

BEFORE THE
JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON AUTOMATION AND TECHNOLOGY
WASHINGTON, D.C.

_____)
)
Notice of Opportunity To Comment On The)
American Bar Association Citation Resolution)
_____)

COMMENTS OF THE DEPARTMENT OF JUSTICE

Joel I. Klein
Acting Assistant Attorney General
Antitrust Division

Communications with respect to this document should be addressed to:

Rebecca P. Dick
Deputy Director of Operations

Christopher J. Kelly
Senior Counsel for Intellectual Property

Frances E. Marshall
Special Assistant

Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 3208
Washington, D.C. 20530

March 14 , 1997

Comments of the United States Department of Justice

1. As the American Bar Association Special Committee on Citation Issues has stated, "continued growth of electronic publication of case reports is certain."¹ Equally certain, however, is that today's standard system of citation impedes the growth of electronic publication of case law and competition generally among publishers of American case law. By adopting the ABA's recommended citation form, the federal courts would eliminate this barrier, fostering increased competition among case law publishers and leading to swifter and less costly access to case law for attorneys and their clients. Because the competitive benefits from use of the recommended citation form should substantially outweigh the costs it imposes, the United States Department of Justice recommends that the federal courts adopt the ABA's recommended citation form.

2. The Department of Justice has several interests in this matter. As an enforcer of our Nation's antitrust laws, the Department has a strong interest in encouraging competition in the provision of case law materials in order to encourage the development of better products and service at lower prices. As an advocate for equal justice under law, the Department seeks access for all citizens to our legal system; higher costs for legal representation and related services, including legal research, diminish that access for some. In addition, as the Nation's largest law firm, the Department is itself a

¹American Bar Association Special Committee on Citation Issues, Report concerning recommendation to ABA House of Delegates, May 23, 1996 (hereinafter "ABA Report"), ¶16.

consumer of case law research products, with a strong interest in obtaining swift, comprehensive and accurate access to judicial opinions at the lowest possible price to its client, the American people.

3. As the ABA Report notes, the advent of computerization and high-speed data transmission makes swift and accurate access to judicial opinions feasible in a way that was unimaginable 25 years ago. Now, rather than waiting for printed copies of opinions to arrive via a case reporter such as West Publishing Company's Federal Reporter or a topical developments service like United States Law Week, practitioners and other citizens can read opinions within hours of issuance. Case law publishers can assemble collections of decisions based on whatever criteria they think the market might demand and present them to users either on-line or on CD-ROM. Users then can choose between comprehensive case law collections or ones that more narrowly target their substantive or geographic interest; either way, they can do so without filling the bookshelves that printed case reports would require. Today, as the ABA Report points out, a lawyer can carry the equivalent of a library in her briefcase.²

4. These gains, however, will not be fully realized if electronic media remain subject to an archaic citation system that penalizes their use. For all its virtues, that is what the current citation system does. By keying on a particular publisher and by identifying the location of cited text on the basis of that publisher's layout of a printed book, the current

²ABA Report at ¶15.

system unnecessarily hampers the usage of other publishers' electronic products in two ways. The chosen publisher enjoys a special advantage and the entire system is founded on a type of textual division that is undesirable in electronic media.

5. Under the current rules of practice in most state and federal courts, a practitioner ordinarily must cite a case by indicating its physical location in a particular series of printed, bound case reports. That series is, with only a few exceptions, West's National Reporter System.³

6. Consequently, to have a useable case law product, a case law publisher other than West itself must be able to indicate to the reader where each case it publishes may be found in West's printed system -- and not only the first page of each case, but each portion of it, so that the reader may employ pinpoint citation to the particular part of the case relevant to his analysis. Publishers other than West can convey this information only through star pagination, the placement of symbols in the text of decisions indicating where pages end and begin in the corresponding West volume.

³Those exceptions are when the case is not published in West's system, either because it is too recent or because West has decided not to publish it. In the former instance, the current system allows citation to on-line services such as Westlaw and Lexis, and reporter services such as BNA's United States Law Week. The latter instance opens the way for citations to specialized reporters such as the United States Patent Quarterly and BNA's Trade Cases. These services, however, are not comprehensive citation alternatives to the West system.

7. West, however, contends that star pagination to its system infringes its copyrights by copying the "arrangement" of those volumes. And, until it agreed with the Department recently in an antitrust consent decree to license the right to star paginate to its reporters,⁴ West had only licensed star pagination to be used by the one other major on-line case law provider, Lexis, and one other print publisher (in its Virgin Islands reporter). Moreover West, as the monopoly licensor of an essential input into these firms' products, was in a position to set a floor on their prices. Thus West, as virtually the only publisher of printed case reports capable of satisfying practitioners' need to utilize the current citation system, has been able to dictate the amount and price level of competition in the market for case law products and services.

8. Whether star pagination infringes West's copyright is in litigation in two circuits. The U.S. District Court for the Southern District of New York rejected West's claim, granting summary judgment for one declaratory-judgment plaintiff and partial summary judgment for another.⁵ In the Eighth Circuit, a third publisher is appealing from a summary judgment in favor of West.⁶ The United States has filed *amicus curiae* briefs in

⁴See *United States v. The Thomson Corp. & West Publishing Co.*, Civ. Action No. 96-1415 (PLF) (D.D.C., consent decree entered March 7, 1997) (resolving competitive concerns raised by West's acquisition by The Thomson Corporation).

⁵ *Matthew Bender & Co. and HyperLaw, Inc. v. West Publishing Co.*, No. 94 Civ. 0589 (JSM) (S.D.N.Y. November 22, 1996)(bench ruling), *appeal withdrawn*, No. 96-9711 (2d Cir., March 4, 1997).

⁶*Oasis Publishing Co. v. West Publishing Co.*, No. 96-2887 (8th Cir., oral argument held March 10, 1997).

both of these infringement cases, supporting the argument that star pagination does not infringe any valid West copyright.

9. If West prevails in this litigation, because of the recent *Thomson-West* consent decree, case law publishers will still be able to employ star pagination, by license at a royalty rate no higher than that specified in the decree. But they will be left at a distinct competitive disadvantage, and their costs will be significantly higher than they would be if the standard citation form were not based on one firm's proprietary product.
10. Even if the plaintiffs prevail and may star paginate to West's reporters without having to pay a royalty, star pagination is not costless. It still entails the expense of accurately ascertaining where page breaks fall in West's volumes, and accurately incorporating that information in another product. This process unnecessarily consumes resources which could be more efficiently employed to make a better or less costly product.
11. The additional cost of star pagination is particularly troublesome in connection with electronic case law products. When published in electronic media, cases may be easily found by employing information intrinsic to the case, such as parties' names, the court, and the docket number; there is no need for extrinsic information, such as where a particular publisher has placed the case in its printed reports. And page numbers, which vary with the format of a particular printed version, are wholly irrelevant to the electronic

"location" of a case. By incorporating star pagination, the new electronic products serve the existing citation system; instead the citation system should serve efficient access to cases within the new products.

12. Use of a media-neutral citation system loosens these restrictions on competition among case law providers. Increased competition is likely to reduce the cost of case law access to attorneys and their clients significantly. For example, before Louisiana introduced its vendor-neutral citation system,⁷ West offered its CD-ROM product there for \$5400. After the citation system's introduction, West's price fell to \$2500 in response to another publisher's offering of a competing CD-ROM for \$1500.⁸ As the current litigation over West's copyright assertions shows, there is no shortage of firms eager to compete in the provision of case law. Adoption of the ABA's recommended citation system will eliminate a needless entry barrier, lower costs, and enable new firms to compete on the merits of their products.

13. Moreover, there is a special value to the federal courts' adoption of a uniform system. Nationwide adoption will ensure uniformity among the courts, so that a citation permissible in the Southern District of New York may also be used in the Northern District of California. A comparison of the citation systems of the Sixth Circuit and the

⁷See ABA Report at ¶48.

⁸West's product offers case law back to 1942, whereas the competitor's product provides case law only back to the 1970s. But for that difference, it is likely that the price of West's product would have decreased even further in response to the competition engendered by the adoption of the new citation system.

state courts of Louisiana and South Dakota, each a sensible solution standing alone, suggests the confusion and compliance costs that would certainly arise if individual circuits or districts each adopted their own preferred media-neutral citation form, a distinct possibility absent action by the Judicial Conference.

14. In addition, the Judicial Conference is in an excellent position to lead the way for all the Nation's courts. Its adoption of the ABA's recommended citation system will set an influential precedent for each state court system to adopt the same citation form, both to free competition among publishers of its case law and to ensure ease and compatibility for its state's attorneys when they practice in another jurisdiction.

15. The Department of Justice also supports the ABA's recommendation that, for some limited period of time, the federal courts "strongly encourage" parties to add parallel citations to "commonly used printed case reports."⁹ The move towards electronic publication of case law is evolutionary, the product of technological advance and consumer demand. The purpose of a new citation system is to accommodate that change, not to mandate it. Not to allow for a parallel citation to a commonly used printed report might indeed be a mandate.¹⁰ Many practitioners are still unfamiliar with electronic case law products and the computer technology on which they depend, or do not have ready

⁹ABA Resolution, ¶1.D.

¹⁰While the proposed citation system, absent the parallel citation, is in theory media-neutral, as to case reporters published under the existing citation system, its effect is different. For example, without a parallel citation, the new citation system would offer little help in finding a case in the Federal Reporter, 3d Series.

access to them. Use of a purportedly media-neutral citation system to force them into the electronic world would be inappropriate. Moreover, the current citation system will not disappear in any case: for practical reasons it will remain necessary for citation to cases predating the new system's adoption. Eventually, the parallel citation may become less necessary to easily locate cases in printed volumes -- perhaps because print publishers will have developed some means, such as a cross-indexing, to guide researchers from a case's citation in the new format to its physical location in a printed volume. Perhaps some adjustment, not now obvious, to the proposed citation format will reveal itself as a way of making the format usable for printed reports even without a cross-index.¹¹ At that point, parallel citations no longer will be necessary to make the new format both convenient and truly media-neutral. In the meantime, though, the parallel citation suggestion will make the new citation truly media-neutral in the near term. It is a realistic way to ensure that the new citation system is a benefit, not a punishment.

16. The cost of compliance with the ABA's recommended system will be small for litigants, including the Department of Justice. The information that the citation comprises will be easily found in any copy of an opinion a court issues, and its arrangement is straightforward. The retraining required for attorneys, secretaries, and paralegals will be minimal. The Department of Justice commits promptly to implement

¹¹Somewhat more difficult to envision are the possibilities that print publishers of comprehensive case reports will be able to adapt their products to make a parallel citation unnecessary, or that demand for print-medium case reports will disappear entirely.

and promote the proposed citation system if it is adopted, and will take every opportunity to employ it in other fora so that it may become truly universal.

17. The burden of facilitating the proposed citation system would fall on the courts themselves, since they would be responsible for numbering paragraphs and assigning sequential opinion numbers. Were opinions still produced on typewriters, paragraph numbering could be a source of delay and aggravation. With word processing software, however, paragraphs can be numbered automatically, either while the document is being typed (as this one was) or after it is completed. Both Canada¹² and South Dakota¹³ seem to have employed paragraph numbering without significant expense. Sequential opinion numbers might appear more challenging, particularly in multi-division districts. As the ABA Report notes, though, a simple computer hookup should accomplish this task inexpensively.¹⁴ While these burdens are real, they must be weighed against the benefits the courts too will enjoy as users of case law materials that will be disseminated more broadly, swiftly, and inexpensively.

18. If any party is likely to lose more than it gains from the adoption of a media-neutral citation system, it is the producers of products the current system favors. It is axiomatic that the elimination of barriers to competition in any market makes the

¹²See ABA Report at ¶47.

¹³See ABA Report at ¶49.

¹⁴See ABA Report, Appendix A, at 16.

incumbent firms worse off as consumers exercise their newfound options to choose. But the nature of competition is such that even those incumbents can thrive in the new market if they choose to adapt and produce products and services that consumers want.

Particularly since the ABA's parallel-citation provision creates a transitional period in which publishers of printed reports can decide how best to configure their products in a market which is no longer skewed in their favor, the proposed ABA citation system does them no injustice.

19. The Department of Justice urges the Judicial Conference to adopt and implement the ABA's proposed citation system. This system will enable more firms to develop products and services to answer the demands of case law users for timeliness, ease of use, reliability, and low cost. These benefits in turn will make the judicial system more efficient and access to justice more affordable for all.