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## Legally Speaking-Hyperflow versus Matthew Bender

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# LEGAL ISSUES



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## Legally Speaking — The Hyperlaw/Bender v. West Decision and the Case for Universal Citation

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Most of us who work with legal materials or are interested in issues regarding copyright have heard of the November 9th decision from the Court of Appeals, Second Circuit regarding the West Publishing Group's loss on their claim of copyright to their pagination system used in their commercial compilation and publication of the decisions of the federal court system. The West Publishing Group, now part of the Thompson International Publishing Group, had historically compiled and published federal court cases since book salesman, John West founded the company in the 1870s. Over the years, West took over almost all publication of cases from the individual state and federal courts, leaving West with what many termed as a de facto monopoly in the field of court opinion legal publishing. Central to what became known as the West Reporter System was the way cases were organized and classified in its pagination system. The pagination system, simply described, revolved around the volume number, West Reporter name and then page number hence, as an example, volume 245 of the Northeast Reporter, 2nd series, page 542 would be written as 245 NE2d 542, usually followed by the date of the decision. This pagination structure became the official standard for legal citation accepted by American courts when referring to cases in all manner of legal documentation and when referring to cases in court. It is important to stress that until very recent times, this system served the court system effectively and elevated the West Publishing Company to the level of world's largest legal publisher. West selected, compiled, organized and added editorial enhancements to opinions such as its Syllabus, Headnotes and Key number system to produce summations of the arguments and cross-references to other cases of note. Publishers like Shepard's McGraw-Hill and later, Lexis-Nexis paid West royalties for using the citation system in their own products resulting in even more profits for the legal publishing giant. It should be noted for the non-law librar-

ian that West has never published all the opinions produced by entire US court system. In reality, "only about 70% of decided cases are ever published in print."<sup>1</sup> Another problem concerned the time-lag between the decision and its issuance and its appearance in its final printed form. Actually, West devised a system of what are called Advance Sheets which are compilations of recent cases published in paperback releases containing the official citations to expedite the pace of publication. Still often this time lag of a few weeks was considered unacceptable to many users of the reporter services.

Additionally, the cost of maintaining this complicated subscription reveals the additional problem of consumer cost into the overall history of this conflict. As an acquisitions librarian who worked in law libraries for over a decade, I can attest to the enormous cost to law libraries of maintaining the West Reporter Services. To complicate the matter, as the only official reporter of most of the Federal and State Courts of Appeals, the library absolutely could not afford to cancel and find an alternative. Much work and time was spent trying to juggle the ever escalating costs of these reporter systems in the face of stagnant or decreasing budgets. This financial burden was even more acute for the county, state or small law firm libraries. Initially, the appearance of two major on-line legal databases, Westlaw and Lexis-Nexis offered little relief to those unable to afford the cost. While academic law libraries and judges were often given deep discounts for installing these databases in their computer labs and offices, to help develop a user base

for their product and perhaps even to influence opinion with regard to West's monopoly, firms and other consumers paid a high price for this access. Such policies led critics of West's monopoly to charge that "there's almost a caste system in the legal world, because unlike big firm lawyers, most solos and small practitioners can't afford to pay the \$4 a minute to access Westlaw and Lexis."<sup>2</sup> This intense economic struggle has driven much of the support for the adoption of a system of universal citation system on the part of such organizations and the American Association of Law Libraries and later the American Bar Association itself.

During the last two decades, however, as electronic publishing began to present itself as a viable option for publication of opinions as well as other types of published legal materials in terms of speed of publication and options with regard to format, the concept of citing such materials also began to change. As an example, what does the concept of a page number mean in a fully electronic document, not just a copy of a printed document? We are not looking at the body of materials in the same way and as a result, changing

the way we cite these new formats is inevitable. Into this new and uncertain publishing environment came entrepreneurial enterprises like Hyperlaw, a company founded to take advantage of the changes in electronic format and offer electronic alternatives to the standard West Reporter system. The new environment also helped to spawn the movement to create a form of universal citation that could allow for faster and more decen-

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tralized court reporting. Such a system would ideally be publisher and vendor neutral and would adapt itself to an electronic environment by focusing on the paragraph rather than the page when citing the portion of the opinion being quoted.

Proponents of universal citation and critics of the current system of citation argued that West was taking information that was produced by taxpayer dollars, adding what they termed minor editorial enhancements, and claiming copyright to what were actually only compilations of materials in the public domain. The cases themselves should be available to whomever might be able to create a product from them the way West had for over a century. The competition, they reasoned would be good for the market and the consumer.

Understandably, West has vigorously resisted this intrusion into its economic territory in the media and in the courts. As an example, in 1992, Thompson Professional Corporation, a Canadian publishing conglomerate attacked West in hearings before the Subcommittee on Intellectual Property and Judicial Administration of the Committee on the Judiciary, House of Representatives saying that West's monopoly "has forced libraries and others to pay tens of millions in monopoly charges for access to legal texts, and has deprived users of the improved choices, quality and timeliness the competition could have provided."<sup>3</sup> West countered with the specter of sinister foreign takeovers when they stated that "we have all witnessed past efforts by foreign firms, acting under the guise of their U.S. subsidiaries they have bought up, to alter or dismantle fundamental American laws for their own profit and at the expense of American jobs and prosperity."<sup>4</sup> Interestingly, Thompson eventually acquired West in 1996 for an incredible \$3.4 billion becoming the West Publishing Group. At this point the battle over West's ownership of its citation system shifted to challenges to West from smaller entrepreneurial firms like Hyperlaw. It should be noted that West steadfastly maintained that the enhancements it added to the opinions constituted enough of a creative effort on their part to warrant copyright of the entire compilation much the same way any anthology would be copyrighted. They based their claim on Sec.103b of the Copyright Act wherein it states that "copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material in the work."<sup>5</sup> While there has never been a question of ownership with regard to the syllabus, headnotes or the key numbering system, challengers to West's copyright have argued that the pagination system does

not constitute sufficient creative effort to warrant copyright and in May of 1997 U.S. Judge John S. Martin agreed stating that the pagination claim was "trivial from a copyright perspective"<sup>6</sup> and "West's case reporters were 'derivative' works, meaning they were an upgraded product based on government documents."<sup>7</sup> On November 3, 1998, the U.S. Court of Appeals for the 2nd Circuit concurred with Judge Martin's earlier decision and West effectively lost its claim. It is almost certain that this case will probably be appealed before the Supreme Court.

These court challenges to West's copyright claims extend back over a decade and West has successfully defended itself throughout this period, an almost daily virtual war of words raged on the listservs between West's representatives and supporters and critics such as Alan Sugarman, founder of Hyperlaw and Jamie Lowe of the Taxpayer Assets Project. In 1988, West sued its competitor, Lexis for copying West's cases in order to construct its Lexis database. Eventually, West did grant a license to Lexis to allow it to copy the cases as part of the settlement. Authors like Jol Silversmith assert that "West may be beginning to realize what it's new role should be. West initially allowed the issue to be framed by its competitors and, when given opportunities to redeem itself in the court of public opinion, took a damn-the-public-opinion, full-speed-ahead approach, defending its copyright and refusing to license."<sup>8</sup>

To add to the dispute, in September of 1998, the AALL Committee on Citation Formats published its Universal Citation Guide (Available at <http://www.wisbar.org/newscenter/gennews/sept98/ucguide.pdf>). The citation guide is significant in that it has within its text, the potential to negate the whole debate regarding West's claim to page number copyright in its reporters. The Universal Citation creates a method of citation adaptable to both print and electronic resources without relying on West's page numbers. Remember that currently, courts may require documents be submitted to them containing sites which refer to West's reporters, making them and West indispensable to the presentation of your case.

The new Universal citation is, however, vendor neutral and neutral to the official citation system. You, the consumer, are not required to have any particular version or even format of a case to cite to it, only the paragraph number. This would require the court to administer the numbering of its cases, something many courts have embraced in states like Louisiana and Maine and others have been hesitant to adopt.

In reality, the Bender/Hyperlaw v. West case could be potentially harmful to the cause of Universal Citation. While West had copyright on its page numbers, there was a very strong reason for having Universal

Citation. If courts were going to recognize a copyright interest in West pagination, then the only way to open up legal information to everyone was to employ Universal Citation. Now, however, this most recent decision has, in effect, by eliminating West's claim, it could be argued, that the need for Universal Citation has also been eliminated. This argument ignores the fundamental advantage to having vendor neutral citation, the ability to publish cases as quickly as possible, making the decisions of the courts actually more accessible than waiting for West to select the case, create the pagination and then copy the pages into your database. Universal Citation could conceivably allow for publication of a case within minutes of a decision rather than days or weeks as with the current system. Many scholars have argued that the further development of on-line legal publishing could be seriously compromised without vendor neutral citation. Universal Citation is also a more adaptable medium for further developments in the future.

For these reasons, regardless of the eventual outcome of the Bender/Hyperlaw v. West case it behooves all responsible consumers of legal and law-related information to continue advocating for the adoption of vendor neutral citation. Though this case was only one small victory, it remains a milestone in the development of this very important form of publishing. While there are no villains, and in fact, legitimate economic interests exist for all parties, hopefully, what will emerge will be a citation system that is more adaptable to today's competitive electronic marketplace and yet provide the citizens of this nation with better, more affordable access to the decisions of its judiciary. 🌱

#### Endnotes

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3. "Of interest..West/Thompson Congressional Testimony 1992," p.159, available at: <http://falcon.cc.ukans.edu/~ptull/west.html>
4. Ibid, p.159.
5. "Copyright corner: compilations and collective works, part 2" by David Ensign in *Kentucky Libraries*, vol.62, no.4, Feb.1998, p.12-13,12.
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7. Ibid, p.2.
8. Silversmith, p.10.