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## House Bill 1822: New Anti-Westopoly Rule Proposed in Congress

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## LEGISLATIVE UPDATES

### HOUSE BILL 1822: NEW ANTI-WESTOPOLY RULE PROPOSED IN CONGRESS

#### INTRODUCTION

For years, West Publishing has had a virtual monopoly on the publishing of judicial opinions and other types of legal materials. This is due not only to its successful system of organizing and arranging cases and legal materials, but also due to a lack of competition. One reason West faces little competition is that it claims a copyright in the volumes it publishes. Another reason is the preference shown by the courts and practitioners to cite to a common set of materials. This preference is not merely an idiosyncrasy of lawyers. It is absolutely necessary in our legal system, where *stare decisis* is the key to legal success. Attorneys need to cite a source the court is familiar with and can access easily. In order to scrutinize legal arguments and apply *stare decisis*, the courts also need to find cases easily and efficiently. Thus, use of a common system of citation is easily justified. However, this preference for a common system has practically eliminated any possibility of competition.

Competition to West's system may have a better chance of succeeding if a new bill proposed in Congress is passed. This bill, introduced by Representative Barney Frank of Massachusetts on May 9, 1995, would prevent courts or other government agencies from requiring documents to cite only to copyrighted material.<sup>1</sup> The basic effect of this law would be to permit lawyers to cite to any set of volumes where cases are published, and not just to West's volumes. Thus, a competitor, who may have been unsuccessful in marketing its volumes of legal materials in the past, could now have a legitimate

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1. H.R. 1584, 104th Cong. (1995). In June, Frank introduced a substitute bill, H.R. 1822, that contained only minor changes. Both were sent to the House Judiciary Committee. So far, no hearings on the bill have been held and it has not been sent out of committee to be voted on.

chance to compete.

This update will begin by discussing the history of the different types of reporters and whether these materials are subject to copyright protection. Then, it will give an overview of the more recent case law dealing with the copyrighting of reporters, specifically those published by West. Next, it will discuss the efforts of West's competitors to compete with the publishing giant through lawsuits and lobbying for new legislation. Finally, taking into consideration the current system of citation and the preference given to West's reporters, this update will explain and analyze the new bill proposed in Congress that forbids courts and government agencies from requiring citations to copyrighted materials.

## I. BACKGROUND

### A. *Types of Reporters*

There are generally two types of reporters, official and unofficial.<sup>2</sup> It is the status of the reporter and not the substance of the reporter that determines whether the reporter is official or unofficial.<sup>3</sup> Official reporters are usually designated as such by statutes, court rules, or contracts between a publishing company and a jurisdiction.<sup>4</sup> An example of an official reporter is United States Reports, published by the Government Publications Office.<sup>5</sup> United States Reports is the official reporter of Supreme Court decisions.<sup>6</sup> An unofficial reporter is any other reporter published that has not been conferred with the status of official reporter by the court or the legislature. Two unofficial reporters, Lawyers Edition and Supreme Court Reports, compete with the United States Reports in publishing Supreme Court

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2. CHRISTINA L. KUNZ, ET. AL., THE PROCESS OF LEGAL RESEARCH 158 (1992).

3. *Id.*

4. *See, e.g.,* United States of America vs. The Thomson Corporation and West Publishing Company; Proposed Final Judgment and Competitive Impact Statement, 61 Fed. Reg. 35250-02 (1996) [hereinafter *Proposed Judgment*].

5. KUNZ, *supra* note 2.

6. *Id.* at 158-9.

opinions.<sup>7</sup>

Although many courts do not have designated official reporters, only one reporter is actually available in that jurisdiction.<sup>8</sup> As this reporter has no competition, it then becomes the de facto official reporter for that jurisdiction.<sup>9</sup> Examples of de facto official reporters are the Federal Second Reporters and Federal Supplement Reporters.<sup>10</sup> Neither is designated as the official reporter of federal district and circuit courts, but no other reporter contains these decisions.<sup>11</sup> Thus, both have become the de facto official reporter for lower court federal decisions.<sup>12</sup> Over half of the fifty states still have an official reporter.<sup>13</sup> However, in the remaining states that do not have an official reporter, West is the only available reporter, and thus has become the de facto official reporter.<sup>14</sup>

### B. Enhanced Reporters

Whether official or unofficial, the format of a reporter or statute book may be either enhanced or unenhanced.<sup>15</sup> Unenhanced versions of code compilations and case reporters contain the law or judicial opinion only.<sup>16</sup> They do not include synopses or notes to aid the reader in researching a topic.<sup>17</sup> Unenhanced materials are mainly used to look at the exact wording of a statute or case and not to research a specific issue.<sup>18</sup> Examples of unenhanced legal materials include United States Reports and the United States Code.

7. Anne Wells Branscomb, *Lessons From the Past: Legal and Medical Databases*, 35 JURIMETRICS J. 417, 422 (1995).

8. *Id.*

9. *Id.*

10. Both of these reporters are published by West. *Id.*

11. *Id.*

12. *Id.*

13. Out of these thirty-nine states, West admits to publishing only eight of these. James H. Wyman, *Freeing the Law: Case Reporter Copyright and the Universal Citation System*, 24 FLA. ST. U. L. REV. 217, 280 at n.82 (1996).

14. *Id.* at 229.

15. *Proposed Judgment*, 61 Fed. Reg. at 35260-2 (1996).

16. *Id.*

17. *Id.*

18. *Id.*

In contrast, enhanced versions of reporters contain synopses, descriptions of specific points of law, and other helpful research devices.<sup>19</sup> Likewise, enhanced statute books contain annotations. Annotations contain case law within the statute's jurisdiction that are either relevant or that interpret that particular section of the statute.<sup>20</sup> Both types of enhanced versions are used to find the answer to a specific issue when the user does not know exactly where to look.<sup>21</sup> Examples of these enhanced versions include the Federal Supplement and the United States Code Annotated. Because of the additional research devices offered by enhanced materials, they are more valuable to the researcher and thus cost more.<sup>22</sup> In addition, an unenhanced version of a material is not considered an adequate substitute for an enhanced version.<sup>23</sup>

### C. West's Reporters

As West is the standard by which all reporters are measured, it is useful to look at its reporter system and the added enhancements it offers.<sup>24</sup> First, the cases in each reporter are arranged by jurisdiction, separating state, federal and specialty court decisions.<sup>25</sup> Within each jurisdiction, the cases are arranged in groups according to date of decision. After a group decided within a certain time are organized together, the reporter follows a new jurisdiction. The decisions from the new jurisdiction are also grouped together, arranged by date of decision. After all of the jurisdictions in the volume are included, the reporter starts over with later cases from the first jurisdiction, the second jurisdiction, and so on. This continues in a similar manner

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19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* Very few publishers produce enhanced materials. Last year, two of the nation's largest publishers of legal materials, West Publishing and Thomson Corp., announced their intention to merge into one company. If this merger proves successful, the combined entity will be the only publisher to offer enhanced versions of reporters and statutes. *Id.*

24. Branscomb, *supra* note 7, at 421.

25. Actually, most of the opinions arrive at West separately, and West merely keeps them separated. Wyman, *supra* note 13, at 242.

throughout the volume. For example, in the Northeastern reporter, Illinois cases by date of decision come first, then Indiana cases, then Massachusetts cases, then New York cases, then Ohio cases, and then the reporter starts over again with Illinois cases by date of decision, and then Indiana cases, and so forth. Within each jurisdiction group, the cases are often also arranged by subject matter.<sup>26</sup>

Each case in West's reporters contains a brief synopsis of the case. The synopsis contains the outcome of the case, the jurisdiction appealed from, and the issues decided by the court. These synopses are generally one to three paragraphs long and are usually specific enough to allow the reader to decide whether it is necessary to read the entire case.

In addition, West's edited cases contain headnotes and key numbers. The headnotes are short numbered paragraphs summarizing each rule of law decided by the court in each case. These allow the reader to refer to the headnote number and go directly to that part of the opinion. More specifically than the case synopsis, headnotes enable the user to determine whether the case is relevant to her research without reading the entire case. Headnotes also contain key numbers which the reader can utilize in West's American Digest System.<sup>27</sup> In general, key numbers correspond to certain broad subjects.<sup>28</sup> More specific subtopics within a subject are denoted by numbers added on to the general subject matter keynote number.<sup>29</sup> Thus, after finding the general keynote number, the reader can look up that number in the Digest to find headings of subtopics.<sup>30</sup> Within each subtopic, a reader can find cases deciding issues of law relevant to the subtopic. Before the advent of electronic research, this method was the only practical way to research an issue.<sup>31</sup>

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26. *Oasis Publishing Co. v. West Publishing Co.*, 924 F. Supp. 918, 924 (D. Minn. 1996). “[I]n nearly twenty-five percent of the cases a West editor will override West’s general guidelines for arrangement and arrange cases differently.” *Id.*

27. This system is published in yearly volumes. West began publishing the American Digest System in 1908. Wyman, *supra* note 13, at 229.

28. KUNZ, *supra* note 2, at 159.

29. *Id.*

30. *Id.*

31. *Id.*

Another aspect of West's reporters is that they contain what West has termed "star pagination." In West's reporters, star pagination is used to refer to pages in other reporters. Within the text of each reporter are asterisks followed by numbers. These numbers coincide with the specific page breaks of another reporter. This allows the reader to pinpoint a cite to a page of a different reporter using West's reporters, without referring to the original reporter.

#### *D. Background and History of Legal Material and Citation Methods*

In 1834, the Supreme Court held that an individual reporter may not claim a copyright in judicial opinions.<sup>32</sup> This established very early in our history that the content of judicial opinions are in the public domain.<sup>33</sup> In the following years, a publishing war ensued.<sup>34</sup> Since the opinions themselves were not subject to copyright, anyone could reproduce them.<sup>35</sup> This was not only a lucrative business for publishers, but also necessary for the lawyers and judges that used these legal materials.<sup>36</sup> Although the government compiled and published its own editions of opinions, these official documents were often extremely expensive and not published in a timely manner.<sup>37</sup>

In 1885, West Publishing's editions became nationwide in the states they covered.<sup>38</sup> This national coverage essentially put smaller publishers out of business, as they could not compete.<sup>39</sup> West's editions were preferred and became popular not only because of their nationwide coverage, but also due to their arrangement of cases and

32. *Wheaton v. Peters*, 33 U.S. 591 (1834); *see also*, *Callahan v. Meyers*, 128 U.S. 617 (1888); *Banks v. Manchester*, 128 U.S. 244 (1888).

33. *Id.*

34. Francine Biscardi, *The Historical Development of the Law Concerning Judicial Report Publication*, 85 LAW LIBR. J. 531 (1993).

35. *Id.*

36. *Id.*

37. *Id.*

38. In 1885, West added four new regional reporters. Eventually this system would become known as the National Reporter System. The National Reporter System has historically published every appellate decision in the country. Wyman, *supra* note 13, at 229.

39. Wyman, *supra* note 13, at 229.

the additional research tools they offered.<sup>40</sup> Part of West's success was its ability to beat the government in its production of volumes of cases.<sup>41</sup> However, West's volumes were also preferred to the governments as West offered indexes, a synopsis of the case, headnotes, key numbers, and star pagination.<sup>42</sup> The government documents did not contain these mechanisms to aid the researcher.<sup>43</sup> West was also aided in its mission by court decisions and statutes that prevented copyrights from vesting in government publications.<sup>44</sup>

In 1895, Congress enacted the Printing Act of 1895 which outlawed the copyrighting of any federal government publication.<sup>45</sup> Years later, when the Copyright Act of 1909 was enacted, a similar provision was included.<sup>46</sup> The Copyright Act of 1976, which currently governs copyrights, is virtually the same as the 1909 Act.<sup>47</sup> Thus, it is settled law that the text of judicial opinions and legislative materials are not subject to copyright. Because of this, government materials are similar to facts which are also not subject to copyright. However, the particular compilations of facts and government materials may, in some instances, be validly copyrighted.

### *E. Copyrighting West's Reporters*

#### *1. Standards for Copyrighting Compilations*

Section 103 of the Copyright Act of 1976 specifically extends copyright protection to compilations.<sup>48</sup> Section 101 defines a

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40. Biscardi, *supra* note 31, at 534.

41. *Id.*

42. *Id.*

43. *Id.*

44. *See, e.g.*, *Wheaton v. Peters*, 33 U.S. 591 (1834); 17 U.S.C. § 105 (1994).

45. Copyright Act of Jan. 12, 1895, ch. 23, 28 Stat. 601.

46. Copyright Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075, 1077 (current version at 17 U.S.C. § 101 *et. seq.* (1994)).

47. 17 U.S.C. § 101 (1994) *et. seq.*

48. Section 103 provides:

§ 103. Subject matter of copyright: Compilations and derivative works

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which a copyright subsists does not extend to any part of



compilation as “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>49</sup> However, all compilations are not protected. The Copyright Act requires all works to be creative and original. Thus, in order for a compilation to be subject to a valid copyright, the selection and arrangement of the material must be done in a creative and non-typical manner.

## 2. *Application of these Principles to West’s System*

There has been a great deal of debate as to whether West’s compilations are subject to copyright protection.<sup>50</sup> Most competitors and legal scholars agree that the completely original aspects of West’s compilations are copyrightable, such as the synopses and headnotes.<sup>51</sup> However, the controversy has surrounded the arrangement and numbering system used by West.<sup>52</sup> Although West concedes that use of the first page of its opinions constitutes fair use under the Copyright Act, it claims that the successive pages are protected by copyright.<sup>53</sup> West argues that copyright protection extends not only to its arrangement of judicial opinions, but also to the page numbering of those opinions.<sup>54</sup> It claims that this numbering system

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the work in which such material has been used unlawfully.

(b) The 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 employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright in the preexisting material. 17 U.S.C. § 103 (1994).

49. 17 U.S.C. § 101 (1994).

50. See William L. Anderson, *Copyright Protection for Citation to a Law Reporter: West Publishing Co. v. Mead Data Central, Inc.*, 71 MINN. L. REV. 991 (1987); Brian A. Dahl, *Originality and Creativity in Reporter Pagination: A Contradiction in Terms?* 74 IOWA L. REV. 713 (1989).

51. *Id.*

52. See *West Publishing Co. v. Mead Data Central, Inc.*, 799 F.2d 1219 (8th Cir. 1986) [hereinafter *Mead II*]; *Oasis Publishing Co., Inc. v. West Publishing Co.*, 924 F. Supp. 918 (D. Minn. 1996).

53. See, e.g., *Mead II*, 799 F.2d at 1222.

54. *Id.*

only exists due to West's original arrangement of cases and is therefore protected.<sup>55</sup> Opponents argue that West's numbering of pages is not copyrightable because the number assigned to each page is merely sequential and the number itself does not contain the requisite amount of creativity.<sup>56</sup> The Court of Appeals for the Eighth Circuit agreed with West's argument for copyright protection and granted a temporary injunction against Mead based on West's claim in 1986.<sup>57</sup> However, since then, the Supreme Court decided *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>58</sup> The Court's holding in *Feist* may have a severe affect on West's claim. Lower courts deciding this issue after *Feist* have split on whether West's system is copyrightable.<sup>59</sup> Thus, West's copyright claim in its page numbering may be in jeopardy.

### F. Case Law

#### 1. *Pre-Feist--West Publishing Co. v. Mead Data Central, Inc.*<sup>60</sup>

In 1985, the District Court for the District of Minnesota granted West Publishing a preliminary injunction against Mead Corp., owner of the *LEXIS* computerized research system.<sup>61</sup> Mead announced on June 24, 1985 that its computer database would begin offering star pagination.<sup>62</sup> This would enable a reader to cite to the exact page of an opinion published in one of West's reporters without ever opening the printed version of the reporter.<sup>63</sup> As this would totally eliminate the necessity to buy West's volumes, West immediately brought a

55. *Id.*

56. See, e.g., *Use of West Law Book Page Numbers in CD Rom Product is Not Infringing*, 53 PAT., TRADEMARK & COPYRIGHT J. 63 (Nov. 28, 1996).

57. *Mead II*, 799 F.2d 1219.

58. 499 U.S. 340 (1991).

59. Cf. *Matthew Bender & Co. v. West Publishing Co.*, 1997 WL 689412 (S.D.N.Y.); *Oasis Publishing Co., Inc. v. West Publishing Co.*, 924 F. Supp. 918 (D. Minn. 1996).

60. *Mead II*, 799 F.2d 1219 (8th Cir. 1986).

61. *West Publishing Co. v. Mead Data Central, Inc.*, 616 F. Supp. 1571 (D. Minn. 1985) [hereinafter *Mead I*].

62. *Mead II*, 799 F.2d at 1222.

63. *Id.*

copyright infringement action against Mead, asking for a preliminary injunction.<sup>64</sup> After West received a preliminary injunction from the district court, Mead appealed.<sup>65</sup> The Court of Appeals for the Eighth Circuit affirmed the grant of the injunction, finding that West's compilation of cases were original works of authorship entitled to copyright protection.<sup>66</sup> West argued that although Mead's use of the first page of its opinions was fair use, this new method of star pagination was an infringement of West's copyright in its arrangement of cases.<sup>67</sup> After reviewing the method that West uses to compile its cases, the Eighth Circuit found that the West's arrangement of cases was "the result of considerable labor, talent, and judgment,"<sup>68</sup> and therefore met the copyright act's requirement of "a modicum of intellectual labor."<sup>69</sup>

## 2. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*<sup>70</sup>

Five years after the Eighth Circuit decision, the Supreme Court decided *Feist* which called into serious question the reasoning behind the Eighth Circuit decision. *Feist* was the Supreme Court's first opportunity to construe section 103 of the Copyright Act that provides copyright protection for compilations.<sup>71</sup> Rural Telephone is a telephone company that publishes white and yellow pages as required by state statute.<sup>72</sup> Feist Publications published a competing area-wide phone book that included coverage of Rural's area.<sup>73</sup> After Rural denied Feist a license to use the names and addresses it compiled, Feist published its directory anyway, copying Rural's information.<sup>74</sup> Rural then brought a copyright infringement action against Feist, claiming a copyright in the arrangement and

64. *Mead I*, 616 F. Supp. 1571.

65. *Mead II*, 799 F.2d 1219.

66. *Id.* at 1227.

67. *Id.* at 1222.

68. *Id.* at 1226.

69. *Id.* at 1227.

70. 499 U.S. 340 (1991).

71. *Id.*; 17 U.S.C. § 103 (1994).

72. *Feist*, 499 U.S. at 342-3.

73. *Id.*

74. *Id.*

compilation of the names and addresses.<sup>75</sup> The district court granted summary judgment to Rural, and the Court of Appeals affirmed.<sup>76</sup>

The Supreme Court reversed, finding that although Rural had a copyright in the directory as a whole, Feist's copying of Rural's arrangement of names and addresses was not copyrightable.<sup>77</sup> In doing so, the Court repudiated the use of "the sweat of the brow" test often used by the lower courts in determining copyright protection for compilations.<sup>78</sup> The Court explained that even compilations must meet the Copyright Act's originality requirement.<sup>79</sup> Thus, the Copyright Act assumes that some compilations are copyrightable while others are not.<sup>80</sup> The court then specified three requirements a compilation must meet in order to be protected.<sup>81</sup> First, it must be a collection of preexisting data.<sup>82</sup> Second, the data must have been selected, coordinated, or arranged in a certain way by the author.<sup>83</sup> Third, the arrangement or selection must be an original creation.<sup>84</sup> Although the court found that Rural's directory satisfied these first two elements, it did not satisfy the third requirement of originality. Instead, the Court found the arrangement produced by Rural to be "entirely typical" and "devoid of even the slightest trace of creativity."<sup>85</sup> "The white pages do nothing more than list Rural's

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75. *Id.* at 344.

76. *Id.*

77. *Id.* at 364.

78. *Id.* at 352-353. (explaining that this test is also known as the "industrious collection" test.) Courts created this test by reasoning that one who puts a great deal of time and effort into producing a work should be entitled to copyright protection for the effort. Moreover, "[i]t may seem unfair that much of the fruit of a compiler's labor may be used by others without compensation." *Id.* at 349.

79. *Id.* at 346; 17 U.S.C. § 102(a) (1994).

80. *Feist*, 499 U.S. at 358.

81. *Id.* at 357. The Court took these three requirements directly from the text of the definition of a compilation in the Copyright Act. Section 101 defines a compilation as: "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. The term compilation also includes collective works." 17 U.S.C. § 101 (1994).

82. 499 U.S. at 357.

83. *Id.*

84. *Id.*

85. *Id.* at 362.

subscribers in alphabetical order . . . there is nothing remotely creative about arranging names alphabetically in a white pages directory.<sup>86</sup> Thus, Rural's arrangement of names and addresses was not a protected work, and could not be infringed by the appropriation of these facts by Feist.<sup>87</sup>

### 3. After Feist

#### a. Oasis Publishing Co. v. West Publishing Co.<sup>88</sup>

In *Oasis*, the plaintiff sought to market a CD-ROM product in which it would scan West's reporters, delete West's original material and then sell the resulting opinions with the internal page numbers included.<sup>89</sup> Before marketing its product, Oasis sued West in the Southern District of Florida seeking a declaratory judgment that West's internal pages were not copyrighted, and claiming violations by West of antitrust statutes and of Florida's public records statute.<sup>90</sup> The case was transferred to the district court of Minnesota which was required to follow the Eighth Circuit's decision in *Mead v. West*.<sup>91</sup> Although the plaintiff argued that *Feist* implicitly overruled *Mead*, the court did not agree.<sup>92</sup> It found that the Eighth Circuit's opinion showed that the Court of Appeals applied the same creativity and originality standard as the Supreme Court.<sup>93</sup> The court reasoned that the *Mead* court did not use the sweat-of-the-brow test rejected by the Supreme Court in *Feist* but rather the *Mead* court had "considered the 'originality and intellectual creation requirements' of the arrangement."<sup>94</sup> Like the Eighth Circuit, the district court examined West's arrangement and found that West's arrangement was subject

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86. *Id.* at 363.

87. *Id.* at 364.

88. 924 F. Supp. 918.

89. *Id.* at 921.

90. *Id.*

91. *Id.*

92. *Id.* at 922-923.

93. *Id.* at 923.

94. *Id.*, quoting *Mead*, 799 F.2d at 1225-26.

to copyright as it had more than a *de minimis* amount of creativity.<sup>95</sup>

Alternatively, Oasis argued that its intended use was a fair use permitted by the Copyright Act.<sup>96</sup> The court acknowledged that although the use of the first page of the opinions was a fair use, the use of the remaining numbers was an infringement.<sup>97</sup> It reasoned that the purpose of the use was primarily commercial, as Oasis intended its product to compete with West's.<sup>98</sup> As to the nature of the work, the court found that even compilations are entitled to protection.<sup>99</sup> In addition, the amount used was qualitatively and quantitatively substantial because Oasis's product would "serve utterly to replace West's products."<sup>100</sup> Finally, the court presumed that Oasis's intended use would have an adverse effect on West's market because Oasis' stated intention was to under-cut West's prices.<sup>101</sup> Taking all four factors into account, the court found that Oasis's intended use was not a fair use.<sup>102</sup> Finding, therefore, that Oasis's intended use would constitute an infringement of West's copyright, it denied Oasis's summary judgment motion and granted West's summary judgment motion dismissing the plaintiff's claims for a declaratory judgment and violation of Florida's public records statute.<sup>103</sup>

*b. Matthew Bender & Co. v. West Publishing Co.*<sup>104</sup>

In direct contrast, on November 22, 1996, the Southern District of New York granted summary judgment in an unreported opinion to Matthew Bender, finding that West could not claim a copyright in the page numbers of the opinions it publishes.<sup>105</sup> Like Oasis, Bender brought a declaratory judgment action against West so that it could

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95. *Oasis*, 924 F. Supp. at 923-4.

96. *Id.* at 926.

97. *Id.* at 926.

98. *Id.* at 927.

99. *Id.* at 927-8.

100. *Id.* at 928.

101. *Id.* at 929.

102. *Id.*

103. *Id.* at 931.

104. 1996 WL 774803 (S.D.N.Y.).

105. *Copyrights: Use of West Law Book Page Numbers in CD ROM Product is Not Infringing*, 53 PAT., TRADEMARK & COPYRIGHT J. 63 (Nov. 28, 1996).

begin star paginating the texts of judicial opinions it was producing on CD-ROM.<sup>106</sup> The court in *Bender* found that despite previous decisions to the contrary, in its view, West could not claim a copyright in mere page numbering. It reasoned that “where and on what particular pages of the text a court opinion appears does not embody any original creation of the compiler.”<sup>107</sup> Moreover, the court held that if this aspect of West’s reporters was copyrightable, *Bender*’s intended use in its star pagination feature would constitute fair use.<sup>108</sup> The court found that the first fair use factor, the purpose and character of the use, weighed in *Bender*’s favor because although its use was commercial, it was not using the pages to take advantage of West’s creative arrangement.<sup>109</sup> Instead, the star pagination feature would merely let a user find the correct place an opinion appeared in West’s hardbound volumes.<sup>110</sup> As for the amount taken in regard to the whole, the court found that borrowing the reflection of “the accident of where a particular portion of court-authored text falls on a page” was not a substantial amount so as to constitute an impermissible infringement.<sup>111</sup> Finally, the court clarified that what *Bender* intended to do only had an effect on the market for judicial opinions themselves and not on West’s market of creative arrangements of cases in its hardbound volumes.<sup>112</sup> Thus, the court granted summary judgment in favor of *Bender* so that it could star paginate its data.<sup>113</sup> If West appeals this decision as it is expected to, this could produce a conflict between the circuits for the Supreme

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106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 64.

112. *Id.*

113. *Id.* The court also set a date for trial of the remaining disputing issues. These issues included: 1) whether West had a copyright in the corrections and editing it performed on judicial opinions before printing, 2) whether West had a valid copyright in the addition of parallel cites to the opinions it reports and 3) whether West has a valid copyright in the syllabi and headnotes it includes even though it does not distinguish or designate which of these are provided by the court or its editors.

Court to decide.<sup>114</sup>

### *G. Competing With West's Virtual Monopoly*

In competing with West, other publishers have brought anti-trust and declaratory actions in the courts and lobbied state legislatures and Congress for protective legislation. In contrast, in order to continue its dominance in the legal publishing industry, West has used two legal avenues to prevent competition. First, West claims a copyright in its materials and routinely brings infringement actions against its competitors. As discussed above, courts have split on which aspects of West's system are copyrightable. Thus, this claim of copyright protection may not be available for much longer. The second avenue West uses to protect its products is to grant a license to certain competitors to use parts of the West system, including star pagination. However, this system has also come under attack recently in the context of anti-trust suits brought against West.

#### *1. Antitrust Settlement*

West has historically sought to protect its materials by licensing certain aspects of its system, like star pagination, to competitors for a fee. Although such a license agreement was accepted by Mead Data Central, Inc. in a previous settlement with West, this licensing has recently been questioned by both competitors and the courts. Last year, two of the United States largest publishers of legal materials, West and Thomson Corp., announced their intent to merge into one corporation.<sup>115</sup> On June 19, 1996, the Justice Department and several

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114. *Id.*

115. *Copyrights/Antitrust: Public Comment is Sought on West-Thomson Merger Settlement*, 52 PAT., TRADEMARK & COPYRIGHT J. 276 (July 11, 1996) [hereinafter *Public Comment*]. The practical effect of the merger is that the combined company would compete with itself in publishing legal materials. For example, West publishes Supreme Court Reports and United States Code Annotated, whereas Thomson publishes Lawyers Edition and the United States Code. These materials compete directly with one another. (Lawyers Edition is published by Lawyer's Cooperative Publishing Company, a subsidiary of Thomson Corp.) See also Anne Wells Branscomb, *Lessons From the Past: Legal and Medical Databases*, 35 JURIMETRICS J. 417-448 (1995).



state attorney generals filed an antitrust suit in the District Court for the District of Columbia, challenging the proposed merger.<sup>116</sup> The same day the suit was filed, the parties filed a settlement agreement with the court.<sup>117</sup> In complying with anti-trust regulations, the district court was required to approve the agreement.<sup>118</sup>

The settlement contained several provisions to combat the merger's anti-competitive effects.<sup>119</sup> One provision provided that West would divest itself of over fifty publications that competitors could acquire.<sup>120</sup> Another provision permits individual states who have contracts with West the right to terminate those contracts.<sup>121</sup> Both of these provisions were approved by the District Court as being in the public interest.<sup>122</sup> However, the court did not approve the most controversial of the provisions, the licensing provision.<sup>123</sup>

This licensing provision required West to license its star pagination system to any competitor for a capped fee.<sup>124</sup> Before the settlement was proposed to the court, part of this provision prohibited licensees from bringing any action in court challenging West's copyright.<sup>125</sup> However, this section was omitted in the final settlement proposal to the court.<sup>126</sup> In defending the licensing provision as submitted to the court, the United States argued that this licensing provision would lessen the anti-competitive effects of the merger by giving greater

116. *Public Comment*, *supra* note 115.

117. *Id.*

118. *Id.*

119. *Copyrights/Antitrust: Antitrust Settlement for West-Thomson Merger Fails on Star Pagination Issue*, 53 PAT., TRADEMARK & COPYRIGHT J. 173 (Jan. 9, 1997) [hereinafter *Antitrust Settlement*].

120. *Id.* at 174.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Public Comment*, *supra* note 115. The license fees provided for in the settlement were not to exceed the following amounts (price is per format per year per 1000 characters in material using the star pagination): \$0.09 for the first year of the license, \$0.11 for the second year of the license, \$0.13 for the third and subsequent years of the license. These amounts were subject to a change in the United States Department of Labor Producer Price Index for Finished Goods.

125. *Id.*

126. *Antitrust Settlement*, *supra* note 119.

options to competitors.<sup>127</sup> Mead and other competitors argued that the Justice Department should have required West to completely abandon its claim to a copyright in the star pagination system.<sup>128</sup>

Part of the licensing provision sought to combat West's practice of picking and choosing which of its competitors to license.<sup>129</sup> The settlement's licensing provision would change this practice by requiring West to negotiate a license with whomever sought a license.<sup>130</sup> Thus, West could no longer shut out serious competitors as it could in the past. As to this part of the licensing provision, the court found that it was in the public interest because it was fair to all competitors.<sup>131</sup> Although the court approved the mandatory nature of the licensing provision, it did not approve of the licensing of star pagination itself.<sup>132</sup> This licensing was not proper, the court found, as the viability of West's copyright in the star pagination system was questionable.<sup>133</sup> The court noted the conflict between courts ruling on the issue and expressed its own doubts whether the star pagination system was copyrightable in light of the Supreme Court's recent ruling in *Feist*.<sup>134</sup> Because of West's questionable copyright, the court felt that the settlement as proposed by the government would endorse this claimed copyright if licensing was required.<sup>135</sup> In addition, the court noted that this licensing system would in effect fund West's current and future litigation surrounding its copyright claim.<sup>136</sup> Thus, the costs of its litigation would be shifted to smaller competitive publishers, who are West's opponents in these copyright suits.<sup>137</sup> This was not in the public interest.<sup>138</sup> Moreover, the court expressed concern that since Thomson was previously West's largest

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127. *Id.*

128. *Id.*

129. *Mead Data Central, Inc. v. West Publishing Co.*, 679 F. Supp. 1455, 1460 (S. D. Ohio 1987).

130. *Antitrust Settlement*, *supra* note 119.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

competitor and now would be merged with West, Thomson would no longer litigate against West to invalidate West's copyright claims.<sup>139</sup> Thus, the licensing requirement itself, the lack of incentive to litigate, and inability of smaller publishers to prevail in litigation against West would validate West's dominance.<sup>140</sup> This would not remedy the anti-competitive effects of the merger or be in the public interest.<sup>141</sup> Thus, the court denied the settlement consent decree as proposed and requested the parties to submit a revised agreement.<sup>142</sup>

## 2. *State Citation Reform*

Many states have responded to West's dominance in the legal publishing world by enacting legislation to reform the citation methods used in their state.<sup>143</sup> This legislation consists of laws to put certain materials in the public domain, creating a universal citation system, and requiring citations to paragraphs of court opinions instead of page numbers.<sup>144</sup> At first, these reforms were not successful. However, more recently, the pressure of the computer age has increased the need for reform thereby requiring feasible solutions.<sup>145</sup> These new solutions have begun to take hold and now pose a substantial threat to West's monopoly.

An example of early attempts at reform that did not succeed can be found in Illinois.<sup>146</sup> Twice the Illinois legislature proposed citation reform bills that would have put chapter and paragraph numbers in the public domain.<sup>147</sup> However, the governor vetoed both laws as he was wary of exposing the state to unwanted litigation from West.<sup>148</sup> In response to this failed attempt, the Attorney General of Illinois instead issued an opinion that West is not permitted to monopolize

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139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *See Wyman, supra note 13 at 258-78.*

144. *Id.*

145. *Id.*

146. Branscomb, *supra note 7 at 425.*

147. *Id.*

148. *Id.*

the numbering system of that state.<sup>149</sup>

A similar opinion was issued by the Attorney General of Texas, after unsuccessful attempts at reform by the Texas legislature.<sup>150</sup> In Texas, a bill was proposed that would require the Secretary of State to assign numbers to materials that were not already numbered by the legislature.<sup>151</sup> This task had been assumed by West since 1925.<sup>152</sup> However, the bill was not approved by the Texas House of Representatives.<sup>153</sup>

Other states have been more successful at reforming citations in their state. In Louisiana, the legislature developed its own system of citations which it required attorneys to use starting December 31, 1993.<sup>154</sup> In Colorado, where West has been designated the official reporter of the state, attorneys must now cite to the paragraph of the opinion they use.<sup>155</sup> This enables competitors fair use of judicial opinions without infringing on West's alleged copyright in its page numbers.<sup>156</sup> In Wisconsin, a public hearing discussed a proposed system that would require the courts to automatically number their opinions and then make the opinions and numbers available to all.<sup>157</sup>

#### *H. Congressional Initiatives*

In 1992, Representative Barney Frank proposed a bill that would have amended the Copyright Act to exclude page numbers and names used in legal citations from copyright protection.<sup>158</sup> This proposal was a response to the controversial case decided by the Eighth Circuit, *West Publishing Co. v. Mead Central Data, Inc.*, the Supreme Court's decision in *Feist*, and the desire by other publishing

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149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* See also Wyman, *supra* note 13, at 260-1. Louisiana's system is explained in the Louisiana Supreme Court's General Administrative Rules, Part G, section 8.

155. Branscomb, *supra* note 7, at 425; Wyman *supra* note 13, at 262.

156. *Id.*

157. *Id.*

158. H.R. 4426, 102nd Cong. (1992).

companies to compete with West.<sup>159</sup> However, this bill was never acted on by the House, other than one hearing held by the House Subcommittee on Intellectual Property and Judicial Administration.<sup>160</sup>

## II. HOUSE BILL 1584/1822

House Bill 1584 was introduced by Representative Barney Frank of Massachusetts on May 9, 1995.<sup>161</sup> This bill would prohibit federal and state courts and agencies from requiring that legal citations in court documents be to copyrighted material where alternatives exist.<sup>162</sup> Thus, in states where there are several different reporters of opinions, a practitioner could cite to any of these reporters. A court or agency could neither require nor express a preference for, one reporter over another.

The bill, as introduced, contains two brief sections. The first is the substantive section of the bill that provides that no state, federal court, agency or department may require documents submitted to the court or agency to be of a system of citation that is copyrighted unless uncopyrighted material may also be used.<sup>163</sup> Section 2 of the bill simply defines the word “state” as used in the first section. It defines state to include any of the fifty states, the District of Columbia, and any other United States possession or territory.

Like his earlier bill to exclude numbering from copyright protection, Frank has admitted that the current bill is a response to the Eight Circuit’s decision, as well as a response to West Publishing’s

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159. Biscardi, *supra* note 31, at 541.

160. *Id.*

161. In June, Frank introduced a substitute bill, House Bill 1822, that contained only minor changes. Both were sent to the House Judiciary Committee. So far, no hearings on the bill have been held and it has not been sent out of committee to be voted on. H.R. 1822, 104th Cong. (1995).

162. H.R. 1822.

163. House Bill 1822 provides, “Section 1. Legal Citation Requirements. No State or Federal Government may require that, in documents submitted to such court, agency, department, or authority, a system of citation to State or Federal laws, regulations, judicial opinions, or administrative decisions be used in which copyright subsists, unless no other system of citation to such laws, regulations, opinions, or decisions exists.” H.R. 1822.

virtual monopoly in the case reporting industry.<sup>164</sup>

### III. ANALYSIS

#### A. *The Current Preferential System of Citation*

In determining the desirability of this legislation, it is essential to determine to what extent courts prefer a citation to one reporter over others. If courts do not express a preference or require certain citations, the legislation is moot. However, in most jurisdictions, a preference or requirement does exist. Most courts have rules dictating the proper format and contents of briefs or memoranda submitted to the court. Many of these specifically identify which reporter should be cited to by practitioners.<sup>165</sup> Some allow for citation only to the official reporter of the jurisdiction.<sup>166</sup> Some allow citation to both the official and unofficial reporters of the jurisdiction<sup>167</sup> while others allow citation to either.<sup>168</sup> More specifically, "[a]lmost all federal courts and a large number of state courts require citations that contain page numbers of West Publishing Company's case reporters."<sup>169</sup> Some courts do allow practitioners to cite to other reporters if a copy is included in the brief or memoranda to the court.<sup>170</sup>

In addition, some courts require citations to be written according to the rules provided for in the *Bluebook*.<sup>171</sup> The *Bluebook* requires

164. *Bill Would Bar Courts From Requiring Use of Copyrighted Legal Citations*, 50 PAT., TRADEMARK & COPYRIGHT J. 53 (May 18, 1995) [hereinafter *Bill Would Bar Courts*].

165. *See, e.g.*, 11th Cir. R. 28-2(k).

166. *See, e.g.*, Mass. R. App. P.R. 16(g); Ark. Sup. Ct. R. 4-2; Ill. S. Ct. R. 6.

167. *See, e.g.*, La. R. Ct. App. 2-12.4; D. Ct. M.D. Penn. R. 7.8; Or. Tax Ct. R. 61(3); Ariz. R. Civ. App. P. R. 13; Bank. Ct. M.D. Penn. R. 7070-7.

168. *See, e.g.*, Tenn. R. App. P.R. 27(h).

169. Wyman, *supra* note 13, at 219.

170. *See* E.D.N.C. R. 5.03; M.D.N. Car. R. 107(c); E.D. Tenn. L. R. 7.4; M.D. Penn. R. 7.8; U.S. Bank. Ct. M.D. Penn. R. 7.070-7; S.D. Ohio L.R. 7.2.

171. *See* Branscomb, *supra* note 7 at 422; 11th Cir. R. 28-2; Fla. R. App. Proc. R. 9.8000(n).

citation to certain reporters, depending on the case's jurisdiction.<sup>172</sup> Many decisions are reported only in West's volumes; thus, to cite to these jurisdictions, the *Bluebook* requires citation to West reporters.<sup>173</sup>

For example, the *Bluebook* requires citations to federal court opinions to be to the Federal Reporter and the Federal Supplement, both published by West.<sup>174</sup> In the past, the *Bluebook* required parallel citation to state official reporters and West's unofficial regional reporters.<sup>175</sup> However, the latest edition of the *Bluebook* requires citation only to the regional reporter published by West.<sup>176</sup> Obviously, this unfairly "bolsters West Publishing Company's dominant position in the legal publishing market" and "enhance[s] West's market position."<sup>177</sup>

Finally, many courts may not have written rules, but lawyers are made aware of the court's preference of citation to a certain set of reporters. Largely, these preferences stem from the access the judge has to the cases herself, or rather, which set of volumes are in her chambers. As opposing counsel in one of West's copyright cases put it, "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."<sup>178</sup>

### *B. Justifications For the Current System*

Although there is clearly a bias by the courts in one form or another to cite to West's reporters, if there is a compelling justification for the present system, there is no need for H.R. 1822. One argument in favor of the present system is that it is uniform. All lawyers cite to the same volumes, all courts have access to those volumes, and no

172. Harvard Law Review Association, *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* at 165-225 (16th Ed. 1996).

173. *Id.*

174. *Id.* at 165-7.

175. *Id.* at 170-225.

176. James W. Paulsen, *An Uninformed System of Citation*, 105 HARV. L. REV. 1780, 1785 (1992).

177. *Id.* at 1786, 1788.

178. Wyman, *supra* note 13 at 280, n.272 (quoting Transcript of Oral Argument at 34, *Oasis Publishing Co. v. West Publishing Co.*, 924 F. Supp. 918 (D. Minn. 1996)).

one gets confused. Moreover, using West's system is desirable because its system includes the opinions from the entire country and all cases are presented in the same way, with synopses, headnotes, and printing in dual-column format. On the other hand, if a uniform citation system was used, as has been adopted or proposed in some states, uniformity would no longer be a persuasive justification for continued citation to West's reporters.<sup>179</sup>

For example, a new citation system could identify cases permanently by their docket number and decision date.<sup>180</sup> Thus, all publishers could use this same citation without any claim from another company of copyright infringement. Any publisher could star paginate to the judicial opinion as written, thereby avoiding any possibility of being sued by West.<sup>181</sup> Another option is that courts themselves, when writing opinions, could automatically assign a citation to its decision instead of having a private publisher assign the citation.<sup>182</sup> This would be especially helpful because a case would have the same citation whether a lawyer retrieves the case from the Internet, a CD-ROM, or a hardbound volume.<sup>183</sup> Although some courts now allow citation to cases from the Internet and computer databases, the cites are always different from the eventual cite in the hardbound volume.<sup>184</sup> If one of these new systems were used, a case would always have the same citation, which allows for easier and more efficient retrieval. Although the adoption of one of these systems may be somewhat of an adjustment at first, in the end, the benefits achieved would most likely outweigh any initial

179. See discussion of state citation reform, *supra*; Wyman, *supra* note 13 at 258-278; Branscomb, *supra* note 7 at 421-2; Donna M. Bergsgaard and William H. Lindberg, *Case Citation Formats in the United States: Is a Radical New Approach Needed?* 23 INT'L J. LEGAL INFO. 53 (1995).

180. Louisiana has recently implemented this type of system. Bergsgaard, *supra* note 179 at 64; see also *supra* note 154.

181. One state reform idea is to refer to judicial opinions by paragraph instead of by page. This would not only eliminate the possibility of claiming a copyright in page numbers, but would allow a reader to locate a pinpoint cite more efficiently. See Branscomb, *supra* note 7, at 431-2.

182. See Wyman, *supra* note 13, at 260-262.

183. *Id.*

184. Thus, "opinions on the Internet are virtually useless to anyone who wishes to cite them in a court document." *Id.* at 219.



inconvenience.<sup>185</sup> In fact, in those jurisdictions where similar systems have been implemented, the systems seem to be working well.<sup>186</sup>

### C. Problems Solved by H.R. 1822

One problem West's virtual monopoly presents is that it permits a private company to decide what becomes the law of our country. As a practical matter, lawyers may cite only to cases that are published because those are the only accessible cases. In the past, before the advent of electronic research and the growing competition of smaller publishers, West's reporters were the only reporters available.<sup>187</sup> Even today, published cases are, in large part, those cases published by West. However, West does not publish every opinion it receives.<sup>188</sup> Thus, in deciding which cases to publish, West, in effect, decides what cases are used by lawyers and therefore what law becomes precedent. This practice becomes more alarming when courts require lawyers to cite only to West's reporters. Although many courts may allow for exceptions, because of the court's preference, the first place a lawyer will look for favorable law is to West's reporters. Thus, West, in determining what cases to publish, shapes and determines what becomes the law; in expressing a preference for West reporters, courts give affirmative sanction to this monopolistic practice.

As explained above, if a lawyer is not allowed, either by court rules or by the preferences expressed by a judge, to cite to other cases, not contained in West's reporters, West is free to manipulate the law as it chooses. For example, in order to protect the copyright in its reporters, West could publish only those lower court decisions that

185. *Id.*

186. *Id.* at 260.

187. In contrast, with the growth of publication of opinions on the Internet, many avenues are now available for lawyers in finding case law. In addition, with the approval of the West-Thomson merger and the settlement's divestiture provision, small publishers may begin to publish on a competitive level with West. See discussion of Antitrust Settlement *supra* notes 115-142 and accompanying text. Thus, it is becoming increasingly unnecessary for lawyers to only cite those cases published in West's volumes because they are the only publications available.

188. Stephen C. Carlson, *The Law and Economics of Star Pagination*, 2 GEO. MASON U. L. REV. 421, 427 (1995).

are favorable to the retention of its copyright.<sup>189</sup> Thus, any lower court decisions that held that West's copyright was invalid would not be published. Without publication, these unfavorable decisions would never be cited by lawyers arguing similar copyright cases. The copyright cases chosen by West would then become the law used in later cases, and could be used later as precedent in its personal lawsuits protecting its copyright. In short, the vast influence West has over the law can very easily be used to manipulate and influence the law to the material advantage of West. It is obviously in West's economic interest to carefully choose which copyright cases to publish. However, if selected in the manner suggested above, West's selection of cases would constrain the law from developing in a natural and equitable manner.

H.R. 1844 would restrict this selective precedent setting by West. Lawyers generally stick to cases published in West's volumes because of the preference expressed for them by the courts. Without the necessity to cater to the preferences of judges or follow court rules that require use of certain reporters, lawyers would feel free to use any reporter. In using any reporter, lawyers could then cite to cases not chosen for publication by West. This would open the entire world of judicial opinions to the public. Thus, precedent would no longer be set by West, but by the natural evolution of the law. Clearly, a natural evolution, as opposed to one carefully chosen by a private conglomerate, is more desirable for society as a whole. After all, the "content of law belongs properly in the public domain as an information asset belonging to the body politic. This principle was established within a few decades of the birth of this nation. The edicts of democratically elected representatives belong to the public and reside in the public domain."<sup>190</sup>

One reason this legislation should be passed is that it would increase competition. It would put all publishers on an even playing field and West would no longer have the upper hand. Monopolies, whether actual or virtual, are never in the public interest because they

189. This is not to suggest that this has or would ever actually happen. However, the mere possibility of this taking place justifies legislative intervention such as House Bill 1822.

190. Branscomb, *supra* note 7, at 421.

stifle competition. They allow an entity like West to continue business as usual, comfortable with its massive market share without striving to provide better services to the public. In refusing to endorse West's monopoly, H.R. 1822 provides an incentive for real competition in the production of legal materials. Despite its necessity in the practice of law, the process of researching has changed little over the years. West's digest system and headnotes have been around a long time. This does not mean that they are the best system. West's competitors should be given a real opportunity to develop research methods that surpass those methods established by West. Users of Westlaw and LEXIS know that it is often easier and more efficient to do research on these databases than by using West's digests. With West's monopoly on legal materials, there is no incentive for West or other publishers to create other systems. If given the chance, other publishers could also come up with inventive ways to present, arrange, and combine legal materials for the ease of the user.<sup>191</sup> H.R. 1822 would give competitors this chance.

In addition, monopolies traditionally allow an entity to keep the cost of its product at an extremely profitable level. If publishers are allowed to compete, costs of legal materials will inevitably decrease. Although West has previously argued that allowing this type of competition would create a "substandard marketplace," there is no evidence this would happen.<sup>192</sup> Like any market, producers of substandard goods will eventually go out of business. This is especially true in the world of legal researching where standards for attorneys, even those they impose on themselves, are very high. The stakes are normally too high for attorneys to use substandard resources.

This new legislation would improve the publishing of legal materials in this way at very little cost and with very little change in the status quo. Although many courts have rules that are contrary to the legislation, those rules would simply no longer have effect.

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191. For example, in Virginia, the state publishes judicial decisions and four CD-ROM publishers compete not for any rights in the printed opinions themselves or their arrangement, but "on the basis of who can deliver the best product, which has the most helpful search engine, and which has the best features for attorneys to use." Branscomb, *supra* note 7, at 431-2.

192. *Id.*

Courts could choose to repeal the rules or simply leave them on the books. Unlike the earlier legislation proposed by Frank in 1992, this bill does not decrease the incentive for publishers to produce materials.<sup>193</sup> Instead, it increases the incentive of publishers to provide quality materials, based in the usefulness of the system to lawyers.

#### *D. Problems with the Bill as Written*

For these reasons alone, the legislation should be passed. However, it is unclear whether this bill would actually prevent courts from preferring certain reporters. This is due to the ambiguous language used. Although the bill's author has expressed that he intends the bill to forbid a court from even expressing a preference for certain materials,<sup>194</sup> the language of the bill unambiguously provides that no government entity "may require" citation to copyrighted materials.<sup>195</sup> Thus, if a court were to interpret the proposed statute in the future, the clear intent of the legislature would be merely to prevent courts from requiring certain citations. This would then leave the door open for a court to merely express a preference, to attorneys practicing before it, for a certain form.

Another problem with the legislation is that it does not provide for a uniform system of citation to legal materials. In order to prevent confusion and keep the burden from falling on the judiciary, a uniform system seems inevitably necessary.<sup>196</sup> If practitioners are allowed to cite to whatever materials they choose, problems will arise for judges in finding, in an efficient manner, all the materials cited. Thus, implementation of a new citation system seems essential to the success of the legislation.

193. West argued against the passage of House Bill 4426 by claiming: "Private publishers would no longer have the incentive to produce such compilations, perhaps leaving the government--with its inherent inefficiency and growing budget constraints--as the sole arbiter of when, how, and to what extent such information is provided to the general public." *Id.*

194. *Bill Would Bar Courts*, *supra* note 164.

195. H.R. 1822, 104th Cong. (1995).

196. See discussion of state citation reform *supra*, notes 143-157 and accompanying text.

CONCLUSION

Whether this legislation is eventually successful depends in part on the lobbying efforts of smaller publishers against West. In the past, West has fought hard to remain in its position at the top. There is no indication that it would not do so here. West will probably argue that the present system is preferred because it promotes uniformity and because a change would increase the workload of the judiciary. However, as discussed above, a change would not be a large burden on the judiciary. Moreover, the present system is out-of-date as it has become less uniform with the advent of electronic databases. Thus, this argument is losing force. Overall, if the fate of Frank's earlier bill is any indication, H.R. 1822 will most likely be stuck in committee indefinitely.

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