many instances in which one decision on the disc cited a specific portion of another decision also on the disc. As I conceived of the work, all such citations ought to be linked with precision so that the user could click through directly to the page on which the referenced text appeared and not be dropped off at the beginning of the cited case.<sup>79</sup> The second had direct effect on the ability of this reference to stand on its own. As I argued, it was critical that users who had been led to a key paragraph in case by the treatise or by a search of the included decisions of lower federal courts (U.S. District Courts and Courts of Appeals) be able to extract that text along with all essential citation information from the disc. For a user instead to be forced to track down that same material using the print law reports of the West Publishing Company or one of the online systems simply in order to obtain the page number needed for a full citation was, as I saw it, unacceptable – a deal-breaker.

In a July memorandum to the key MDC personnel I wrote:

The aim is not to show users all the page divisions. The function we are after is simply the furnishing of page information for particular portions of public domain text the user has found on the disk, using a properly licensed source of that information -- the on-line library. In what way would it violate the agreement to have the user find a portion of a decision published in F.2d, say, click a button that indicates the user's desire to have an on-line search for the West page on which the text in question is to be found. The system then turns to the on-line system with the identity of the document, the line number of the beginning of the text in question or

<sup>73</sup> West, Mead Data Central Settle, A.B.A. J., Sept. 1, 1988, at 36.

<sup>74</sup> The fees were said to amount to tens of millions of dollars. See *Westlaw and Lexis Near Truce*, New York Times, July 19, 1988, at D5.

<sup>75</sup> *Id.*

<sup>76</sup> PWM, Notes on Jan. 19, 1990 Meetings in Dayton (undated) (copy on file).

<sup>77</sup> PWM, Notes on July 17-18 Meetings in Dayton (copy on file).

<sup>78</sup> PWM, Notes on Jan. 19, 1990 Meetings in Dayton (copy on file).

<sup>79</sup> Memorandum from Peter W. Martin to Sue Alexander, Bill Baker, Pat Guiant, and Nancy Nash, July 19, 1989 (copy on file).

some similar address that is common to both the CD-ROM and on-line version of the document. The on-line version of the document is found; the West page number is found on it and returned to the user.

Numerous variations can be run on this combination of disk and on-line system. The search on-line for page numbers can be done in stride as the research moves around selecting excerpts from an array of decisions or it can be run at the end of a session for all the decision excerpts selected during it. The on-line collection against which this search occurs can be part of an undifferentiated library or it can be a specialty library in LEXIS that complements the CD-ROM disk. The information delivered to the user can be presented in all kinds of ways.

....

If the settlement agreement allows MDC to include West pages in LEXIS, there must be a way consistent with the agreement for the user to find material on the CD-ROM and then have an automated LEXIS search pull needed page references. The issue then is not whether but how.<sup>80</sup>

Due to subsequent developments the problem was never resolved.

### *G. An Abrupt Change in MDC's Corporate Structure and CD-ROM Strategy*

Those subsequent developments traced back to a strategic move taken by Mead Data Central in late 1988. Seeking to control material that West needed for a comprehensive online collection of state legislative codes, the Mead Corporation acquired the Michie Company. Michie held exclusive statute publishing arrangements with a number of states. To purchase the company Mead paid a sum far in excess of Michie's book value.<sup>81</sup>

Initially the acquisition had no perceptible effect on the CD-ROM project handled by the MDC unit in Dayton. During 1989 there were some signs of uncertainty about direction, but work continued without slugging. Some at MDC were unmistakably eager to move rapidly ahead. Together with them, I devoted a month of intensive effort to building the prototype CD.

Throughout this period, MDC was engaged in a major program of upgrading the quality of the LEXIS case databases. The effort included the proofreading and pagination of all decisions against canonical print editions, including those published by West.<sup>82</sup> It also entailed bringing its 137 case law databases into a consistent data structure with a common set of field or "segment" names.<sup>83</sup>

By 1990, however, the situation at Mead Data Central had changed with direct consequences for this CD-ROM development project and any potential successors. All CD-ROM development responsibility was consolidated in Mead Data Central's new Michie group based in Charlottesville, Virginia. None of the people with whom I had been working were transferred there. Both Bill Baker and Dan Davidson

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<sup>80</sup> Memorandum from Peter W. Martin to Sue Alexander, Bill Baker, Pat Guiant, and Nancy Nash, July 21, 1989 (copy on file).

<sup>81</sup> Macmillan sold Michie to MDC's parent the Mead Corporation. *See* Mead Puts 3rd Qtr Oper Net At 80c-85c A Shr Vs \$1.06, Dow Jones News Service, Sept. 7, 1989 ("\$226.5 million, which was far in excess of book value").

<sup>82</sup> Discussions with Kathryn Downing in 1989. Email from Jean Cline to Susan Alexander, Subject: Editorial Guidelines, April 13, 1989.

<sup>83</sup> MDC, Project Requirements for Caselaw Design Consistency (version 3.0), Aug., 1989 (copy on file).

imagined they might be, but Jim Roemer who was moving to Charlottesville to head the Michie group made it clear that they were both to remain in Dayton with only transitional responsibilities for work assigned to Michie.<sup>84</sup> All of this was explained to me during meetings in Dayton in January 1990.<sup>85</sup> The news came as a complete surprise. Only the month before, also at a meeting in Dayton, I had been shown a proposed release schedule for the CD (beta version out in July 1990) and had met with a marketing person assigned the responsibility for developing a plan for this new MDC product.<sup>86</sup>

The positive news was that Michie took CD-ROM publication very seriously, having production of statutes well under development. However, the implications of the reorganization for development of a new software platform were negative. All talk of LEX-Guide ended. FOLIO Views had been chosen by Michie for its statutory discs. The same software was its presumptive choice for any other CD products.<sup>87</sup> The difficulty was that I had already taken a look at the Views platform and found it wanting, in its then current form.

From its start, Owl's Guide was a WYSIWYG Window's application. In contrast the initial release of FOLIO Views was a DOS/character-based program. Having worked with MDC staff on the specifications of a software platform for the Social Security reference which contemplated combining Guide with a full-text search engine, I was resistant to use of the more limited Views. (It was only in 1992 that FOLIO announced a Windows version of Views.) The clear advantage that Views held over Guide was that it included an effective search engine. With Guide, achieving that capability required coupling it with other software.

Faced with the prospect of being forced to use Views, I resent copies of an exchange about its limitations I had had with the MDC technical group the year before, together with a small test database I had built using it.<sup>88</sup> I expressed satisfaction with the Functional Specification for LEX-Guide dated Oct. 9, 1989. My letter concluded with the sentence: "I am open to persuasion that FOLIO can do the job, but persuading me will take a lot of new evidence."

A meeting with the Michie group followed. On February 14, 1990, I flew to Charlottesville where I met with Donald E. Selby, Jr., Vice President and Director of Professional Publications, Jim Roemer, and Andrew Wyszkowski, Vice President and Director of Information Resources Management).<sup>89</sup> They demonstrated Michie's implementation of FOLIO Views; I raised numerous questions about its suitability for my work.<sup>90</sup>

In correspondence the following day, I added a concern about the small window on text provided by the DOS-based Views (a problem shared with the current on-line systems) when compared to a Guide's Windows-based graphic display.<sup>91</sup> I pointed out that Windows and graphics were not simply important for showing graphic images and facilitating the movement of text from the information product to a

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<sup>84</sup> PWM, Notes on Jan. 19, 1990 Meeting in Dayton (copy on file).

<sup>85</sup> *Id.*

<sup>86</sup> PWM, Notes on Dec. 1, 1989 Meeting in Dayton (copy on file).

<sup>87</sup> PWM, Notes on Jan. 19, 1990 Meeting in Dayton (copy on file).

<sup>88</sup> Letter from Peter W. Martin to Bill Baker, Jan. 31, 1990. (copy on file).

<sup>89</sup> Letter from Donald E. Selby, Jr. to Peter W. Martin, Feb. 1, 1990 (copy on file).

<sup>90</sup> PWM, Notes on Michie Meeting, Feb. 14, 1990 (copy on file).

<sup>91</sup> Memorandum from Peter W. Martin to Jim Roemer, Don Selby, Andy Wyszkowski, Feb. 15, 1990, Subject: How Much Text Can I See at Once? (copy on file)

piece of writing. They also enabled readers to see amounts of text comparable to the contents of a printed page were able to present all the conventional format cues to the logical structure of statutes and regulations. A day later I sent more follow-up questions about Views.<sup>92</sup>

On February 19, Andy Wyzkowski called to respond<sup>93</sup> to my questions. The following day he elaborated and sent as a sample, Michie's New Mexico Statutes Annotated.<sup>94</sup> (Using Views, Michie was just then finishing a prototype CD containing the complete New Mexico Statutes Annotated<sup>95</sup> for that state's legislature.) Wyzkowski argued that Views would move to the Windows operating system as the market moved and that I should not consider the current version of the software as static; Views was pursuing a rapid development path.

The unanticipated shift in CD-ROM platform prompted me to write Jim Roemer and Jack Simson (president of MDC from 1982 to 1992). In letters dated February 18, 1990, I asserted that a revised agreement was essential before any LEXIS release of an online Social Security collection of primary material that drew my work (identifying many missing court decisions, highlighting the importance of acquiring the Social Security Rulings, etc.).

In less than a year's time, the notion of an online Social Security library has moved from something that I alone was talking about, in relation to the CD-ROM project, to something that was moving ahead on its own. Sonny Reisz, first mentioned to me by Sue Alexander as an MDC employee who was interested in a possible assignment on my project, has since November been working to put up a Social Security library in April. As described to me, that library will carry the name Social Security, it will perforce include the materials I have identified which have been added to the LEXIS collection. It will also have many features that will make it dramatically inferior to the CD-ROM collection I am building. ...

No Social Security library should go up in LEXIS until we have the future of the CD-ROM project. It is to our mutual advantage (MDC's and Martin's) to have any online Social Security library fully reflect the editorial choices and connections that will ultimately be part of my CD-ROM, whether or not MDC or Michie ends up being my CD-ROM publisher – rather than having a clumsy knockoff appear online well in advance of the CD-ROM release.<sup>96</sup>

This led to an agreement with Kathryn Downing of MDC that I would design and supervise the preparation of an online version of my reference work while the CD-ROM platform issues awaited resolution. Prior to the release of that online version, no LEXIS collection would carry the label "Social Security."

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<sup>92</sup> Memorandum to Andy Wyzkowski, Feb. 16, 1990, Subject: Follow-up Questions about FOLIO (or Preview) (copy on file).

<sup>93</sup> PWM, Notes on Phone Conversation with Andy Wyzkowski, Feb. 19, 1990 (copy on file).

<sup>94</sup> Letter from Andrew Wyzkowski to Peter W. Martin, Feb. 20, 1990 (copy on file).

<sup>95</sup> New Mexico Statutes Annotated (Michie prototype April 1990) (copy on file). This prototype was followed by Michie's New Mexico Law on Disc (May 1991) (copy on file), which added New Mexico appellate decisions reaching back to 1965, Virginia Law on Disc (Aug. 1991), and Georgia Law on Disc (Dec. 1992).

<sup>96</sup> Letter from Peter W. Martin to James P. Roemer, Feb. 18, 1990 (copy on file); Letter from Peter W. Martin to Jack W. Simpson, Feb. 18, 1990 (copy on file).



### *H. With CD-ROM on Hold, a Shift to Realizing the Work Online*

March 14-15, 1990, I met in Dayton with the MDC team now responsible for an online realization of my work, Sue Alexander and Sonny Reisz.<sup>97</sup> While there, I learned that Kathryn Downing had left the company for a senior position at Thomson Professional Publishing. Work on adapting the treatise structure to the online environment began. A critical first step entailed exploring whether and, if so, how my topical classification matrix could be applied to decisions and rulings held online. During the months that followed, my attention was held by this and the many other technical issues involved in attempting to achieve the sorts of moves planned for CD within the LEXIS environment of the period.

In September 1990, I sent a memorandum to Eric Brown, Downing's replacement. It concluded with a section entitled "Other Critical Items Remaining Unresolved." In essence, the issues it listed boiled down to two: "(1) what are the plans for capitalizing on what is already built (marketing, training, documentation prepared by me) and (2) on what schedule shall I flesh out the contemplated on-line treatise."<sup>98</sup> The following month I sent an account to Brown chronicling how the project had reached the present situation. It drew no response. Unknown to me (and against his will) Brown was gone or about to go, dismissed by MDC.

In November 1990, the first set of documents I had prepared was loaded on LEXIS. This initial installment provided access, topic-by-topic, to the pertinent primary legal materials, access that drew upon topic tags originally designed for CD-ROM. It was, in essence, the treatise shell, but contained no explanatory text.

In December 1990, I wrote David Berger, MDC's Vice President for Legal Information Services, expressing puzzlement over Brown's abrupt departure. That letter expressed "my pride and pleasure at having the first piece of my two and a half year project published on LEXIS and my deep gratitude ..." It also quoted from the September memorandum to Brown and concluded: "We would also both be served by a revised or sharpened understanding about plans for and auspices of a CD-ROM publication."<sup>99</sup>

A follow-up letter to James P. Roemer, at Michie, posed several questions surrounding CD-ROM publication that had been put "on hold" in the winter of 1990. Each question was coupled with my surmised answer. The questions included: "Is Michie prepared within the next 12-18 months to build and release a CD-ROM version of Martin on Social Security using a software platform that would approximate the LexGuide specifications of 1989 and work well with the LEXIS Windows Session Manager?" and "Did you ever solve the page break licensing puzzle? ... A year ago, MDC's counsel's office was taking the conservative position that a MDC or Michie CD-ROM could not ... use conversion tables or any similar device to enable users to follow jumpcites making use of West page number[s] or to derive the internal page number of a key passage extracted from within a 40 page decision."<sup>100</sup> My letter concluded:

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<sup>97</sup> PWM, Notes of meeting, March 15, 1990 (copy on file).

<sup>98</sup> Letter from Peter W. Martin to David A. Berger, Vice President, Legal Information Services, Dec. 12, 1990 (copy on file).

<sup>99</sup> *Id.*

<sup>100</sup> Letter from Peter W. Martin to James P. Roemer, The Michie Company, Dec. 26, 1990 (copy on file).

If my surmised answers to the above CD-ROM questions are correct, I shall view the on-line version as the sole residue of our publication contract and focus on bringing it to full functionality as an autonomous work. While I shall, in that event, continue to explore the possibility of a CD-ROM version complementing and complemented by the on-line material, I shall do so with such resources as I can assembled here [at Cornell]. Should I decide to publish such a version, I would expect to offer it to Michie on reasonable terms, but would contemplate self-publication and distribution as the more likely path.<sup>101</sup>

In February 1991 a communication from Bob Glass, MDC's Director of Specialties, Legal Information Services, wondering about the "process description" called for by the 1988 agreement prompted a memorandum to Glass, Sue Alexander, and Sonny Reisz. It took the position that I had more than met the contractual commitment to document my process and concluded: "If after this flow of information, you still have questions about my software tools or procedures I will be happy to respond in the form and degree of detail you want – within the framework of the contract."<sup>102</sup> That memorandum went on to address the MDC relationship and my interest in it. I wrote:

What has propelled me for the last two and a half years is a conviction that electronic media made possible new and more powerful forms of packaging information and expertise. I am eager to have what I create in pursuit of that vision used, to learn from that use, and to encourage the creation of similar works in other fields. Because we are in the midst of such technological change and resulting shifts in work environment I fully expect that this year's optimal form for an "electronic treatise" will swiftly become obsolete unless there is at least as much attention to its form and functionality as to its information and expertise content. That excites me. ... What I have found so frustrating during the time I have worked with MDC on this project is the lack of similar vision or commitment in return (I am referring not to individuals but the institution). I trust I don't have to remind you that a year ago when the CD-ROM arrangements that seemed so firm in the fall of 1989 were undone by MDC it was I not MDC that proposed we shift our immediate attention to an online version or how close to pulling the plug on that endeavor MDC was in the autumn of 1990 or of the energy I had to pour into salvaging the project when the task should have been working on it. What I am eager to avoid, for my sake and yours, is the risk that future work of mine in the electronic information field will be mired in MDC's corporate indecision, confusion, or indifference.<sup>103</sup>

That led to a meeting at the end of February 1991 at which I was told that Michie was prepared to build a Martin on Social Security CD-ROM product using Folio Views. I turned the offer down, expressing concern over that platform's functionality, stating that I would prefer to work under "independent auspices." I assured MDC, however, that any such work would be complementary to the online version. The process description question was raised again (by Glass), and I repeated my willingness to supply the company with any specific process documents they requested.<sup>104</sup>

In early May, I wrote Bob Glass, Sue Alexander, and Sonny Reisz noting a number of MDC action items listed in the minutes of our February meeting that had not occurred:

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<sup>101</sup> Letter to James P. Roemer, The Michie Company, Dec. 26, 1990 (copy on file).

<sup>102</sup> Memorandum from Peter W. Martin to Bob Glass, Sue Alexander, and Sonny Reisz, Feb. 6, 1991 (copy on file).

<sup>103</sup> *Id.*

<sup>104</sup> Prof. Peter Martin/MDC Meeting, Minutes, Feb. 27, 1991 (copy on file).

- I had received no questions about process description.
- There had been no consultation over marketing plans for this novel online resource.
- An important technical issue remained unresolved.
- No contract revision freeing me to pursue CD-ROM development with a party other than MDC had been sent.
- Test documents of the treatise I had furnished had not yet been loaded into LEXIS even though the planned release date was less than a month away.<sup>105</sup>

June 1, 1991 saw release of the online version of the treatise.

### *I. Limitations of the LEXIS Online System, Circa 1990-92, as They Bore Upon the Challenge of Situating a Treatise Designed to Take Advantage of CD-ROM Functionality within that Environment*

Adapting the project, designed for CD-ROM software capable of hypertext moves and full-text search, for the LEXIS online service, as it then existed, necessitated huge adjustment and compromise. Critically, the online system was incapable of "point and click hypertext." It was also not clear whether my plan to tag the primary legal materials, most importantly the cases, in accordance with the treatise's topic structure was feasible within LEXIS.

In March of 1990, I learned that the metadata tags that LEXIS used to pull documents into searchable files could also function in searches of all documents within a file and, indeed, that they could be combined with other "words." I seized on this as the way I would attach my treatise topic codes to cases (and later the Social Security Rulings). All cases that would comprise the PMSSCA file ended up being coded #MSOC#. My plans called for all those cases to carry additional "DOC#" codes that tied them to one or more specific treatise topics. As I explained in a memorandum dated March 14, 1990, I envisioned that a search employing the appropriate code would retrieve all the cases I had classified as addressing the proper treatment of evidence supplied by a disability claimant's "treating physician." "That initial search could be modified to look for certain key words ('etiology') in the original decision set or to limit the answer set to decisions of a particular court (2d circuit)..."<sup>106</sup> I posed a number of questions about this unconventional use of a standard LEXIS data element. For example, what limits the system architecture imposed on the number of these tags per document or on their format. I also inquired whether the system could "be set up so that the user enters a less cryptic command than the actual DOC#" character string which would then be translated into a search using the code.<sup>107</sup> I learned that number of codes was not a problem and that the codes themselves had to consist of four characters beginning with a letter. At once, I began work on case classification using general category codes like #MSFA# (family benefit issues) and #MSDI# (disability benefit issues) and individual topic codes like #M066# (weight or burden of proof consequences of detailed testimony by the claimant's

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<sup>105</sup> Memorandum from Peter W. Martin to Bob Glass, Sue Alexander, Sonny Reisz, Subject: Status, May 7, 1991 (copy on file).

<sup>106</sup> Memorandum from Peter W. Martin to Sue Alexander and Sonny Reisz, March 14, 1990 (copy on file).

<sup>107</sup> *Id.*

treating physician). The topic codes evolved toward a format that marked boundaries between separate groups of related topics by a change of the initial letter. All cases dealing with different medical issues were to receive codes beginning with MO, with treating physician cases now being tagged #MO81#. <sup>108</sup>

In August 1990, I pressed Sonny Reisz for clarity on which of the moves into the material that I envisioned were possible. <sup>109</sup> A month later I remained unclear "about how the various devices available online will fit together to furnish the user interface to my case classifications." <sup>110</sup> I wrote, "Because these decisions should not go public without a suitable front end, I view it as critical that we reach a complete understanding about how that will be done." <sup>111</sup> A meeting in September solved one problem, namely, how to present the researcher selecting this unique resource with front end guidance. While a little used feature of the LEXIS system, collections of documents (denominated "files") could have a set of "Guide" pages. Users could browse these pages before proceeding within a file, at no charge. Moreover, they could be called something other than "Guide." I chose to have them labeled "Table" documents. If selected, all the "Table" or "Guide" documents would load. Indeed, they could be set up to load automatically upon selection of the file to which they furnished guidance. <sup>112</sup> Guide documents could be browsed in sequence or selected individually by simply keying the document's number. They could also be segmented into pages enabling the user to move to the portion of the Table providing the script for addressing the Act's provisions dealing with its topic or the portion of the document describing the topic's scope. Lastly, these pages could carry carrying descriptive names like "scope" and "act" rather than numbers.

The question of how to enable users to employ my topic codes remained unresolved. In late September 1990 I sent a sample set of Guide documents. The covering memorandum explained that it assumed the direct and open use of the topic DOC# codes. <sup>113</sup> That provoked a powerful negative response. I was told that because of the proprietary nature of MDC's metadata scheme the DOC# codes could not be displayed to the public. Simultaneously, I was informed that the creation of a new system to allow the use of proxies in their place was not possible.

I had also indicated that the ability to move to a specific section of the Code of Federal Regulations (CFR) was vitally important. Neither the "LEXSTAT" command, which worked with statutes, nor the "LEXSEE" command, which would retrieve a case by citation, worked with the CFR. I also argued for refining both LEXSTAT and LEXSEE so that one could move directly to a statutory subsection or page within a decision. About the CFR move, MDC reported "[this] is not in plan and all indications are that it will not happen in the immediate future." About the latter, the word was "As of this date, an affirmative schedule for the development and implementation of these enhancements has not been formalized." <sup>114</sup> (They were in fact accomplished in 1991.)

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<sup>108</sup> Memorandum from Peter W. Martin to Sonny Reisz, Aug. 17, 1990 (copy on file).

<sup>109</sup> *Id.*

<sup>110</sup> PWM, MDC Meeting, Sept. 19, 1990 (copy on file).

<sup>111</sup> *Id.*

<sup>112</sup> Memorandum from Sue Alexander to Bob Glass, RE: Martin Issues, Oct. 1, 1990 sent to me for comment by Eric L. Brown, Senior Director, Editorial Services, MDC, Oct. 1, 1990 (copy on file).

<sup>113</sup> Memorandum from Peter W. Martin to Eric Brown, Sue Alexander, and Sonny Reisz, Sept. 27, 1990 (copy on file).

<sup>114</sup> Memorandum from Sue Alexander to Bob Glass, RE: Martin Issues, Oct. 1, 1990 sent to me for comment by Eric L. Brown, Senior Director, Editorial Services, MDC, Oct. 1, 1990 (copy on file).

At that point (October 4, 1990) I explained that if MDC's final position was that the topic codes on which I had invested "massive time and energy (my own and student assistants working full-time through the summer)" could not be exposed to the user or accessed through proxies, the relationship was over. And, in that event, MDC would be in breach of clear commitments that reached back to February. I pointed out that all meetings and exchanges since February had concerned "how" not "whether".<sup>115</sup> Five days later, I was contacted by Robert P. Glass, Director of Specialties, Legal Information Services, MDC, with "good news."<sup>116</sup> His good news was that MDC could and would implement a scheme of proxy codes to lie between users and a hidden system of "DOC#" codes. Those proxy codes were to be held in a non-displayed field and did not need to be sandwiched between "#" symbols. We quickly agreed that users would search using strings like "TOPIC(A100)" instead of the corresponding DOC#. This forced a crash revision of all topic codes and coding and posed a slight risk of confusion to those performing a LEXIS search that included any of the character strings I had chosen to use as proxies for the hidden topic codes. (A search of all federal decisions for the word "A100" would retrieve not only cases in which that set of four characters appeared in the decision text, but also, without explanation or any visible basis, all cases that carried that Social Security topic code.) A desire to minimize such confusion influenced my choice of the new topic codes.<sup>117</sup>

On November 17, 1990 a set of table documents incorporating this scheme and a collection of tagged cases was released on LEXIS. (Around that same time Eric Brown, the MDC, Senior Director of Editorial Services, who had, I believe, authorized this coding approach, was sacked.)<sup>118</sup>

During the winter and spring of 1991, LEXIS staff and I worked on how to fit treatise commentary into the topical structure that, by then, already furnished point-by-point access to the act, regulations, cases, rulings, and related commentary held by the LEXIS system (such as law journal articles and A.L.R. Annotations). This required careful attention to the very small window on text then available from LEXIS. Rather than adopt the format then being applied to journal articles, treatises, and other forms of commentary written for print publication that had been imported into LEXIS, I argued for a data design that would facilitate navigation in this quite different environment. In a March memorandum, I explained:

Since the primary access to my treatise sections will be a computer screen, I am acutely conscious of the limited size of the page (screen) and the boundaries between pages (screens). [There was no scrolling in those days. Text was transmitted to the remote terminal or computer in blocks of characters measuring 80 across and 24 lines from top to bottom.]

....

My approach to ... [a treatise section] would fit its identifying material and heading ... on the first three lines of the screen. Its text would take up the next 10-11 lines at 78 characters per line. The table of ... references would take up four lines. In other words ... [most sections] will

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<sup>115</sup> Memorandum from Peter W. Martin to Eric Brown, Oct. 4, 1990 (copy on file).

<sup>116</sup> Letter from Robert P. Glass, Director, Specialties, Legal Information Services, MDC, to Peter W. Martin, Oct. 9, 1990 (copy on file).

<sup>117</sup> Memorandum from Peter W. Martin to Bob Glass, Subject: New Coding Scheme and Other Issues, Oct. 11, 1990 (copy on file).

<sup>118</sup> Letter from Peter W. Martin to David A. Berger, Vice President. Legal Information Services, Dec. 12, 1990 (copy on file).

deliver their main message through a single screen, including the tools to move with precision to the type of references the user may want to follow-up on.<sup>119</sup>

A second consideration pushed for the inclusion of the references to all primary authorities bearing on a treatise section within the same document, although not necessarily the same screen, as the commentary. LEXIS pricing at the time distinguished categorically between movements within a single document, for which there was no incremental charge, and retrieval of other documents whether by search or by citation. The latter moves carried charges.

In 1991, LEXIS did not have hypertext capability of the sort that is now commonplace. Navigating from one document or document part to another required the keying in of commands. To provide a crude proxy for the hypertext link to a specific document and the point-and-click launched search, the online version of the treatise furnished executable command scripts that, when keyed, would take a user to a specified resource. An arrow "=>" preceded each such command string. Because of the division of LEXIS content into distinct "files" and the distinction it made between a "search," on the one hand, and a "focus" executed upon the results of a prior search, on the other, some of these scripts were quite complex. This was particularly true of those designed to access particular subsections of the act or regulations. For example, the script that took one directly from a section of the treatise to 42 U.S.C. § 405(b) read: "=> 42 usc 405; .fo; b administration determination entitlement benefits;.vk1;.fu". Such lengthy command strings were also necessary in order to obtain a display of case search results that isolated the relevant passages. While the command string ".es;.cf;PMSSCA;TOPIC(E100)" would launch a search for all cases classified to section E 100 of the treatise, it required ".es;.cf;PMSSCA;TOPIC(E100) and error! or mistak! or estop! or mislead! or employee or administ!" to produce a satisfactory display of the results. Moves to individual cited cases were a far simpler matter, *e.g.*, "lxe 450 us 785".

Although most lawyers then operated within a DOS character-based interface, Microsoft Windows had begun to gain sufficient use within the legal profession that, by 1990, LEXIS commissioned and released research software that ran under Windows.<sup>120</sup> Using it the command scripts provided in the treatise could be transmitted with a point and click or block, copy, and transmit.<sup>121</sup> That, at least, removed the need to rekey their strange recipes. However, because of the way this application parsed text, few of the command scripts could be blocked with a simple click. The problem was that the software interpreted most punctuation marks used within the scripts as word separators and stopped at the first it encountered. Consequently, the cursor had to be brought, with precision, from the beginning to the end of a command stack in order to block it. A final limitation of this new interface to the online service was that it did not expand the user's window on retrieved text. LEXIS (like Westlaw) during this period delivered documents by the screen, with each screen containing 80 characters across and 24 lines top to bottom. The new software did not change that. Furthermore, some of the limited display real estate was occupied by navigation markers. The principal functionality gains achieved by the new Windows interface to the LEXIS system's terminal-oriented data delivery were: (1) that it provided point-and-click access to a large number of frequently used commands and (2) that allowed users to move text from research results directly into word processing software with a block, copy, and paste sequence.

<sup>119</sup> Memorandum from Peter W. Martin to Sue Alexander and Sonny Reisz, March 19, 1991 (copy on file).

<sup>120</sup> LEXIS 2000 Research Software for Windows.

<sup>121</sup> Introducing ..., P. Martin, Social Security Law 3 (1991) (copy on file).

### *J. The Relationship with Mead Data Central Comes to an End*

Once the online version of Martin on Social Security went public in June 1991, I wrote Robert Glass about marketing plans: “Now that a coherent, fully functional, version of this work is up, my attention shifts to the challenge of: 1) getting this novel reference tool used and 2) exploring its value as a prototype for other legal reference collections.” The letter renewed my suggestion of a board of advisers who would receive free use in return for their advice, a group also selected “to provide high leverage ‘word of mouth’ publicity.” It stressed again the value of having this collection carry a “lump sum” price. Finally, I argued that the work needed to be marketed in the same way that West marketed its competing print products, noting the importance of physical presence at meetings of the National Organization of Social Security Claims Representatives.<sup>122</sup>

Two weeks later, I received a letter from Susan Alexander promising that my points would be addressed in a July meeting. Her letter revealed a complete failure to engage the marketing point for it enclosed a list of demonstrations within the LEXIS organization as evidence of her group’s efforts on this front.<sup>123</sup>

On July 2, I wrote Gary Pollard congratulating him on his appointment to the position formerly held by Kathryn Downing and Eric Brown. That letter struck a positive note: “My assumption has been that part of MDC’s difficulty in resolving important questions since November has been due to the vacancy in the position you now hold. My hope is, therefore, strong that we can now resolve the outstanding questions surrounding the Martin-MDC relationship and the plans for my on-line treatise and related collection.”<sup>124</sup>

On July 12, I received a letter from Steve Emmert, Corporate Counsel, laying out MDC’s position on compliance with the original agreement and rejecting my assertions of noncompliance and “bad faith.” It argued that MDC continued to be willing to produce the CD and noted that the agreement gave it the final say on software.<sup>125</sup> My reply concluded: “I am coming to Dayton, hopeful that we can find a framework for putting the 1988 agreement behind us, but until we do that I shall hold firmly to all claims I have under it. I understand the positions taken in your letter and respectfully disagree.”<sup>126</sup>

On October 1, 1991, I sent a letter to Gary Pollard and Steve Emmert that began by reciting work I had done and scheduled publicizing the availability of the online treatise (including a workshop at the next National Organization of Social Security Claims Representatives conference “that I arranged and will pay for”). It then listed MDC actions “that I expected by now that have either not occurred or not been communicated to me ....” “From Steve I was to receive two items. The first was a license back of CD-ROM rights coupled with a termination provision. The second was a letter amendment to our contract adjusting the royalty share to take account of the fact that I am undertaking far more of the cost and effort of marketing than is customary for an author (in a situation that calls for more aggressive and imaginative marketing than the typical print treatise). From others at MDC I was led to expect a study of alternative pricing options that would produce some form of subscription or lump sum pricing for segments of the market where that might be important.” My letter also expressed the view that MDC and I had a minimum commitment of five years “so that any decision on MDC’s part to end online

<sup>122</sup> Letter from Peter W. Martin to Robert Glass, June 5, 1991 (copy on file).

<sup>123</sup> Letter from Susan K. Alexander, Manager, Federal Specialties, to Peter W. Martin, June 14, 1991 (copy on file).

<sup>124</sup> Letter from Peter W. Martin to Gary Pollard, July 2, 1991 (copy on file).

<sup>125</sup> Letter from Steven M. Emmert, Corporate Counsel, MDC, to Peter W. Martin, July 12, 1991 (copy on file).

<sup>126</sup> Letter from Peter W. Martin to Steven M. Emmert, Esq., July 15, 1991 (copy on file).

distribution before that time ... would require mutual agreement.” Finally, I stressed that the harm to me of any premature termination would increase once I had a related CD-ROM “in the market.”<sup>127</sup>

A letter from Steve Emmert, dated November 7, responded. It rejected an increase in the royalty rate beyond moving it from 20% to 25% (I had asked for 50%) and foreshadowed the ultimate termination:

While we see great potential for products with many of the attributes of Martin on Social Security, we cannot subsidize this product indefinitely.

...[W]e cannot commit to offer Martin on Social Security if use does not increase. Therefore, we believe that the best course of action at this time is to permit you to consider alternative distribution channels for Martin on Social Security, including other online services and stand-alone or complementary CD-ROM or floppy disk products.<sup>128</sup>

In response, I sent Emmert a revised paragraph 4.1 to the MDC contract that dropped CD-ROM from the list of uses MDC was licensed to make of the treatise.<sup>129</sup> He replied with a proposed amendment to the original agreement for my signature.<sup>130</sup>

On December 23, 1991, I wrote back, expressing a willingness to sign but seeking assurance that a revised paragraph 4.1 along with other unrevised provisions would create no issue for a “prospective CD-ROM publication by Michie or Thomson or Cornell University.” The letter concluded:

I propose a meeting in Dayton sometime before the end of January – a meeting to include those present at the July meeting or their successors – at which we would review the understandings each party has about how the agreement as revised will relate to my publication of a CD-ROM along the lines outlined in the original agreement with another publisher and our understandings about how we will work together to market the online version. Since MDC’s personnel continue to change, I propose that we generate and sign a set of minutes at that meeting reflecting our mutual understanding of the amendment and then proceed to sign it.<sup>131</sup>

On the basis of the proposed contract amendment, I initiated explicit discussion with Thomson Electronic Publishing about a possible CD-ROM publishing agreement.<sup>132</sup>

In January, I sent a second letter to Emmert requesting clarity on how royalties were being calculated on use of the existing online version. (It was prompted by a growing belief that the LEXIS system for tracking use failed to capture the full range of moves enabled by this novel resource.) My letter proceeded by way of specific questions: How is the user charged for time spent in the TABLE file and how does that translate into royalties? How are users charged for the LEXSEE moves within the treatise content and for time spent examining its documents; ditto searches on that file? How are users charged for accessing documents in the primary law files to which the treatise links by means of the LEXIS scripts that anchor each topic, scripts that take several forms. With the statute and regulations they take the

<sup>127</sup> Letter from Peter W. Martin to Gary Pollard and Steve Emmert, Oct. 1, 1991 (copy on file).

<sup>128</sup> Letter from Steven M. Emmert to Peter W. Martin, Nov. 7, 1991 (copy on file).

<sup>129</sup> Letter from Peter W. Martin to Steve Emmert, Nov. 13, 1991 (copy on file).

<sup>130</sup> Letter from Steven M. Emmert to Peter W. Martin, Dec. 16, 1991 (copy on file).

<sup>131</sup> Letter from Peter W. Martin to Steven M. Emmert, Dec. 23, 1991 (copy on file).

<sup>132</sup> PWM, Notes, Meetings with Michie and Thomson, Dec. 1991 (copy on file).



form of LEXSTAT commands, in many cases following by a focus command designed to take the user to a specific subsection. With the cases in PMSSCA and the rulings in PMSSRL these take the form of LEXSEE commands to individually cited documents and searches preceded by change file commands and employing the topic codes with which I have tagged all documents in those files as well as words designed to deliver the user to the relevant passages. Finally, I inquired how searches of the case and ruling collections not launched from the treatise but nonetheless making use of my selection or my selection and the topic codes were charged and counted toward royalties.<sup>133</sup>

All ambiguity about the relationship ended in March when I received a letter from David A. Berger, Vice President Legal Information Services, informing me of the MDC's decision to remove "Martin on Social Security Law" from LEXIS on June 6, 1992, and to terminate the agreement as of June 30, 1992.<sup>134</sup>

My reply noted that I was forced to view MDC's action as a breach of contract rather than an exercise of the right to terminate set forth in the agreement. Reminding Berger of my needs as I sought another publisher for the work. I noted that I had sought a revised agreement in Dec. 1990, adding: "Had you then been clear about MDC's intentions, I would not have sunk all the effort I did into shaping this work to the limitations and environment of LEXIS and to speaking, demonstrating, and writing about these LEXIS files." The letter also enumerated a series of promises about a revised agreement that had not been kept.<sup>135</sup>

Berger responded at the end of April, offering terms of settlement that included:

- Release of rights to use my name and material and release of my obligations
- Payment of \$5,000 to defray my expenses in marketing the online material
- All files of primary material that comprised my library to be removed but not the material itself
- Agreement to furnish "one machine-readable copy of the cases and social security rulings [I] selected for inclusion [in the online library] for use in [my] CD ROM product on social security law."<sup>136</sup>

That was followed by a letter from Gary E. Pollard, Senior Director, Editorial Services, offering revised settlement terms that reflected our subsequent correspondence and discussions. Crucial to my ability to continue developing the work was MDC's agreement to furnish me the following, without charge:

- "Machine-readable" copies of all cases and Social Security Rulings that I had selected for inclusion in the online files associated with the treatise
- "Machine-readable" copies of all cases and Social Security Rulings (not to exceed 10,000) that were included in the larger set from which those in the online files were selected

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<sup>133</sup> Letter from Peter W. Martin to Steven M. Emmert, Jan. 8, 1992 (copy on file).

<sup>134</sup> Letter from David A. Berger, Vice President, Legal Information Services to Peter W. Martin, March 4, 1992 (copy on file).

<sup>135</sup> Letter from Peter W. Martin to David A. Berger, March 25, 1992 (copy on file).

<sup>136</sup> Letter from David A. Berger, Vice President, Legal Information Services to Peter W. Martin, April 28, 1992 (copy on file).

- "Machine-readable" copies of all sections of the CFR and Fed. Reg. that pertain to Social Security, as they exist at the time of the request
- "Machine-readable" copies of all sections of the U.S. Code that pertain to Social Security, as they exist at the time of the request (provided I have a license from Thomson for their use)
- A right to download up to 1,000 documents per year for inclusion in my electronic resource through June 30, 1997

The proposed license to all this material was subject to one express limitation. It would not extend to "any copyrighted material which may be downloaded" (i.e. West pagination). Pollard's draft also limited the use of the MDC furnished material to "prepar[ing] a CD ROM product on social Security law."

I agreed to the proposed terms with one modification – a loosening of the last quoted provision to read: "Martin understands and agrees that the information provided by MDC may only be used by Martin to prepare computer-based information products in social security law." My argument for the change was that during the period immediately following the LEXIS termination and even after publication on CD-ROM, the need for a complementary online service or diskette distribution might be essential. I also asked that any cash component of the settlement go to "Cornell Law School in support of our work on computer-based legal information."

On June 9, 1992, MDC sent revised settlement terms that incorporated the requested changes. I signed the agreement on June 11. David Berger signed on June 16. Three days later, Pollard mailed a copy of the fully executed agreement.

### *K. The Shifting MDC / Michie Cast*

In 1988 Jack W. Simpson was President of MDC (a position he held from 1982 until he was forced out by Mead in November 1992). James P. Roemer was Vice President and General Manager of LEXIS, MDC. In that capacity he signed my October 28, 1988 agreement with MDC on the company's behalf. Bruce Rhoades was Vice President for Systems and Technology. In 1988, Rhoades and John Holt, who worked for him, had been working with Owl's Guide, which they viewed as an "excellent development platform." Later working on the platform, in collaboration with Owl personnel, were Jon Boring and Patrick M. Guiant. Dan Davidson with whom I worked in 1989 was charged by Simpson with getting a CD-ROM product "out the door." Specifically, he was responsible for platform development until the Michie group reorganization took place in late 1989.

By October 1988, Susan K. Alexander was signing letters as Manager, CD ROM Products or simply "Legal Information Publishing." Working under Sue and closely with me so long as the CD-ROM project was alive was Bill Baker. Working under Sue and closely with me once the shift to an online version occurred in 1990 was Sonny Reisz.

Kathryn Downing, who was Sue Alexander's boss in 1988 as Director of Development and Operations for the Legal Division, left MDC in 1990 to join Thomson Professional Publishing. She served as the President of Thomson's new electronic publishing subsidiary (Thomson Electronic Publishing) until March of 1993 when that unit was merged into Lawyers Cooperative Publishing and Downing was appointed president of the combined entity. In September 1995, Ms. Downing left Thomson to join Times Mirror Co. of Los

Angeles as president and chief executive of its legal publisher, Matthew Bender & Co. Inc. In 1998 Matthew Bender & Co. and a stake in another of Times Mirror's legal publishing companies were acquired for \$1.6 billion by European publisher Reed Elsevier (which by then also owned LEXIS). Kathryn was at that point head of Times Mirror's medical and legal publications. In 1998 she was appointed president of the Los Angeles Times (owned by Times Mirror), and in June of 1999, she was appointed that paper's publisher. She had a short and troubled run in that post.

For a time, Eric Brown was a key MDC player (Senior Director, Editorial Services, as of Oct. 3, 1990). He was removed from his post quite abruptly in late 1990.<sup>137</sup> The position remained empty until Gary Pollard was promoted to fill it.

Working under Brown was Robert P. Glass, Director of Specialties, Legal Information Services, as of Oct. 9, 1990.

Following the December 1989 reorganization, James P. Roemer, moved to the position of President of the (new) Michie Group. (Roemer left that position in 1991 to become President of ProQuest.) At Michie Roemer's immediate subordinates were: Donald E. Selby, Jr., Vice President, Director of Professional Publications, and Andrew Wyszowski, Vice President, Director of Information Resources Management. At MDC David Berger became Vice President, Legal information Services.

Steve Emmert was the principal person from MDC's counsel's office with whom I had direct dealings. However, Nancy Nash appeared to hold responsibility for interpretation of and compliance with the highly confidential MDC/West cross-licensing agreement.

### III. Finding a New Home with Thomson

#### *A. Thomson Electronic Publishing*

When Kathryn Downing left MDC in 1989, she left to head a new unit established within Thomson Professional Publishing (TPP). In the period that followed, I stayed in touch with her.

Throughout the 1980s, the parent Thomson Company, based in Canada, had moved aggressively into law publishing in the U.S., U.K., and Australia through acquisitions. As the decade came to an end, in the U.S. the company owned Warren, Gorham & Lamont, Callaghan & Company and Clark Boardman (two companies it merged into Clark Boardman Callaghan), Bancroft-Whitney, and Lawyers' Cooperative Publishing Company (Lawyers' Coop) with its Research Institute of America (RIA) subsidiary.<sup>138</sup> By 1990 a number of these Thomson entities had begun to move into electronic information services. To facilitate and coordinate that shift, the company established a new subsidiary, Thomson Electronic Publishing, and recruited Kathryn Downing from LEXIS to head it. Her charge was to develop CD-ROM

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<sup>137</sup> Letter from Peter W. Martin to David A. Berger, Dec. 12, 1990.

I have a memory of having been informed that Berger arrived one day to find his office lock changed and his files removed.

<sup>138</sup> See Geraldine Fabrikant, Thomson's American Quest; Big Purchases by Publisher, New York Times, Dec. 6, 1986.

based legal information products. (Lawyers' Coop already licensed an electronic version of its U.S. Code publication [UCCS] and a citator [Autocite] to MDC for use on LEXIS.)<sup>139</sup>

By the early 1990s lawyers were growing comfortable with desktop computers. CD-ROM drives were reasonably priced, and the cost of mastering, duplicating, and shipping CDs permitted a price point much lower than print. A single disk or at most two could hold the case law of a state. Westlaw and LEXIS offered more than most small firm lawyers needed, at prices they could not afford. Both companies charged in ways that made their services unattractive to those making repeated use of a single state's cases and statutes. Thomson's reorganization was aimed at bringing its print publications into this new environment.

In October 1990, I visited Ms. Downing at Thomson Electronic Publishing's new headquarters in Stamford, Connecticut.<sup>140</sup> We discussed her plans for the unit, which included CD-ROM versions of state primary law in jurisdictions where Thomson then held or hoped to land publishing contracts (New York, California, and Michigan). We discussed software options then available for CD-ROM publication. I inquired about the possibility of my using portions of the Thomson (Lawyers' Coop) version of the U.S. Code in the preparation of electronic course materials. She offered a license on the spot. We discussed the vexed status of my project with Mead Data Central and also the possible shape and role of an institute, "housed at the law school or outside it, that would carry out legal information projects."<sup>141</sup> We continued the conversation at a conference on electronic publishing held in May 1991<sup>142</sup> at which I spoke on "What a Computer-Based Legal Reference Work Can and Must Deliver." That December I reported to her on the progress, limited though it was, in bringing the core framework for Martin on Social Security up on LEXIS.

The willingness of MDC to adjust our original contract to the reality that the company did not intend to publish my work on CD-ROM allowed me to seek a CD-ROM publisher elsewhere. I asked whether Thomson Electronic Publishing might be interested, providing a "fact sheet" that reviewed the volume of Social Security litigation at the administrative level and on appeal to the federal courts. The document also reviewed the existing reference materials, print and electronic, with which my new work was in competition.<sup>143</sup>

I pursued the developing relationship with Thomson in other ways. In January 1992, I pointed out flaws in certain portions of the U.S. Code the company licensed to LEXIS and their inconsistency with the printed version.<sup>144</sup> That drew immediate, high level attention.<sup>145</sup> In February, the company's vice president for technology visited me in Ithaca. We discussed the electronic publishing unit's CD-ROM publication plans, its progress on forthcoming New York and California discs, and the company's first

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<sup>139</sup> High-Volume Legal Databases for CD-ROM: Flexibility Key to Complex Electronic Publishing, CD-ROM Professional, July 1, 1993, Volume v6; Issue n4

<sup>140</sup> PWM, Notes on Meeting with Kathryn Downing, Oct. 10, 1990 (copy on file).

<sup>141</sup> Letter from Peter W. Martin to Kathryn M. Downing, Vice President/COO, Electronic Publishing Division, Thomson Professional Publishing, Oct. 24, 1990 (copy on file).

<sup>142</sup> NCAIR Conference on Electronic Publishing Standards and Formats in the Fields of Law and Accounting, May 8-10, 1991.

<sup>143</sup> PWM, Fact Sheet: Social Security Law and Social Security Law Materials, Dec. 9, 1991 (copy on file).

<sup>144</sup> Letter from Peter W. Martin to Kathryn Downing, President and COO, Thomson Electronic Publishing, Jan. 28, 1992 (copy on file).

<sup>145</sup> Letter from David J. Oliveiri, V.P. and General Manager, National/Federal Markets, Electronic Publishing, Thomson Professional Publishing to Peter W. Martin, Feb. 7, 1992 (copy on file).

topical CDs. We reviewed software options, and I agreed to send some sample documents (sections of the Social Security Act and regulations, three Supreme Court decisions, and a small portion of the treatise) set up with FOLIO Views.<sup>146</sup>

In early March 1992, upon receiving notice of MDC's intention to terminate our full agreement I notified Thomson at once.<sup>147</sup> The company sent a representative to meet with me in Ithaca. We discussed how to test the market for my planned Social Security disc.<sup>148</sup> Within a week I received a draft customer interview script for review.<sup>149</sup> Thomson then proceeded to gauge potential demand through a set of structured customer interviews,<sup>150</sup> employing a small prototype that I had prepared.<sup>151</sup> The results were encouraging.<sup>152</sup>

Later that spring I was invited to participate in Thomson Electronic Publishing's first major "product launch." Lawyers' Coop had secured the contract to publish New York's official law reports, a contract which, for the first time, called for publication of an electronic version in addition to the production of traditional print volumes.<sup>153</sup> What emerged was TEP's "LAWDESK," 37 years of New York's official reports on CD-ROM, together with the state's code.<sup>154</sup> At its launch, I spoke about the value of having a comprehensive collection of New York State law on CD-ROM.

The termination agreement with MDC, executed in June 1992, provided me with a significant asset. To any publisher interested in developing a CD-ROM reference of the sort I proposed but lacking a full collection of the associated primary law in digital format (statute, regulations, federal court decisions, agency rulings), my right to draw that data from LEXIS had great value.

Open negotiations with Thomson Electronic Publishing (TEP) began in the summer of 1992. TEP asked for and promptly received the terms of my settlement with MDC.<sup>155</sup> In November, following a meeting with key TEP personnel, I furnished a "first cut at terms for an agreement" identifying the work that I would be responsible for and what I would expect from the company.<sup>156</sup> That was followed in December by proposals on the financial terms and "duration, performance protection, and related termination rights." The latter was of particular importance to me in light of the experience with MDC.<sup>157</sup> In February of 1993, I furnished TEP an inventory of the primary law documents (provisions of

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<sup>146</sup> PWM, Notes, Meeting with Chip Cater, Feb. 21, 1992 (copy on file).

<sup>147</sup> Letter from Peter W. Martin to Kathryn Downing, President and COO, Thomson Electronic Publishing, March 6, 1992; Letter from Peter W. Martin to Chip Cater, Vice President Technology, Thomson Electronic Publishing, March 6, 1992 (copy on file).

<sup>148</sup> Letter from John DeFeo, Thomson Electronic Publishing to Peter W. Martin, March 25, 1992

<sup>149</sup> Letter from John DeFeo, Thomson Professional Publishing to Peter W. Martin, March 31, 1992 (copy on file)

<sup>150</sup> *Id.*

<sup>151</sup> PWM, FAX to John DeFeo, Thomson Electronic Publishing, March 27, 1992 (copy on file)

<sup>152</sup> Letter from John DeFeo, Thomson Professional Publishing to Peter W. Martin, Oct. 9, 1992 (attaching the results) (copy on file).

<sup>153</sup> High-Volume Legal Databases for CD-ROM: Flexibility Key to Complex Electronic Publishing, CD-ROM Professional, July 1, 1993, Volume v6; Issue n4.

<sup>154</sup> New York case law on CD-ROM, CD-ROM Professional, Sept. 1, 1992, Volume v5; Issue n5.

<sup>155</sup> Letter from Peter W. Martin to John DeFeo, Senior Vice President, Thomson Electronic Publishing, Aug. 4, 1992 (conveying the terms of my settlement with MDC) (copy on file).

<sup>156</sup> Letter from Peter W. Martin to Kathryn Downing, President & COO, Thomson Electronic Publishing, Nov. 4, 1992 (copy on file).

<sup>157</sup> Letter from Peter W. Martin to Kathryn Downing, President & COO, Thomson Electronic Publishing, Dec. 18, 1992 (copy on file).

the act and regulations, federal court decisions) needed for the CD-ROM and available under the terms of the MDC settlement.<sup>158</sup> At the same time, I notified MDC that Thomson Electronic Publishing would be my publisher and therefore my agent in receiving the data called for by that agreement.<sup>159</sup> By March TEP and I were working on a draft of the publishing agreement<sup>160</sup> and had begun exploring platform alternatives. TEP had used a DOS version of Folio Views for its New York CD-ROM. I argued that we ought to employ the next generation of the software, which would permit offering a Windows work environment.<sup>161</sup> I prepared an outline of how that version of Views could be employed to realize the appropriate structure for each component of the CD and how those components would interconnect.<sup>162</sup>

Ultimately, it was not until May of 1993 that we achieved a detailed publication agreement.<sup>163</sup> A corporate reorganization within Thomson that took place in late March slowed progress on that front and, even more critically, delayed development of the CD-ROM. Thomson had decided to merge the electronic publishing unit into Lawyers Cooperative Publishing (LCP) and to appoint Kathryn Downing president of the combined company.<sup>164</sup>

The entire summer of 1993 I spent preparing the treatise while waiting for the reorganized Thomson group to take charge of converting the primary law data received from MDC to a format suitable for the disc. I created a prototype of the treatise using the latest version of Views.<sup>165</sup> Although the TEP staff had publicized a prospective November release date at a conference of the National Organization of Social Security Claims Representatives, by September two things were clear: (1) that date would not be met and (2) West, goaded by the threat of a Thomson CD-ROM, was ready to release a Social Security disc of its own.<sup>166</sup>

### *B. Clark Boardman Callaghan*

At last, responsibility for my project, within the reorganized Thomson empire, was assigned to Clark, Boardman, Callaghan (CBC). By the end of 1993, the MDC data had been shipped to an Irish firm with detailed instructions on how to configure the statutes, regulations, rulings, and cases for the CD, accompanied by a timeline that pointed to the release of the CD-ROM toward the end of May 1994.<sup>167</sup> A CBC demonstration to representatives of the Social Security Administration produced strong encouragement but also pressure to increase the scope of the disc's resources to include both Supplemental Security Income and Medicare.<sup>168</sup> A Clark Boardman Callaghan flyer announced the coming availability of "Social Security Plus" "a complete Social Security Library at your fingertips" as of

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<sup>158</sup> PWM, Inventory of Documents to Be Secured from MDC, Feb. 1, 1993 (copy on file).

<sup>159</sup> Letter from Peter W. Martin to Bernard G. Reisz, Mead Data Central, Feb. 24, 1993 (copy on file).

<sup>160</sup> FAX from John DeFeo, March 10, 1993 (copy on file).

<sup>161</sup> Memo from Peter W. Martin to John DeFeo, March 29, 1993 (copy on file).

<sup>162</sup> PWM, First Cut at Outline of Infobase Structure, Martin on Social Security, March 29, 1993 (copy on file).

<sup>163</sup> Agreement between Peter W. Martin and Electronic Publishing, A Division of Thomson Legal Publishing Inc., May 6, 1993 (copy on file).

<sup>164</sup> Letter from Kathryn Downing to Peter W. Martin, March 24, 1993 (copy on file).

<sup>165</sup> Memorandum from Peter W. Martin to Eimear Auston and John DeFeo, Subject: Treatise, Folio 3.0 Version, May 6, 1993 (copy on file).

<sup>166</sup> Letter from Peter W. Martin to John DeFeo and Patty Hagstrom, Sept. 10, 1993 (not sent) (copy on file).

<sup>167</sup> FAX from Don Zinter, Dec. 20, 1993; letter from Donald E. Zinter, Manager of Technical Development, Clark Boardman, Callaghan, to Noel Flemming, P. Beagan & Sons, Dec. 16, 1993 (copy on file).

<sup>168</sup> Letter from Donald E. Zinter to Peter W. Martin, Feb. 4, 1994 (copy on file).

June 1994.<sup>169</sup> The technical staff of CBC and I worked feverishly during March, April, and May to meet that target. Our challenges included incomplete data from MDC, the need to add editorial content from LCP's autocite system to case data, and the necessity of reformatting all primary law data to produce the high level of functionality and integration between treatise and underlying primary sources called for by my design.<sup>170</sup> We had to build and then implement a system that would enable me to transfer the topic codes that connected both cases and Social Security rulings to the treatise structure for insertion in individual case and ruling records.<sup>171</sup> Editorial content associated with the sections of the Social Security Act when published as part of the full U.S. Code (USCS) by LCP, had to be separated from the Act's text and most of it stripped off.<sup>172</sup> In the course of data manipulations, errors kept slipping in, defects not only in the visible text but also in data elements on which crucial cross linkages relied.<sup>173</sup> Misunderstandings arose and had to be dispelled.<sup>174</sup> Finally, even as we pressed to complete the work for initial release, we had to lay the foundation for an updating process and consider the frequency of those updates.<sup>175</sup>

The announced release date came and went. By late June, however, we had a version that was sufficiently complete that the company felt comfortable submitting it to a "best of" Views implementations competition held by the Folio Corporation. It received an award.

Successive drafts of the act, rulings, and cases databases were transferred back and forth between Rochester and Ithaca. In late July I received "near final" databases for review. They contained numerous defects.<sup>176</sup> Finally, in early August, the initial release was ready for distribution.<sup>177</sup> CBC's marketing materials stressed the product's "seamless integration of text, cases, code, regulations, rulings, policy and procedure ... available at the click of a mouse or touch of a key!"<sup>178</sup>

Because of the delays, CBC and I agreed in late August that the first updated disc ought to be ready soon, within a month or two.<sup>179</sup> That schedule required immediate work on a system that I could employ in specifying the new cases, rulings, act and regulation provisions to be included on that second disc and its quarterly successors.<sup>180</sup> Throughout its life, this reference proved to be a hungry beast. Once launched it had to be fed regularly with fresh cases, coded to the treatise structure, new

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<sup>169</sup> New from Clark Boardman Callaghan, Social Security Plus, undated 1994 (copy on file).

<sup>170</sup> Letter from Donald E. Zinter to Peter W. Martin, April 13, 1994; Memorandum from Peter W. Martin to Don Zinter, Subject: Infobase Details #1, May 18, 1994 (copy on file).

<sup>171</sup> Memorandum from Peter W. Martin to Don Zinter and Scott Hossler, Subject: A Couple of Further Points, May 3, 1994 (copy on file).

<sup>172</sup> Memorandum from Peter W. Martin to Don Zinter and Scott Hossler, Subject: May 1 Ask, Rulings, USCS, May 3, 1994 (copy on file).

<sup>173</sup> Memorandum from Peter W. Martin to Don Zinter, Subject: Treatise -- Working Draft, May 10, 1994 (copy on file).

<sup>174</sup> Memorandum from Glenn Ferguson to Peter W. Martin, Re: USCS in Social Security Plus, May 9, 1994 and my reply (copy on file).

<sup>175</sup> Id.

<sup>176</sup> Memorandum from Peter W. Martin to Don Zinter, Subject: Review of Near Final Infobases, July 25, 1994 (copy on file).

<sup>177</sup> Memorandum from Don Zinter to Peter W. Martin, Subject: CD Enclosed, Aug. 4, 1994 (copy on file).

<sup>178</sup> Clark Boardman Callaghan, Social Security Plus on CD-ROM, undated (1994) (copy on file).

<sup>179</sup> Memorandum from Don Zinter to Peter Martin, Subject: Social Security Plus Meeting Minutes, Aug. 24, 1994 (copy on file).

<sup>180</sup> Memorandum from Peter W. Martin to Donald Zinter, undated (1994), Subject: Further Reflections on Maintenance (copy on file).

regulations and agency rulings, plus other updating material. Subscribers received quarterly replacement CDs. All responsibility for identifying and coding the primary material, along with preparing corresponding revisions to the treatise text and the substantive content of a newsletter that accompanied the updated CDs, rested with me.

In October, the Chicago Daily Law Bulletin published a review of *Social Security Plus*. It was quite favorable, although the reviewer, Barry Bayer, did wonder if the product was not overpriced at \$1,395 (a figure that included a year of updates).<sup>181</sup> Price notwithstanding, market reception was strong. In the first year, over eight hundred law firms and the Social Security Administration (SSA) subscribed.<sup>182</sup> SSA's use was encouraged by my addition of treatise sections and primary materials covering the Supplemental Security Income Program that it administered in parallel with Social Security.<sup>183</sup> A second feature attractive to SSA was added as soon as possible. Once the agency's program manual (the POMS) became available in digital format, it was loaded onto the disc, and I added links to its provisions from all pertinent treatise sections.

In late 1995, citing pressure from SSA and the company's marketing people, CBC argued again for inclusion of Medicare and Medicaid materials. The success of *Social Security Plus* also led CBC editors to talk about "Martinizing" other CD titles that contained both treatises and primary law sources. The idea was that they should be integrated in similar ways.<sup>184</sup> These related issues came to a head in December 1995 prompting a lengthy letter to CBC exploring our quite different perspectives and interests. In pertinent part it read as follows:

The continuing success of the work CBC has entitled "Social Security Plus" (It was called merely the "Work" in the original author/publisher agreement dated May 6, 1993.) is gratifying to me. I am also proud to know that in some respects this work has provided a pattern of integration for other CBC publications. Thus, while Thomson was slow in bringing the work to publication, which gave West some competitive room it shouldn't have had, we are, happily, working together on a project that now has strong forward momentum.

From time to time, we have had meetings that raised issues of scope and timetable, with passing mention of their implications for our underlying agreement, but we seem not to have resolved some important ones, for they keep popping up, even some that I thought were settled. No doubt that is in part due to some very different interests.

CBC has an array of other products that to some considerable extent overlap with this one – in content and potential customer base. And any change in the scope of this work may implicate an even wider circle.

As yet, this work is the only one I know of in CBC's Social Security, Elder Law, Medical Benefits territory to be offered in electronic format, but what about the future? Overlap can mean complement. It can also mean compete. Questions of the future of current print offerings like

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<sup>181</sup> Barry G. Boyer, Social Security System, with Folio Views for Windows, Chicago Daily Law Bulletin, Oct. 19, 1994.

<sup>182</sup> Social Security Plus, Sept. 6, 1995 (copy on file).

<sup>183</sup> They were included in the September 1995 release. Social Security Plus, Sept. 6, 1995. See Memorandum from Steve Mutkoski to Peter Martin, Re: Organization/Integration of SSI Material, June 24, 1995 (copy on file).

<sup>184</sup> Letter from Peter W. Martin to Sue Rhinebold, Product Manager, Dec. 13, 1995 (copy on file).



Social Security Disability Claims and Social Security Law and Practice must inevitably weigh on you and your colleagues. Those reference works, along with *Advising the Elderly Client*, contain some material that I would use, appropriate, reorganize, fit into the framework I've built. But each has its own heritage, scope, organization, customer base.

Much as I respect those separate works, I value the functionality and authorial integrity of the existing work sufficiently that on nearly all revisions or new features my approach will continue to be to learn from them and other competing works but design from the ground up. And except as powerful market incentives argue for adding additional substantive coverage to my work, my clear priority will be improvement of its treatment of its existing coverage. In short I want to be able to add features and depth (more graphical practice guides like those I added last spring and integrating the POMS as soon as it becomes available, having already devoted a lot of time building potential POMS links) rather than additional topics. I would also like to work with CBC in providing an on-line update collection and building a disk update cycle that works off it.

This level of authorial control over the full collection and ongoing involvement in its maintenance and revision is at the core of what you tell me is referred to internally as "Martinizing." You did persuade me that it was critical to the Agency for my work to cover eligibility and benefit issues of SSI and I revised the work to cover them -- and I will not only maintain the expanded work but plan to go back and fill in some of the gaps in the case collection, complete with topic tags.

There is one other fundamental difference in perspective. As an author I think of major additions to this work as large personal projects, larger than a print work of comparable scope would entail because of all the connections to a companion collection of primary material. You and your colleagues feel the press of the market place and quite naturally want to deliver an even better product in an environment where 3 months can seem a long time.

When we met on September 6, [1995] my position on expanding the work to include Medicaid and Medicare was I thought clear. Because of the major revision of those programs underway in Congress (revision tending toward elimination in the case of Medicaid) I argued that the time was wrong to start creating a coherent element of my treatise or a companion work of similar and like scope covering the Medical Benefit programs. I indicated that when the dust had settled, I'd be interested in doing that probably working with [a colleague].... I suggested we see where things stood in the spring. ... We left it, I thought, that short term to the extent that SSA needs required it, the work would be expanded to include the primary material covering the issues dealt with by their [administrative law judges].

....

If CBC wants to create a separate Medicaid-Medicare reference or move its *Advising the Elderly Client* set to CD-ROM that is solely your business. I have ideas and interest in being involved (through the Cornell institute) but whether, when, and how are questions for you. But I am opposed to adding editorial material ported from any CBC product (no matter how excellent) to a common package with my work. That is my business. Once on, particularly with a customer like the Social Security Administration, such additions will never come off.

....

Please understand that I care deeply about the quality and long-term success of this creation of mine begin in 1988, first published by CBC in 1994 under a 1993 TEP agreement. Please also understand that while I value the contributions of many fine CBC folks to its quality and success, I necessarily have a longer-term view and different perspective. If our different interests call for some adjustment of the original agreement I am open to that and would readily meet to explore options with whoever has authority to do so on CBC's behalf.<sup>185</sup>

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Discussion of adding Medicare or other CBC editorial content to the CD ended at that point. No doubt that was because early 1996 brought news of a corporate ownership change that impinged directly on any and all future plans of the CBC unit of the Thomson Professional Publishing group.

#### IV. Thomson's Acquisition of West Brings an End to Commercial Auspices

In February 1996, Thomson and West Publishing Company announced Thomson's agreement to purchase West for \$3.43 billion. The deal closed in July 1996 after the Justice Department and the attorneys general of several states that had previously opposed the merger approved a consent decree requiring the merged company to divest itself of a number of products. A number of competitors, however, proceeded to challenge that resolution in federal district court.<sup>186</sup>

West had been looking for a buyer since the summer of 1995. Thomson had tried to acquire Mead Data Central in 1994 but had been outbid by Reed-Elsevier.<sup>187</sup> During the long period of Justice Department review and district court deliberations over the proposed consent decree uncertainty hovered over all Thomson publications that had West counterparts. Throughout 1996 I tried to engage CBC personnel in discussion of the likely relationship between *Social Security Plus* and West's Social Security products and the plans for integrating West and CBC editorial and marketing staff.<sup>188</sup> They resisted. Very likely they were themselves in the dark. In January 1997 the merged entity was renamed the West Group, and all of Thomson's legal publishing units (including Clark Boardman Callaghan, Lawyers Coop, and Bancroft-Whitney) were folded into the new entity. On March 7, 1997, the U.S. District Court for the District of Columbia finally approved the consent decree agreed to by the Justice Department and Thomson. The principal revision to the original version allowed small publishers to defer payment for their inclusion of West pagination until a Supreme Court decision on the validity of the Thomson/West copyright claim so long as that came before December 31, 2000. That liability would be wiped out if the Supreme Court invalidated the claim. Should there be no Supreme Court decision by the end of 2000, royalty payments would commence being due until there was one.<sup>189</sup>

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<sup>185</sup> Letter from Peter W. Martin to Sue Rhinebold Product Manager, Dec. 13, 1995 (copy on file).

<sup>186</sup> Sandra Torry, Thomson-West's, Opponents Want to Undo a Done Deal, Washington Post, Sept. 23, 1996.

<sup>187</sup> John J. Oslund, For West Publishing, The Gavel is Coming Down Hard and Loud  
Legal Publishing Industry Shaken by Technology and Competition, Minnesota Star Tribune, Nov. 28, 1994.

<sup>188</sup> PWM, Notes, Oct. 30, 1996 (copy on file).

<sup>189</sup> U.S. v. Thomson Corp., 949 F.Supp. 907 (D D.C. 1996) (declining to approve the star pagination provision); U.S. v. Thomson Corp., No. CIV.A. 96-1415, March 7, 1997) (approving the license with a small publisher addendum).

The first direct consequence of the merger for Social Security Plus was West Group's unilateral decision in March 1997 to shift the color scheme of the disc's contents (color of headings and links). This had unfortunate consequences for its graphic elements. West wanted a uniform look to its newly expanded catalog of CD-ROM titles.<sup>190</sup> In short order, a new set of West employees had to be brought to understand this unique work's content, structure, and update process. In May 1997 the original 1993 publication agreement renewed automatically, since neither party gave notice of termination.<sup>191</sup> Two months later, in July, the new West Group proposed to combine my "analytic" content with other "analytic content" on a single "Social Security Excellence" CD-ROM, that would hold a collection of primary law databases all could draw on. Software lock-out features would allow subscribers to be offered their choice of analytic material.<sup>192</sup> I resisted.

Inevitably, West concluded that the source of the cases and statutory provisions included on *Social Security Plus* had to switch from LEXIS to Westlaw. Because of the radical change in work flow this entailed, the changeover was scheduled for September 1997. Differences in the data structures of the competing online systems required that nearly all the links in the treatise be revised. Hundreds of cases were missing in the initial batch drawn from Westlaw. This prompted me to perform an audit. It establish a sizeable inventory of decisions that had, for one reason or another, been dropped. Topic codes were misapplied. Formatting issues arose.<sup>193</sup> At that time, LEXIS held a much larger collection of unpublished district court decisions than Westlaw. That generated an awkward question: Should such uniquely LEXIS cases remain on what had become a West product? (They did, but no more were allowed to join them.) In short, because of the tight integration between the treatise and underlying primary law material, this switch in data, which to West Group executives must have seemed straightforward, turned into a huge undertaking.

The end of the relationship was in sight. In November 1997 Thomson offered \$200,000 for a termination of the contract with a transfer over of all my rights.<sup>194</sup> I declined.

As I explained:<sup>195</sup>

You are offering me \$200,000 to surrender all rights in a creation representing ten years of effort. It is a work that embodies a distinct person vision, realized only through more or less continuous struggle against patterns based on existing products and entrenched print paradigms. My hands have shaped nearly every feature, not simply the contents, but countless details of data structure, format, and functionality. Nothing else that I have done professionally has been of this scale and quality. I say this partly for myself but also so that you understand my frame of mind. I will find it very difficult to let go of this "magnum opus" and especially to have it blended into a competing product. I am confident you intend \$200,000 to be a "fair" sum and not a "low ball" figure designed to commence haggling. However, I need your help in understanding its fairness or perhaps more accurately its attractiveness vis-a-vis

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<sup>190</sup> Memorandum from Peter W. Martin to David Stumme and Jonathan Bell, Subject: Revised scdtreat, scdothor, scdnew etc., March 10, 1997 (copy on file).

<sup>191</sup> Memorandum from Peter W. Martin to Sue, Mick and others at Clark, Boardman, Callaghan and the West Group, Subject: Background for Those Making Decisions About the Future of My Work, July 22, 1997 (copy on file).

<sup>192</sup> *Id.*

<sup>193</sup> PWM, Comments, Sept. 1997 (copy on file).

<sup>194</sup> Letter from Colleen R. Courtade, Senior Editor, West Group to Peter W. Martin, Nov. 5, 1997 (copy on file).

<sup>195</sup> Letter from Peter W. Martin to Colleen R. Courtade, West Group, Nov. 13, 1997 (copy on file).

the principal alternative to which I must compare it – retrieving rights to the work for myself at first opportunity.

Getting the entire work back as it currently exists or as it existed immediately prior to the case data switch, without lengthy delay, and distributing it via Cornell's Legal Information Institute has very strong personal attraction. The attraction is so strong I would sacrifice considerable financial advantage to secure that result. (To illustrate I would readily waive all royalties for 1997 and pass on the money you've offered in return for a termination that produced swift reversion of all rights to me.) I read your letter as indicating West Group would not agree to that. Consequently, to retrieve full rights I must wait.

I need your help in evaluating the competing attractions of West Group's proposal because you have access to critical numbers that I do not. I am particularly dependent right now because of the incomplete royalty report I just received covering the first half of 1997. The initial report was in error, the "corrected report" which arrived by express today contains only "net sales" and not subscription numbers.

I focus on subscription numbers because one way for me to gauge the fairness of the West Group termination offer is to compare it with what I would have to pay under our present contract to secure return of all rights in the work following a termination at my election. Provisions that are a direct consequence of my prior experience with Mead Data Central give me a right to terminate and secure the reversion of copyright in the full work. In the event of a material breach by West Group not cured within 30 days that return is unconditional, following a one year "wind down" period. (I might note in this connection, simply to preserve my rights, that I consider any failure to pay full contractual royalties or to provide full and accurate royalty reports to be a material breach.) On the other hand, if West Group continues, despite its discomfort, to adhere to the terms of the existing contract I must wait until May 1999 to terminate. In that even, following the one year "wind down" period, copyright reversion is conditioned on my paying \$100,000 or \$300 per subscriber whichever is the larger sum. And that explains my emphasis on subscription information. Obviously, I am not asking what the figures will be in May 2000. I want to know what they are in November 1997, in some detail, and what they were in prior years so as to be able to understand the trends to date.

Undoubtedly, West Group assembled subscription figures for the full period my CD-ROM has been published along with other relevant data in the course of reaching the conclusion that it wanted to continue to publish the work and determining how much to offer for unencumbered rights. I am not asking for any more data than informed those decisions, under appropriate non-disclosure. I require that information to be persuaded your offer is a fair one and that it represents, for me, a preferable resolution in comparison with the future exercise of the termination rights I already have under the contract.

The merger of the two company's accounting records led to repeated lapses in the timeliness and detail of royalty statements. Those lapses allowed me to exercise the right, set out in the 1993 agreement, to serve notice of termination for default if that problem was not cured within thirty days.<sup>196</sup> I explained

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<sup>196</sup> Letter from Peter W. Martin to Brian Hall, CEO, West Group and Colleen Courtade, West Group, Oct. 22, 1998 (copy on file).

that I did so fully expecting the default to be cured, but to "be clear about my resolve to take the work back for publication either by my institute (the LII) or a commercial licensee should West Group fail to live up to any of the other ... terms of my 1993 contract with TEP." The same letter drew attention to the right both parties had to give notice of termination as of the contract renewal date, May 6, 1999. I explained that I was not prepared to exercise that right as it would require me to pay a large sum, but mentioned it "to be sure that ... [the date for notice] does not pass without West Group giving thought to exercising [its right]..., for it is West Group that appears unhappy with the present contract and product."

West Group responded by curing the breach and giving notice of contract termination, effective May 6, 1999.<sup>197</sup> The "wind down" provision on the contract assured existing subscribers of continuing updates for a full year after that date, with a return of copyright to me immediately following that period. By a letter dated May 5, 2000,<sup>198</sup> West Group returned copyright in the full work. Within the month it was online, as *Martin on Social Security*, at the Legal Information Institute web site. In one form or another it has remained on the open Web ever since. Initially, it was held and updated in the same format as it had been published on CD-ROM. A specialized Web server, FOLIO's Sitedirector, converted its FOLIO Views content to browsable, HTML on the fly. Other Legal Information Institute collections, including importantly the American Legal Ethics Library, prepared for both disk and Internet delivery, were handled the same way.

In time all the supporting primary law material – the act, agency regulations, rulings, program manual, and cases – that had originally necessitated that the treatise be published as part of a single integrated data collection appeared on the open Web, placed and maintained there by others. As that occurred, the reference work itself shrank, in the sense that collecting, formatting, and updating all that associated primary authority fell to others. Identifying, interpreting, describing, coding, and linking to that primary material remained the role of the treatise, using such search and integrating software tools as evolving technology made available.

The treatise and related primary authorities also supported an inter law school Social Security course that the LII and I offered via the Internet from 2001 through 2008.

## V. The Social Security Administration as a Potential Partner or Data Source

During the early stages of this project, I endeavored to learn how much of the relevant data the Social Security Administration held in electronic format. One aim was to determine if the agency itself might be a data source for any of the primary materials. A second was to see if the agency could be persuaded to cooperate in the work's creation in order to improve the information available to its own staff. I was informed by the chief counsel for Social Security in the Department of Health and Human Services (where Social Security was lodged until legislation passed by Congress in 1994 returned it to the independent agency status with which it began) that the Agency did "maintain an electronic data base that includes portions of the Social Security Act and regulations implementing the Act." He added,

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<sup>197</sup> Letter from Robert F. Bouchard, Senior Publisher, West Group to Peter W. Martin, Dec. 8, 1998 (copy on file).

<sup>198</sup> Letter from Robert F. Bouchard, Vice President/Publisher, West Group to Peter W. Martin, May 5, 2000 (copy on file).

however, that it was "the Agency's policy not to make this data base available to the public."<sup>199</sup> I also learned that while the program manual known as the POMS, then in the middle of a major revision, was held in electronic form, the data format was designed solely for publishing that multi-volume reference in print and would not be usable "for on line retrieval."<sup>200</sup> When Mead Data Central began building the LEXIS database in support of the online version of the treatise in 1990, the inclusion of a full set of Social Security Rulings and Acquiescence Rulings required the digitizing of a set of print copies by rekeying. Ultimately, I was able to secure the Hearings, Appeals, and Litigation Law Manual of the agency's Office of Hearings and Appeals as a word processing file. And in 1996, by which time some agency staff were using the Clark Boardman Callaghan CD-ROM, the Social Security Administration was both able and willing to furnish a revised POMS in electronic form.

## VI. Market for the CD-ROM

The first full year after its release, 1995, Social Security Plus had 1,398 subscribers. The Thomson merger with West halted delivery of such details to me, but I infer from the level of royalties paid that the number held at roughly that level, well above 1,000, through contract termination in 1999.

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<sup>199</sup> Letter from Donald A. Gonya, Chief Counsel for Social Security, Office of the General Counsel, Department of Health & Human Services to Peter W. Martin, March 22, 1988 (copy on file).

<sup>200</sup> *Id.*