The purpose of this paper is to explore the copyrightability of legal briefs. This paper examines whether briefs are original enough to receive copyright protection, and who the author of such a work would be. Assuming copyright protection were granted, it then analyzes the arguments for fair use and a possible exception for public policy reasons. Finally, this paper considers the implications of copyrighted legal briefs for law libraries and possible solutions.

Headings:

Copyright

Law Libraries

Legal literature
THE COPYRIGHTABILITY OF LEGAL BRIEFS

by
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Introduction

Just because a document is available, and the custom has always been to copy and share that type of document, does not mean that someone could not one day raise a copyright claim against such use. In a recently filed lawsuit, two attorneys argue that LexisNexis and West have violated the copyrights in their legal briefs by placing them in electronic searchable databases. This is despite the fact that these very briefs are available to the public in print and are digitally available on PACER as part of Congress’s mandate for open records (Hamblett, 2012).

What is prompting the increased concern over copyright protection in legal briefs? Certainly, the easier access to briefs through computer technology is a factor. The new trend of protecting one’s intellectual property rights may be another factor, as may be the development of attorneys jumping from firm to firm, and the amplified risk that they may take their work with them, spreading the prevalence of copying (Issacs, 2006, p. 393).

As of yet, no court has ruled on the copyrightability of legal briefs (Issacs, 2006, p. 402). However, that does not mean that briefs are not eligible for copyright protection. It merely indicates, as is often the case in civil actions, that the litigation costs are higher than the potential rewards (Field, 2008, p. 145).
Background

Definition

A brief is a written argument prepared for a court case by an attorney (Whiteman, 2005, p. 484). Every court has its own rules that govern the type, content, and length of briefs that can be submitted to them (Whiteman, 2005, p. 468). For example, in the Supreme Court of the United States, a brief on the merits (either for the plaintiff or respondent) can be no more than 15,000 words (Sup. Ct. R. 33.1(g), 2010, p. 43). In the North Carolina Supreme Court, what determines the length of a brief is whether it has been composed in “nonproportionally spaced type” or “proportionally spaced type” (N.C. R. App. P. 28(j), 2009, p. 44).

Modern litigation revolves around written, rather than oral, arguments (Cozine, 1994, p. 482). In fact, with its high case load, the judiciary is facing a large budgetary strain, meaning appellate courts are frequently deciding cases based on written briefs alone (Craig, 2005, p. 132). Briefs provide material about the facts and legal analysis of the case and are an important research tool for background information on the case. Attorneys litigating in a similar area of law regularly use them as starting points for their own briefs. Additionally, they supply attorneys with the reasoning behind the judge’s decision and the relevant legal authorities (Whiteman, 2005, p. 467). Legal briefs have become an essential element in the appellate process.

History of Legal Briefs

The use of briefs in the American legal system did not become a common practice until the nineteenth century (Cozine, 1994, pp. 483-484). The Supreme Court of the
United States issued the first Rule on arguments in written form in 1795, but it merely required submission of “a statement of the material points of the case” (Cozine, 1994, p. 486). Prior to this date, the American legal system followed that of the English and relied only on oral arguments (Cozine, 1994, p. 483; Whiteman, 2005, p. 468).

The Supreme Court Rule on the submission of written arguments was expanded in 1821 and again in 1833 (Cozine, 1994, pp. 486, 487). Shortly after 1833, the Court ruled that written arguments could be used in place of oral arguments. Moreover, in 1849, the Court shortened the time limit for oral arguments to only two hours per attorney. Thus, the briefs submitted after these Rules would likely have been closer to the modern written brief in content and length due to the new restrictions on oral arguments (Cozine, 1994, p. 488). This is mainly conjecture, however, since written briefs were not systematically retained by the Court until 1854 (Whiteman, 2005, p. 468).

**Briefs Today**

Under the federal Freedom of Information Act (FOIA) and state “sunshine laws,” people have the right to view and obtain copies of public—including litigation-related—documents (Emerson, 1976, p. 15; Stueber, 2007, p. 20). The primary goals of these laws are to inform citizens about their government and keep government operations as open and transparent as national security allows (“FOIA.gov,” 2011; “American Association of Law Libraries,” 2011). Prior to the 1990’s, court documents could be found only at courthouses and in law libraries, and only in print (Craig, 2005, p. 132; Whiteman, 2005, p. 468). Furthermore, few, if any, of these places retained a collection from multiple jurisdictions. Some law firms may have maintained an internal collection of their own
briefs for reference and subsequent use, but overall, copies of any particular brief were
difficult to obtain (Craig, 2005, p. 132). With the advent of e-filing, copies of legal briefs
have become increasingly easier to locate and acquire for both laypeople and law
professionals (Issacs, 2006, p. 398).

Today, electronic submission is used by a majority of federal and state courts
(Whiteman, 2005, p. 469). At the federal level, the CM/ECF (Case
Management/Electronic Case Files) system enables attorneys to file their briefs
electronically (Whiteman, 2005, p. 470). These documents from all federal jurisdictions
are then available to the public through PACER (Public Access to Court Electronic
Records) with a subscription and a small fee (“PACER,” n.d.).

In North Carolina, briefs can be submitted and retrieved electronically via the
“North Carolina Supreme Court and Court of Appeals Electronic Filing Site and
Document Library” (n.d.). Attorneys, court reporters, and pro ses must register to
electronically file documents, but no registration or fee is required to search the document
library. E-filed documents from either the North Carolina Supreme Court or Court of
Appeals can be retrieved as far back as 1998. (“North Carolina Supreme Court,”
“Frequently asked questions,” n.d.)

Copyrightability of Legal Briefs

Section 102 Subject Matter

Originality

In order for legal briefs to be protected by copyright, they must be “original”
(Copyright Act, 2010, § 102(a)). Originality means that the “work was created
independently” and has “at least some minimal degree of creativity” (Feist, 1991, p. 345). For a work to be independently created, the work simply needs to not have been substantially copied from an earlier work (Arnstein, 1936, p. 275). The second requirement, the threshold level of creativity, is a low bar as well (Wang, 2004, p. 713).4 There needs only to be more than a “trivial variation” from an earlier work that results in a sufficiently creative new work (Issacs, 2006, p. 404).

Section 102(b) of the Copyright Act (2010) bars copyright protection of ideas and facts, but copyright protection generally will extend to the parts of a work that are original (Feist, 1991, pp. 344, 348). For example, compilations of facts are generally copyrightable, as is the author’s unique expression of his ideas (Feist, 1991, p. 344; Wang, 2004, p. 718).5 Even though a majority of a brief will be a statement of the facts, not all attorneys will state the same facts or state those facts in the same order (Wang, 2004, p. 733). Thus, due to the variation in the selection and arrangement of the facts, parts of briefs will be original enough to receive copyright protection (Issacs, 2006, p. 404).

The legal arguments presented in briefs will likely be common to all briefs in that area of law. Likewise, any boilerplate language and legal terms used will create additional obstacles to a finding of originality (Issacs, 2006, p. 408). However, there is conceivably a fairly large number of ways that an attorney could argue his case, and if the attorney included especially expressive language, the brief may receive more than just the “thin” copyright protection given to compilations (Issacs, 2006, pp. 406-407, 409).
Authorship

Who the author of a work is matters a great deal because it determines who initially owns the work and who has rights in the work (Copyright Act, 2010, § 201(a); Nimmer, 2011, § 5.01[A]). It is also an important component for determining the duration of the work’s copyright protection (“United States Copyright Office,” 2011). For example, the general rule is that copyright protection lasts for the life of the author plus an additional seventy years (Copyright Act, 2010, § 302(a)). However, for a work made for hire, the copyright term is for ninety-five years from the year of first publication or one hundred twenty years from the year of creation, whichever expires first (Copyright Act, 2010, § 302(c)).

The Supreme Court has defined an author to be “he to whom anything owes its origin; originator; maker” (Burrow-Giles, 1884, pp. 57-58). One might assume that the author of a brief would be the attorney drafting the document, but legal writing is actually a collaborative process consisting of many attorneys within a firm and sometimes even including the client himself (Friedman, 2011, p. 528; Vaver, 1993, p. 665). Moreover, it is a longstanding tradition for attorneys to “borrow” from other attorney’s legal documents when writing their own, often without attribution (Friedman, 2011, p. 528; Issacs, 2006, p. 397). This is not a species of plagiarism but the accepted method of composing legal briefs (Friedman, 2011, pp. 528-529).

Section 201 of the Copyright Act (2010) designates the employer as the author of any work created by an employee “within the scope of employment” (Issacs, 2006, p. 400). This means that the law firm, not the individual attorney, is actually the owner of the copyright in the brief (Steuber, 2007, p. 20). The employer is not the client because,
unless the attorney is acting as in-house counsel, the attorney would be considered an independent contractor (Issacs, 2006, pp. 400, 401).

**Fair Use**

**Generally**

Were legal briefs found to be copyrightable, there would still be a strong argument for fair use. It is difficult to predict whether a court is going to find a use fair because a finding of fair use requires a case-by-case analysis (*Campbell*, 1994, p. 577; Wang, 2004, p. 725). Section 107 of the Copyright Act (2010) lists four factors for courts to consider when analyzing whether a use is fair:

“(1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
“(2) the nature of the copyrighted work;
“(3) the amount and substantiality of the proportion used in relation to the copyrighted work as a whole; and
“(4) the effect of the use upon the potential market for or value of the copyrighted work.”

This list is not exhaustive, however, and courts are free to consider other relevant factors (Issacs, 2006, pp. 421-422).

Fair use is “an equitable rule of reason,” so no one factor is determinative, and courts must weigh the four factors “in light of the purposes of copyright” (H. Rep. No. 94-1476, 1976, p. 65; *Campbell*, 1994, p. 578). Article I, Section 8 of the Constitution of the United States of America states that the purpose of copyright protection is “to promote the progress of science and the useful arts.” Copyright protection is primarily to ensure that the public benefits from the creative works authors produce (Issacs, 2006, p. 416). The limited monopoly granted to authors serves that purpose by
providing an incentive for authors to continue to create new works (Nimmer, 2011, §103[A]).

The first factor—the purpose and character of the use—has two elements to it. The first is whether the infringing work is for a commercial or nonprofit use. A work that is used for a commercial purpose is not *per se* unfair; instead, it is merely a “factor that tends to weigh against fair use” (*Harper & Row, Publishers, Inc. v. Nation Enters.*, as cited in *Campbell*, 1994, pp. 584-585). The central question when considering whether the purpose was commercial is whether the defendant is likely to profit from his infringing use of the copyrighted work, not whether making money from the sale of the work was his only motivation (*Harper & Row*, 1985, p. 562).

The second element of the first factor is whether the infringing work is transformative. A work is transformative if it “adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message” (*Campbell*, 1994, p. 579). The unauthorized work has to do more than be a mere substitute for the original work (*Campbell*, 1994, p. 579).

The second factor—the nature of the copyrighted work—looks at whether the original work is factual or fictional, as well as whether the work has been published or not (Nimmer, 2011, § 13.05[A][2]). If the original work is factual, it is more likely that this factor will weigh in favor of the defendant because there is “a greater need to disseminate factual works than works of fiction or fantasy” (*Harper & Row*, 1985, p. 563). If a work has yet to be published, this will weigh against a finding of fair use due to the copyright owner’s right to first distribution (*Harper & Row*, 1985, p. 564).
The third factor—the amount and substantiality of the portion of the copyrighted work used—is both a quantitative and qualitative analysis (Campbell, 1994, p. 587). Generally, the more a defendant copies from the original work, the less likely it will be found a fair use (Issacs, 2006, p. 431). However, the Supreme Court has held that the degree to which copying of an original work is reasonable “varies with the purpose and character of the use” (Campbell, 1994, pp. 586-587). Thus, copying of an entire work may be permissible in some circumstances (Nimmer, 2011, § 13.05[A][3]).

Practically, the fourth factor—the effect of the use upon the potential market—has developed into the most important factor in the fair use analysis. In determining the market harm to the copyright holder, courts take into account not only the use by this one defendant, but the harm such use would create if it were unrestrained and widespread (Nimmer, 2011, §13.05[A][4]). Any market in which a copyright holder is reasonably likely to enter is also considered (Campbell, 1994, p. 592). Whether the unauthorized work would cause any harm to the copyright holder depends significantly on how transformed the new work is from the original; the more transformative the work, the less likely it will supplant the market for the original (Bill Graham Archives, 2005, p. 332; Campbell, 1994, p. 591).

Even after these four factors are analyzed, courts still have to weigh them with the ultimate goal of copyright in mind: to encourage creative works that will benefit the public (Campbell, 1994, p. 578; Issacs, 2006, p. 415). When a court finds, after weighing the fair use factors, that upholding copyright protection would provide greater incentive than is necessary to ensure the creation of new works, then doing so would not serve the purpose of copyright. Thus, where a new work would afford a significant benefit to
society, courts should find fair use unless there is a showing of “some meaningful likelihood of future harm” (Issacs, 2006, pp. 417, 427).16

Applied to Legal Briefs

Whether copying of legal briefs would be considered fair use or not is anyone’s guess right now since there has been no litigation on the subject (Kobayashi & Ribstein, 2004, p. 753).17 However, there is a persuasive argument for finding fair use under the four-factor test.

The first factor in the fair use analysis would weigh against a finding of fair use because the unauthorized use is both commercial and not transformative. The purpose behind copying another’s brief is to use it in the representation of a client, which is unquestionably a commercial purpose (Issacs, 2006, pp. 431-432). Furthermore, the copied brief would not be transformative since it would be used for the same purpose as the original—i.e., to argue a case (Issacs, 2006, p. 432). It would be nothing more than a substitute for the original (Campbell, 1994, p. 579).

The copying of briefs to display in an electronic database would not be transformative either. However, if the database were used for a purpose that would add to the public’s knowledge base, such as creating a searchable index, there would be a stronger argument that the use is transformative (Band, 2009, pp. 241-242). The Supreme Court has held that the fair use analysis needs to be flexible, especially when dealing with changing technology (H. Rep. No. 94-1476, as cited in Sony, 1984, pp. 431-432).

The nature of legal briefs would favor a finding of fair use. For the same reasons it is hard to determine whether briefs even have enough originality to receive copyright
protection, legal briefs are closer to factual works that need less copyright protection (Field, 2008, p. 132). If briefs do manage to have enough originality to warrant copyright protection, it will be based mainly on the author’s selection and arrangement of the facts, rather than on an attorney’s overly creative expression. An attorney’s primary concern when drafting a brief is stating the argument clearly and persuasively, not to write a masterpiece (Issacs, 2006, p. 432).

The amount and substantiality of the portion used is a difficult factor to weigh because it will vary on a case-by-case basis. It would probably weigh against a defendant who copied a brief verbatim (Field, 2008, p. 130). That is not very likely however, given that at least the facts of the case would have to change for each case. More frequently, only parts of a brief will be copied, and that makes it more difficult to hypothesize how a court would rule on this factor (Issacs, 2006, pp. 430, 431).

The lack of potential harm to the market for the original would tend to favor a finding of fair use. Wang (2004) argues that an attorney who copies a brief is “free-riding” because he is able to compete with the attorney who originally drafted the brief by offering lower fees than if he had to draft a brief from scratch (p. 738). This theory does not take into account the fact that clients often hire attorneys for reasons other than cost and for more than just to draft a particular document (Issacs, 2006, pp. 435, 436).

There may be a potential market for the licensing of legal briefs, especially to commercial databases. However, there are significant problems with relying on licensing when it comes to making legal briefs more accessible. Some attorneys will never agree to licensing terms, regardless of the offer (Issacs, 2006, p. 439). They may believe that by maintaining possession over their work, they will have some kind of advantage over other
attorneys, or that current clients will be offended by such a use of the work for which they paid so much (Issacs, 2006, p. 440). There is also the problem that negotiation costs for licensing briefs will be high due to the sheer volume of briefs and the multiple parties involved (Issacs, 2006, p. 441).

The highest cost associated with licensing legal briefs, however, would be to nonprofits. Any nonprofit organization that wishes to create a database of legal briefs will be most likely unable to afford the licensing terms. It would then have the options of either abandoning the project or obtaining consent from every owner of every brief it wishes to add to its database. All the benefits of increased accessibility, and in this instance, freely available to the public, would be defeated by a licensing scheme.

Finally, it is necessary to consider, even if the factors weigh towards a finding of fair use, whether a finding of fair use would promote the creation of new works. Most attorneys charge by the hour, and they are only able to charge for the time actually spent working on a case. This means they cannot charge a client for any copying from another work; they can only charge for time spent on adding new material or creating an entirely new work (Issacs, 2006, p. 434). Therefore, the limited monopoly conferred by the Copyright Clause is not the driving force behind, or even needed for, the creation of new briefs; rather it is the attorney’s inability to charge for time using a previous brief, as well as his duty “to provide competent representation to a client” (Issacs, 2006, p. 435; Model Code, 2009, R. 1.1).

Although it is never certain whether fair use will be a successful defense against copyright infringement, in the case of legal briefs, there appears to be a strong case for it. While the first and third factors might weigh against the defendant, the second and, most
importantly, the fourth favor fair use. Equally important, a finding of fair use would not diminish the creation of new briefs in any way.

A Public Policy Exception

Similar to the fair use argument, the Supreme Court established long ago that judicial opinions are not copyrightable (Wheaton, 1834). Under the “government works exception,” the Copyright Act (2010) has incorporated that holding, and the Copyright Office has a list of certain documents which cannot be copyrighted due to public policy reasons (§ 105; Compendium II, 1984, § 206.01). Even though legal briefs would not fall into this exception because they are not works created by a government employee, briefs should be excluded from copyright protection for similar public policy reasons.

The court in Veeck v. S. Bldg. Code Cong. Int’l, Inc. (2002) found that when a private work is adopted into law, the work enters the public domain (as cited in Kobayashi & Ribstein, 2011, p. 1178). Accordingly, when judges use parts of briefs in their judicial opinions, those parts are no longer protected by copyright (Kobayashi & Ribstein, 2011, p. 1178). Friedman (2011) stated that judges often copy from attorneys’ briefs when writing opinions (p. 529). Moreover, even if not specifically incorporated into the decision, judges rely on the submitted briefs for the legal arguments and reasoning in the case (Friedman, 2011, p. 520). Thus, an argument can be made that the briefs in a case are always part of the decision, whether they are incorporated or not.

In a judicial system founded on stare decisis, legal briefs are also very important because a court has to follow the precedent of the prior decision only if the facts of the new case are “indistinguishable” (Friedman, 2011, p. 524). The briefs from the winning
side are useful because they have received judicial approval, and an attorney can use them to convey his argument in a similar fashion. The briefs on the losing side are equally important because an attorney can find what reasoning the court rejected and either avoid that reasoning or find a way to make a persuasive argument that his facts are distinguishable from the facts in the prior case (Friedman, 2011, p. 525; Vaver, 1993, p. 676).

Attorneys, as professionals, should be willing to share their knowledge and expertise with each other (Vaver, 1993, p. 676). The sharing of legal documents is a longstanding tradition among attorneys (Issacs, 2006, p. 397). If an attorney has found a legal strategy that works, other attorneys and the public alike benefit from the sharing of that knowledge (Stueber, 2007, p. 19). Permitting attorneys and the public to have greater access to legal briefs would save both time and money, resulting in a more efficient and open legal system (Whiteman, 2005, p. 471).

**Impact on Law Libraries**

**Generally**

Law libraries serve a special purpose: they provide access to legal materials that are “fundamental to the principles of open government” (Cobb & Allen-Hart, 2005, p. 5). Our democratic society requires that citizens have access—within reasonable limits given national security concerns—to documents such as constitutions, statutes, regulations, and case law. “Librarians, archivists and other information professionals have long been the caretakers of legal information, assuring these resources are maintained in such a way that the valuable information will not be lost while providing access to them” (Cobb &
Allen-Hart, 2005, p. 5). Decisions about how that material is preserved, and in what formats, are crucial to a law library’s implicit promise to its patrons of making such information available.

Currently, legal materials exist in a variety of formats, including print, microfilm, and electronic. The major concern for law libraries is how to disseminate these materials to the broadest audience without losing the information contained within. Law libraries have to determine the best way to preserve these materials so that the information can continue to be available to everyone in the future (Cobb & Allen-Hart, 2005, p. 5). With shrinking budgets and the perpetual issue of never having enough space, “hundreds of print volumes are discarded every day all over the country” (Axtmann, 2003, p. 23). Law libraries are seeking ways to provide their patrons with continued access to a variety of legal resources, from federal and state statutes to case reporters to, in many cases, reams of court records, including lawyers’ briefs, through digitization. Digitization is “[t]he process of creating digital files by scanning or otherwise converting analog materials” (Cobb & Allen-Hart, 2005, p. 9).

Digitization, while it may ease budgetary and space issues and make materials more widely available, also makes preservation more problematic. Without paper back-up, there is always the risk of losing the digitized content. As is the case with any digital content, preservation and maintaining accessibility are threatened by the risks of technological obsolescence, as well as by the costs of managing the content. Technology rapidly changes, and the hardware and software used to access and store the digital content has to be continually upgraded in order for the content to remain accessible. This content also has to be managed. Electronic materials are not much use if there is no way
to easily locate the information needed. The materials are even more useless if the server crashes and the website goes down (Cobb & Allen-Hart, 2005, p. 11).

**Digitization & Copyright**

Any library that provides legal briefs electronically to its patrons has to consider the consequences of copyright on such material, and that makes law libraries especially relevant in this context. Some law libraries, in an attempt to tackle both their budget and space issues, have already started digitizing parts of their collections. Legal briefs are great resources to digitize as these collections take up a massive amount of shelf space and increased access to briefs will benefit library patrons. The attorney who wants to find a specific brief would not have to make his or her way to the library itself, and then wade through mounds of material which may or may not be well cataloged, or call the library’s reference desk hoping that the person who answers has the time and knowledge to help. For example, the Creighton University School of Law Library scanned, ran OCR software, and added metadata for 3725 Nebraska Supreme Court and Court of Appeals briefs. These briefs, going back to 2006, are now freely available on the library’s website, and the library has plans to continue digitizing its briefs collection (“Legal Information Preservation Alliance,” 2011). Digitized and made available by the law library, briefs are more accessible than ever, and the library itself has likely gained a broader patron base via attorneys who know the library can be relied upon for an important source of legal research.

The difficulty of digitizing briefs, and the reason most law libraries are averse to doing so, is the risk of prosecution for copyright infringement. By digitizing a work under
copyright protection and making it available to patrons, libraries are infringing a copyright owner’s reproduction and distribution rights (Laster, 2007, p. 27). A library might be exempt from any statutory damages if it can demonstrate it had a reasonable belief that its use was fair or if it is part of a state university—and therefore immune from copyright infringement suits. However, it is still possible for the copyright holder to receive an injunction against the library, forcing it to take down the digitized content (Hirtle, Hudson, & Kenyon, 2009, pp. 193-213).

It is possible, under the current economic circumstances, that most law libraries will not risk the cost of digitizing legal briefs for fear of liability. A great benefit could be had if briefs and all the materials associated with court records could be transformed from shelves bending under the weight of bound or unbound stacks of such material to easily manageable digital records.

**Possible Solutions**

Protecting legal briefs under copyright could lead to due process concerns (Kobayashi & Ribstein, 2004, p. 755). Therefore, attorneys might look to other doctrines, such as misappropriation, attorney work product, or plagiarism, to protect briefs without resorting to the enhanced protection copyright affords (Kobayashi & Ribstein, 2004, p. 755; Moïse, 2011, p. 47). Congress could also enact an amendment to the Copyright Act resulting in no copyright protection for legal briefs (Vaver, 1993, p. 681). Similarly, legal precedence could establish that briefs are generally not copyrightable. Without copyright protection, legal briefs would be in the public domain and be available to all.
Another option is for courts to limit the protection granted to legal briefs (Vaver, 1993, p. 681). For example, an attorney could bring an infringement claim against the commercial publication of his brief, but not against the granting of free public access. Alternatively, Congress could incorporate litigation records into an exception to copyright.

**Conclusion**

Legal briefs, with all their factual and legal arguments, do not contain very much original material. The originality requirement for copyright, however, is very low, and legal briefs would meet that requirement—if not by their content alone, then by the selection and arrangement of the facts and arguments.

Even if legal briefs are entitled to copyright protection, though, many more issues still remain unresolved. Who should be the author of a legal brief? Is copying of the brief fair use? Should legal briefs be in the public domain because of public policy reasons? The answers to these questions have a pronounced impact on the extent to which legal briefs can be copied, used, and distributed.

Legal writing is so collaborative in nature that it is hard to pinpoint one individual as the author. Furthermore, as a work for hire, the firm is the actual author of any brief written by any attorney who works for it. Once legal briefs are held to be protected by copyright, anyone who wants to use them will have to contact the copyright owner to receive permission to use them. Determining who the author is determines who the initial owner is, and the difficulty of figuring out who the author is will make others even less inclined to use them.
The use of legal briefs should be considered fair because copyright protection is not necessary for inducing the creation of new briefs. Attorneys have incentives outside of copyright for the production of new briefs, and any copying by other attorneys will not harm the market for briefs.

Although there may be a potential market for the licensing of legal briefs, law libraries would likely not purchase licenses because they would already have the briefs in paper in their collection, would probably have access to the briefs through commercial databases, and would not be able to afford the licensing fees. A better solution would be to allow law libraries to post briefs online under fair use or some other exception. They would not harm the market for licensing to commercial databases because law libraries would only have one or a few jurisdictions in their collection, and they would not have the budget to make the online services as sophisticated as a commercial database.

Currently, works of government employees are not copyrightable. Legal briefs should be in the public domain for the same public policy reasons. Under due process, citizens have the right to access the law (Kobayashi & Ribstein, 2004, p. 749). Legal briefs underlie the reasoning and decision-making process of judicial opinions and help in the interpreting of judicial opinions. Allowing greater access to them would assist both attorneys and laypersons in better understanding the judicial process and ultimately make it more effectual and fair.
Notes

1 Black’s Law Dictionary (9th ed.) defines brief as “A written statement setting out the legal contentions of a party in litigation, esp. on appeal; a document prepared by counsel as the basis for arguing a case, consisting of legal and factual arguments and the authorities in support of them” (Garner, 2009, p. 217).

2 Briefs are used by both law students and practicing attorneys to understand the stages of litigation and learn the basic structure of writing a legal argument (Craig, 2005, p. 133; “The Supreme Court of Texas Blog”, 2012; Whiteman, 2005, p. 467). Briefs written by others can also help attorneys format their own briefs to fit the local court rules (Craig, 2005, p. 133).

3 Oral arguments in the Supreme Court have since been shortened even more: to only half an hour, unless the Court rules otherwise, as in the March 2012 oral arguments before the Court on the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (Sup. Ct. R. 28.3, 2010, p. 35).

4 “To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be” (Feist, 1991, p. 345).

5 Section 101 of the Copyright Act (2010) defines compilation as “a work…of preexisting materials or of data that are selected, coordinated or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”
6 The other components in determining duration of copyright protection are when a work was created and/or published, whether it is a foreign work, and whether it is already under copyright protection (“United States Copyright Office,” 2011). Consult Chapter 3 of the Copyright Act for the exact durational requirements.

7 “[Take the] case of a client who goes to his solicitor to draw up a will, assuming that the instructions do not exclude the will when drawn from being an original literary work, is it to be said that the solicitor thereby has a copyright in another man’s will during his lifetime and is entitled to the rights which the statute gives to the owner of a copyright? The whole idea seems to me absolutely absurd” – Mr. Justice Astbury, quoted in Harold Drabble, Ltd. V. Hycolite Mfg. Co. (as cited in Vaver, 1993, p. 661).

8 Courts disagree over whether “borrowing” from another brief without giving attribution is allowed under the Rules of Professional Conduct (Moïse, 2011, p. 47).

9 Nimmer (2011), a leading authority in the field of copyright, argues that there are “no valid grounds why legal forms…and other legal documents should not be protected under the law of copyright” (§ 2.18[E]).

10 Fair Use is an affirmative defense which “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster” (Nimmer, 2011, § 13.05; Stewart v. Abend, as cited in Campbell, 1994, p. 577).

11 “The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors” (Fox Film Corp., 1932, p. 127).
“[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works” (Campbell, 1994, p. 579).

“[S]ome works are closer to the core of intended copyright protection than others” (Campbell, 1994, p. 586).

Under section 106 of the Copyright Act (2010), the copyright owner has the exclusive right to distribute copies of the copyrighted work to the public.

The copying of an entire copyrighted work was found permissible in both Campbell v. Acuff-Rose Music, Inc. (1994) and Sony Corp. of Am. v. Universal City Studios, Inc. (1984).

The court in Perfect 10, Inc. v. Amazon.com, Inc. (2007) found Google’s incorporation of Perfect 10’s photographs into an electronic search engine “highly transformative” because of the social benefits associated with providing increased access to information (p. 1165).

In fact, two authors who have analyzed fair use as applied to legal documents have come to opposite conclusions. Issacs (2006) determined that any copying of litigation documents would be fair use, while Wang (2004) found that the copying of legal complaints would not constitute fair use (p. 446; pp. 739-740).

This argument might be applicable in class action suits where attorneys are competing for clients or to be appointed lead attorney (Kobayashi & Ribstein, 2004, p. 752).

The American Bar Association (1993) has opined that “the lawyer who has agreed to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than she actually spent on the client’s behalf…A lawyer who is able to
reuse old work product has not re-earned the hours previously billed and compensated when the work product was first generated.”

20 Wang (2004) makes the unpersuasive argument that attorneys will lack incentive to be the first to draft a legal document since they will not be protected from other attorneys copying it. Thus, they will wait around for another attorney to be the first so they can simply copy that attorney’s work (p. 738).

21 The Supreme Court extended this doctrine to state court decisions in Banks v. Manchester (1888).

22 “Edicts of government, such as judicial opinions, administrative rulings, legislative enactments, public ordinances, and similar official legal documents are not copyrightable for reasons of public policy” (Compendium II, 1984, § 206.01).
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