

# FREEING THE LAW: CASE REPORTER COPYRIGHT AND THE UNIVERSAL CITATION SYSTEM\*

JAMES H. WYMAN\*\*

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## I. INTRODUCTION

K. must remember that the proceedings were not public; they could certainly, if the Court considered it necessary, become public, but the Law did not prescribe that they must be made

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public. Naturally, therefore, the legal records of the case . . . were inaccessible to the accused and his counsel, consequently one did not know in general, or at least did not know with any precision, what charges to meet in the first plea; accordingly it could only be by pure chance that it contained really relevant matter.<sup>1</sup>

Franz Kafka

The striking and seemingly sudden rise of the Internet has had a dramatic effect upon public access to information. For a minimal monthly fee—or even for no charge<sup>2</sup>—citizens with a computer and a modem are able to instantly browse anything from their Senator's most recent musings in the Congressional Record<sup>3</sup> to the latest notices of proposed rulemaking in the Federal Register.<sup>4</sup> Perhaps nowhere have the ramifications of such readily available information been as intensely debated as they have been in the legal profession. For twenty years, case law has been electronically available to the bench and bar via the WESTLAW and LEXIS computer-assisted legal research services, albeit at a steep price.<sup>5</sup> The prospect of an extensive body of case law archived on the Internet and inexpensive CD-ROMs has engendered a stormy and sometimes cantankerous debate among information activists, law librarians, and legal publishers.

The courts of this country—for whom “[i]t is emphatically the province and duty . . . to say what the law is”<sup>6</sup>—have slowly begun to promulgate their decisions on “what the law is” over the Internet.<sup>7</sup> In part because of the enterprising offices of several

1. FRANZ KAFKA, *THE TRIAL* 115 (Willa & Edwin Muir trans., Schocken Books 1988) (1925).

2. A number of communities throughout the United States have set up, generally through public libraries, FreeNet systems that provide free access to the Internet. See Rob Pegoraro, *Free; The Info Freeway; On-Line on the Cheap*, WASH. POST, June 28, 1995, at R5.

3. See Search Full Text of the Congressional Record—104th Congress, available at <http://thomas.loc.gov/home/r104query.html> (Aug. 16, 1996).

4. See, e.g., GPO Access on the Web, available at <http://thorplus.lib.purdue.edu/vlibrary/reference/gpo/index.html> (Aug. 16, 1996).

5. Both WESTLAW and LEXIS charge upwards of \$200 per hour for the use of their services. See Susan Hansen, *Fending Off the Future*, AM. LAW., Sept. 1994, at 76.

6. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

7. Although a bulletin board system (BBS) is not strictly a part of the Internet, each U.S. Court of Appeals has a BBS through which decisions can be retrieved for 75 cents a minute. Laura Mansnerus, *Easing Limits on Legal Publishing*, N.Y. TIMES, Oct. 9, 1995, at D5. In addition, many state supreme courts place their opinions on a BBS as well. However, a number of courts delete older cases on their BBSs and replace them with newer cases. Morenike Efuntade, *Alternative Case Citation Issue Examined* by Joint DOJ-Judicial Group, U.S. L. WEEK—DAILY ED., May 1, 1995, available in LEXIS, News library, Wires file. Moreover, a BBS can only be accessed by dialing—usually while incurring long distance tolls—a dedicated phone line the court has set up for its BBS. See *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 833-34 (E.D. Pa. 1996).

law schools around the nation,<sup>8</sup> the opinions of the U.S. Supreme Court,<sup>9</sup> all U.S. Courts of Appeals,<sup>10</sup> and over a third of all state supreme courts<sup>11</sup> are now available on the Internet's World Wide Web. Far from providing a complete body of case law to the user, however, these Web sites generally offer opinions dating back a few years at most.<sup>12</sup>

More important, though, is the fact that the opinions on the Internet are virtually useless to anyone who wishes to cite them in a court document.<sup>13</sup> Almost all federal courts and a large number of state courts require citations that contain the page numbers of West Publishing Company's case reporters.<sup>14</sup> Although it is in almost all other respects an outstanding corporate citizen, West's assertion of copyright in its case reporter pagination<sup>15</sup>

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8. See, e.g., Bill Rankin, *Law Libraries: Emory Offering Court Rules*, *Legal Documents*, ATLANTA J. & CONST., Feb. 14, 1996, at D7.

9. Decisions of the U.S. Supreme Court, available at <http://www.law.cornell.edu/supct/supct.table.html> (Aug. 16, 1996) (providing all decisions since 1990).

10. A list of the U.S. Courts of Appeals, the addresses of the Web sites containing their opinions, and the dates of the earliest opinions available may be found in the Appendix to this Comment.

11. As of August 1996, 19 state supreme courts had World Wide Web sites that provided and archived their opinions. A list of these courts, their Web site addresses, and the dates of the earliest opinions available may be found in the Appendix to this Comment.

12. See Proposed Final Judgment and Competitive Impact Statement, *United States v. Thomson Corp.*, 61 Fed. Reg. 35,250, 35,261 (1996) ("The Internet does not provide access to historical opinions.").

13. *Id.* ("[T]he case law offered on the Internet does not provide citations that are accepted by courts or are relied on by attorneys.").

14. See, e.g., D.C. CIR. R. 28(b) ("Citations to decisions of this court shall be to the Federal Reporter."); 3D CIR. R. 28.3(a) ("[C]itations to federal opinions that have been reported shall be to the United States Reports, the Federal Reporter, the Federal Supplement or the Federal Rules Decisions . . ."); MISS. R. APP. P. 28(e) ("[A]ll Mississippi cases shall be cited to both the Southern Reporter and, in cases decided prior to 1967, the official Mississippi Reports."); IND. R. APP. P. 15(C) ("The North [E]astern Reporter shall constitute the official reporter of the Indiana Supreme Court and the Indiana Court of Appeals.").

15. West claims that the pagination in its reporters is a reflection of its copyrighted selection and arrangement of cases and that the use of its page numbers therefore constitutes copyright infringement. See *West Publishing Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1227 (8th Cir. 1986), cert. denied, 479 U.S. 1070 (1987); see also discussion *infra* part III.A. Although West does not claim copyright in its case reporter pagination *per se*, see *Joint Stipulation of Facts* ¶ 31, *Oasis Publishing Co., Inc. v. West Publishing Co.*, 924 F. Supp. 918 (D. Minn. 1996) (No. 3-95-563), for simplicity's sake, this Comment treats West's claim of copyright in its selection and arrangement of cases as if it were a claim of copyright in the pagination of its reporters.

On February 26, 1996, the Thomson Corporation, a diversified Canadian publishing concern, announced that it was purchasing West Publishing Company for \$3.43 billion dollars. See Iver Peterson, *Thomson to Buy Legal Publisher in a \$3.43 Billion Cash Accord*, N.Y. TIMES, Feb. 27, 1996, at D1. The Justice Department gave conditional approval to the purchase on June 19, 1996. See Iver Peterson, *West Publishing Purchase by Thomson is Approved*, N.Y. TIMES, June 20, 1996, at D6. In addition to requiring West to sell off 58 electronic publications, the Justice Department's settlement also requires West to license the pagination of its case reporters. *Id.* The proposed final judgment specifically states, however, that the settlement "should not be read to suggest that . . . a license is required"

precludes the providers of opinions on the Internet and CD-ROMs from including star pagination<sup>16</sup> to the West reporters. The result is clear: the judiciary says “what the law is,” yet drastically limits its unfettered electronic use by requiring citation to case law enshrouded in the copyrighted print volumes of a private vendor. While this limitation may be of little concern to the larger law firms that can afford to conduct electronic legal research via WESTLAW or LEXIS—or for that matter to the judiciary, to whom these services are frequently provided either entirely free or at steep discounts—less well-heeled parties are put at a disadvantage. In the end, the public pays, either through increased legal services costs or less effective legal representation.

This Comment discusses the issues underlying the debate over electronic case law citation. Part II provides an historical background that begins with the seminal case law copyright decisions of the nineteenth century and concludes with the rise of the West Publishing Company and LEXIS. Part III explores West Publishing’s pagination copyright claim, from its recognition by the Eighth Circuit in *West Publishing Co. v. Mead Data Central, Inc.*,<sup>17</sup> to its continuing tenability in light of the U.S. Supreme Court’s 1991 decision in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*<sup>18</sup> and ongoing litigation. Part III also examines the obstacles confronting the possibility of a complete archive of case law on the Internet and the more ready availability of case law on inexpensive CD-ROMs. Part IV explores the alternative, medium-neutral citation systems that have recently been offered and discusses the practical application of such a system, using Florida as an example. Finally, Part V concludes that the judiciary should recognize the changing nature of legal research by moving to adopt a universal citation system that does not favor any particular vendor or medium.

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and that the settlement “shall have no impact whatsoever on any adjudication concerning these matters.” Proposed Final Judgment and Competitive Impact Statement, *United States v. Thomson Corp.*, 61 Fed. Reg. 35,250, 35,251 (1996). The pagination license agreement itself provides for an escalating scale of royalties that begins at a yearly rate of \$.09 per 1,000 characters and increases to a yearly rate of \$.13 per 1,000 characters by the third year. *Id.* at 35,254. Critics have characterized the agreement as being too expensive, and one CD-ROM publisher who does not currently use West’s pagination estimated that a license would increase costs by 20 percent. Richard C. Reuben, *Creating a Gentle Publishing Giant*, A.B.A. J., Aug. 1996, at 22.

16. Star pagination is “a feature whereby a published case . . . includes the internal page breaks from another publisher’s version of the case.” *Oasis Publishing Co., Inc. v. West Publishing Co.*, 924 F. Supp 918, 921 (D. Minn. 1996).

17. 799 F.2d 1219 (8th Cir. 1986), cert. denied, 479 U.S. 1070 (1987).

18. 499 U.S. 340 (1991).

## II. HISTORICAL BACKGROUND

While there are a significant number of legal publishers in the United States, West Publishing Company has, by virtue of the judiciary's case reporter citation requirements, established a de facto monopoly over case law in this country. This notion of a quasi-monopoly is further buttressed by West's aggressive defense of its copyright claim in the pagination of its case reporters. However, the West defense is entirely at odds with the public policy articulated in over 150 years of precedent, and rests solely upon the decision of an Eighth Circuit panel that profoundly underestimated the ramifications of its holding.

### A. The Copyrightability of Case Reporters

#### 1. *Wheaton v. Peters*

The Eighth Circuit's decision to grant copyright protection to West's case reporter pagination<sup>19</sup> was one of the more recent in a long line of case reporter copyright decisions that stretch back to the era of Chief Justice John Marshall.

In 1834, the Marshall Court decided *Wheaton v. Peters*.<sup>20</sup> Richard Peters, Jr. began his tenure as the fourth Reporter of Decisions for the U.S. Supreme Court in 1828.<sup>21</sup> After recognizing the prohibitive cost of owning a complete set of the Court's opinions to date, Peters developed a plan to publish the reports of his predecessors' twenty-five volumes in a condensed six-volume version for less than a third of the price of the originals.<sup>22</sup> Although Peters planned to publish no more than "a 'Digest' of the facts of the Cases and the opinions of the Court,"<sup>23</sup> his immediate predecessor, Henry Wheaton, filed a bill in equity in 1831 alleging copyright infringement and seeking to enjoin Peters from further publication of Peters' Condensed Reports.<sup>24</sup>

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19. See *West Publishing Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219 (8th Cir. 1986), cert. denied, 479 U.S. 1070 (1987); see also discussion *infra* part III.A.

20. 33 U.S. 591 (1834).

21. See Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1358 (1985).

22. *Id.* at 1365.

23. *Id.* at 1367 (quoting Letter from Richard Peters, Jr. to William Cranch (Aug. 14, 1828)).

24. *Id.* at 1370. The first three of the four volumes of Alexander Dallas, the unofficial first Reporter of Decisions who died in 1817, had already entered the public domain. *Id.* at 1366 n.428. The 45 pages of Supreme Court decisions in Dallas' fourth volume were apparently of insufficient interest to his heirs and assigns to warrant litigation. *Id.* William Cranch, the Court's second Reporter of Decisions, agreed to settle with Peters out of court in return for 50 copies of Peters' Condensed Reports. *Id.* at 1369.

Wheaton v. Peters was the Supreme Court's first decision on copyright law.<sup>25</sup> The Court found that rather than sanctioning any existing common law copyright, the Copyright Act of 1790 created a new statutory right.<sup>26</sup> To obtain this statutory right, which Congress created to execute the Copyright Clause of the Constitution,<sup>27</sup> an author had to substantially comply with the Congress's requirements.<sup>28</sup> More important, however, was the Court's pronouncement on what was, as one commentator has put it, the "ultimate question in the case[:] . . . whether [judicial opinions], embodying as they do the law of the land, might be the subject of private property at all."<sup>29</sup> Justice McLean, writing for the majority—and supplying no reasoning or analysis at all—observed in a terse concluding paragraph that "[i]t may be proper to remark that the court are unanimously of [the] opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right."<sup>30</sup>

The Court apparently adopted the reasoning of Peters' counsel. Thomas Sergeant had argued that the Court had supplied its opinions to Wheaton "not for his own sake, but for the benefit and use of the public; not for his own exclusive property, but for the free and unrestrained use of the citizens of the United States."<sup>31</sup> Peters' other counsel, J.R. Ingersoll, was even more blunt:

[I]n all countries that are subject to the sovereignty of the laws, it is held that their promulgation is as essential as their existence. . . . The extended principles of national law . . . are fairly and authoritatively known only as they are promulgated from this bench. It is therefore the true policy, influenced by the essential spirit of the government, that laws of every description should be universally diffused. To fetter or restrain their dissemination, must be to counteract this policy. To limit, or even to regulate it, would, in fact, produce the same effect. Nothing

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25. See L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 732 (1989).

26. *Wheaton v. Peters*, 33 U.S. 591, 661 (1834).

27. Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

28. *Wheaton*, 33 U.S. at 664.

29. *Patterson & Joyce*, *supra* note 25, at 733.

30. *Wheaton*, 33 U.S. at 668.

31. *Id.* at 638.

can be done, consistently with our free institutions, except to encourage it and promote it.<sup>32</sup>

The impact of the Court's opinion was sudden and extensive. Where case reports had once been scarce because of the inflated prices charged by the owners of copyrights in the volumes, publishers around the country now raced to put out their own, presumably lower-priced editions.<sup>33</sup> The law was thus more readily available to the citizenry than ever before. Wheaton laid the foundation for the Court's "bedrock policy . . . that the public should have maximum access to the law."<sup>34</sup>

## 2. Callaghan v. Myers

In 1888, the Court affirmed Wheaton in *Banks v. Manchester*,<sup>35</sup> framing its holding denying copyright to the work of an official state reporter as a matter of public policy.<sup>36</sup> The Court had yet to rule, however, upon the thornier question of whether anyone might be entitled to copyright in case reporters as whole. That opportunity came almost immediately. *Callaghan v. Myers*,<sup>37</sup> decided the same term as *Banks*, involved a fact pattern similar to Wheaton. Callaghan & Co. owned the copyright on the first thirty-one volumes of the Illinois Supreme Court Reports, while E.B. Myers owned the copyright on volumes thirty-two through forty-six.<sup>38</sup> Callaghan, wishing to publish a complete set of reports, attempted to buy the rights to the subsequent volumes from Myers.<sup>39</sup> Callaghan refused to pay the price asked by Myers, however, and proceeded to reprint the Myers volumes with, among other things, marginally altered headnotes.<sup>40</sup> Myers sued Callaghan. Despite Callaghan's argument that it had edited the opinions on its own, the circuit court found that the Callaghan

32. *Id.* at 619-20.

33. *Patterson & Joyce*, *supra* note 25, at 734.

34. *Id.* at 742.

35. 128 U.S. 244 (1888).

36. *Id.* at 253;

Judges . . . can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors. . . . The question is one of public policy, and there has always been a judicial consensus, from the time of [Wheaton], that no copyright could, under the statutes passed by [C]ongress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties. The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all . . .

37. 128 U.S. 617 (1888).

38. *Id.* at 619-20.

39. *Id.* at 622.

40. *Id.*

reprints infringed Myers' copyright.<sup>41</sup> The Supreme Court affirmed.<sup>42</sup>

Justice Blatchford's opinion reaffirmed Wheaton, yet held that, in the absence of a statute to the contrary, public policy did not prohibit a reporter of cases from obtaining a copyright to protect his own intellectual property in a volume of law reports.<sup>43</sup> As to which material comprised a reporter's intellectual property, the Court found that this was "the matter not embracing the written opinions of the court, namely, the title-page, table of cases, head-notes, statements of facts, arguments of counsel, and index."<sup>44</sup> In dictum, Justice Blatchford noted:

Such work of the reporter, which may be the lawful subject of copyright, comprehends also the order of arrangement of the cases, the division of reports into volumes, the numbering and paging of the volumes, the table of the cases cited in the opinions, (where such table is made,) and the subdivision of the index into appropriate, condensed titles, involving the distribution of the subjects of the various head-notes, and cross-references, where such exist. A publication of the mere opinions of the court, in a volume, without more, would be comparatively valueless to any one.<sup>45</sup>

Although Justice Blatchford seemed to be announcing that the pagination of case reporters and their arrangement of cases are the lawful subject of copyright, he contradicted this notion later in the opinion when he stated that the Court "concur[red] with the conclusions of [Circuit Court] Judge Drummond."<sup>46</sup> One of those conclusions, quoted approvingly by the Court, was that

[t]he fact appears to be, and, indeed, it is not a subject of controversy, that in arranging the order of cases, and in the paging of the different volumes, [Myer's] edition has been followed by the defendants; but, while this is so, I should not feel inclined, merely on that account, and independent of other matters to give a decree to the plaintiff, although it is claimed that the arrangement of the cases and the paging of the volumes are protected by a copyright. Undoubtedly, in some cases, where are involved labor, talent, judgment, the classification and disposi-

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41. *Id.* at 625.

42. *Id.* at 667. Because Myers had apparently failed to deposit volume 32 for copyright protection by the required deadline of three months following publication, the Court reversed and remanded the circuit court's decree with respect to that volume.*Id.*; see also *id.* at 655.

43. *Id.* at 647.

44. *Id.* at 649.

45. *Id.*

46. *Id.* at 661.

tion of subjects in a book entitle it to a copyright. But the arrangement of law cases and the paging of the book may depend simply on the will of the printer, of the reporter, or publisher, or the order in which the cases have been decided, or upon other accidental circumstances. . . . [T]he arrangement of cases and the paging of the volumes is a labor inconsiderable in itself, and I regard it, not as an independent matter, but in connection with other similarities existing between the two editions . . . .<sup>47</sup>

Professors Craig Joyce and L. Ray Patterson point out that the seeming inconsistency disappears when viewed from a perspective grounded in nineteenth-century copyright theory. Myers' volumes were compilations consisting of distinct elements, and in the nineteenth century, copyright vested " 'in the materials as combined and arranged; in the union of form and substance. Any one may use the same materials in a different combination, or adopt a similar arrangement for different selections.' "<sup>48</sup> Thus, while the Court might have drawn the distinction more clearly, it evidently viewed arrangement and pagination as merely two elements that are not to be considered independently of the work as a whole.

### 3. Banks Law Publishing Co. v. Lawyers' Co-operative Publishing Co.

Unlike Callaghan, the Second Circuit's 1909 decision in *Banks Law Publishing Co. v. Lawyers' Co-operative Publishing Co.*<sup>49</sup> revolved entirely around the issue of copyright in case reporter arrangement and pagination. In 1882, in response to the lack of ready availability of U.S. Supreme Court decisions, the Lawyers' Co-operative Publishing Company (Lawyers' Co-op) decided to utilize a new printing technology involving stereotype plates and produce low-cost sets of Supreme Court reports.<sup>50</sup> The Banks Law Publishing Company published and owned the copyright in the *United States Reports*, the official reporter of the U.S. Supreme

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47. *Id.* at 661-62 (quoting *Myers v. Callaghan*, 20 F. 441, 442 (C.C.N.D Ill. 1884)) (emphasis added).

48. Patterson & Joyce, *Monopolizing the Law*, *supra* note 25, at 739 (quoting EATON S. DRONE, *A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES* 156 (1879)).

49. 169 F. 386 (2d Cir. 1909) (per curiam), appeal dismissed per stipulation, 223 U.S. 738 (1911).

50. THOMAS A. WOXLAND & PATTI J. OGDEN, *LANDMARKS IN AMERICAN LEGAL PUBLISHING* 41 (1990). The need for low-cost sets of Supreme Court opinions was understandable: complete sets of the 103 volumes of the *U.S. Reports* cost 500 dollars in 1882. *Id.* Lawyers' Co-op sold their editions for a dollar per volume.*Id.*

Court.<sup>51</sup> When Lawyers' Co-op began using star pagination to the U.S. Reports in its Lawyers' Edition of Supreme Court cases, Banks sued in equity, alleging infringement via the arrangement of cases, the division into volumes, the table of cases, and star pagination.<sup>52</sup>

Reducing the issue to whether arrangement and pagination were copyrightable, the trial court found for Lawyer's Co-op.<sup>53</sup> The Second Circuit, in a *per curiam* opinion, affirmed the lower court's findings, stating that "the arrangement of reported cases in sequence, their paging and distribution into volumes, are not features of such importance as to entitle the reporter to copyright protection of such details."<sup>54</sup> The court derived this language from the trial judge's opinion, which the Second Circuit adopted as its own.<sup>55</sup> Commenting upon the testimony at trial describing Banks' selection and arrangement of cases, the trial court said:

It is inconceivable to me that to merely arrange the cases in sequence (though concededly the reporter uses good judgment in so doing) and paging the volumes—things essential to be done to produce the volumes—are features or characteristics of such importance as to entitle him to copyright protection of such details. In my estimation no valid copyright for these elements or details alone can be secured to the official reporter. A different question would be presented if, for instance, infringement of the headnotes, or syllabuses, index digest, synopses of arguments or statements of the cases, or an abridgment thereof were claimed.<sup>56</sup>

The trial court then quoted, in full, the Callaghan trial court's remarks concerning arrangement and pagination, which Justice Blatchford had excerpted in his opinion. Remarking upon the significance of Justice Blatchford's approving quotation to the holding in Callaghan, the Lawyers' Co-op trial court observed:

This excerpt conspicuously intimates that, if the elements infringed consisted simply of the arrangement of the cases and the pagination, a different conclusion would have been reached.

No authority is cited which supports the contention that complainant is entitled to be protected in its pagination and arrangement of cases where the substance of the origination is not pirated . . . [F]or another to simply adopt the plan and

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51. Lawyers' Co-op, 169 F. at 386.

52. *Id.*

53. *Id.* at 391.

54. *Id.*

55. *Id.*

56. *Id.* at 390.

grouping of the cases, making marginal reference to the paging of the volumes issued under his direction, without in any way pirating the substance of his origination, is not enough, in my judgment, to establish infringement.<sup>57</sup>

After briefly referring to a Sixth Circuit case in which the plaintiff was denied an injunction against a competing volume containing the laws of Michigan,<sup>58</sup> the trial court concluded: "Applying this holding to the facts under consideration, an action for infringement does not lie if the defendant's asserted wrongdoing simply consisted of reprinting the decisions of the court with the paging, the defendant independently supplying headnotes, statements of cases, etc."<sup>59</sup>

Lawyers' Co-op cleared up whatever confusion Justice Blatchford had introduced into the maximum access policy underlying the Wheaton line of cases with his seemingly conflicting remarks about the copyrightability of pagination and arrangement of case reporters. The clear holding of Lawyers' Co-op is that the pagination and arrangement of court opinions are, as a matter of public policy, insufficient intellectual labor to warrant copyright protection.<sup>60</sup> Although the Lawyers' Co-op court reasoned that the pagination and arrangement of cases were elements necessary to the official reporter's statutory duties<sup>61</sup>—something the Eighth Circuit pointedly noted in its decision in *West Publishing Co. v. Mead Data Central, Inc.*<sup>62</sup>—the court went on to remark that, in other circumstances not involving case reporters, the pagination and arrangement "of the material matter of a book may be the subject of a valid copyright."<sup>63</sup> The court was understandably not able to foresee a time when court rules of citation would trans-

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57. *Id.*

58. See *Howell v. Miller*, 91 F. 129 (6th Cir. 1898). The Lawyers' Co-op trial court quoted Justice Harlan's opinion in *Howell*:

If Miller had cut from Howell's books, delivered to him by the state, the general laws of Michigan as therein printed, and the pages so cut out had been used when his compilation was printed—if this had been done, and nothing more—there would have been no ground of complaint.

Lawyers' Co-op, 169 F. at 390-91 (quoting *Howell*, 91 F. at 137).

59. Lawyers' Co-op, 169 F. at 391.

60. See *id.* at 390.

61. See *id.* ("[T]he statute prescribing his duties does not point out how the cases shall be arranged into volumes and printed, but to fittingly reproduce the decisions and opinions in volumes it is necessary to supply pagings, together with an orderly arrangement of the cases.").

62. 799 F.2d 1219, 1225-26 (8th Cir. 1986), cert. denied, 479 U.S. 1070 (1987); see also discussion *infra* part III.A.

63. Lawyers' Co-op, 169 F. at 390.

form the nominally unofficial status of a reporter into all but official status.

## B. The Rise of West and the Emergence of LEXIS

### 1. West Publishing Company: "Everywhere Familiar"

The West Publishing Company came into being amidst this evolution of nineteenth-century copyright jurisprudence involving case reporters. John B. West was a traveling salesman for an office supply company in Minnesota.<sup>64</sup> Having the opportunity to visit a number of attorneys, he discovered a common complaint: the publication of official court reports frequently lagged far behind the date courts issued their opinions.<sup>65</sup> Sensing a business opportunity, the twenty-four-year-old West began publishing *The Syllabi* in 1876.<sup>66</sup> An eight-page weekly, *The Syllabi* promised "prompt and reliable intelligence as to the various questions adjudicated by the Minnesota Courts at a date long prior to the publication of the State Reports."<sup>67</sup> Within six months, *The Syllabi's* growth and popularity were such that West revamped the format and coverage, renaming the publication the *North Western Reporter* and including the full text of all Minnesota Supreme Court decisions, Minnesota federal court decisions, and Wisconsin Supreme Court decisions "of special importance."<sup>68</sup>

Two years later, in 1879, John West transformed his publication into the first of his company's modern regional reporters.<sup>69</sup> The *North Western Reporter* contained the full text of all supreme court decisions from Iowa, Minnesota, Michigan, Nebraska, Wisconsin, and the Dakota Territory.<sup>70</sup> Over the next two years, West began publishing the *Federal Reporter* and the *Supreme Court Reporter*.<sup>71</sup> In 1885, the West Publishing Company, as it was now known, began publishing four new regional reporters, completing

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64. WOXLAND & OGDEN, *supra* note 50, at 38.

65. *Id.* This complaint provides an eerie parallel to the issue facing the legal publishing industry today. The print publication of court opinions still lags behind the date courts issue their opinions (albeit to a considerably lesser extent than in John West's day). However, the electronic publication of court opinions is virtually instantaneous. The modern-day version of the complaint John West heard is that these instantly published electronic opinions are useless because courts expect citations to the print versions. For a solution to this problem, see discussion *infra* part IV.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

what would eventually be known as the National Reporter System.<sup>72</sup> West Publishing thus became the first legal publishing company to provide nationwide coverage of court decisions. Because the National Reporter System published every appellate case in the country, West was criticized for being indiscriminate—for being a “waste-basket” or “blanket” publisher.<sup>73</sup> West took pride in this criticism, however, explaining that “[i]t is one of the greatest merits of the National Reporter System that it gives all the cases.”<sup>74</sup>

In 1887, West introduced the *American Digest*, an annual publication which contained digests of all the cases handed down in a given year.<sup>75</sup> In 1889, West hired John A. Mallory to work on the *American Digest*.<sup>76</sup> Mallory’s plan was to transform the *American Digest* into an annual update of a new publication, a comprehensive digest entitled the Century Edition of the *American Digest*, which would cover cases from 1658 through 1896.<sup>77</sup> Mallory completed the first volume in 1897 and promoted it at the annual meeting of the American Bar Association.<sup>78</sup> The *American Digest*, with its comprehensive classification system—to be dubbed the “Key Number” system in 1908<sup>79</sup>—was a rousing success. It soon became the standard system for conducting legal research. As West Publishing itself noted in the introduction to the First Decennial Edition of the *American Digest*, “The American Digest classification is now everywhere familiar to the bar; it is taught in law schools and in law offices . . . .”<sup>80</sup>

West’s success grew with the twentieth century. In addition to setting the standard for legal research methods, West’s comprehensive case reporter coverage enabled it to become the de facto official reporter for a number of jurisdictions. As of 1995, nineteen states had no official reporter, presumably requiring citation to one of West’s National Reporter System volumes.<sup>81</sup> Thirty-one

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72. *Id.*

73. *Id.*

74. *Id.* at 40 (quoting A Symposium of Law Publishers, 23 AM. L. REV. 396, 406-407 (1889)).

75. *Id.* at 60.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* (quoting 1 FIRST DECENNIAL EDITION OF THE AMERICAN DIGEST vii (1908)).

81. See Robert Berring, On Not Throwing Out the Baby: Planning the Future of Legal Information, 83 CAL. L. REV. 615, 633 n.66 (1995). Professor Berring, in an “informal survey,” found that only seven of the states without official reporters required citation to West publications. *Id.* at 631 n.61. However, in the absence of any alternative citation system, it is difficult to imagine a different source, save perhaps the not

states still have official reporters, a number of which are published by West.<sup>82</sup> In addition, while the official reporter of the U.S. Supreme Court remains the U.S. Reports, federal district and circuit courts have no official reporter; the de facto official reporters are West's Federal Reporter and Federal Supplement.<sup>83</sup> Finally, and perhaps most notably, the fifteenth edition of The Bluebook eliminated its requirement of parallel citation to both a state's official reporter and a West NRS reporter for out-of-state documents, requiring instead citation to West's NRS alone.<sup>84</sup>

Nevertheless, West's preeminence in legal publishing and legal research has been tied to its dominance of the printed page. The advent of the computer as an alternative, if not preferred, method of conducting legal research planted the seeds of a still-continuing revolution.

## 2. The Arrival of LEXIS

In the early 1960s, a team of University of Pittsburgh employees working under Professor John Horty converted the public health statutes of all fifty states into digital form, using punched cards whose codes were transferred to magnetic tape.<sup>85</sup> Horty's team moved beyond statutes, and by 1965 had put a selection of U.S. Supreme Court and Pennsylvania cases on magnetic tape.<sup>86</sup> To demonstrate the system, Horty would occasionally allow search requests by lawyers, who would mail or telephone their searches and, after the system ran the search overnight, would receive their search results by mail or telephone the next day.<sup>87</sup>

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terribly economical WESTLAW or LEXIS, to which a court in the remaining 12 states could allow citation.

82. See *id.* at 624 n.37. West only admits to publishing the official reporter for eight states. See Joint Stipulation of Facts ¶ 72, *Oasis Publishing Co., Inc. v. West Publishing Co.*, 924 F. Supp. 918 (D. Minn. 1996) (No. 3-95-563).

83. Professor Berring's informal survey turned up only 15 of 101 federal district and circuit courts that require citation to West publications. *Id.* at 631 n.61. Although West is the only publisher of lower federal court decisions in comprehensive book form, see *Matthew Bender & Co., Inc. v. West Publishing Co.*, No. 94 Civ. 0589, 1995 U.S. Dist. LEXIS 17688, at \*1-2 (S.D.N.Y. Nov. 28, 1995), presumably there is some flexibility allowed in citation to opinions not yet published in the Federal Reporter or the Federal Supplement.

84. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 169-215 (15th ed. 1991). Aside from law reviews, a number of courts require adherence to The Bluebook's citation requirements in court documents. See, e.g., FLA. R. APP. P. 9.800(n) ("All other citations shall be in the form prescribed by the latest edition of The Bluebook . . .").

85. William G. Harrington, A Brief History of Computer-Assisted Legal Research, 77 LAW LIBR. J. 543, 544 (1985).

86. *Id.*

87. *Id.*

The Ohio State Bar Association had heard of Horthy's work.<sup>88</sup> Deciding to develop a computer-assisted legal research service for Ohio lawyers, the Ohio group set forth a definition of the service it wanted: a nonindexed, full-text, on-line, and interactive system.<sup>89</sup> Nonindexing freed the user from the more rigid indexing systems such as the one used by the West digests, allowing the creation of "an ad hoc index specific to the problem at hand."<sup>90</sup> Full-text searching was a departure as well; traditional legal research with index-based digests involved searching headnotes or summaries.<sup>91</sup> On-line searching allowed the user to contact the computer directly, rather than by communicating search requests to intermediaries.<sup>92</sup> Finally, interactivity allowed the user to instantly respond to the results of a search by either amending or resubmitting search terms.<sup>93</sup>

The Ohio group, now organized into a nonprofit corporation called Ohio Bar Automated Research (OBAR), entered into a contract with Data Corporation, which had developed a nonindexed, full-text, on-line, and interactive system for the Air Force called (Data) Central.<sup>94</sup> The results of the OBAR experiment were mixed: while OBAR had demonstrated the feasibility of computer-assisted legal research, it had a number of problems that could only be solved by the investment of significant financial resources.<sup>95</sup> In 1969, the Mead Corporation acquired Data Corporation, apparently unaware of the latter's contractual obligation to OBAR.<sup>96</sup> Mead, however, recognized the potential for computer-assisted legal research and invested in and improved the system.<sup>97</sup> It formed a subsidiary, Mead Data Central (MDC), to develop and market the research service.<sup>98</sup> The OBAR organization sold its interest in the system to MDC.<sup>99</sup> By the end of 1972, MDC had made a number of improvements to the system, switching from printers to display terminals and revising the language and logic of the system.<sup>100</sup> MDC dubbed the new system LEXIS and

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88. *Id.* at 545.

89. *Id.*

90. *Id.* at 546.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 547-48.

95. *Id.* at 549-50.

96. *Id.* at 550.

97. *Id.*

98. *Id.*

99. *Id.* at 551.

100. *Id.*

introduced it at a news conference in April 1973.<sup>101</sup> By the end of the year, a number of major New York law firms were performing legal research on LEXIS.<sup>102</sup>

That same year, the West Publishing Company decided to enter the computer-assisted legal research business.<sup>103</sup> Its system—WESTLAW—went on-line exactly two years after MDC introduced LEXIS.<sup>104</sup> Unlike LEXIS, however, the WESTLAW database consisted entirely of West headnotes rather than the full text of opinions.<sup>105</sup> By the end of 1976, West began to build a full-text database.<sup>106</sup> Nevertheless, WESTLAW was widely regarded throughout the rest of the 1970s as vastly inferior to LEXIS.<sup>107</sup> In 1980, West began an overhaul of WESTLAW, adding new features and remedying design deficiencies such as the prolonged search times and frequent interruptions that had plagued the system in the 1970s.<sup>108</sup> By 1984, WESTLAW had become “a highly sophisticated, user-friendly research service.”<sup>109</sup> Possessing few advantages over WESTLAW, MDC announced in June 1985 that it would do something very much like what Lawyers’ Co-op had done almost a century earlier: it would provide star pagination in its database to the West National Reporter System.<sup>110</sup>

### III. DECONSTRUCTING THE WEST “MONOPOLY”

And then he continued: “Besides, you were quite right in what you said; I am in the confidence of the Court.” He paused, as if he wanted to give K. time to digest this fact. . . . K. abandoned any attempt at apology, for he did not want to deflect the conversation, nor did he want the painter to feel too important, and so become in a sense inaccessible, accordingly he asked: “Is your position an official appointment?” “No,” said the painter curtly, as if the question had cut him short. K., being anxious to keep him going, said: “Well, such unrecognized posts often carry more influence with them than the official ones.”<sup>111</sup>

Franz Kafka

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101. *Id.* at 552-53.

102. *Id.* at 553.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 554.

108. *Id.*

109. *Id.*

110. See Dan Oberdorfer, *West-Mead Data Copyright Suit Hearing Slated*, NAT’L L.J., Sept. 9, 1985, at 20.

111. KAFKA, *supra* note 1, at 147-48.

### A. West Publishing Co. v. Mead Data Central, Inc.

West responded to MDC's plans to implement star pagination in LEXIS by seeking an injunction in a Minnesota federal district court.<sup>112</sup> The district court granted the injunction,<sup>113</sup> and MDC appealed. The Eighth Circuit affirmed, finding that "West's arrangement is a copyrightable aspect of its compilation of cases, that the pagination of West's volumes reflects and expresses West's arrangement, and that MDC's intended use of West's page numbers infringes West's copyright in the arrangement."<sup>114</sup>

#### 1. The Opinion

The majority opinion in Mead methodically addressed MDC's series of arguments. MDC contended that case arrangement was per se uncopyrightable because it could meet neither the standard of originality nor the standard for consideration as the original work of an author,<sup>115</sup> both of which are basic requirements under the Copyright Act of 1976.<sup>116</sup> In response, the court pointed out that the standard for originality was minimal, meaning only that the work must have its origin with the author,<sup>117</sup> and that a work must be the product of only a slight degree of creative or intellectual labor to be the original work of an author.<sup>118</sup> Furthermore, the court observed that the Copyright Act provided protection for compilations and derivative works<sup>119</sup> and noted that "[a]n arrangement of opinions in a case reporter, no less than a compilation and arrangement of Shakespeare's sonnets, can qualify for copyright protection."<sup>120</sup> As support for its proposition, the court cited Callaghan.<sup>121</sup> Although noting the seeming discrepancy between Justice Blatchford's allusion to the copyrightability of pagination and arrangement and his approv-

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112. *Id.*

113. *West Publishing Co. v. Mead Data Cent., Inc.*, 616 F. Supp 1571, 1574 (D. Minn. 1985), *aff'd*, 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987).

114. *West Publishing Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1223 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987). West and MDC eventually settled out of court, with MDC reportedly agreeing to pay "tens of millions of dollars" to purchase a license from West for the use of its page numbers. Stephen Labaton, *Westlaw and Lexis Near Truce*, N.Y. TIMES, July 19, 1988, at D5.

115. *Id.*

116. See 17 U.S.C. § 102(a) (1994).

117. *Mead*, 799 F.2d at 1223 (citing *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128, 131 (8th Cir. 1985)).

118. *Id.* (citing *Goldstein v. California*, 412 U.S. 546, 561 (1973); MELVIN NIMMER, 1 NIMMER ON COPYRIGHT § 1.08(C)(1) (1985)).

119. *Id.* at 1223-24 (citing 17 U.S.C. §§ 101, 103).

120. *Id.* at 1224.

121. *Id.*

ing quotation of the circuit court's opinion indicating a different result,<sup>122</sup> the court nonetheless extracted a rule of sorts: "Callaghan establishes at least that there is no per se rule excluding case arrangement from copyright protection, and that instead, in each case the arrangement must be evaluated in light of the originality and intellectual-creation standards."<sup>123</sup>

MDC also argued that Lawyers' Co-op strongly supported its contention that case arrangement and pagination were insufficient to meet the required originality standard.<sup>124</sup> The Eighth Circuit, however, dismissed this contention, finding that the official status of the reporter in Lawyers' Co-op was dispositive in the denial of copyright protection.<sup>125</sup> MDC maintained further that the holding in Lawyers' Co-op did not depend upon the reporter's official status because the statute prescribing his duties did not specify how to arrange the cases or paginate the volumes.<sup>126</sup> Thus, MDC argued, the reporter exercised discretion and judgment in case arrangement and pagination, elements which the Lawyers' Co-op court must have viewed as involving insufficient intellectual labor for copyright purposes.<sup>127</sup> The Eighth Circuit agreed that the reporter had exercised independent judgment, but noted that the Lawyers' Co-op court "dismissed the matters in which the reporter exercised discretion as things done 'voluntarily and in evident compliance with the proper and faithful discharge of his official duties.'"<sup>128</sup> Moreover, the court continued, the Lawyers' Co-op court did not reach the question of whether that judgment met the originality and intellectual creation requirements because "it was unwilling to look past the fact that [arrangement and pagination] were done to meet the reporter's statutory obligations."<sup>129</sup> Additionally, the court pointed out that Callaghan involved an official reporter as well, yet the Callaghan Court did not find pagination and arrangement of cases per se uncopyrightable.<sup>130</sup> Concluding its discussion of Lawyers' Co-op,

122. *Id.* at 1225 ("The teaching of Callaghan with respect to the issues before us does not come through with unmistakable clarity.").

123. *Id.*

124. *Id.*

125. *Id.* ("[T]he ultimate rationale for the [Lawyers' Co-op] decision was that . . . because the reporter's statutory duties required case arrangement and pagination, these should not be considered the product of the reporter's intellectual labor.").

126. *Id.*

127. *Id.*

128. *Id.* at 1226 (quoting *Banks Law Publishing Co. v. Lawyers' Co-op. Publishing Co.*, 169 F. 386, 389-90 (2d Cir. 1909)).

129. *Id.*

130. *Id.*

the majority noted that the Second Circuit had required “a greater degree of intellectual creativity than the trend of modern cases” and had written its decision at a time when compilations and derivative works were neither expressly defined nor included in the Copyright Act.<sup>131</sup>

MDC added a twist to the discussion of official reporter status: it argued that West was indeed the official reporter for some states, and that therefore Lawyers’ Co-op, regardless of the linchpin upon which it turned, supported MDC’s view that West could not copyright its case arrangement and pagination.<sup>132</sup> The majority, however, viewed the denomination of a West’s regional reporter as “official” in orders discontinuing official state reporters as “mean[ing] something quite different from the title ‘official reporter’ held by Messrs. Wheaton and Peters.”<sup>133</sup> The court said it did “not believe” that any state employed West and controlled the details of its work.<sup>134</sup> Furthermore, the court added, even if it were willing to grant that West had some official status, it found that West had used “sufficient talent and industry in compiling and arranging cases” to qualify for copyright protection.<sup>135</sup>

Finding that there was nothing to preclude copyright in case arrangement and pagination, the Eighth Circuit then described what it felt was West’s “sufficient talent and industry” to meet the originality and intellectual creativity requirements.<sup>136</sup> West, according to the court, “collect[ed]” the opinions, separated state court decisions from federal court decisions, and assigned them—

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131. *Id.*

132. *Id.*

133. *Id.* Curiously, the Third Circuit came to the opposite conclusion about West during litigation unrelated to copyright claims. See *Lowenschuss v. West Publishing Co.*, 542 F.2d 180, 186 (3d Cir. 1976) (“Where, as here, no official reporter exists, a convincing argument may be made that West, an unofficial reporter, performs the same function as an official reporter and should be accorded the identical protection from liability for defamation when it publishes verbatim opinions of the courts.”).

134. *Mead*, 799 F.2d at 1226. It is interesting to speculate what the *Mead* court would have made of Florida’s codified arrangement with West. See FLA. STAT. § 25.381 (1995) (“[T]he Supreme Court and the Attorney General shall jointly enter into a contract with West Publishing . . . providing for the publication . . . of Florida Cases . . .”). A Minnesota federal district court would later find that regardless of whether Florida viewed West as its official reporter, the state’s contractual agreement reserving case arrangement copyright in West eliminated official status as a dispositive consideration. See *Oasis Publishing Co., Inc. v. West Publishing Co.*, 924 F. Supp. 918, 930 (D. Minn. 1996); see also discussion *infra* part III.B.

135. *Mead*, 799 F.2d at 1226.

136. It is worth noting at this point that the majority did not rely upon anything contained in the record for its examination of West’s arrangement and pagination process. See *id.* at 1237 (Oliver, J., dissenting) (“The record in this case does not indicate in any way how or by whom West’s page numbers are, in fact, created.”). In later litigation, West would stipulate as to its arrangement process. See *infra* note 234 and accompanying text.

on a geographical basis for state decisions and by court level for federal decisions—to the appropriate West reporter.<sup>137</sup> West then assigned opinions to a particular volume of the reporter and arranged them within the volume.<sup>138</sup> The court concluded that the process was “the result of considerable labor, talent, and judgment” and easily met the intellectual creativity requirement.<sup>139</sup>

Because it found West was entitled to copyright its arrangements, the court reduced MDC’s argument to its “insistence that all West seeks to protect is numbers on pages.”<sup>140</sup> The court agreed that if this were the case, MDC would win, because a mere sequence of numbers is not copyrightable.<sup>141</sup> However, the court reasoned that

protection for the numbers is not sought for their own sake. It is sought, rather, because access to these particular numbers—the “jump cites”—would give users of LEXIS a large part of what West has spent so much labor and industry in compiling, and would pro tanto reduce anyone’s need to buy West’s books. The key to this case, then, is not whether numbers are copyrightable, but whether the copyright on the books as a whole is infringed by the unauthorized appropriation of these particular numbers.<sup>142</sup>

The court went on to hold that the use of the page numbers would infringe West’s copyright in its arrangement.<sup>143</sup> To support its analysis, the majority used the example of LEXIS’s LEXSEE feature. A hypothetical LEXIS user might call up the first page in a West volume, page down through to the last page of the case, and then, having discerned the page number of the following case, use LEXSEE to bring that case to the screen.<sup>144</sup> LEXSEE would thus “permit LEXIS users to view the arrangement of cases in every volume of West’s National Reporter System.”<sup>145</sup> Moreover, the court found that even if this procedure were not possible, it would still find that MDC’s uses of star pagination infringed West’s copyright.<sup>146</sup> This was so, the court reasoned, because the jump cites within LEXIS cases gave LEXIS users the precise location

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137. Mead, 799 F.2d at 1226.

138. *Id.*

139. *Id.* at 1226-27. The court also found that West met the originality requirement because West did not copy its cases from another source. *Id.* at 1227.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

in West's case arrangement of that portion of the opinion the user is viewing.<sup>147</sup> In addition, the court observed that MDC's star pagination would obviate the need for consumers to purchase West's reporters and would thus adversely affect West's market position.<sup>148</sup>

Finally, in response to MDC's argument that the star pagination was not an infringement because West's page numbers were statements of pure fact, the court observed that MDC's proposed use of these facts was closer to constituting wholesale appropriation of the arrangement rather than an isolated use of the arrangement's factual aspects.<sup>149</sup> To support its reasoning that such an appropriation was an infringement, the majority cited *Hutchinson Telephone Co. v. Fronteer Directory*,<sup>150</sup> a case the Eighth Circuit had decided a year earlier: "The names, addresses, and phone numbers in a telephone directory are 'facts'; though isolated use of these facts is not copyright infringement, copying each and every listing is an infringement."<sup>151</sup>

## 2. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*

Five years after *Mead*, the U.S. Supreme Court decided *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*<sup>152</sup> Because *Feist* was the Supreme Court's first opportunity to interpret the 1976 Copyright Act's express provision granting copyright protection to factual compilations and derivative works,<sup>153</sup> it has a significant impact on any analysis of the holding in *Mead*.

*Rural Telephone Service Company, Inc.*, a public utility that provided telephone service in Kansas, published a telephone directory consisting of both white and yellow pages.<sup>154</sup> *Feist Publications, Inc.*, published telephone directories that covered wider geographic areas than is otherwise the norm.<sup>155</sup> *Rural* refused to license its listings to *Feist*.<sup>156</sup> *Feist* nevertheless extracted listings

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147. *Id.*

148. *Id.* at 1228.

149. *Id.*

150. 770 F.2d 128 (8th Cir. 1985).

151. *Mead*, 799 F.2d at 1228.

152. 499 U.S. 340 (1991).

153. An exhaustive look at *Feist* and its ramifications is beyond the scope of this Comment. For a detailed examination of *Feist*, see Jane C. Ginsburg, No "Sweat"? Copyright and Other Protection of Works of Information After *Feist v. Rural Telephone*, 92 COLUM. L. REV. 338 (1992).

154. *Feist*, 499 U.S. at 342.

155. *Id.* at 342-43.

156. *Id.* at 343.

from Rural's directory and published them in its own directory.<sup>157</sup> Rural sued for copyright infringement, the district court granted summary judgment to Rural, and the Court of Appeals affirmed.<sup>158</sup>

The Feist Court began its inquiry by noting the tension between two "well-established propositions": (1) facts are not copyrightable; and (2) compilations of facts "generally" are copyrightable.<sup>159</sup> The difference between the two lies in the requirement of originality, which the Court said "means only that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity."<sup>160</sup> The level of creativity required "is extremely low; even a slight amount will suffice."<sup>161</sup> The originality requirement, the Court added, is rooted in Article I, Section 8 of the Constitution, in which the terms "'authors' [and] 'writings' . . . presuppose a degree of originality."<sup>162</sup> Because facts do not owe their origin to an act of authorship, they are not original.<sup>163</sup> Compilations, however, are different:

Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws . . . . Thus, even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement.<sup>164</sup>

Nonetheless, the Court found that the copyright protection afforded to factual compilations is limited in a significant respect: "The mere fact that a work is copyrighted does not mean that every element of the work may be protected."<sup>165</sup> Only those elements original to the author are entitled to copyright protection.<sup>166</sup> If a factual compilation contains nothing but facts, protec-

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157. *Id.*

158. *Id.* at 344.

159. *Id.*

160. *Id.* at 345.

161. *Id.*

162. *Id.* at 346.

163. *Id.* at 347.

164. *Id.* at 348 (citations omitted).

165. *Id.*

166. *Id.*

tion is extended only to the selection and arrangement of those facts, and then only if the selection and arrangement are "original."<sup>167</sup> Thus, the Court observed, "copyright in a factual compilation is thin."<sup>168</sup>

The Feist Court repudiated the "sweat of the brow" line of factual compilation cases<sup>169</sup> in which "the underlying notion was that copyright was a reward for the hard work that went into compiling facts."<sup>170</sup> The "sweat of the brow" doctrine, the Court said, went beyond extending copyright protection to selection and arrangement and extended protection to the facts themselves.<sup>171</sup> Moreover, Congress had recognized the mistaken assumption of this line of cases and rectified it by defining "compilation" in the Copyright Act of 1976: "A 'compilation' is a work formed by the collection and assembling 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."<sup>172</sup> The Court noted that the focus on selection, coordination, and arrangement of facts was an application of the originality requirement.<sup>173</sup> More importantly, however, Congress had gone on to require that facts be selected, coordinated, or arranged "in such a way" that the resulting work is original:

This implies that some "ways" will trigger copyright, but that others will not. . . . Otherwise, the phrase "in such a way" is meaningless and Congress should have defined "compilation" simply as "a work formed by the collection and assembly of preexisting materials or data that are selected, coordinated, or arranged." That Congress did not do so is dispositive. . . . [W]e conclude that the statute envisions that there will be some fact-based works in which the selection, coordination, and arrangement are not sufficiently original to trigger copyright protection.<sup>174</sup>

The Court then considered whether Feist had copied anything original from Rural's directory. As Rural had already conceded that the names, addresses, and telephone numbers in its direc-

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167. *Id.* at 349.

168. *Id.*

169. The Court cited *Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484 (9th Cir. 1937), and *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83 (2d Cir.) cert. denied, 259 U.S. 581 (1922), as examples from this line of cases.

170. Feist, 499 U.S. at 352.

171. *Id.* at 353.

172. 17 U.S.C. § 101 (1994).

173. Feist, 499 U.S. at 358.

174. *Id.*

tory were “preexisting material”<sup>175</sup>—in other words, uncopyrightable facts—the question that remained for the Court was whether Rural had selected, coordinated, or arranged these facts in an original way. Describing Rural’s work as a “garden-variety white pages directory,” the Court held that the directory’s selection and arrangement did not satisfy the minimum standards for copyright protection.<sup>176</sup> Because it published “the most basic information” about its subscribers, “Rural’s selection of listings could not be more obvious.”<sup>177</sup> Moreover, Rural’s arrangement of the listings lacked the requisite originality as well:

The white pages do nothing more than list Rural’s subscribers in alphabetical order. This arrangement may, technically speaking, owe its origin to Rural; no one disputes that Rural undertook the task of alphabetizing the names itself. But there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. . . . It is not only unoriginal, it is practically inevitable. This time-honored tradition does not possess the minimal creative spark required by the Copyright Act and the Constitution.<sup>178</sup>

The Court found that while the Rural directory as a whole was entitled to copyright protection, the white pages “utterly lack[ed the] originality” necessary for copyright protection under the Copyright Act of 1976.<sup>179</sup> Feist’s use of the listings could therefore not constitute infringement, regardless of the effort Rural had expended in compiling its directory.

### 3. Analysis

#### a. The Tenability of Mead After Feist

What is perhaps most immediately noticeable about the Mead opinion when viewed in light of Feist is the Eighth Circuit’s reliance upon another white pages infringement case, *Hutchinson Telephone Co. v. Fronteer Directory*,<sup>180</sup> for both a standard for originality<sup>181</sup> and for its proposition that wholesale appropriation

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175. *Id.* at 361.

176. *Id.* at 362.

177. *Id.*

178. *Id.* at 363.

179. *Id.* at 364.

180. 770 F.2d 128 (8th Cir. 1985).

181. See *Mead*, 799 F.2d at 1223 (citing *Hutchinson*, 770 F.2d at 131).

of factual compilations always constitutes infringement.<sup>182</sup> Hutchinson has been called “the most specious of authority” by at least one post-Feist commentator;<sup>183</sup> it is probably more accurately described as having been entirely undermined by Feist. The Feist Court overruled not only Hutchinson’s standard for originality, but also its view of the degree of copyright protection extended to factual compilations.

Further, in dismissing MDC’s reliance upon Lawyers’ Co-op, the Mead court stated that the 1909 decision “requir[ed] a greater degree of intellectual creativity than the trend of modern cases.”<sup>184</sup> As support for this proposition, the Eighth Circuit cited *Rockford Map Publishers v. Directory Service Co.*,<sup>185</sup> a 1985 Seventh Circuit decision. The *Rockford Map* court, however, stated that “copyright depend[s] on the fact that the compiler ma[kes] a contribution—a new arrangement or presentation of facts.”<sup>186</sup> Indeed, the *Rockford Map* court did not even inquire into whether the “contribution” made by the plaintiff in that case was sufficient to constitute an original work of authorship—an inquiry that, as the Feist Court pointed out, the Copyright Act mandates.<sup>187</sup> Ignoring the requirement that facts be “selected, coordinated, or arranged in such a way” that the resulting work is an original work of authorship, the *Rockford Map* court instead found that the fact of arrangement alone was sufficient to warrant copyright protection.<sup>188</sup> If this is the “modern trend” against which the Lawyers’ Co-op court’s denial of copyright protection to case reporter pagination stands in contrast, Feist has brought it to a screeching halt.

The majority opinion in *Mead* focused an inordinate amount of attention on the labor West expended in compiling its case reporters. West’s arrangement, the court observed, was “the result of considerable labor, talent, and judgment”;<sup>189</sup> and what MDC was trying to do was give its users “a large part of what West has

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182. See *id.* at 1228 (citing *Hutchinson*, 770 F.2d at 128).

183. Carl J. Khalil, *Are Page Numbers Really Copyrightable? The Effect of Feist on the West Publishing v. LEXIS Case*, 76 J. PAT. & TRADEMARK OFF. SOC’Y 807, 811 (1994).

184. *Mead*, 799 F.2d at 1226 (citation omitted).

185. 768 F.2d 145 (7th Cir. 1985), cert. denied, 474 U.S. 1061 (1986).

186. *Id.* at 149. The *Rockford Map* court relied in part on *Jewelers’ Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83 (2d Cir), cert. denied, 250 U.S. 581 (1922), one of the two cases the Feist Court used as exemplars of the discredited “sweat of the brow” doctrine. See Feist, 499 U.S. at 352 (“[S]ome courts misunderstood the [copyright] statute.”).

187. See Feist, 499 U.S. at 358.

188. *Rockford Map*, 768 F.2d at 149.

189. *Mead*, 799 U.S. at 1226.

spent so much labor and industry in compiling.”<sup>190</sup> In a similar vein, Mead concluded that the Supreme Court had not found the independent use of case reporter page numbers an infringement in Callaghan because the plaintiff’s “case arrangement and pagination involved little labor.”<sup>191</sup> However, the amount of labor expended in producing factual compilations is, after Feist, entirely irrelevant to copyright considerations.

Finally, the Feist Court’s articulation of a threshold requirement for originality in factual compilations casts further doubt upon Mead. Because the Mead court arguably applied a lower standard for originality than that mandated by Feist, West’s case arrangement process must be reevaluated in light of the considerations set out in Feist.

Before evaluating West’s arrangement of cases, it is necessary to remark that the separation of decisions is unquestionably a process not performed by West. Federal and state court opinions are not stored in some central repository from which West subsequently collects and sorts them out; rather, because West receives them from both individual federal courts and individual states, the opinions arrive at West already separated.<sup>192</sup>

More important, however, is the short shrift that Mead gave to West’s arrangement process, which would appear to have been a primary consideration. Because there was no record at trial of West’s arrangement and pagination process, a look at how the cases appear on their face in the reporters is both necessary and enlightening.<sup>193</sup>

The Southern Reporter contains the state court opinions of Alabama, Florida, Louisiana, and Mississippi. Volume 661 of the Second Series of the Southern Reporter begins with a group of opinions from the Florida District Courts of Appeal in chronological order.<sup>194</sup> Next, the volume reports two decisions of the Louisiana Supreme Court and then a group of opinions of the Louisiana Circuit Courts of Appeal, all in chronological order.<sup>195</sup> The following pages contain Mississippi Supreme Court opinions, again in

190. *Id.* at 1227.

191. *Id.* at 1224.

192. See Khalil, *supra* note 183, at 817 (“One would imagine that the opinions arrive already ‘separated’ since they originate from separate courts.”)

193. West would later explain its arrangement process in *Oasis Publishing Co., Inc. v. West Publishing Co.*, 924 F. Supp. 918 (D. Minn. 1996). See *infra* note 234 and accompanying text.

194. 661 So. 2d at 19-141. A list of Florida decisions without published opinions occupies the first 18 pages of the volume. See *id.* at 1-18.

195. See *id.* at 142-76.

chronological order.<sup>196</sup> The volume then reports decisions of the Alabama Supreme Court in chronological order,<sup>197</sup> followed by opinions of the Alabama Court of Civil Appeals, also in chronological order.<sup>198</sup> Immediately following, however, are the opinions of both the Alabama Court of Criminal Appeals and the Alabama Supreme Court for two cases, both of which are reported in the order of their procedural posture before the Alabama courts and, as a whole, not in chronological order.<sup>199</sup> Next, the volume reports decisions of the Florida Supreme Court chronologically<sup>200</sup> before beginning again with decisions of the Florida District Courts of Appeal and repeating the entire pattern described above.<sup>201</sup> Within the subsequent jurisdictional case groupings, however, the reporter often presents additional cases from the same time periods covered by the earlier jurisdictional case groupings. Nevertheless, the cases within the groupings are reported in chronological order.

The Second Series of the Federal Reporter follows a similar tack. The reporter groups cases chronologically by circuit, using much the same round robin approach within the volume. In other words, although cases are grouped by circuit, each circuit frequently has more than one grouping within a volume. Again, although the time frame of a later grouping for a particular circuit often overlaps with the time frame of an earlier grouping for that circuit, the cases are nevertheless reported in chronological order within each grouping.

Two things immediately become clear from the above descriptions. First, West arranges the cases in its reporters by jurisdiction. Second, within each jurisdictional grouping, West arranges the cases in chronological order. Feist compels the question: Is there originality in this arrangement of facts?<sup>202</sup> Although the Feist Court reasoned that the originality standard “does not require that facts be presented in an innovative or surprising way,” it insisted that “the arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever.”<sup>203</sup> Arranging cases chronologically by jurisdiction in a case reporter would seem to be on a plane with arranging names alphabetically in a

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196. See *id.* at 177-202.

197. See *id.* at 203-39.

198. See *id.* at 239-55.

199. See *id.* at 255-77.

200. See *id.* at 278-305.

201. See *id.* at 306.

202. See 499 U.S. at 363.

203. *Id.* at 362.

telephone directory. To report cases one after another in the same order a court has decided them “is not only unoriginal, it is practically inevitable.”<sup>204</sup> Moreover, if “there is nothing remotely creative about arranging names alphabetically in a white pages directory,”<sup>205</sup> much the same can be said about arranging cases by court of origin in a case reporter. The cases simply arrive that way to begin with. “Arranging” cases by jurisdiction and in chronological order is a “time-honored tradition [that] does not possess the minimal creative spark required by the Copyright Act and the Constitution.”<sup>206</sup> Yet even if one assumes that this form of arrangement comes close to possessing that minimal creative spark, extending copyright protection beyond the arrangement to the arrangement’s page numbers—which are, without question, the result of a rote, mechanized system or process—stretches the already “thin” copyright in factual arrangements to transparent absurdity.

#### b. Public Policy

Although it is difficult—but not impossible—to fault the Mead court for its inability to anticipate Feist, the Eighth Circuit decision nonetheless disregarded a public policy backed by a century and a half of precedent. Of the cases in the Wheaton line, only Callaghan had found the use of a case reporter infringing.<sup>207</sup> The defendant in Callaghan did far more than simply appropriate the plaintiff’s arrangement of cases, however; he pirated the plaintiff’s headnotes, statements of cases, and arguments of counsel as well.<sup>208</sup> No court has ever found the appropriation of such material from a case reporter to be noninfringing. Yet until Mead, no court had ever found the mere use of a case reporter’s arrangement and pagination infringing. Both the Callaghan Court and the Lawyers’ Co-op court had the chance to do just that; both, however, declined. From the Callaghan Court’s relative lack of clarity on the point, the majority in Mead was able to glean that there was no rule against copyrighting case reporter arrangement and pagination,<sup>209</sup> and from this ostensible absence of the barking dog, the court fashioned the rule that copyrighting these comparatively insignificant elements was indeed permissible in all

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204. *Id.* at 363.

205. *Id.*

206. *Id.*

207. See *Callaghan v. Myers*, 128 U.S. 617, 661 (1888).

208. See *id.* at 659.

209. *Mead*, 799 F.2d at 1225.

instances save those where positive law effectively compels the publisher to arrange the cases in a volume.<sup>210</sup> The Mead holding is thus at odds with the current of thought underlying *Wheaton* and its progeny. The public policy this line of cases furthers is one of maximum, unimpeded access to the law,<sup>211</sup> not of unimpeded access to a publisher's intellectual property.

The *Wheaton* public policy of not allowing legal publishers to encumber free access to the law is derived directly from the balancing of interests embodied in the Copyright Clause of the Constitution and reflected in the Copyright Act of 1976. As Professors Patterson and Joyce point out, copyright in a work is not meant to be treated as the proprietary right of an author, but as "the grant of a closely regulated statutory monopoly."<sup>212</sup> The 1976 Act balances the monopolistic interests of authors in protecting their works from wrongful appropriation against the interests of the public in restricting the monopoly and allowing reasonable access to the works.<sup>213</sup> Mead all but ignored the latter and instead over-emphasized the former.<sup>214</sup>

Joyce and Patterson make the implicit argument that the Mead decision effectively violates the Copyright Clause.<sup>215</sup> By extending copyright protection to the page numbers of legal materials, the Mead court essentially retarded rather than "[p]romot[ed] the Progress of [legal] Science".<sup>216</sup>

Where a single publisher is the sole compiler of a jurisdiction's case reports and statutes, permitting that publisher to control others' use of such numbers produces one of two results: either it impedes more efficient access to the law by restricting the use of competitors' developing technologies, as occurred prior to the settlement in Mead; or it in effect imposes a tax for the use

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210. See *id.* at 1226.

211. See Patterson & Joyce, *supra* note 25, at 742.

212. *Id.* at 803.

213. *Id.* at 807.

214. According to Professors Joyce and Patterson, one of the many flaws in the Mead decision was a conflation of unfair competition and copyright law. See *id.* at 778. The court continually focused on the market effects of star pagination—a consideration irrelevant to a finding of copyrightability and subsequent infringement. See *id.* at 781.

215. Although it made no mention of the Mead decision, the Feist Court liberally cited to the Joyce and Patterson article. See 499 U.S. 340 at 347-49, 351, 361-62. By embracing the Joyce and Patterson view of copyright, it is fair to say that the Feist Court implicitly endorsed the article's understanding of the *Wheaton* public policy of encouraging maximum access to the law.

216. U.S. CONST. art. I, § 8, cl. 8.

of the law, preventing effective price competition by sanctioning the imposition of license fees on the publisher's rivals.<sup>217</sup>

Mead has undoubtedly brought about both results. Competitors who seek to release, say, federal court decisions on CD-ROM will only do so if the bar finds the product useful (and hence profitable to the publishing company). The threat of a West lawsuit, however, precludes competitors from providing the bar and the public in general with ready, cost-efficient access to the law.<sup>218</sup> The only remaining alternative for competitors who wish to avoid litigation is to enter into a licensing and royalty agreement with West.<sup>219</sup> West thus exerts a quasi-monopolistic control over access to the law, charging prohibitively expensive fees and intimidating competitors into either acquiescing or simply refraining from publishing the law. To a great degree, then, legal science ends up being held hostage—in direct contravention of the Constitution.

Finally, the Eighth Circuit's decision glossed over the extent to which West has become a *de facto*—and, in at least one state, *de jure*<sup>220</sup>—official reporter in numerous jurisdictions. In so doing, the court took a narrow, *laissez-faire* view of the state of legal publishing in this country. Unless West were bound by statutory duties to produce a volume of cases, the court reasoned, it was entirely free to cloak the law it reported in a questionable form of intellectual property, namely page numbers.<sup>221</sup> This view only sanctions monopolistic behavior on the part of legal publishers. If, indeed, West were the only publisher of case reporters in the United States, the Eighth Circuit's reasoning would entitle West to safeguard its case reporter pagination and effectively control access to the law. Moreover, when the court held that notwithstanding West's possibly official status, its arrangement and pagination were nevertheless sufficient to warrant copyright protection,<sup>222</sup> it undercut its own analysis of Lawyers' Co-op. If, as the Mead court found, the denial of copyright protection to case arrangement and pagination in Lawyers' Co-op turned upon the reporter's official status,<sup>223</sup> then regardless of whatever judgment

217. Patterson & Joyce, *supra* note 25, at 810.

218. See Plaintiff's Brief ¶ 25, *Oasis Publishing Co., Inc. v. West Publishing Co.*, (S.D. Fla.) (No. 95-0481), available at [gopher://essential.essential.org:70/00/pub/tap/Legal/oasis](http://gopher://essential.essential.org:70/00/pub/tap/Legal/oasis).

219. See *id.* ¶ 24.

220. See FLA. STAT. § 25.381 (1995).

221. See Mead, 799 F.2d at 1226.

222. See *id.*

223. See *id.* at 1225.

or discretion West exercised in its arrangement of cases, its official status precluded copyright protection for those elements.

### B. Mead Revisited: A Failed Attempt to Free Florida Law

Ten years after the Mead decision, West still finds itself involved in litigation over its claimed copyright to the internal pagination of its case reporters. In February 1994, Matthew Bender & Co., Inc. filed suit against West, seeking a declaratory judgment that West does not possess a federal copyright in the internal pagination of its case reporters and that therefore the use of West's pagination in Bender's CD-ROM of New York cases would be noninfringing.<sup>224</sup> The Manhattan federal district court denied West's motion to dismiss in May 1996.<sup>225</sup> The Bender litigation was still ongoing as of August 1996. Nevertheless, West did score an important victory in May 1996 when the same Minnesota federal district court that decided Mead granted West partial summary judgment in an action filed by a CD-ROM publisher seeking to include West's pagination on a CD-ROM of Florida case law.<sup>226</sup>

Oasis Publishing Co., Inc. originally brought suit against West in the Southern District of Florida, alleging, among other things, that West's refusal to allow the use of the Southern Reporter's pagination on Oasis's proposed CD-ROM of Florida cases violated "various Florida public records statutes."<sup>227</sup> In addition, Oasis sought a declaratory judgment that West has no federal copyright in the page numbers of the Southern Reporter, that any use of the page numbers by Oasis would be noninfringing, and that "Florida public records law makes unenforceable any copyright in the page numbers in the Southern Reporter."<sup>228</sup> West moved to dismiss and to transfer the case to Minnesota; the court, without ruling on the motion to dismiss, granted the motion to transfer the case.<sup>229</sup>

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224. See *Matthew Bender & Co., Inc. v. West Publishing Co.*, No. 94 Civ. 0589, 1995 U.S. Dist. LEXIS 17688, at \*1-3 (S.D.N.Y. Nov. 28, 1995).

225. *Matthew Bender & Co., Inc. v. West Publishing Co.*, No. 94 Civ. 0589, 1996 U.S. Dist. LEXIS 5871, at \*35 (S.D.N.Y. May 2, 1996).

226. *Oasis Publishing Co., Inc. v. West Publishing Co.*, 924 F. Supp. 918, 931 (D. Minn. 1996).

227. *Id.* at 921.

228. *Id.* The Oasis complaint also alleged four other counts: (1) that West had created and was maintaining an illegal monopoly in violation of 15 U.S.C. § 2; (2) that West had created "a dangerous probability of monopolization" in violation of 15 U.S.C. § 2; (3) that the alleged West monopoly also violated section 542.19, Florida Statutes; and (4) that West was attempting to create a monopoly under section 542.22, Florida Statutes. *Id.*

229. *Id.*

The Minnesota federal district court first addressed the overall question of whether West could copyright the internal pagination of any of its case reporters. The court immediately disposed of Oasis's contention that Feist had overruled Mead: "[T]he [Mead court] applied essentially the same creativity standard discussed and applied in Feist. . . . Feist did not overrule Mead."<sup>230</sup> The court stated that even if Mead had not applied the appropriate standard of originality, "its analysis demonstrates that West's arrangement in that case easily satisfied the 'modicum of creativity' later emphasized repeatedly by the Supreme Court in Feist."<sup>231</sup>

Unlike Mead, the district court in Oasis had more facts in the record on which to base a determination of creativity in the arrangement of cases.<sup>232</sup> After noting West's division of cases by state and court level,<sup>233</sup> the court explained that West then divides opinions within each state and court level "and arranges them by placing first the fully headnoted opinions and jacketed memoranda, next sheet memoranda, and finally table dispositions."<sup>234</sup> Attorney-editors at West decide which cases deserve

230. Oasis, 924 F. Supp. at 922.

231. Id. at 923.

232. Id. at 924.

233. Id. As in Mead, the court's depiction of West as actively "divid[ing] the cases by state" apparently overlooked the fact that the opinions arrive already separated by state. See supra note 192 and accompanying text.

234. Oasis, 924 F. Supp. at 924. West had stipulated as to the arrangement of the Southern Reporter as follows:

Reports of opinions, full[-]text memorandum decisions (called "jacketed memorandums" by West because West provides them with a separate case folder "jacket"), consecutively[ ]issued memorandum dispositions (such as a batch of review-denied or appeal-denied decisions by a state appellate court) and then memorandum decisions reported in tables are generally first coordinated and arranged in the following order: Supreme Court of Alabama; Court of Civil Appeals of Alabama; Court of Criminal Appeals of Alabama; Supreme Court of Florida; Court of Appeals of Florida; Supreme Court of Louisiana; Court of Appeals of Louisiana; Supreme Court of Mississippi.

Within each jurisdiction, reports of opinions and jacketed memorandum decisions come first and within that grouping, are arranged in filing date order. Other memorandum case reports, if any, are grouped together and come next. Tables of dispositions, if any, generally are coordinated and arranged next.

In addition to this general arrangement, West has a procedure whereby it links two or more case reports together in a "precede and follow" arrangement which overrides any general arrangement rule that would otherwise split the two case reports.

In Southern Reporter, all cases from the Florida Supreme Court precede cases from the Florida Appellate Courts. Within each court division the cases are ordered by case type: Florida Supreme Court opinions precede Florida Supreme Court memorand[a] which precede Florida Supreme Court unpublished opinion tables, which precede the Florida district court opinions (Fla. App. 1st Dist., Fla. App. 2[d] Dist., etc.).

headnotes and, based upon the subject matter of the decisions, override West's general arrangement guidelines in approximately twenty-five percent of the cases.<sup>235</sup> Finding that no other publisher followed West's arrangement, and that the arrangement "require[d] far more than rote chronological or jurisdictional sequencing," the court held that West's arrangement "easily" satisfied the requirements of Feist.<sup>236</sup>

The court then quickly dismissed the argument that even if West's arrangement were protected by copyright, such protection did not extend to pagination.<sup>237</sup> Oasis contended that the pagination of each case was simply a system or process devoid of creativity and, therefore, could not be copyrighted.<sup>238</sup> In response, the court pointed out that the Mead court had rejected the same argument.<sup>239</sup> Calling pagination "an integral part" of West's arrangement, the court held that it was an original work of authorship entitled to copyright protection.<sup>240</sup>

Oasis also argued that because West had conceded that citation to the first page of each case within its volumes was a noninfringing fair use, any copyright protection in West's internal pagination was diminished because the initial page numbers already revealed West's arrangement of cases.<sup>241</sup> The court responded by pointing out that West's concession did not authorize others to copy every page citation.<sup>242</sup> Moreover, the court continued, even if one could determine West's arrangement from the

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Page numbers in Southern Reporter and Florida Cases are input by automated machinery used by West in its publication process of publishing reports of Florida court decisions.

Joint Stipulation of Facts ¶¶ 33-37.

235. Oasis, 924 F. Supp. at 924. The court provided several examples illustrating the override process:

For example, the West editor might choose to process a case more quickly where the case otherwise would be destined for a later volume, so that the case instead will follow a related decision in the same volume. Similarly, West may decide to speed its process and publish a decision immediately after a related decision, disregarding the date the decisions were rendered. Or West might choose to combine separate decisions into a single published opinion.

Id. (citations omitted).

236. Id. at 924-25.

237. See id. at 925.

238. Id.

239. Id.

240. Id. As support for this holding, the court quoted Justice Blatchford's dictum in Callaghan, see *supra* text accompanying note 45, without mentioning the Callaghan Court's approving quotation of the lower court's countervailing language, see *supra* text accompanying note 47.

241. Oasis, 924 F. Supp. at 926.

242. Id.

initial page citations, their use, unlike that of the internal page citations, did not obviate the need to buy West's reporters.<sup>243</sup>

After weighing and dismissing Oasis's contention that its proposed star pagination to the Southern Reporter was a fair use,<sup>244</sup> the court then addressed the question of whether West's alleged status as Florida's official reporter precluded copyright in the page numbers of the Southern Reporter.<sup>245</sup> In 1948, Florida had ceased publishing its own official reporter, Florida Reports, and had adopted the Southern Reporter as the state's official publication of state court opinions.<sup>246</sup> The following year, West began publishing Florida Cases, a version of the Southern Reporter with non-Florida cases omitted, yet with the same pagination as the Southern Reporter.<sup>247</sup>

Although West allows others to freely star paginate to volumes that it publishes as a state's official reporter, it denied that it was the official reporter for Florida.<sup>248</sup> Oasis contended that the opposite was true, however, because section 25.381, Florida Statutes explicitly directed the Florida Supreme Court and Florida's Attorney General to enter biannually into a contract with West providing for the publication and distribution of Florida Cases.<sup>249</sup> Moreover, Oasis argued that West had "acquiesce[d]" in Florida's view of West as the state's official reporter and that the following notice issued by the Florida Supreme Court and published by West in the Southern Reporter supported its position:

The SOUTHERN REPORTER, beginning with 1948 Florida Supreme Court cases reported in 37 So.2d 692 et seq., is adopted by the Supreme Court of Florida, and by the Board of Commissioners of State Institutions of Florida as the official publication of the opinions and decisions of the Supreme Court of Florida. This book connects with Volume 160 Florida Reports, without omission or duplication.

Citations should be to Southern Reporter volume and page thus: 42 So.2d 368

[signed]  
Alto Adams

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243. Id.

244. See id. at 926-29.

245. Id. at 929-30. Oasis actually argued that Florida Cases—the West-published volume that contains only the Florida decisions published in the Southern Reporter and which uses the Southern Reporter's pagination—was in the public domain. Id. at 930.

246. Id. at 920; see also *infra* text accompanying notes 416-20.

247. Id.

248. Id. at 930 ("West denies it publishes the official reports of Florida.").

249. Id. at 929-30 (citing FLA. STAT. § 25.381 (1995)).

Chief Justice<sup>250</sup>

The Oasis court stated its reluctance to “mark the legal relationship between the State of Florida and West” and noted that the facts of the case did not require it to do so.<sup>251</sup> The copyright interest at issue, the court went on, did not involve the opinions of Florida’s courts per se, but rather West’s arrangement of those opinions.<sup>252</sup> The court reasoned that even if West were the official reporter of Florida, the state had given its “express consent” to the contractual clause allowing West to keep its copyright in the arrangement of cases.<sup>253</sup> Since 1957, Florida’s contract with West had acknowledged West’s copyright interest in the syllabi and other material original to West; immediately after the Mead decision, the contract was revised to include language covering West’s arrangement.<sup>254</sup> The court found that the “undisputed evidence” showed that Florida had “freely acquiesced to the added language.”<sup>255</sup>

Finally, as to Oasis’s claim that the pagination of Florida Cases was freely copyable because Florida Cases is a public record subject to Florida’s Public Records Act,<sup>256</sup> the court adopted West’s counterargument in response. The Florida Supreme Court had already held that the Public Records Act did not apply to judicial records;<sup>257</sup> further, even if the Public Records Act did apply, allowing it to negate West’s copyright interest would violate the

250. *Id.* at 930 & n.6. West published the notice in Volume 37 of the Second Series of the Southern Reporter. See insert facing 37 So. 2d at viii.

251. 924 F. Supp. at 930.

252. *Id.*

253. *Id.*; see also Florida Cases, July 1, 1995-June 30, 1997, Contract for Publication and Distribution, at D.2 (on file with author): “The Synopsis, Syllabi and Key Number Digest classifications, Index Digest, Table of Statutes Construed, and arrangement of cases, editorially prepared and supplied by the FIRST PARTY and included in the volumes of FLORIDA CASES, are subject to copyright and will be copyrighted by the FIRST PARTY.”

254. Oasis, 924 F. Supp. at 930-31.

255. *Id.* at 931.

256. See FLA. STAT. § 119.01 (“[A]ll state, county, and municipal records shall be open for personal inspection by any person.”).

257. Oasis, 924 F. Supp. at 931 (citing *Times Publishing Co. v. Ake*, 660 So. 2d 255 (Fla. 1995)). Oddly enough, the court did not address Oasis’s claim that Florida Cases is a public record subject to the Florida Constitution, which provides that:

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf . . . . This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder . . . .

FLA. CONST. art. I, § 24(a) (emphasis added). Admittedly, this would still have raised the Supremacy Clause problem the court discussed. In addition, the agreement between West and Florida, while ostensibly violative of the Florida Constitution, is nonetheless a valid contract. See *infra* text accompanying notes 258-59.

Supremacy Clause of the U.S. Constitution.<sup>258</sup> Moreover, the court added, even assuming the absence of any constitutional difficulty, Florida's contract with West had expressly reserved in West the copyright in the arrangement of cases.<sup>259</sup>

The Oasis court's finding that Feist did not overrule Mead is not surprising. While Feist arguably overruled Mead implicitly, it certainly did not do so expressly. Thus, the district court, being a part of the Eighth Circuit, understandably felt bound to view Mead as still constituting good law.<sup>260</sup> However, the court's ostensibly blind adherence to Mead simply points out that the reasoning in Mead has led to bad public policy. The issue is not the arrangement of cases. No publisher is interested in duplicating West's arrangement case-by-case. Even granting that West's arrangement process is sufficiently original to satisfy Feist, other legal publishers are hardly champing at the bit to mimic that process by presenting cases in the precise manner West publishes them in its reporters. Rather, the issue is whether West's pagination is sufficiently original to satisfy Feist.

While the district court in Oasis found that pagination was "an integral part" of West's arrangement,<sup>261</sup> the court was far too quick to dismiss Oasis's argument that extending West's copyright interest beyond its arrangement of cases to pagination gave West copyright in a system.<sup>262</sup> As one of West's experts had affirmed, West's pagination "is a system of citation."<sup>263</sup> The Copyright Act expressly precludes copyright protection in "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."<sup>264</sup> The form in which West's system of pagination is embodied happens to be West's arrangement of cases. The Oasis court, however, found that the system was an integral part of the arrangement.<sup>265</sup> Thus, the court should have balanced the prohibition against copyrighting systems with the extent of West's copyright interest in its arrangement of cases. This balancing would necessitate in turn

258. Oasis, 924 F. Supp. at 931.

259. *Id.*

260. See Transcript of Oral Argument at 51 ("I suspect . . . I'm simply a whistle stop on the way to the Circuit.").

261. Oasis, 924 F. Supp. at 925; see also *West Publishing Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1227 (8th Cir. 1986) (finding internal pagination "an important part" of West's arrangement).

262. See Oasis, 924 F. Supp. at 925.

263. Transcript of Oral Argument at 25 (quoting Prof. Robert Berring).

264. 17 U.S.C. § 102(b) (1994).

265. Oasis, 924 F. Supp. at 925.

weighing public policy ramifications; and, because the courts of this country generally require that parties who seek resolution of cases and controversies use West's pagination, public policy would seem to dictate that the line of copyright protection be drawn to exclude such pagination. This is a view entirely consistent with *Wheaton* and its progeny.<sup>266</sup> Nevertheless, both *Oasis* and *Mead* eschewed any public policy analysis and found that the mere possibility of market harm to West was sufficient to warrant extending copyright protection to West's pagination.<sup>267</sup> Market harm, however, while relevant to considerations of fair use, has no bearing on whether there is a copyright interest in the first place.<sup>268</sup>

The holdings in *Mead* and *Oasis* should serve as a wake-up call to states such as Florida. Implicit in the *Oasis* court's continual reiteration of Florida's "express consent" in allowing the copyright interest in the arrangement of Florida Cases to remain with West is the observation that Florida has effectively duped itself. Other states for whom West publishes official reports have required West to give up its copyright in the arrangements of cases in those official reports.<sup>269</sup> In discontinuing its own official reporter, however, and in denominating as official—solely in its own eyes, apparently—the Florida-only version of the *Southern Reporter* entitled *Florida Cases*, Florida has lost control over the citation system for "what the law is" in Florida.<sup>270</sup> The contract between West and Florida, which gives West control over the arrangement of the opinions reported in *Florida Cases*, limits access to the most important public records of the Florida judiciary—the law itself—and arguably violates the public records

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266. See *supra* discussion part II.A.1-3.

267. *West Publishing Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1228 (8th Cir. 1986); *Oasis*, 924 F. Supp. at 926.

268. See *Patterson & Joyce*, *supra* note 25, at 781 (observing that it is improper "to resort to the market effect of an infringer's conduct . . . to determine initially whether there was copyright protection and therefore infringement").

269. Transcript of Oral Argument at 43, *Oasis*, (No. 3-95-563) ("The contract between West and Ohio specifically states that the arrangement of the Ohio official reports shall be in the public domain. By contract, the state required West to give up the copyright and West did so.")

270. By eliminating the official *Florida Reports* in 1948, Florida did eliminate the problem of parallel citations to both the *Florida Reports* and the *Southern Reporter*. Where a state has an official reporter, such as the erstwhile *Florida Reports*, *The Bluebook* requires that documents submitted to the courts of that state contain citations to both the official reporter and the West regional reporter. See, e.g., *The Bluebook: A Uniform System of Citation* 202 (15th ed. 1991) ("In documents submitted to Ohio state courts, cite to Ohio St., Ohio St. 2d, Ohio St. 3d, or Ohio, if therein, and to N.E. or N.E.2d if therein.")

provision of the Florida Constitution, which specifically includes the judiciary.<sup>271</sup> In effect, West owns Florida's law.<sup>272</sup>

### C. The "Crown Jewels": Electronic Case Law Databases on the Internet

West Publishing Company has not only zealously safeguarded its interest in the page numbers of its reporters, it has also sought to prevent public access to electronic case law databases originally created by the government. In 1963, the U.S. Air Force created Finding Legal Information Through Electronics (FLITE), an electronic database of legal materials containing, among other things, all United States Supreme Court decisions dating back to 1937.<sup>273</sup> In 1971, the Department of Justice (DOJ) created an electronic database called the Justice Retrieval and Inquiry System (JURIS), which inherited the Supreme Court decisions from FLITE, and which came to contain a complete collection of federal case law dating back, in some instances, to 1789.<sup>274</sup> JURIS allowed DOJ attorneys to conduct research and also provided a citing service similar to Shepard's.<sup>275</sup> Access to JURIS was limited to DOJ attorneys and federal and state agencies that subscribed through a reimbursement agreement with DOJ.<sup>276</sup> In 1983, DOJ decided to contract the data entry and management for JURIS out to a private vendor: West Publishing Company.<sup>277</sup> Unfortunately, the DOJ contract allowed West to remove from JURIS the case law West had input should West ever choose not to renew the contract.<sup>278</sup> In 1993, in response to a petition submitted to Attorney General Janet Reno by information activist James Love seeking general public access to JURIS, West decided not to re-

271. See FLA. CONST. art. I, § 24(a); see also *supra* note 257.

272. While the Florida Supreme Court has apparently relaxed its citation requirements by only "preferr[ing]" pinpoint citation to the Southern Reporter, see FLA. R. APP. P. 9.800(n), as counsel for Oasis pointed out during oral argument, "when a court expresses to counsel a practice in the Bar before it, that . . . it would prefer something be done in a certain way, well, by golly, that is the way the lawyer is going to do it." Transcript of Oral Argument at 34, Oasis, (No. 3-95-563).

273. See James Love, Supreme Court Decisions in FLITE Database, Dec. 22, 1995, *h*-*ternet* listserv posting available at <http://www.essential.org/listproc/tap-juris/0178.html> (Aug. 16, 1996) (copy on file with the author).

274. Gary Wolf, Who Owns the Law?, *WIRED*, May 1994, at 98; John J. Oslund, Debate Rages Over Who Owns the Law, *MINN. STAR-TRIB.*, Mar. 6, 1995, at A8.

275. *Tax Analysts v. Department of Justice*, 913 F. Supp. 599, 601 (D.D.C. 1996).

276. *Id.*

277. Wolf, *supra* note 274, at 100. As Gary Wolf notes, this was "a move consistent with the Reagan-era emphasis of privatization." *Id.*

278. *Id.*

new its contract and removed the case law it had input.<sup>279</sup> Lacking the budget to re-enter the data from the ten years West had control over JURIS, DOJ shut the system down.<sup>280</sup>

Although JURIS is no longer active, DOJ has not yet erased the case law comprising the JURIS database.<sup>281</sup> A nonprofit organization named Tax Analysts, which had also submitted a Freedom of Information Act (FOIA)<sup>282</sup> request for the JURIS database in 1993, brought suit in federal district court in 1994 seeking to compel release of JURIS under FOIA.<sup>283</sup> West intervened as of right in the action because of its substantial interest in JURIS.<sup>284</sup> The district court granted DOJ's partial motion to dismiss and West's motion to dismiss, finding that JURIS was not an "agency record" within the meaning of FOIA.<sup>285</sup>

The district court's decision, relying as it did upon *Mead* for part of its reasoning,<sup>286</sup> seems open to question. The court, in commenting upon the contract between DOJ and West, found that West was not attempting to license data in the public domain, but rather its electronic compilation of data in the public domain.<sup>287</sup> Without any discussion of the originality requirement mandated by *Feist*, the court held that by "electronically format[ing]" case law, West was "legally entitled" to license the data in JURIS.<sup>288</sup> The court stated that "[m]aking data 'readable' . . . takes considerable time and effort."<sup>289</sup> Of course, *Feist* makes considerations of time and effort expended irrelevant to a finding

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279. *Id.*

280. *Id.*

281. *Id.* at 100-01.

282. 5 U.S.C. § 552 (1994).

283. *Tax Analysts v. Department of Justice*, 913 F. Supp. 599, 600-01 (D.D.C. 1996).

284. *Id.* at 601.

285. *Id.* The district court found that the U.S. Supreme Court's decision in *Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989), did not provide adequate guidance as to what constituted agency "control" of a document. 913 F. Supp. at 602. "Agency records" are documents which are (1) created or obtained by the agency, and (2) under agency control at the time of the FOIA request. 492 U.S. at 144-45. Although the Supreme Court specifically defined "control" as meaning "that the materials have come into the agency's possession in the legitimate conduct of its official duties," *id.* at 145, the district court de-emphasized this definition and instead insisted that possession alone does not determine control. See 913 F. Supp. at 603. The district court thus disregarded the Supreme Court's instruction to consider not possession alone, but whether the agency took possession of the materials in the "legitimate conduct" of its official duties.

286. See *Tax Analysts*, 913 F. Supp. at 605 (citing *West Publishing Co. v. Mead Data Cent., Inc.*, 616 F. Supp. 1571, 1577 (D. Minn. 1985), *aff'd*, 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987)).

287. *Id.*

288. *Id.*

289. *Id.*

of copyrightability.<sup>290</sup> Further, the proper inquiry is whether the process of “electronically formatting” case law possesses the minimal degree of creativity to satisfy the Copyright Act’s originality requirement.<sup>291</sup> Inputting text to make it readable by DOJ’s computer system, regardless of the particular quirks of JURIS, is simply a rote, mechanized process devoid of creativity. The Copyright Act specifically excludes mechanical processes from copyrightability.<sup>292</sup>

Regardless of the district court’s ruling, a number of individuals and organizations are continuing their press to make the electronic case law databases commissioned by the government accessible to the general public. Taxpayers Asset Project (TAP), a public interest group headed by James Love, has dubbed the effort to release the electronic case law databases “the Crown Jewels” campaign.<sup>293</sup> In addition to supporting Tax Analysts’ push to have DOJ release JURIS to the public, TAP is particularly interested in gaining access to the almost sixty years of U.S. Supreme Court opinions contained in the FLITE database.<sup>294</sup> Unlike JURIS, FLITE contains no copyrightable materials and was developed entirely at taxpayer expense.<sup>295</sup> The Clinton Administration, apparently lobbied hard by West, has claimed that it does not have to release the records contained in the FLITE database because it views them as “library” materials.<sup>296</sup> A federal district court in California agreed with the Clinton Administration in 1995, finding that the definition of “records” in the Records Disposal Act<sup>297</sup>—which was in effect at the same time Congress passed the FOIA—specifically excluded library reference materials.<sup>298</sup> Because such materials are used for reference or research purposes, the court reasoned, “the indicia of control are lacking.”<sup>299</sup>

Although the lower federal courts have dealt the information activists a setback, it would seem to be only a matter of time be-

290. 499 U.S. at 353-54.

291. *Id.* at 358-59.

292. See 17 U.S.C. § 102(b) (1994) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

293. See Love, *supra* note 263.

294. *Id.*

295. *Id.*

296. *Id.*

297. 44 U.S.C. § 3301 (1994).

298. *Baizer v. Department of the Air Force*, 887 F. Supp 225, 229 (N.D. Cal. 1995).

299. *Id.* at 228.

fore an archive of older federal case law is made available on the Internet. Either a higher federal court will recognize that public access to the taxpayer-subsidized JURIS and FLITE databases is solidly within the public policy embodied in both the FOIA and the Wheaton line of cases, or technology will eventually allow relatively painless electronic scanning of older court decisions and their subsequent placement on the Internet.<sup>300</sup>

However, even though Feist and subsequent lower court decisions<sup>301</sup> have made it clear that the copyright interest in factual compilation databases is highly limited, West and other commercial interests are pushing for congressional passage of H.R. 3531, the Database Investment and Intellectual Property Antipiracy Act of 1996.<sup>302</sup> The Act would in a sense overrule Feist by granting protection to databases<sup>303</sup> that are "the result of a qualitatively or quantitatively substantial investment of human, technical, financial or other resources in the collection, assembly, verification, organization or presentation of the database contents . . . ."<sup>304</sup> In other words, the Act would afford database producers the "sweat of the brow" protection Feist read out of the Copyright Act.<sup>305</sup> The Act creates a cause of action against anyone who uses "all or a substantial part" of a protected database's contents "in a manner that conflicts with the database owner's normal exploitation of the database or adversely affects the actual or potential

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300. Although the proposed National Information Infrastructure Copyright Protection Act now pending before Congress would prohibit such activity, see H.R. 2441, 104th Cong., 1st Sess. § 2 (1995), there is nothing in the Copyright Act that prevents a WESTLAW user from systematically downloading opinions from WESTLAW, stripping out the West syllabi, headnotes, and page numbers, and creating a publicly accessible case law database. WESTLAW's subscriber agreement, however, does prohibit the practice. Nevertheless, small CD-ROM publishers have attempted to accomplish much the same thing by electronically scanning cases from West's print reporters. See *West Publishing Co. v. On Point Solutions, Inc.*, No. 93-CV2071MHS, 1994 U.S. Dist. LEXIS 20040 (N.D. Ga. Sept. 1, 1994).

301. See, e.g., *BellSouth Advertising & Publishing Corp. v. Donnelley Info. Publishing, Inc.*, 999 F.2d 1436, 1438-39, 1444 (11th Cir. 1993), cert. denied, 114 S. Ct. 943 (1994) (finding that extraction of all listings from yellow pages directory for use in competing directory was permissible); *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 647-48 (W.D. Wis. 1996) (finding no copyright infringement where user downloaded telephone listings from publisher's CD-ROM and made listings available on Internet).

302. H.R. 3531, 104th Cong., 2d Sess. (1996); see also IIA Praises Introduction of Database Protection Measure, P.R. NEWSWIRE, May 30, 1996, available in LEXIS, News Library, Curnws File.

303. The Act uses the term "database" to mean not just electronic databases, but rather any "collection, assembly or compilation, in any form or medium now or later known or developed, of works, data or other materials, arranged in a systematic or methodical way." H.R. 3531, 104th Cong., 2d Sess. § 2 (1996) (emphasis added).

304. *Id.* § 3(a).

305. See *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 354 (1991).

market for the database.”<sup>306</sup> A database owner may also bring an action against anyone who “engage[s] . . . in the repeated or systematic extraction, use or reuse of insubstantial parts” of a protected database’s contents.<sup>307</sup> Moreover, the Act also provides for criminal penalties against those who violate the Act “for direct or indirect commercial advantage or financial gain” or whose violation of the Act “causes loss or damage to a database owner aggregating \$10,000 or more in any one-year calendar period.”<sup>308</sup>

Because of West’s ostensible “substantial interest” in JURIS, the Act would seem to allow West to sue those who used the opinions in JURIS to create their own electronic database. Furthermore, the Act, along with the equally pro-publisher (and anti-public interest) National Information Infrastructure Copyright Protection Act of 1995,<sup>309</sup> would make it impossible for anyone to electronically scan a West-published opinion into a computer, delete West’s proprietary material, and publish the raw opinion. Because many older opinions are only found in West reporters, there is generally no other way for a case law database publisher to provide these older opinions. West would thus remain the sole proprietor of a substantial portion of the law in this country.

Yet even absent this legislative agenda, the problem of star pagination would still remain. Most of the opinions in JURIS contain star pagination to West reporters.<sup>310</sup> Unless West finds itself caught up in a sudden fit of altruism and places its page numbers in the public domain—or unless ongoing litigation seeking to have West’s page numbers declared uncopyrightable is successful<sup>311</sup>—the older opinions, much like the new opinions which law libraries are placing on the Internet, will be of limited use.

306. H.R. 3531, 104th Cong., 2d Sess. § 4(a)(1) (1996).

307. *Id.* § 4(a)(2).

308. *Id.* § 8(a).

309. H.R. 2441, 104th Cong., 1st Sess. (1995). The proposed legislation would make it a civil violation for anyone to place copyrighted material into a computer’s random access memory (RAM) without permission of the copyright owner. See *id.* § 2(a) (adding “by transmission” to copyright owner’s exclusive distribution right); *id.* § 2(a)(B)(2) (adding to definition of “transmit” additional definition that “to ‘transmit’ a reproduction is to distribute it by any device or process whereby a copy or phonorecord of the work is fixed beyond the place from which it was sent”).

310. See *Tax Analysts v. Department of Justice*, 913 F. Supp. 599, 601 (D.D.C. 1996). The opinions from the ten-year span during which West had been inputting data contain West’s headnotes as well, which are undeniably the publisher’s intellectual property. *Id.*

311. See *Matthew Bender & Co., Inc. v. West Publishing Co.*, No. 94 Civ. 0589, 1996 U.S. Dist. LEXIS 5871 (S.D.N.Y. May 2, 1996) (denying West’s motion to dismiss); *Matthew Bender & Co., Inc. v. West Publishing Co.*, No. 94 Civ. 0589, 1995 U.S. Dist. LEXIS 17688 (S.D.N.Y. Nov. 22, 1995) (granting Bender permission to file a second supplemental complaint); see also *supra* discussion part III.B.

#### IV. THE UNIVERSAL CITATION SYSTEM

It would be a mistake to think that just because a certain kind of judicial business has always been conducted in a particular way in the past, it therefore ought to be conducted that way in the future. The federal courts, like other governmental institutions, must, where necessary, change with the changing times.<sup>312</sup>

Chief Justice William H. Rehnquist

Notwithstanding the ongoing debate over pagination copyright, the placement on the Internet of all federal circuit court decisions<sup>313</sup> and decisions from a significant number of state courts has led some to question whether a citation system tied to the print medium (let alone tied to a single vendor in that medium) is desirable. For even if West's page numbers became freely available for all to use as they see fit, the Internet and CD-ROM purveyors of court opinions would still have to wait at least until the arrival of West's advance sheets before being able to insert star pagination to the West reporters. Moreover, star pagination is an overly time-consuming process. Thus, the work involved in inserting page numbers in court opinions would seem considerably more than one could expect from the public-spirited yet shallow-pocketed law libraries now placing opinions on the World Wide Web. Together with legal CD-ROM publishers, the law libraries retrieve opinions from court bulletin board systems (BBSs). Aside from a case name and docket number, there is usually nothing to identify these cases.

##### A. Toward the Wisconsin Proposal

Aware that the federal court opinions available for downloading from court BBSs were of little use to practitioners without a proper form of citation, the Library Program Subcommittee of the United States Judicial Conference Committee on Automation and Technology issued a report in 1991 proposing the development of

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312. Chief Justice William H. Rehnquist, Remarks at the Washington College of Law Centennial Celebration (Apr. 9, 1996).

313. Ironically, the Eighth Circuit completed the array of U.S. Courts of Appeals on the World Wide Web when the Washington University School of Law in St. Louis began placing Eighth Circuit decisions on-line in January 1996. See United States Court of Appeals for the Eighth Circuit, available at <http://www.wulaw.wustl.edu/8th.cir/> (Aug. 16, 1996).

a parallel electronic citation system.<sup>314</sup> The committee recommended the use of the following citation form:

Smith v. Jones, 1990 FED App. 0322P (5th Cir.)

In this citation, "1990" is the year of the opinion, "0322" designates the opinion as the 322d issued during 1990, and "P" indicates that the opinion is published.<sup>315</sup> The proposed citation form would have been used as a temporary measure until the citation to the West reporter became available.<sup>316</sup> During the September 1991 hearings on the proposal, both West Chief Executive Officer Dwight Opperman and Chief Judge Gerald B. Tjoflat of the U.S. Court of Appeals for the Eleventh Circuit testified against adopting the new citation system, claiming it would lead to increased court work loads.<sup>317</sup> West lobbied hard against the plan, sending to law librarians information booklets that warned of dire consequences and voicing to individual federal judges its opposition.<sup>318</sup> In 1992, the Judicial Conference declined to mandate the proposal, yet left the individual circuits free to experiment with the system.<sup>319</sup>

The Sixth Circuit decided to adopt the new citation system in January 1994.<sup>320</sup> Apparently, the increased work load feared by some in the federal judiciary has yet to materialize. Inserting slip opinion page numbers or sequential case identification numbers

314. WIS. STATE BAR TECH'Y RESOURCE COMM., PROPOSED CITATION SYSTEM FOR WISCONSIN 11 (1994), available at <http://www.law.cornell.edu/papers/wiscite/wiscite.overview.html> (Aug. 16, 1996) [hereinafter WIS. CITATION REPORT].

315. AMERICAN ASS'N OF L. LIBR., REPORT OF THE TASK FORCE ON CITATION FORMATS ¶ 46 (1995), available at <http://lawlib.wuacc.edu/aallnet/citeform.html> (Aug. 16, 1996) [hereinafter AALL CITATION REPORT].

316. *Id.*

317. Hansen, *supra* note 5, at 78; Tom Hamburger & Sharon Schmickle, High Stakes and Hot Competition; In Face of Change, West Publishing Fights to Maintain Its Lead in Legal Publishing, MINN. STAR-TRIB., Mar. 6, 1995, at 1A. Judge Tjoflat testified that "it's simply that we have lots to do, and we don't want to have any red tape in what we do." Hamburger & Schmickle, *supra*. He later clarified: "I don't want anything to be imposed on the federal judiciary that would require . . . one more whit of work." Hansen, *supra* note 5, at 78.

A number of commentators have remarked upon the appearance of impropriety engendered by federal judges accepting perquisites from West. West, in addition to giving federal judges personally inscribed calendars, free books, and even bound collections of a particular judge's opinions, sponsors the Edward J. Devitt Distinguished Service Award. An independent panel of federal judges hands out the award, which honors a different member of the federal judiciary every year with a \$15,000 cash prize and a crystal obelisk. Each year, West flies members of the panel, at West's expense, to such destinations as Palm Springs, the Virgin Islands, Palm Beach, Naples, Florida, and Bel Air, California. See Hamburger & Schmickle, *supra*.

318. Hansen, *supra* note 5, at 78.

319. AALL CITATION REPORT, *supra* note 315, ¶ 46.

320. See *id.* ¶ 46 n.63.

into the electronic opinions available on the circuit's BBS has added little to the work of the court.<sup>321</sup> Chief Judge Gilbert Merritt has remarked that the new citation system "just makes [an electronic opinion] more usable. It's not any great big deal."<sup>322</sup> However, the Sixth Circuit's citation system serves only to fill the gap between release of opinions on the court's BBS and their final publication in the West reporter.<sup>323</sup> Thus, the citation form is only final for unpublished opinions.

At about the same time that the Sixth Circuit adopted its new citation system, the Supreme Court of Louisiana ordered all Louisiana appellate courts to begin using a "uniform public domain citation form" along with a parallel citation to West's Southern Reporter.<sup>324</sup> The Louisiana system dispenses with the idea of adding sequential case identification numbers, and uses docket numbers instead.<sup>325</sup> For pinpoint citations, the Louisiana citation system uses slip opinion page numbers; pinpoint citations to the Southern Reporter are optional.<sup>326</sup> Thus, a pinpoint citation to a Louisiana case looks as follows:

Smith v. Jones, 93-2345, p. 7 (La. 7/15/94); 650 So. 2d 500

Unlike the Sixth Circuit's citation system, however, the Louisiana citation form is final.<sup>327</sup> Thus, its effects on legal publishing have been measurable. Prior to the adoption of the new citation form, Louisiana court opinions were available only in the Southern Reporter, WESTLAW, LEXIS, and on West's Louisiana Cases CD-ROM.<sup>328</sup> The new citation form allowed two new CD-ROM products containing Louisiana court opinions to appear on the market.<sup>329</sup> Neither of the two companies marketing the new CD-ROMs are licensed to use West's page numbers.<sup>330</sup> Moreover, not only has the Louisiana Supreme Court's order encouraged competition in the legal publishing arena, it has led to a "considerable lowering of prices" as well.<sup>331</sup>

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321. Hansen, *supra* note 5, at 78.

322. *Id.*

323. See AALL CITATION REPORT, *supra* note 315, ¶ 47.

324. LA. SUP. CT. GEN. ADMIN. R. Part G, § 8.

325. *Id.* In addition, instead of just the year, the citation form indicates the month and day of issue. *Id.*

326. *Id.*

327. See AALL CITATION REPORT, *supra* note 315, ¶ 50.

328. *Id.* ¶ 49.

329. *Id.*

330. *Id.*

331. *Id.* (quoting Thorne D. Harris III, CD-ROMs—The New Basic Research Tool, LA. B.J., Dec. 1994, at 381).

Both the Louisiana and the Sixth Circuit moves, forward-looking as they may seem, are at best only half measures.<sup>332</sup> For in retaining the use of slip opinion page numbers, the two jurisdictions ignored the fact that page numbers are a convention ill-suited to electronic publication. Although slip opinion page numbers are obviously available much sooner than case reporter page numbers, page breaks in the word processing files courts use shift when the user selects a different typeface, changes the margins, or has a printer different from that of the disseminating court.<sup>333</sup> The traditional solution to such difficulties—star pagination—is cumbersome and time-consuming.<sup>334</sup> Apparently aware of this inconvenience, the Colorado Supreme Court authorized both the use of and pinpoint citation to paragraph numbers in all Colorado decisions beginning in May 1994.<sup>335</sup> Nevertheless, the Colorado court retained the use of West's Pacific Reporter as the basic citation form for Colorado, only replacing West's internal pagination with paragraph numbers.<sup>336</sup>

A well-thought-out proposal for an electronic citation system finally appeared on June 22, 1994, when the Technology Resource Committee of the Wisconsin State Bar (Wisconsin TRC) issued a report on a proposed medium-neutral citation system for Wisconsin.<sup>337</sup> The Wisconsin TRC discarded the disadvantages of the Sixth Circuit, Louisiana, and Colorado citation formats and instead incorporated the advantages of those formats in one system. It kept the year and sequential opinion numbering conventions from the Sixth Circuit format and used the paragraph numbering system from the Colorado format. In addition, after the year in the new format, the Wisconsin TRC added a jurisdiction identifier—traditionally placed, along with the year, in the paren-

332. The Louisiana citation form has an additional flaw as well. By using docket numbers instead of the sequential opinion numbers used by the Sixth Circuit, the Louisiana form necessitates the use of an opinion's specific date to obviate confusion with a case containing the same docket number. AALL CITATION REPORT, *supra* note 315, ¶ 64. The use of docket numbers possesses other disadvantages as well: (1) they have no connection with whether the case is published; (2) they do not indicate the sequence of publication; (3) they are frequently too long, creating a greater possibility of error in the citation; and (4) they frequently do not work well with many electronic case law validation and research tools. *Id.*

333. See ABA SPECIAL COMM. ON CITATION ISSUES, REPORT TO THE HOUSE OF DELEGATES ¶ 33 (1996) [hereinafter ABA CITATION REPORT]; WIS. CITATION REPORT, *supra* note 314 at 21; AALL CITATION REPORT, *supra* note 315, ¶ 37.

334. Star pagination to slip opinion page numbers would require a court clerk to type in a bracketed page number at the beginning of each page of text.

335. AALL CITATION REPORT, *supra* note 315, ¶ 51.

336. *Id.*

337. WIS. CITATION REPORT, *supra* note 314; see also Marcia J. Koslov, What is the Citation Proposal?, WIS. LAW., Feb. 1995, at 10.

thetical at the end of case citations. Pinpoint citations in the proposed Wisconsin format appear as follows:

Smith v. Jones, 1996 Wis App 35, 15.

This simple citation refers the reader to the fifteenth paragraph of the Wisconsin Court of Appeals' thirty-fifth decision in 1996.

The Wisconsin proposal was thus the first universal citation form that recognized the coming primacy of electronic case law and adapted citation requirements accordingly. The Wisconsin State Bar Board of Governors approved the new format almost immediately; after a May 1995 hearing, however, the Wisconsin Supreme Court postponed consideration of the issue for eighteen months.<sup>338</sup> Nevertheless, the Wisconsin proposal caught on. In March 1995, the American Association of Law Libraries (AALL) Task Force on Citation Formats submitted a report to the AALL Executive Board recommending adoption of the Wisconsin citation format.<sup>339</sup> The entire AALL approved the proposal on July 18, 1995.<sup>340</sup> Following the AALL recommendation, the South Dakota State Bar Association, which had been distributing state court opinions to its members using the medium-neutral citation format, began preparing a proposal for the South Dakota Supreme Court, urging it to adopt the new format.<sup>341</sup> At the annual meeting of the American Bar Association in August 1995, the ABA's Board of Governors appointed a Special Committee on Citation Issues to develop recommendations concerning citation systems and make those recommendations to the ABA's House of Delegates the following year.<sup>342</sup> In October 1995, the Florida Supreme Court, which had earlier requested comments on a proposal to eliminate pinpoint citations to West's Southern Reporter, adopted a rule which stated that while attorneys should continue to cite to the Southern Reporter, pinpoint citations, while "preferred," were

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338. See John J. Oslund, Wisconsin High Court Delays Decision on Case Citation Plan; West Publishing Opposes Proposed Change, MINN. STAR-TRIB., May 26, 1995, at 1D. The Wisconsin Supreme Court did, however, decide to begin posting all of its decisions on court BBS by September 1995. *Id.*

339. See AALL CITATION REPORT, *supra* note 315.

340. Federal Courts: Law Librarians Adopt Resolutions Calling for Alternative Legal Cites, DAILY REP. FOR EXECUTIVES, July 19, 1995, at D45.

341. Dana Coleman, Other States Battling Over Universal Citations, NEW JERSEY LAW., July 31, 1995, at 18. The South Dakota Supreme Court had earlier rebuffed attorneys' attempts to cite the bar association's opinions to the court, claiming that it could not find the cited opinions and reiterating that attorneys had to use West's North Western Reporter because it was the state's official reporter. *Id.*

342. See Jill Schachner Chanen, In the Matter of Cites, A.B.A. J., Feb. 1996, at 87; see also ABA Special Committee on Citation Issues, available at <http://www.abanet.org/citation/home.html> (Aug. 16, 1996).

not absolutely necessary.<sup>343</sup> In January 1996, the California Supreme Court's Advisory Committee on Publication of Official Reports asked for comments on a proposed "neutral-format" citation style for state appellate court opinions.<sup>344</sup> In May 1996, the ABA Special Committee released its final report, recommending the adoption of the Wisconsin proposal as a standard citation system for all United States jurisdictions.<sup>345</sup> The ABA House of Delegates accepted the Special Committee's recommendation and endorsed the proposed system in August 1996.<sup>346</sup>

### B. Analysis of the New Citation Format

Although driven in part by West's insistence upon asserting copyright in the pagination of its case reporters, the move toward a universal citation system is primarily a response to the vast changes technology has wrought upon the manner in which legal information is stored and delivered. A generation ago, legal research meant using print-based case reporters. Computer-assisted legal research was available to only a handful of top law firms.<sup>347</sup> Since 1990, however, every law student in the United States has been given a free LEXIS and WESTLAW account.<sup>348</sup> After the first semester of law school, during which students are generally prohibited by their schools from accessing either LEXIS or WESTLAW, students rarely return to the library stacks con-

343. See *In re Fla. R. App. P. 9.800(n)*, Citations, 661 So. 2d 815 (Fla. 1995).

344. Posting of James Evans to law-lib Internet listserv (Jan. 23, 1996) (copy on file with the author).

345. See ABA CITATION REPORT, *supra* note 333, ¶ 11. The Special Committee provided the following examples of the citation form at the federal level:

Supreme Court: 1996 US 15

Court of Appeals: 1996 5Cir 15

District Court: 1996 SDNY 15

*Id.* ¶ 40, app. A. The AALL proposes a slightly different format for federal district courts and courts of appeals:

Court of Appeals: 1996 US App (5th) 15

District Court: 1996 US NY (S Dist) 15

AMERICAN ASS'N OF L. LIBR., USER GUIDE TO THE AALL MEDIUM NEUTRAL CITATION Rule 4.2, 4.3 (Draft Release 2.2 1996). The ABA Special Committee also recommended that "all jurisdictions [should] strongly encourage parallel citation to a print source" during a transition to "primary reliance on electronic case reports." ABA CITATION REPORT, *supra* note 333, ¶ 38.

346. M.A. Stapleton, ABA Backs 'Instant' Legal Cite System, CHI. DAILY L. BULL., Aug. 6, 1996, at 1. The vote in the House of Delegates was an overwhelming 336-59. *Id.* Four days earlier, the ABA's Board of Governors unanimously endorsed the new citation form. M.A. Stapleton, ABA Body Backs Universal System for Legal Cites, CHI. DAILY L. BULL., Aug. 2, 1996, at 1.

347. See Harrington, *supra* note 85, at 553.

348. Marilyn R. Walter, Retaking Control over Teaching Research, 43 J. LEGAL EDUC. 569, 581 (1993).

taining case reporters; the overwhelming bulk of legal research that students conduct takes place electronically.<sup>349</sup> Moreover, law schools frequently give their students not only free e-mail accounts, but also free access to the Internet<sup>350</sup>—where they can now find a wealth of case law and an assortment of other legal research resources. The United States has thus reached a point where its new lawyers are entirely familiar and comfortable with electronic legal research, and turn to the print medium only as a last resort.

Further, CD-ROM technology, which allows the entire body of case law from a given state to be placed on a small disk, has allowed the sole practitioners and small firms that had hitherto been unable to afford building a library of case reporters in print an efficient means of accessing the case law in their jurisdictions.

The citation forms developed for use in print reporters are, however, a product of both nineteenth-century technology and nineteenth-century ways of thinking. Pages do not naturally exist in cyberspace. The nearest analogy to other forms of information dissemination immediately comes to mind when one looks at the scroll bar that generally resides on the right side of the screen of most computer applications. Before Gutenberg invented the printing press—and pages—there were scrolls. Citations to scrolls took a simple form: the number of the scroll (or chapter or book) and the paragraph number of the material being cited within the scroll.<sup>351</sup> Instead of being determined by technology, as pages are, paragraphs indicate what the author intended as a complete thought.<sup>352</sup> Examples of scroll/book/chapter and paragraph numbers abound, the most obvious being the Bible, e.g., Genesis 2:8.<sup>353</sup> As the Wisconsin TRC noted, “The proposal of the Committee is, in no small part, a proposal to use this system. In several millennia, we have come full circle.”<sup>354</sup>

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349. Exceptions occur when students clerk for small law firms or other legal entities that do not subscribe to WESTLAW or LEXIS. See Carol L. Schlein, *Selecting On-Line Research and Discussion Service for Small Firms*, NEW JERSEY LAW., May 8, 1995, at 15 (noting that LEXIS and WESTLAW have historically been too expensive for lawyers in small firms).

350. See, e.g., THE FLORIDA STATE UNIVERSITY COLLEGE OF LAW, 1995-1996 STUDENT HANDBOOK 79 (noting that “law students have access to Internet services [and] e-mail”).

351. WIS. CITATION REPORT, *supra* note 314, at 22.

352. *Id.* at 28.

353. *Id.* at 22-23.

354. *Id.* at 23.

## 1. Criticism of the Proposed Form

### a. A Citation to Nowhere

Criticism of the proposal centers around the observation that the new citation form does nothing to inform the user where the material being cited may be found.<sup>355</sup> Calling the universal citation form “incomplete and inefficient,” critics point out that users are left to guess whether a cited case can be found in a legal newspaper, a reporter volume, or on the Internet or a CD-ROM.<sup>356</sup> Therefore, the argument goes, the new system “makes it much more difficult to evaluate the reliability of information sources” because “it is very likely that one will find variant texts between competing products.”<sup>357</sup> Such observations, while undeniably valid, are hardly novel. For example, in those jurisdictions that require parallel print citations, the reader is left to wonder which of the parallel sources the author used.<sup>358</sup> Moreover, even if an attorney cites to one case reporter, there is no indication whether the attorney used the actual print volume, a CD-ROM, WESTLAW, or LEXIS.<sup>359</sup> In any event, the issue would seem to be a minor one at best, for it only comes into play where there are differing versions of court opinions.<sup>360</sup> Furthermore, the definitive version of a particular case originates on a court BBS, from which all providers will have obtained the opinion. To create a different version, a provider would have to actively alter the opinion in some fashion. Thus, at least in theory, the competitive marketplace should winnow out such unreliable providers of legal information.<sup>361</sup>

### b. Citations to “Any Reliable Source”

West Publishing is quick to point out that it is not opposed to new citation forms. It prefers a citation rule that is really no rule:

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355. See, e.g., Donna M. Bergsgaard & Andrew M. Desmond, *Keep Government Out of the Citation Business*, JUDICATURE, Sept.-Oct. 1995, at 61; Donna M. Bergsgaard & William H. Lindberg, *Case Citation Formats in the United States: Is a Radical New Approach Needed?*, 23 INT'L J. LEGAL INFO. 53, 59 (1995); Berring, *supra* note 81, at 632.

356. Bergsgaard & Desmond, *supra* note 355, at 61.

357. Berring, *supra* note 81, at 632.

358. AALL CITATION REPORT, *supra* note 315, ¶ 59.

359. *Id.*

360. *Id.* As the AALL report indicates, “in actual practice this is not a common occurrence and may be easily remedied by obtaining a different version of the case, from one’s own office, another practitioner, a library, or the court.”*Id.*

361. *Id.* It is precisely this form of unreliability that, among other things, led many to view WESTLAW as inferior to LEXIS in the late 1970s. See Harrington, *supra* note 85, at 554.

an “open rule” where courts allow citation to any reliable source.<sup>362</sup> In other words, if a case can only be found on CD-ROM, the Internet, or in a legal newspaper, courts should allow citation to any of those specific sources. One West spokesperson has even suggested that World Wide Web location citations, known as Uniform Resource Locators (URLs), may make the proposed citation form obsolete within a few years.<sup>363</sup> Thus, West maintains that “[i]t is not necessary for courts to require attorneys to cite specific sources of the law.”<sup>364</sup>

West’s comments are somewhat disingenuous. West reporters are undoubtedly the most comprehensive and reliable source of case law; thus, most attorneys would continue to use West reporters even if courts adopted such an “open rule” system. An “open rule” of citation, however, is the sort of anarchic system that would be anathema to most courts. Courts promulgate citation requirements precisely because they do not want to subscribe to every possible source of case law. Moreover, the universal citation form leads to a more appropriate version of the “open” citation rule envisioned by its critics because it allows attorneys to use “any reliable source” rather than cite to any of those sources. The proposed citation form requires the use of the citation contained within the opinion itself. The citation will thus be readily found in all sources. For example, an attorney in Florida might cite a case found on the Internet as follows:

Smith v. Jones, 1996 Fla 23

A Florida Supreme Court justice, lacking access to the Internet but possessing a CD-ROM of Florida opinions, could easily find the opinion simply by locating the twenty-third Florida Supreme Court opinion from 1996 on the disk.<sup>365</sup> Under West’s “open rule” proposal, the attorney’s citation might look like this:

Smith v. Jones, <http://nersp.nerdc.ufl.edu/~lawinfo/flsupct/cases/feb96/op-86532.html>

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362. Bergsgaard & Desmond, *supra* note 355, at 63-64; Bergsgaard & Lindberg, *supra* note 355, at 63.

363. Bergsgaard & Desmond, *supra* note 355, at 61.

364. *Id.*

365. It would be left to CD-ROM publishers how best to locate an opinion on disk. The easiest system would entail the use of a search engine which would allow the user to input the citation—much in the same manner as the LEXIS LEXSEE and WESTLAW Find functions—to call up the case in question.

The same case would be equally easy to find on the Internet. A Web site containing a particular court’s cases would list opinions sequentially by year. A user accessing the site would simply click on the sequential opinion number to call up the opinion in question.

Although perhaps able to garner some helpful information from the URL, our putative justice would have a much more difficult time finding the opinion in question without access to the Internet. Moreover, the use of such lengthy citations is not only cumbersome, it is also more prone to error.<sup>366</sup>

Finally, the notion of reliability—or, more precisely, unreliability—is often mentioned as an argument against the universal citation form. Without publishers such as West to edit and clean up court opinions, those who take opinions with the new citation format off of Internet databases will simply be getting the “[r]aw output of the courts.”<sup>367</sup> This line of thinking conjures up visions of hopelessly ungrammatical judges carelessly tossing off muddled opinions that must be filtered through legal publishers to make sense. Yet the notion that publishers make any significant changes to final opinions is unfounded.<sup>368</sup> As one commentator has noted, once final opinions are issued, “they do not change significantly, except in rare cases. Even the publishers confirm that most of their suggestions are technical, concerning issues like the form of footnotes.”<sup>369</sup> Minor technical changes would have no impact upon the paragraph numbers in an opinion with a universal citation. Moreover, the ranks of appellate court clerks—who frequently either write or edit a judge’s opinion—are generally filled with notoriously particular former law review editors. Thus, an overall system of quality control is already in place in the courts.

### c. Disadvantaging the Print Medium

Critics also contend that the universal citation form puts both print reporters and their users at a disadvantage.<sup>370</sup> In addition to failing to identify the print reporter in which a cited case might be found, the citation proposal would entail the use of a citation translation table for print reporter users, the addition of

366. See discussion *infra* part IV.B.2.

367. Robert C. Berring, *Universal Citation Systems—Will Tinkering with the Future Be the End of Reliable, Standardized Opinions? Yes: Keep Committees Out and Let Market Forces Work*, A.B.A. J., July 1996, at 74. Professor Berring also notes that “[m]aterial [currently] is gathered, edited, cleaned up, standardized and vetted” by legal publishers. *Id.*

368. See Gary Sherman, *Universal Citation Systems—Will Tinkering with the Future Be the End of Reliable, Standardized Opinions? No: Court Bulletin Boards Pose No Threat to Quality*, A.B.A. J., July 1996, at 75 (observing that “judges . . . generally deny that the print publishers make significant editorial contributions to the final opinion”).

369. *Id.*

370. See Donna M. Bergsgaard & William H. Lindberg, *A Dissenting View*, in AALL CITATION REPORT, *supra* note 315, at 30-33 (dissenting from majority recommendation).

“confusing spine labels to volumes that now carry easily understood and easily transcribed volume numbers,” and “significant” retraining of every attorney who currently knows how to find cases in print publications.<sup>371</sup> Moreover, these critics point out that while electronic products have become a popular means of searching for the law, print remains the preferred medium for legal study and analysis.<sup>372</sup>

The first point—that the appropriate print reporter would be difficult to locate with the proposed citation system—is not a fault of the citation form but rather of the print reporter itself. For if a given legal publisher insists upon continuing the use of volume numbers that only signify how many volumes of a print reporter it has published, rather than indicating upon the volume’s spine which cases from which jurisdiction and which year are included within the volume, then the publisher should release a translation table to allow the print user to find a case that uses the proposed citation form in the publisher’s volume. These solutions, however, become the gist of the critics’ argument that universal citations would disadvantage print reporters. Nevertheless, West provides translation tables today, for translating citation forms from those jurisdictions with official reporters to West’s National Reporter System.<sup>373</sup> West does not argue that these official reporters disadvantage users of the National Reporter System. However, this does seem to be the very argument that West is making with respect to universal citations: the proposed form will disadvantage users of the National Reporter System because the reporters in that system group multiple jurisdictions within a single volume, thus making it difficult (though not impossible) for West to indicate to the user which cases from which years are included within a volume. Of course, this is where the potential for “confusing spine labels” comes in. Yet this difficulty does not exist where print reporters contain only cases from one jurisdiction. The solution there is simply to stop assigning volume numbers to such reporters and instead number them by year, indicating in addition the sequentially numbered cases contained within the volume. While West’s National Reporter System was a stroke of marketing genius which made legal research more convenient, its success should not be allowed to

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371. *Id.* at 31.

372. *Id.*

373. AAAL CITATION REPORT, *supra* note 315, ¶ 58. West’s National Reporter Blue Book contains translation tables that convert official citations to National Reporter System citations. *Id.*

stand as an obstacle to making legal research even more convenient—not to mention less expensive.

The potential retraining of a nation of attorneys who have grown accustomed to researching in print reporters is not a particularly strong argument. The current system of citation is hardly intuitive, as any first-year law student who is trying to figure out what “661 So. 2d 288 (Fla. 1995)” means will tell you. The universal citation form conveys information in a way that even nonlawyers might understand, for instead of an esoteric reference to a particular volume number of a publisher’s reporter series, the proposed form simply indicates the year. Retraining attorneys to recognize the information conveyed in a much simpler citation system is not an onerous task.<sup>374</sup>

Finally, it is difficult to argue with the proposition that print remains the preferred medium in which to read case law. However, this is not necessarily the same as saying that print reporters remain the preferred medium in which to read case law. Many users of electronic products confess to some difficulty reading cases from a computer screen.<sup>375</sup> Yet it seems unlikely that these users, once they have found a case electronically, then travel to the nearest law library and read the case in a reporter. Rather, users of electronic case law are much more apt to print out the case file they are viewing on the screen.<sup>376</sup> Thus, the universal citation form cannot be said to disadvantage users who prefer to read cases in print.

374. Indeed, the proposed citation form by and large maintains the jurisdiction identifiers familiar to attorneys from the parentheticals of the current citation system. What is perhaps most novel about the new citation form is that it numbers cases sequentially by year and uses paragraph numbers instead of page numbers. Although the use of these two numbers might take attorneys some time to accustom themselves, it seems difficult to agree with critics who call it a “significant new learning task.” See *id.*

375. *Id.* As Chief Judge Richard A. Posner of the Seventh Circuit says, “The problem is, us older guys are accustomed to reading on the printed page.” Christine Biederman, *Growing Internet Law Libraries Shake Century-Old Legal Tradition*, N.Y. TIMES ON THE WEB, Feb. 16, 1996, available at <http://www.nytimes.com/library/cyber/week/0216bluebook.html> (Aug. 16, 1996).

376. The author conducted virtually all of the research for this Comment electronically and printed out those sources he chose to read. Ironically, the only instances that compelled the author to visit a law library occurred when an electronic database did not include star pagination for a particular journal. This suggests that law journals consider adopting a medium neutral citation format as well: instead of volume numbers, law journals would use the year of publication; instead of continuous pagination within a volume (which might still be retained for the sake of convenience), articles would be numbered sequentially; and instead of relying upon page numbers for pinpoint citation, paragraphs would be numbered.

#### d. Letting the Market Decide

Another line of criticism is perhaps best summed up as being of the “if-it-ain’t-broke-don’t-fix-it” variety. Taking a page from the teachings of the law and economics movement, critics of the citation proposal suggest that the market should dictate legal citation form.<sup>377</sup> The reason current citation practices favor West reporters is because the market has decided this.<sup>378</sup> The market, the argument goes, will only accept the new citation format when it is ready.<sup>379</sup> Moreover, a universal citation system requirement is likened to unwanted “Big Government” and “Excessive Regulation.”<sup>380</sup> Requiring the new form would, according to this view, “make the world of citation far more restrictive than it has ever been in the past.”<sup>381</sup>

The market did indeed anoint West as the favored resource for case law. Recognizing this fact, many courts—as well as The Bluebook—followed suit and, because West reporters were so readily available, required citations to West volumes. But these very requirements, together with West’s assertion of copyright in its reporter pagination, have skewed any “natural” market response to new citation forms. Thus, one cannot suggest that the market dictates citation form because current citation requirements prevent it from doing so. If the courts gave up citation requirements to specific sources such as West reporters and adopted the “open rule” of citation, then perhaps the market would eventually come to favor a particular citation form. As discussed earlier, however, courts would be loathe to adopt such a rule.<sup>382</sup> Thus, it is up to the courts—whether seen as “Big Government” involvement or no—to sort out citation requirements and adapt them to evolving technological needs. The Bluebook editors have done just that. While the fifteenth edition of The Bluebook dispensed with the use of parallel citations (except within individual jurisdictions) and adopted West’s National Reporter System as the preferred manner for case citation, the editors of the sixteenth edition have decided to recommend that

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377. See, e.g., Berring, *supra* note 81, at 631 (“Under no circumstances should citation requirements be changed in a way that would interfere with the natural evolution of legal information in the marketplace.”).

378. *Id.* at 633.

379. *Id.* at 634.

380. See Bergsgaard & Desmond, *supra* note 355, at 66.

381. Berring, *supra* note 81, at 631.

382. See discussion *supra* part IV.B.1.b.

“when vendor-neutral citations are available, people should use those vendor-neutral citations as the preferred citation.”<sup>383</sup>

## 2. Theory: Requirements of Legal Citation Form

While legal citation forms serve a number of purposes, the primary purpose is “to direct the reader to a source of the information referred to by the author.”<sup>384</sup> In his article *Legal Citation Form: Theory and Practice*,<sup>385</sup> Paul Axel-Lute listed 13 principles of legal citation form: Uniqueness, Brevity, Redundancy, Informativeness, Dissimilarity among forms, Similarity to original, Logic, Permanence, Readability/ Transcribability, Tradition, Standardization, Simplicity, and Honesty.<sup>386</sup>

To satisfy the criterion of Uniqueness, “[a] citation should contain sufficient information to identify unambiguously the material cited.”<sup>387</sup> The universal citation form easily complies with this requirement, as it identifies the court issuing the opinion and assigns a unique identifying number to the opinion. Brevity requires that a citation form “should not be longer than necessary.”<sup>388</sup> The new citation form is, in fact, shorter than traditional citation forms, because it does not include references to a particular publisher’s volume. Redundancy is a two-pronged criterion, requiring that the citation form (1) enable one to recover from an error in the citation, and (2) provide references to different sources for the same material.<sup>389</sup> The current print-based citation form has fairly strong redundancy in the first sense, as the volume number and year repeat much the same information.<sup>390</sup> The new citation form lacks this redundancy, but more than makes up for it in that the citation is part of the opinion itself, thus making it easier to recover from errors.<sup>391</sup> In addition, because of this inateness, the new form is superior in the second sense of redundancy, as it refers readers to all sources of case law, e.g., CD-ROMs, print reporters, on-line databases, etc.<sup>392</sup>

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383. Biederman, *supra* note 375 (quoting Harvard Law Review president Dave Friedman).

384. Byron D. Cooper, *Anglo-American Legal Citation: Historical Development and Library Implications*, 75 *LAW LIBR. J.* 3, 3 (1982).

385. Paul Axel-Lute, *Legal Citation Form: Theory and Practice*, 75 *LAW LIBR. J.* 148 (1982).

386. *Id.* at 148-49.

387. *Id.* at 148.

388. *Id.*

389. *Id.*

390. *WIS. CITATION REPORT*, *supra* note 314, at 33.

391. *Id.*

392. *Id.*

Informativeness requires that the citation possess “the information that is most likely to be useful to the reader in understanding and evaluating the authority behind the statement supported by the citation.”<sup>393</sup> Both new and old forms convey equally the information needed to evaluate the authority of the material cited. Dissimilarity among forms requires that citation forms of material cited in the same context be sufficiently dissimilar to minimize confusion.<sup>394</sup> According to the Wisconsin TRC report, the four-digit year of the new form provides “a distinctive format that will prevent confusion with other forms.”<sup>395</sup> To satisfy the criterion of Similarity to original “[a] citation form should be as close as possible to the full identifying information on the cited material.”<sup>396</sup> The new citation form meets this criterion, as the cite and the identifying material in the case are one and the same; such is not the case with the current system. Logic requires that elements of a citation form be arranged to reflect the logical relationships of the cited material’s attributes.<sup>397</sup> Both new and old forms satisfy this principle equally. Permanence means precisely that: citation information “should be as permanent as possible, minimizing the need to revise the citation at a later time.”<sup>398</sup> This criterion is lacking in the current system, as the means for citing new cases—slip opinions<sup>399</sup>—eventually changes to advance sheets and then a permanent reporter.<sup>400</sup> Because it is a part of the opinion, the new citation form is permanent as soon as the case is released. Readability/ Transcribability refers to a citation’s “expressib[ility] in different media.”<sup>401</sup> Both citation forms possess this quality equally.

Tradition requires that authority “be cited the way it has been cited previously, in order to avoid a confusing multiplicity of forms.”<sup>402</sup> Generations of attorneys have used the current system, while the proposed citation form represents a significant change. Axel-Lute goes on to say, however, that “[c]itation forms found on the cited material itself should be followed unless they are defec-

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393. Axel-Lute, *supra* note 385, at 148.

394. *Id.* at 149.

395. WIS. CITATION REPORT, *supra* note 314, at 33.

396. Axel-Lute, *supra* note 385, at 149.

397. *Id.*

398. *Id.*

399. See *The Bluebook: A Uniform System of Citation* 67 (15th ed. 1991) (“When a case is unreported and available only in separately printed slip opinions, give the docket number, the court, and the full date of the most recent major disposition of the case.”).

400. WIS. CITATION REPORT, *supra* note 314, at 34.

401. Axel-Lute, *supra* note 385, at 149.

402. *Id.*

tive with respect to other principles.”<sup>403</sup> Because the new form will be found within a cited case, this principle seems to mandate the use of the new form, traditional citation form notwithstanding. The Standardization principle requires that a “writer should follow [The Bluebook:] A Uniform System of Citation.”<sup>404</sup> The Bluebook has made the current system all but uniform across the country. However, the editors of The Bluebook have indicated that they will recommend the new citation form be used once it is adopted as an official method of citation by a given court.<sup>405</sup> The AALL and the ABA have already endorsed the Wisconsin proposal; thus, it would seem likely that it will become the standard form of vendor-neutral citation.

To satisfy the Simplicity principle, the number of separate rules to be learned should be kept to a minimum.<sup>406</sup> The proposed citation form is a good deal simpler than the current form, as it only requires the user to learn jurisdiction designations. Finally, the Honesty principle requires that “[t]he writer should cite the source that was actually used, rather than another source for the same material.”<sup>407</sup> Under the current system, one cites to a publication containing a copy of the opinion, rather than the opinion itself. Because one would cite to the opinion itself under the proposed system, one would be citing to the source actually used.

The Axel-Lute principles, published in 1982, do not address certain conditions that have subsequently arisen, namely the advent of electronic publication, CD-ROMs, and the Internet, as well as the controversy surrounding pagination copyright.<sup>408</sup> To address the concerns these conditions engendered, the Wisconsin TRC report added four additional principles: Precision, Public Domain, Longevity, and Universality. Precision requires that a citation “allow the user to easily find the precise material referred to.”<sup>409</sup> The Wisconsin report observes that paragraph citations provide far greater accuracy than page number citations, “particularly when the page is in a multi-columned version . . . and consequently covers a large amount of material.”<sup>410</sup> The Public Domain principle requires that one should be able to use a ci-

403. *Id.*

404. *Id.*

405. See Bluebook Editors Moving Toward Recommending Vendor-Neutral Citations, *DAILY REP. FOR EXECUTIVES*, Mar. 7, 1996, at A45.

406. Axel-Lute, *supra* note 385, at 149.

407. *Id.*

408. AALL CITATION REPORT, *supra* note 315, ¶ 21.

409. WIS. CITATION REPORT, *supra* note 314, at 35-36.

410. *Id.*

tation system without legal hindrance.<sup>411</sup> As the proposed system is, by definition, vendor-neutral, it is not the property of any one entity, and may be freely used by all.

To satisfy the Longevity principle, a citation form should be able to conform to changes in technology over a long period of time.<sup>412</sup> The vendor neutral citation form is tied to the author's thoughts, expressed as paragraphs, rather than the page numbers, which are the result of a medium-specific mechanical process that is independent of the author. Related to this principle is Universality, which requires that one be able to use a citation system within a variety of media and for a variety of purposes.<sup>413</sup> The proposed system meets this criterion, while the current system does not.

### 3. Practice: The Potential Application of the Universal Citation Form in Florida

Raising the specter of "Big Government" and an overworked judiciary, criticism of the universal citation system frequently takes the form of objecting to the costs involved in putting it into practice. Therefore, exploring the potential application of the proposed system in a single jurisdiction is helpful. For example, Florida has a tradition of encouraging unfettered access to public records.<sup>414</sup> Indeed, in addition to the public records statute,<sup>415</sup> the Florida Constitution guarantees access to public records, specifically including the public records of the judiciary.<sup>416</sup> Yet Florida is also typical of a number of states, in that its court rules require citation to a reporter in West's National Reporter System—in this case, the Southern Reporter.<sup>417</sup>

#### a. Background

As discussed earlier,<sup>418</sup> Florida had published its own cases in volumes known as Florida Reports until 1948.<sup>419</sup> State law in ef-

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411. *Id.*

412. *Id.* at 36.

413. *Id.*

414. See, e.g., Barbara A. Petersen & Charlie Roberts, Access to Electronic Public Records, 22 FLA. ST. U. L. REV. 443, 499 (1994) (discussing Florida legislation that requires record custodians to provide copies of public records in the medium requested if the record is maintained in that medium); Matthew D. Bunker et al., Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology, 20 FLA. ST. U. L. REV. 543, 557-59 (1993) (discussing guidelines to ensure access to computerized records in Florida).

415. See FLA. STAT. ch. 119 (1995).

416. FLA. CONST. art. I, § 24(a).

417. FLA. R. APP. P. 9.800(a)-(b), (n).

418. See *supra* text accompanying note 246.

fect before that time allowed the supreme court to contract with a "reputable publisher" to print and bind the cases for the state.<sup>420</sup> The publisher physically delivered the reporters to the supreme court, where court personnel would mail them to judges throughout Florida and also sell them.<sup>421</sup> After the Second World War, the case load had grown too big for the court to physically distribute its own case reporters; therefore, along with a number of other jurisdictions, the state decided to rely upon West's National Reporter System.<sup>422</sup>

Florida is unusual, however, because the court rules requiring citation to the Southern Reporter are a reflection of Florida statutory law, which specifies that every two years the state must enter into a contract with West Publishing providing for the publication of Florida case law.<sup>423</sup> Thus, because it enjoys the rare privilege of being a private company enshrined in the Florida Statutes, West Publishing would seem to be the official reporter for Florida.<sup>424</sup> Nevertheless, West denies its official status in Florida<sup>425</sup> and has zealously pursued competitors who have tried to use its page numbers for their compilations of Florida cases.<sup>426</sup> Florida therefore has found itself in a rather odd position: it has a constitution that specifically mandates repeal of any statute or court rule limiting access to public records,<sup>427</sup> yet it keeps a statute on the books<sup>428</sup> requiring its court system to sign agreements with a publishing company that claims copyright in the versions of the public records it publishes for the state. Further, the Florida Supreme Court still requires, via court rule,<sup>429</sup> that the only

419. Interview with Jo Dowling, Ass't Librarian, Supreme Court of Florida, in Tallahassee, Fla. (Apr. 2, 1996).

420. *Id.*

421. *Id.*

422. *Id.*

423. FLA. STAT. § 25.381 (1995).

424. The Florida Supreme Court has admitted as much. See SUPREME COURT MANUAL, § 4, at 700 ("Publishers other than the Court's official reporter . . ."); see also *supra* text accompanying note 250.

425. *Oasis Publishing Co., Inc. v. West Publishing Co.*, 924 F. Supp. 918, 930 (D. Minn. 1996).

426. See *West Publishing Co. v. On Point Solutions, Inc.*, No. 93-CV-2071-MHS, 1994 U.S. Dist. LEXIS 20040 (N.D. Ga. Sept. 1, 1994); see also discussion *supra* part III.B.

427. FLA. CONST. art. I, § 24(d) provides:

All laws that are in effect on July 1, 1993 that limit public access to records or meetings shall remain in force, and such laws apply to records of the legislative and judicial branches, until they are repealed. Rules of court that are in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed.

428. FLA. STAT. § 25.381 (1995).

429. FLA. R. APP. P. 9.800(a)-(b), (n).

acceptable citation form for case law in Florida is the publisher's copyrighted version. Because the copyright claim prevents competitors from offering citable and affordable versions of case law, the Florida statute and court rule work to hinder access to these public records.

Therefore, it would seem that Florida would be ripe for adopting the universal citation form. The Florida Supreme Court, however, while apparently recognizing the difficulty West's copyright claims have created, has simply opted to discard the requirement of pinpoint citations to the Southern Reporter rather than adopt the new citation form.<sup>430</sup> This decision, while understandably cautious considering the rapid changes taking place, was perhaps too cautious if one understands how easy it would be for Florida to adopt the new citation form.

#### b. The Opinion Dissemination Process in Florida

After a Florida Supreme Court opinion is drafted with word processing software, it is circulated to the panel that originally heard the case.<sup>431</sup> Depending upon how long the justices' voting process takes, the opinion is then ready to be finalized.<sup>432</sup> After being checked one more time for corrections, the opinion—now called a "file stamp case"—is put in a special directory for West Publishing on a clerk's computer.<sup>433</sup> From there, the court's Information System Services (ISS) department transmits opinions to West every Thursday after 10:00 a.m.<sup>434</sup> After all of the opinions have been transmitted to West, ISS takes the opinions and places them on the court's BBS.<sup>435</sup> From there, LEXIS retrieves its copies of opinions, as does the official supreme court opinion Web site at the University of Florida College of Law.<sup>436</sup> Court data from 1993 indicates that the court disseminated "roughly" 428 opinions with dispositions that year.<sup>437</sup>

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430. In re Fla. R. App. P. 9.800(n), Citations, 661 So. 2d 815, 816 (Fla. 1995): "[P]inpoint citation to . . . the Southern Reporter . . . is optional, although preferred." As noted earlier, few attorneys practicing before the Florida Supreme Court would venture to disregard its "preferences." See *supra* note 272.

431. Interview with Janie Bentley, Deputy Clerk, Supreme Court of Florida, in Tallahassee, Fla. (Apr. 2, 1996).

432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.*

437. *Id.*

### c. Implementing the New Citation Form

The obvious time to append the universal citation form to the Florida Supreme Court's opinions is when they are checked for corrections a final time, immediately prior to their becoming a "file-stamp case" ready for distribution. Court personnel checking the opinion could easily assign sequential case numbers at this point, because it is from here that the opinions are released for distribution; thus, the assigned numbers would accurately reflect the sequence in which the court releases its opinions. This requires no more work than the clerk checking the last sequential case number issued and typing, e.g., "1996 Fla 23" at the top of the document.

Assigning paragraph numbers at this stage would seem desirable as well. Software currently exists that completely automates the assignment of paragraph numbers with a minimum of checking required.<sup>438</sup> Indeed, macros within currently used word processing software can automatically assign paragraph numbers to opinions.<sup>439</sup> The Wisconsin TRC report recommends that paragraph numbers start at the line containing the author's name, while the AALL report proposes that paragraph numbers begin with the first paragraph of the opinion.<sup>440</sup> Both reports agree that indented quotations and footnotes should remain unnumbered.<sup>441</sup>

Implementing the universal citation in Florida would thus be a simple task that requires minimal additional effort on the part of existing court personnel. Of greater concern is the disposition of the court's electronic opinions. Currently, ISS deletes opinions from the court's BBS within two weeks after placing them there.<sup>442</sup> While the opinions are being archived prospectively on the official court opinion Web site, they are only readily accessible as Web pages, not as the original source files.<sup>443</sup> While Rich Text Format (RTF) versions of the original source files are available for downloading, they are only formally accessible as individual files at the end of each case's web page.<sup>444</sup> The court should seri-

438. AALL CITATION REPORT, *supra* note 315, ¶ 72.

439. WIS. CITATION REPORT, *supra* note 314, at 28.

440. *Id.* at 30; AALL CITATION REPORT, *supra* note 315, ¶ 67.

441. WIS. CITATION REPORT, *supra* note 314, at 28; AALL CITATION REPORT, *supra* note 315, ¶ 67. A footnote would be considered a part of the paragraph in which it appears, while an indented quotation would be considered a part of the paragraph immediately preceding it. WIS. CITATION REPORT, *supra* note 314, at 28.

442. Bentley, *supra* note 431.

443. See Supreme Court of Florida Opinions, available at <http://nersp.nerdc.ufl.edu/~lawinfo/flsupct/index.html> (Aug. 16, 1996).

444. See *id.*

ously consider replacing its Internet-inaccessible BBS with a file transfer protocol (ftp)<sup>445</sup> Internet site where the files are kept permanently. Indeed, since 1990, the U.S. Supreme Court has been archiving its opinions through its Project Hermes at an ftp site at Case Western Reserve University.<sup>446</sup> The opinions are available both in a plain text format as well as in the Court's original Word Perfect word processing format.<sup>447</sup> When combined with the universal citation form, a similar system in Florida would allow anyone who is interested to download opinions and compile them on CD-ROM, Web sites, or even in print reporters. The market would then reward those who add the most value to the data with headnotes, syllabi, or search engines at the lowest cost. Most important, the site would serve as the authoritative location for Florida case law.<sup>448</sup> Just as users of current citations know to look to the Southern Reporter for the authoritative versions of Florida opinions today, the users of the universal citation system would know to look to the court's electronic archive<sup>449</sup> for the authoritative versions of Florida opinions tomorrow.

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445. Ftp allows a user "to list the names of computer files available on a remote computer, and to transfer one or more of those files to an individual's local computer." *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 835 (E.D. Pa. 1996).

446. See Robert J. Ambrogi, *Finding Court Decisions on the Internet*, RES GESTAE, June 1995, at 44.

447. *Id.*

448. This is hardly a significant investment in financial terms. The average Florida Supreme Court opinion for the month of February 1996 was approximately nine kilobytes in length. See Index of /~lawinfo/flsupct/cases/feb96, available at <http://nersp.nerdc.ufl.edu/~lawinfo/flsupct/cases/feb96/> (Aug. 16, 1996). Assuming a caseload of no more than 500 cases per year, see *supra* note 437 and accompanying text, a year's worth of Florida Supreme Court opinions would take up 4.5 megabytes of space. A moderately well-equipped personal computer costs approximately \$2,000 today and contains over one gigabyte—a thousand megabytes—of storage space. See Elisa Williams, *It's Time to Buy a Computer*, ORANGE COUNTY REGISTER, May 5, 1996, at K7. Thus, an average personal computer contains enough space for 222 years of Florida Supreme Court opinions.

The biggest investment would be in providing a system with wide bandwidth Internet access to meet the demands of users. The purchase of server hardware, software, and a direct connection to the Internet runs "anywhere from \$10,000 to \$35,000 and up, depending on the power of the computer system and the speed of the connection." Eric Richardson, *Site Construction*, INTERNET WORLD, Apr. 1996, at 62, 64. The cost of a 1.54 megabyte-per-second T1 connection ranges from \$1,300 to \$2,000 a month. *Id.* at 66. Thus, after the initial investment in setting up the ftp server, the yearly cost (excluding that of an individual to oversee the system) would be between \$15,600 and \$24,000—insignificant in terms of state budgetary appropriations.

449. These users would presumably also be aware of conveniently designed Web sites or CD-ROMs containing copies of all opinions in the archive.

CD-ROM users, who now generally have to wait for periodic updates to their collections of case law on CD-ROM, will quite likely be able to instantly update their CD-ROM case law libraries via supplements on the World Wide Web. See Robert E. Calem, *Hybrid CD-ROMs Send Users to the Web*, N.Y. TIMES ON THE WEB, Apr. 18, 1996, available at <http://www.nytimes.com/library/cyber/week/0419interactive.html> (Aug. 16, 1996); Robert E. Calem, *CD-ROM Publishers Seek Salvation in On-Line Links*, N.Y. TIMES ON THE WEB,

## V. CONCLUSION

[T]he Law . . . should be accessible to every man and at all times.<sup>450</sup>

Franz Kafka

Courts in this country have two jobs: to say “what the law is” and to disseminate those sayings to the citizenry.<sup>451</sup> Those sayings on what the law is should be made available to the bench, bar, and public at little or no cost. The dissemination of this information should not be limited via either copyright law or exclusive contracts. Nevertheless, this is currently the state of case law dissemination in the United States, even though such a policy is at odds with both 150 years of court precedent and at least one state constitution.

However, the ascendance of new information technologies, in particular the Internet and CD-ROMs, is having a radical effect upon the way information is disseminated. Court opinions are quickly finding their way onto both the Internet as well as the CD-ROMs of small publishers who have neither copyright claims nor contractual agreements with particular jurisdictions. Current court rules of citation lag far behind this technological revolution, generally permitting citation only to the print reporters of a private legal publisher that asserts copyright in the page numbers of those volumes. While this claim seems spurious in the light of the Supreme Court’s decision in *Feist*, it nonetheless continues to restrict the sound public policy of maximum access to the law by both discouraging competitors from entering the legal publishing market and keeping the price of access artificially high.

The print medium, however, is no longer the primary means via which the legal researcher accesses court opinions. Recognizing this fact, several organizations have proposed a new citation form that is independent of both vendor and medium formats. The implementation of the new format requires little or nothing in the way of extra court resources. Indeed, its success would be assured if each jurisdiction began maintaining its own authoritative electronic databases of court opinions. Therefore, the judiciary should move immediately to adopt a uniform system of cita-

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Apr. 17, 1996, available at <http://www.nytimes.com/library/cyber/week/0418interactive.html> (Aug. 16, 1996).

450. KAFKA, *supra* note 1, at 213.

451. The judiciary is the third branch of the government, and “governments have a duty to disseminate government information to their citizens.” AALL CITATION REPORT, *supra* note 315, ¶ 14.

tion that denominates opinions by the year and sequential order of release, and that provides for precise location markers within each opinion via the use of paragraph numbers.

## APPENDIX

## U.S. COURTS OF APPEALS ON THE WORLD WIDE WEB (AUG. 1996)

Court	World Wide Web URL	Date of Earliest Opinion
D.C. Cir.	<a href="http://www.ll.georgetown.edu/Fed-Ct/cadc.html">http://www.ll.georgetown.edu/Fed-Ct/cadc.html</a>	Mar. 95
1st Cir.	<a href="http://www.law.emory.edu/1circuit">http://www.law.emory.edu/1circuit</a>	Nov. 95
2d Cir.	<a href="http://www.law.pace.edu/legal/us-legal/judiciary/second-circuit.html">http://www.law.pace.edu/legal/us-legal/judiciary/second-circuit.html</a>	Sep. 95
3d Cir.	<a href="http://www.law.vill.edu/Fed-Ct/ca03.html">http://www.law.vill.edu/Fed-Ct/ca03.html</a>	May 94
4th Cir.	<a href="http://www.law.emory.edu/4circuit">http://www.law.emory.edu/4circuit</a>	Jan. 95
5th Cir.	<a href="http://www.law.utexas.edu/us5th/us5th.html">http://www.law.utexas.edu/us5th/us5th.html</a>	Nov. 92
6th Cir.	<a href="http://www.law.emory.edu/6circuit">http://www.law.emory.edu/6circuit</a>	Jan. 95
7th Cir.	<a href="http://www.law.emory.edu/7circuit">http://www.law.emory.edu/7circuit</a>	Aug. 95
8th Cir.	<a href="http://www.wulaw.wustl.edu/8th.cir/">http://www.wulaw.wustl.edu/8th.cir/</a>	Oct. 95
9th Cir.	<a href="http://www.law.vill.edu/Fed-Ct/ca09.html">http://www.law.vill.edu/Fed-Ct/ca09.html</a>	June 95
10th Cir.	<a href="http://www.law.emory.edu/10circuit">http://www.law.emory.edu/10circuit</a>	Aug. 95
11th Cir.	<a href="http://www.law.emory.edu/11circuit">http://www.law.emory.edu/11circuit</a>	Nov. 94
Fed. Cir.	<a href="http://www.ll.georgetown.edu/Fed-Ct/cafed.html">http://www.ll.georgetown.edu/Fed-Ct/cafed.html</a>	Aug. 95

## STATE SUPREME COURTS ON THE WORLD WIDE WEB (AUG. 1996)

Court	World Wide Web URL	Date of Earliest Opinion
Alaska <sup>†</sup>	<a href="http://www.touchngo.com/sp/sp.htm">http://www.touchngo.com/sp/sp.htm</a>	Jan. 91
Ark. <sup>†</sup>	<a href="http://www.state.ar.us/supremecourt/opinions/sc1996.htm">http://www.state.ar.us/supremecourt/opinions/sc1996.htm</a>	Jan. 96
Florida	<a href="http://nersp.nerdc.ufl.edu/~lawinfo/flsupct/index.html">http://nersp.nerdc.ufl.edu/~lawinfo/flsupct/index.html</a>	Sep. 95
Idaho <sup>†</sup>	<a href="http://www.state.id.us/judicial/scopins.html">http://www.state.id.us/judicial/scopins.html</a>	Dec. 95
Indiana <sup>†</sup>	<a href="http://www.law.indiana.edu/law/incourts/incourts.html">http://www.law.indiana.edu/law/incourts/incourts.html</a>	Jan. 95
Mass. <sup>†</sup>	<a href="http://www.lweekly.com/wm/lw/page/lw/sjc">http://www.lweekly.com/wm/lw/page/lw/sjc</a>	Apr. 96
Michigan	<a href="http://www.umich.edu/~icle/misupct/index.htm">http://www.umich.edu/~icle/misupct/index.htm</a>	Oct. 95
Minn. <sup>†</sup>	<a href="http://www.courts.state.mn.us/opinions/sc/current/sccur.html">http://www.courts.state.mn.us/opinions/sc/current/sccur.html</a>	May 96
Miss. <sup>†</sup>	<a href="http://www.mslawyer.com/mssc/case.html">http://www.mslawyer.com/mssc/case.html</a>	Feb. 96
Missouri	<a href="http://www.state.mo.us/sca/mosupct.htm">http://www.state.mo.us/sca/mosupct.htm</a>	Feb. 95
N.H.	<a href="http://www.state.nh.us/courts/supreme/opinions.htm">http://www.state.nh.us/courts/supreme/opinions.htm</a>	Nov. 95
N.Y.	<a href="http://www.law.cornell.edu:80/ny/ctap/overview.html">http://www.law.cornell.edu:80/ny/ctap/overview.html</a>	Jan. 92
N.C. <sup>†</sup>	<a href="http://www.aoc.state.nc.us/www/courts/appeals/sc/contents.html">http://www.aoc.state.nc.us/www/courts/appeals/sc/contents.html</a>	Dec. 95
Ohio	<a href="http://www.sconet.ohio.gov/">http://www.sconet.ohio.gov/</a>	May 92
Tenn. <sup>†</sup>	<a href="http://www.tsc.state.tn.us/opinions/tsc/oplittsc.htm">http://www.tsc.state.tn.us/opinions/tsc/oplittsc.htm</a>	Aug. 95
Vermont	<a href="gopher://dol.state.vt.us:70/11GOPHER_ROOT3%3A%5BSUPCT%5D">gopher://dol.state.vt.us:70/11GOPHER_ROOT3%3A%5BSUPCT%5D</a>	Aug. 91
Wash. <sup>†</sup>	<a href="http://www.wa.gov/courts/opinpage/home.htm">http://www.wa.gov/courts/opinpage/home.htm</a>	Mar. 96
Wis. <sup>†</sup>	<a href="http://www.wisbar.org/Wis/index.html">http://www.wisbar.org/Wis/index.html</a>	Oct. 95
Wyo.	<a href="http://courts.state.wy.us/opinion.htm">http://courts.state.wy.us/opinion.htm</a>	Jan. 96

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<sup>†</sup> State court of appeals opinions are also available from the same Web site.

