

# ARTICLE

## CHAOS, CYBERSPACE AND TRADITION: LEGAL INFORMATION TRANSMOGRIFIED

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### I. INTRODUCTION

The practice of law in the United States has always been built around law books. Whether one looks to the early role of *Blackstone's Commentaries* and the enormous impact that this one set had on American jurisprudence, or to the primacy of the law library in Dean Langdell's reconceptualization of legal education, or to the structural and substantive importance of the West National Reporter and Digest System, everywhere one finds books at the center of the enterprise.<sup>1</sup> However, most lawyers take for granted the central role of legal information in its traditional paper form. The great sets of books around which so much is built are so completely a part of our legal tradition that they disappear before us. This makes them more, not less, important.

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1. FREDERICK C. HICKS, *MEN AND BOOKS FAMOUS IN THE LAW* (1921), describes the role of several particular law books in crystallizing American legal thought. His chapter on *Blackstone's Commentaries* is especially interesting. LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 621-32 (1985), puts the role of books in wonderful perspective.

They are so omnipresent that they blend into the intellectual fabric. The legal publication universe is at the core of American law.

This central component of American law is now in a process of change. The change is one that affects all aspects of our culture, but its impact will be felt first in law. The dominant role played by the book in legal information is now ending. My contention is that its demise will not manifest itself in the form of a clean break with tradition. There will be at least a decade, perhaps a generation, involved in constructing the new information environment. Many lawyers, law professors and judges remain creatures of the old information, and will never change their views of how things ought to be. However, they are being superseded by newer researchers, who come to the profession as devotees of electronic information.

The transformation of legal information could have drifted into its change over the course of several decades, inching forward in fits and starts while the new models of legal information tracked the larger cultural shift from print to digital forms of information. The change could have taken place in each law firm and each court at a different rate. Indeed, it was taking place in this fashion. However, a series of events in the world of legal publishing has accelerated this trend. For old models of legal information, 1996 was the year the music died.

The change in legal information will spawn a series of problems, and pose a range of challenges. The goal of this essay is to outline recent changes in legal publishing, and to raise questions about the issues that will confront all who use legal sources in the future.

## II. WHAT HAPPENED

### A. The Power of Tradition

Setting the Stage. In 1996, the West Publishing Company was purchased by the Thomson Group.<sup>2</sup> For many who invest their time and energy working with legal materials, this was the commercial equivalent of the Pope announcing that the Vatican was to be taken over by Microsoft. A number of scholars have analyzed the implications of the age of electronic information on the law,<sup>3</sup> but the sale of the company that long

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2. John E. Morris, *How West Was Won*, AMERICAN LAWYER, Sept. 1996, at 73, outlines the final stages of the sale. As of February 28, 1997, the Justice Department continues its review of the details of the final deal, but the major points have been cleared and the publishers have consolidated offices. See generally Daniel Wise, *\$3.4 Billion Merger of Legal Publishers Cleared by U.S. Judge*, N.Y. L.J., February 28, 1997, at 1.

3. For a fine summary of work up to this point, see M. ETHAN KATSH, *LAW IN A DIGITAL WORLD* (1995). Katsh's bibliography at pages 271-289 is especially helpful. Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615 (1996), is filled with good sources and its footnotes are a veritable mother lode of

served as the bulwark of legal authority raised the stakes attached to the movement to new forms of information to a new level. It is one thing to speculate about possibilities for the future. It is quite another to have the future arrive at one's door in a taxi. The whirlwind consolidation of the legal publishing industry into two large conglomerates, each centered on a full-text database, has shifted the tectonic plates of legal information.

Part of the culture shock that will affect the legal profession will come from the changing role of the West Publishing Company. The West Publishing Company was a unique enterprise. It not only dominated American legal publishing, it established a special culture in doing so. Perhaps only now that it is gone can one appreciate just how unique it was.<sup>4</sup>

Founded in St. Paul, Minnesota by the West brothers in 1876, West brought entrepreneurial energy to legal publishing; rather than the scholarly inclinations or official sponsorship that had cloaked other legal publishers.<sup>5</sup> West responded to market needs for information. It did not anticipate those needs; West's lack of expertise in legal information guaranteed that fact. Instead, it set about providing information in the most comprehensive, uniform way possible. The company was ultimately to be influential for what they produced, and how they produced it.

West created the National Reporter System, a series of publications containing the jurisprudence of the federal system and every state.<sup>6</sup> West made two great decisions. First, West decided to report every case that the courts deemed worthy of publication. Therefore, West had to institute systems for getting the opinions from the courts. This was hard work, but West did it well. It removed the West enterprise from the world of picking opinions either on the basis of merit or interest. It allowed West to develop a system for editing each decision from each jurisdiction, preparing headnotes and digests for each opinion, all in a uniform, seemingly "objective" style. West became the dominant conduit for distributing judicial information.

The second decision was to create a geographically based system for publishing the reports. This allowed West to cover every jurisdiction

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work in this area.

4. As of March 1, 1997, all of West Publishing Company's senior management has been replaced. Brian Hall is the President of the newly titled West Group. See *West Group—Overview* (visited April 20, 1997) <<http://www.westpub.com/Welcomewgoverv.htm>>. Mr. Hall had been with Thomson Legal Publishing before the merger. *Id.*

5. For a very good history of West's founding years, see Thomas A. Woxland, "Forever Associated with the Practice of Law": *The Early Years of the West Publishing Company*, 5(1) LEGAL REFERENCE SERVICES Q. 115 (1985); See also, W. W. MARVIN, WEST PUBLISHING COMPANY: ORIGIN, GROWTH, LEADERSHIP (1969) (an authorized history). For a charming perspective on how West conceptualized itself in its early years, see generally WHERE LAW BOOKS ARE MADE: LAW BOOKS BY THE MILLION (1901).

6. Detailed descriptions of the National Reporter System can be found in any textbook on legal research. See, e.g., ROBERT C. BERRING, FINDING THE LAW (1995).

in a linked system. The creation of Regional Reporters and the federal components of the West system allowed standard coverage of seemingly "objective" legal information. In the early days commentators called it the "blanket" system and it played a role in standardizing American jurisprudence, one recognized at the time.<sup>7</sup>

West's form of standardized case reporting, with unified indexing, became the accepted standard for case information.<sup>8</sup> Owning the National Reporter System meant owning all of the relevant jurisprudence published in the country.<sup>9</sup> Owning the West Regional Reporter that covered your state meant owning all of the jurisprudence of that state.<sup>10</sup>

As time passed, the myth that West published all judicial opinions (in what came to be called "comprehensive" publishing) took hold.<sup>11</sup> In fact, many decisions written by judges do not enter the system. Every state and federal court had rules for what should and should not be published.<sup>12</sup> Only appearance in the printed reports conveyed "reality" to a decision. An opinion was considered "unpublished" even though it could be found in the Clerk of the Court's files, in a newsletter, or in a loose leaf service. Only if the decision could be found in a bound case reporter could it be deemed published. Only when a case was published

7. "One effect of the blanket system of reporters, established by the West Publishing Company, has been to present the reports of several [states] in a single series. . . . This must necessarily have the effect of bringing about a more general comparison of the adjudications of the different American jurisdictions upon particular questions, which must in the end result in a unification of the law." *The Lawyer's Reports Annotated*, 22 AM. L. REV. 921, 922 (1888).

8. The role of the *American Digest System* as an organizational force in American legal thought is explored in Robert C. Berring, *Collapse of the Legal Research Universe: The Imperative of Digital Information*, 69 WASH. L. REV. 9 (1994) [hereinafter Berring, *Legal Research Universe*] and in Richard Delgado and Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207 (1989).

9. This leaves statutory and administrative materials to the side. Given the stress placed on judicial decisions in the United States construct of the common law, this is not an unfair emphasis. Only in recent years have statutes and administrative codes grown in influence.

10. See generally THE AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, POLICIES OF THE COUNCIL OF THE SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR AND OF THE ACCREDITATION COMMITTEE, Annex II (Nov. 1988) (listing the required collections for law schools, which relies on the *National Reporter System* and the *American Digest System* as its core although noting that this standard is currently under reconsideration); Memorandum from James P. White, Consultant on Legal Education to the American Bar Association, to Library Directors of ABA Approved Law Schools, (Feb. 18, 1997) (discussing adjusting questions in the site evaluation process of re-accreditation) (on file with author).

11. See *A Symposium of Law Publishers*, 23 AM. L. REV. 396, 401 (1889) (containing the only personal statement of John B. West's beliefs on the issue). A representative sentence of West's is: "I believe it to be the principal business of American law publishers, to enable the legal profession to examine the American case law on any given subject, as easily, exhaustively, and economically as possible." *Id.*

12. See generally Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Court of Appeals*, 85 CAL. L. REV. 541 (1997).

in a comprehensive system, which meant only when a case appeared in the West system, did it become real. The practice of many courts in requiring citation to the National Reporter System reified this belief.<sup>13</sup> The information could exist in other formats, but the "real" incarnation, the one that counted, was its appearance in the West bound volumes. Only if the decision could be found in a bound case reporter, which meant it could be found in the West system, could it be deemed real.

West was not the only locus for "real" judicial decisions. Official reporters, authorized by the jurisdiction, remained in about half the states,<sup>14</sup> and there was an official report of the decisions of the United States Supreme Court.<sup>15</sup> These official reports remained the preferred citation in the jurisdiction in which they appeared, but they did not destroy the utility or universality of the West system. While official publications waxed and waned in accuracy and timelines, West products were reliable, standard and (in a print world) quickly available.<sup>16</sup> From the beginning, West's *Federal Reporter* and *Federal Supplement* have been the main repository of the decisions of the lower federal courts, the largest producers of opinions in the system.

Perhaps the greatest of West's achievements was garnering credibility. There is no exact explanation of how this happens. At some point, however, the judgment of the market is that this information is what counts. I call this the "Tinkerbell" phenomenon.<sup>17</sup> If everyone believes that a set is credible, it is credible. The West Publishing Company worked closely with the Bench and Bar. Its motto, "Forever Associated with the Practice of Law," was more than a marketing slogan. West saw itself as a partner to the courts, and it played its cards very close to the vest.<sup>18</sup> West worked with the Courts to be dependable. The

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13. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 14, 61-62 (16th ed. 1996) [hereinafter THE BLUEBOOK].

14. *Id.* at 165-228.

15. Some official reports were once idiosyncratic, even including commentary. See Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on the Marshall Court Ascendancy*, 83 MICH. L. REV. 1291 (1985) which provides rich and interesting background on this issue. In recent years even official reports have tended to follow sterile formats, with only a few exceptions. See KENT C. OLSON AND ROBERT C. BERRING, PRACTICAL APPROACHES TO LEGAL RESEARCH, 111-41, (1984).

16. One of the original justifications for the advance sheet was the desire to get opinions into the hands of attorneys every two weeks.

17. In the Walt Disney animated feature "Peter Pan," Tinkerbell was a fairy. She only existed if children believed in her existence. This character, viewed by the author at an impressionable age, stands for the classic bootstrapping of authoritativeness. For example, if everyone believes that the *New York Times* is the national newspaper of record, it is. Users seldom have time or ability to critically evaluate what they use. Instead, they rely on reputation. See PATRICK WILSON, SECOND-HAND KNOWLEDGE: AN INQUIRY INTO COGNITIVE AUTHORITY 131-134 (1983).

18. An example of this corporate self-image was the controversy over the publication of *U.S. v. Kilpatrick*, 575 F.Supp. 325 (D. Colo. 1983). Prosecutors and the I.R.S. attempted to suppress publication of the case, but the judge wanted it published. The case appeared in

closer that West stayed to simply serving as a conduit for judicial information, the better off it would be.

The second thing about West was its specific corporate culture. West had a very special "feel" to it. Anyone who visited West encountered a group of people who were not just producing information, they were on a mission.<sup>19</sup> Much of this was facilitated by West's ownership structure. The West Publishing Company was owned principally by senior management.<sup>20</sup> An employee who was not at the top of the executive structure might get shares.<sup>21</sup> There was an emphasis on rewarding long-term service and loyalty. Upon retirement, shares were returned to the company. There was never an accounting to shareholders, and the management could chart the course they saw as most prudent. Because West did not have to report to shareholders, they did not have to proceed in economical steps. They checked and rechecked text, verified and reverified sources. Perhaps the location of West in St. Paul, the epicenter of Garrison Keillor country, helped, but there was a real mission to the place. The company was quite self-conscious about its mission and its importance.

The same market dominance and management ownership that allowed for extraordinary measures of editing and quality control allowed the company to be very profitable.<sup>22</sup> West fought fiercely to protect its rights, and has for a century been a frequent advocate of its rights.<sup>23</sup> Its very size and omnipresence created antagonists. But even those who railed against much of West had to concede that it produced high quality information.<sup>24</sup>

The smaller, but nonetheless crucial, partner in this world of information was *Shepard's Citations*. *Shepard's* allowed the researcher to follow the citation trail of each case that came to be "published." The West National Reporter System and American Digest System published and classified each judicial decision; *Shepard's Citations* allowed one to

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advance sheets, was withdrawn, and was re-issued. The controversy was finally resolved in *Blondin v. Winner*, 822 F.2d 969 (10th Cir. 1987). West went through a strained minuet trying to figure out who to listen to. The power of whether or not to publish is seldom clearer. See John Riley, *Tenth Circuit Vacates No-Publication Order*, NAT'L L.J., Feb. 6, 1984, at 3 and W. John Moore, *Judges' Berating of Prosecutors Could Force Grand Jury Change*, LEGAL TIMES, Feb. 6, 1984, at 1.

19. When West figured out that this was a valuable asset, they began bringing groups of law librarians to St. Paul just to meet with West's people.

20. See generally Woxland, *supra* note 5.

21. The histories of West Publishing and of LEXIS have yet to be written. The author relies on his own recollection and his conversations with West and LEXIS employees.

22. Cf. John J. Oslund, *Debate Rages over Who Owns the Law: Tens of Millions of Dollars are Riding on the Outcome*, MINNEAPOLIS STAR TRIB., March 6, 1995, at 8A.

23. For detailed discussion of these issues, see *Oasis v. West*, 924 F. Supp. 918 (Minn. 1996), and *United States v. Thomson Corp.*, 949 F. Supp. 907 (D.C. 1996).

24. See Oslund, *supra* note 22.

keep track of it. *Shepard's* method of reporting on every subsequent citation of one's case, no matter how tangential or banal, provided a comprehensiveness of scope that tracked the West philosophy perfectly. *Shepard's* also gained credibility and came to be trusted by legal researchers as the standard against which information was to be tested.

*Shepard's* was so pervasive and so dominant in its own market, that it became the universal referent for any lawyer checking on a case's validity. To Shepardize™ was required procedure. Failure to do so could result in major problems.<sup>25</sup> Numerous courts have discussed Shepardizing as being central to research.<sup>26</sup>

So at its apex, the controlled paper universe of legal information consisted of a set of West reporters and a set of *Shepard's Citations*. As legal information exploded with more and more judicial opinions being produced, old research tools were strained to the breaking point. For example, one venerable tool, *West's Decennial Digest*, grew so cumbersome that it had to be issued every five years as *Decennial Part I* and *Decennial Part II*.

## B. The Beginning of Change

The legal information system was centered on the book. The growth of computers and the use of data processing systems offered new possibilities. An increasing number of judicial decisions were appearing each year, and computers, with the capacity to store and sort large amounts of data, offered some promise of relief, for the bulging paper sets and those who used them. LEXIS was not the first attempt to bring computers and legal information together. In 1964, Professor John Horthy of the University of Pittsburgh Health Science Center demonstrated a system at the American Bar Association meeting.<sup>27</sup> But the road to success was rocky. When LEXIS began to take hold in the mid-1970s, West was in a quandary. Should they defend the fortress of books, or should they take a plunge into the world of computers? Hindsight is always comforting, but recall that at the time, no one knew if online research would do anything other than make a large sucking sound near piles of cash.

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25. See, e.g., *Rosenstiel v. Rosenstiel*, 251 N.Y.S.2d 565, 578-579 (1964) (noting that "[t]he court was astounded to find that case relied on by defendant's counsel" had been reversed, and the reversal had in turn been upheld).

26. E.g., *Cimino v. Yale University*, 638 F. Supp. 952, 959 n.7 (D. Conn. 1986) ("diligent research, which includes Shepardizing cases, is a professional responsibility."); *Fletcher v. Florida*, 858 F. Supp. 169, 172 (M.D. Florida 1994) (noting plaintiffs' "neglect to Shepardize," and stating that they "should guard against future research failures").

27. *The LEXIS Service Started With A Handful of Clients*, in LEXIS TWENTIETH ANNIVERSARY 12 (1993) (history of the development of the system as seen by those who developed it) [hereinafter LEXIS TWENTIETH ANNIVERSARY].

LEXIS itself stumbled through a series of baby steps on its way to success, working with state bar associations and carefully building its database.<sup>28</sup> LEXIS faced the double challenge of making users who were unfamiliar with operating computers familiar with keyboards and protocols, and building trust in the LEXIS database.<sup>29</sup> The manner in which they triumphed is chronicled elsewhere,<sup>30</sup> but Mead Data Central, the owners of LEXIS at the time, attributed their triumph to the law school program.<sup>31</sup> As the success of online research became more and more undeniable, West was compelled to move.<sup>32</sup> West introduced the WESTLAW database, first limiting it to an online version of the headnotes that accompany cases. West abandoned this approach, and ultimately developed WESTLAW. A new battle was joined. WESTLAW competed head-on with LEXIS as a full-text, free-text online system of judicial decisions.

The history of competition between LEXIS and WESTLAW, and the evolution of these databases into full fledged libraries of information can be found elsewhere.<sup>33</sup> The salient point is that it was a competition. Unlike the National Reporter System, which had no real competitor, WESTLAW was locked in a very serious struggle with LEXIS. LEXIS had been developed under the aegis of the Mead Paper Company.<sup>34</sup> It had terrific financial resources, but it did not have roots in the book publishing business.<sup>35</sup> So while West was expanding WESTLAW, it could continue to sell books to the vast majority of American lawyers who viewed the new databases as gimmicks for students.

It is worth taking a moment to consider how the traditional lawyer thought of legal information. The law library was the center of the law firm. If a firm prospered enough to afford luxurious offices, the law library was often made a showplace. Clients looked to the library for an indication of the lawyers' prowess. Even Perry Mason sat in front of a set of book shelves. Lawyers commonly thought of these libraries as a part of overhead; paying for them was a cost of doing business. After opening a new practice, the first visit might be from the West salesman,

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28. *Id.* at 12-17.

29. *Id.* See generally William G. Harrington, *A Brief History of Computer-Assisted Research*, 77 L. LIBR. J. 543 (1985).

30. See Scott F. Burson, *Report from the Electronic Trenches: An Update on Computer-Assisted Legal Research*, 4 LEGAL REFERENCE SERVICES Q. 3 (1984) and Harrington, *supra* note 29.

31. *Id.* at 16. "Mead Data Central's first great marketing breakthrough came with the 1975 decision to offer LEXIS usage free to law schools, a move that insured future generations of attorneys would embrace the new service."

32. Burson, *supra* note 30, at 11-12.

33. See Berring, *Legal Research Universe*, *supra* note 8.

34. LEXIS TWENTIETH ANNIVERSARY, *supra* note 27, at 9.

35. *Id.* at 13.

selling the cases (and statutes and practice sets) for the firm's jurisdiction. Paying for information was part of the fabric of practicing law.

As LEXIS and WESTLAW grew in influence, many battles were fought in law firms over usage and placement of terminals.<sup>36</sup> To build a constituency of users, the databases initiated astoundingly generous giveaway programs for law schools, eventually providing each law student with his or her own personal password for free use of the system. At its peak, this included 24 hour access to the whole database, with toll free telephone support, free software for home computers, free assistance and training in the law schools and as much written aid as could be absorbed. Legions of law students, who were used to online searching and wanted access to its speed and power, graduated.

LEXIS and WESTLAW also marketed their services to law firms as dispersible (i.e., chargeable to the client). This was a brilliant stroke for encouraging lawyers to utilize the systems. If one used a database, one paid by the unit of time, or the library used. LEXIS and WESTLAW costs could be allocated and passed directly to the client. In certain situations the cost might even be surcharged.<sup>37</sup> Thus, use of the databases could actually generate profit. The subject of dispersing costs using this method was never universal, and eventually became quite controversial.<sup>38</sup> The practice is much more bounded today, but these initial impressions created the context for the new, electronic legal information: legal information was now a commodity. No longer was legal information a simple overhead cost; now it was a cost item. It had to justify its existence by paying its way. To put it baldly, a firm would never charge a client for a portion of its annual subscription to the National Reporter System, but the firm might very well bill a client for its share of the cost of online information.

LEXIS and WESTLAW began as repositories of decisions, but soon grew more complex.<sup>39</sup> Statutory and legislative material quickly appeared in both databases.<sup>40</sup> Then came administrative materials, some of which had been very difficult to find in paper form. The online services, in a race to provide the most useful material, were building enormous libraries of information. When LEXIS introduced its NEXIS

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36. See comments, *supra* note 21.

37. *Skaddenomics*, AM. LAW., Sept. 1991, at 3 (describing large law firm billing practices at its apogee, or the "ludicrous world of law firm billing;" Skadden, Arps, Slate Meagher & Flom added 25% to the cost of all online research charges in clients' bills); *Skadden May Forfeit \$1.5 Million in Fees*, MANHATTAN LAW., Feb. 23-28, 1988 at 6, (includes a detailing of a charge of \$27,000 for LEXIS research as a part of a bill).

38. *Skaddenomics*, *supra* note 37.

39. See MARK CYGNET, *DISCOVERING WESTLAW: THE ESSENTIAL GUIDE*, (6th ed. 1996); STEVEN L. EMANUEL, *LEXIS-NEXIS FOR LAW STUDENTS* (2nd ed. 1995).

40. Burson, *supra* note 30, at 5.

service, with Boolean searching of everything from professional journals to restaurant reviews, a new form of information was born. But it took a while for everyone to figure that out. And while the experimentation went on, the National Reporter System and *Shepard's* were still on the shelves, anchoring a credible system.

### C. The Shoot Out of 1996

As the representative of a dying information paradigm in the most computerized discipline in the world, the West print system was eroding. This process was accelerated by the vendor neutral citation controversy, which threatened the bound case reporters status as the sole repositories of the real law.<sup>41</sup> But the biggest impetus to the changes of 1996 was the purchase of LEXIS by Reed Elsevier PLC.<sup>42</sup> LEXIS had long been an anomaly, a huge database vendor owned by a paper company.<sup>43</sup> The early years of LEXIS were almost buccaneer days, selling a crazy concept to a world of conservative lawyers. Although LEXIS grew, so did the level of competition; LEXIS needed infusions of capital for continued research and development.<sup>44</sup> Reed Elsevier spent over one billion dollars to buy the system in 1994.<sup>45</sup>

Suddenly a very large player was behind the controls of LEXIS, one who could draw on world wide assets and invest considerable resources into honing new products. While West continued to fight on all fronts, another decision was made. In the autumn of 1995, West announced that it was looking for a new partner.<sup>46</sup> After protracted negotiations and a series of delightful rumors, West announced that it was being sold to Thomson Publishing Group, a Canadian information conglomerate.<sup>47</sup> The price was more than three billion dollars.

Hard on the heels of the West announcement came word that the publisher of *Shepard's* had been sold to a combination of Times Mirror Co., parent company of Matthew Bender, an established legal publisher,

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41. Robert C. Berring, *On Not Throwing Out the Baby: Planning the Future of Legal Information*, 83 CAL. L. REV. 615, 617-18 (1995) [hereinafter Berring, *Planning the Future*]; but see James H. Wyman, *Freeing the Law: Case Reporter Copyright and the Universal Citation System*, 24 FLA. ST. U. L. REV. 217 (1996).

42. Raju Narisetti & Greg Steinmetz, *Reed Elsevier Wins Bidding for Lexis/Nexis*, WALL ST. J., Oct. 5, 1994, at A3; Richard L. Hudson, *Reed Elsevier Enters Big League of On-Line Services*, WALL ST. J., Oct. 6, 1994, at B4.

43. See generally LEXIS TWENTIETH ANNIVERSARY, *supra* note 27.

44. Marcia Berss, *Logging Off Lexis*, FORBES, Jan. 4, 1993, at 46.

45. Anthony Aarons, *Lexis-Nexis Price: \$1.5B: Few Immediate Changes Expected from Reed*, L.A. DAILY J., Oct. 6, 1994, at 8.

46. See John Oslund, *Which Direction for West?*, MINN. STAR TRIB. Nov. 13, 1995, at 1D; *West Publishing Co.: Outside Advisors Are Hired to Consider Alternatives*, WALL ST. J., AUG. 30, 1995, 1995 WL-WSJ 9897894.

47. Steven Lipin et al., *Thomson to Purchase West Publishing for \$3.43 Billion*, WALL ST. J., Feb. 27, 1996, at A3; and Morris, *supra* note 2, at 74.

and Reed Elsevier PLC, parent company of LEXIS.<sup>48</sup> This meant that the National Reporter System was out of the hands of the cult of quality at West, and that *Shepard's* would shift from being Switzerland in the publishing wars, always independent, always on its own, to being a member of one team.

This realignment will have profound effects. No one outside the inner circles of the two companies knows what will happen, (perhaps even they are unsure) but it seems certain that a larger mix of electronic products is at its core. Thomson had been aggressively marketing compact disk systems (CDs) in various states. These states include New York and California, where Thomson also owns the companies that print and distribute the official reporters. Now Thomson can combine that CD effort with the WESTLAW database. Reed Elsevier has used its acquisition of traditional sets like *Shepard's* to expand its database offerings. The tectonic plates of legal information are shifting.

### III. ISSUES FOR THE FUTURE

A wide array of issues faces legal information users and providers in the near future. Three main questions head the list. The first concerns issues of authority and credibility. The second centers on issues of access to legal sources. The third surrounds issues of search strategy and education.

#### A. Authority and Credibility

In the old legal information universe, the touchstones were clear. For judicial information, the official reports of one's jurisdiction might be the ultimate repository of authoritative decisions. Whether that jurisdiction had an official reporter or not, the National Reporter System was there as a "comprehensive" back-up. A lawyer might cite a more ephemeral source until the "real" citation became available, but once the case was published in either the official version or in the National Reporter System, those sources had to be used.<sup>49</sup> The standard citation guide, the *Uniform System of Citation*, spent considerable time setting out the parameters of case citation, with all of it cycling into the system of printed judicial reports.<sup>50</sup>

West won its reputation for credibility early on. Once it was established, it became accepted as the standard, it was the "Tinkerbell."

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48. Frederick Rose, *Times Mirror to Swap College Business for McGraw-Hill's Legal-Citation Unit*, WALL ST. J., July 5, 1996, at A3.

49. See THE BLUEBOOK, *supra* note 13, at 68; see also *id.* at 165 (defining the order of preference in citing to Supreme Court opinions).

50. See *id.* at 55-71.

A lawyer reading a case in the National Reporter System or in an official state report did not stop to consider whether it was an accurate portrayal of the information. She accepted it as real. It was the definitive form of the information.<sup>51</sup> She might question its price, or how much of it she might need, but the issue for the new lawyer was whether she needed to *buy* the cases, or could she get away with using a set located somewhere else. Since West offered the only nationally based system, and since citations to out of jurisdiction material would inevitably lead to a West citation, West became the major paradigm. West filled its quasi-official role well; for example, it worked closely with the judiciary. It has long been known among law librarians that West overdid its production standards. West hired only lawyers as its book salespeople. New hires at West started as proofreaders, going through each case word by word in teams. No stone was left unturned in an effort to get it right. West had a reputation for humorless intensity. Of course, this was all possible because West was making a lot of money.<sup>52</sup> How much we cannot tell, and the final payoff price of over three billion dollars cannot be gainsaid.

All of the stability introduced by West is now at risk. As more and more publishers enter the fray, producing a dizzying array of electronic products, things will grow more confusing. Where once a lawyer did not have to think about the information that she was going to use, now choices will be popping up like zits on a teenaged face. Compact disk products may have all the cases of a jurisdiction at a fraction of the cost of LEXIS, WESTLAW or the books.<sup>53</sup> But what is the coverage that they offer? How credible are they? Internet-based providers can provide access to cases at very low rates to the user.<sup>54</sup> But the same questions must be asked. Various law schools are posting cases, and some public-spirited individuals and groups are posting at online sites.<sup>55</sup> These volunteers range from very sophisticated operations, like the Legal Information Institute at Cornell, to the work of individual librarians. In other words, cases are everywhere. Price options will be everywhere. The primacy of the old paper sets is fading, and a vortex of conflicting claims and products is spinning into place.

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51. On a dare, Kent Olson actually reviewed a volume of the *Federal Reporter* as if it were a book. Kent C. Olson, *Book Review of 750 F.2d, 6(3/4)* LEGAL REFERENCE SERVICES Q. 199 (1987).

52. Steven Lipin et al., *Thomson to Purchase West Publishing for \$3.43 Billion*, WALL ST. J., Feb. 27, 1996; and Morris, *supra* note 2.

53. See, e.g., CAL. ST. B.J., Mar. 1997, at 14 (advertisement for AccessLaw's CalDisc).

54. See, e.g., LOIS Homepage (visited May 5, 1997) <<http://www.pita.com>>.

55. For example, the Boalt Hall Law Library's website provides links to various legal information websites, *Internet Resources* (visited April 16, 1997) <<http://law164.law.berkeley.edu/library/internet.html>>.

The momentum towards a world of unlimited cases in all manner of formats has been accelerated by the movement toward vendor-neutral citation.<sup>56</sup> A coalition of small publishers, public interest advocates and library groups has continued to lobby for the establishment of a new form of citation that will embed paragraph numbers in the text of each judicial opinion at the time of its issuance, and identify each case by an alphanumeric address.<sup>57</sup> The hope is that as court decisions are made available electronically via bulletin boards or Internet web pages, anyone can download and re-use them. The smaller publishers are seeking inexpensive access to the raw opinions; the public interest advocates think this will mean low cost information for everyone.<sup>58</sup>

My reasons for doubting the efficacy of the movement to achieve these intentions are set out elsewhere.<sup>59</sup> Whether it reaches its goals or not, however, this movement has momentum, and is something of a historical inevitability. The practical implication of vendor neutral citation is that rather than referring one back to an authoritative printed text, all versions of the case will carry the same internal citation. Rather than relying on a link back to a paper set, upon which all citations can be grounded, each version will carry the same identifiers that were embedded in the raw text of the decision.

This will quickly destroy the role of the printed sets, especially the National Reporter System, as centerpieces of the system. The printed sets have only held sway because they were the central repositories of the information upon which everything else was built. If one were to embark today on the design of methods of distributing case information effectively and profitably, one would never come up with Regional Reporters or the *Federal Supplement*. They are inefficient and top-heavy. If they cannot serve as foundations for the system, it becomes difficult to see what function they can usefully fill. In a world of customized products that are competing to offer the leanest, lowest cost information, who will want to be saddled with a subscription to a paper set that contains far more than one needs? Who will want access to an enormous online database filled with exotica and obscure content? Great research libraries may answer that question in the affirmative, but there are only a handful of those. Legal publishers make money by selling to lawyers.

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56. See Berring, *Planning the Future*, *supra* note 41, at 630; Wyman, *supra* note 41, at 258-64.

57. Wyman, *supra* note 41, at 262-63.

58. The Judicial Conference of the United States issued a call for comments on the adoption of the vendor neutral citation by the Administrative Office of Federal Courts; 62 Fed. Reg. 8037. This call has generated a number of submissions that set out the advocates arguments strongly which Hyperlaw has posted on their Web site; see *Citation Reform* (visited April 14, 1997) <<http://www.hyperlaw.com/hlreport.htm>>.

59. Berring, *Planning the Future*, *supra* note 41, at 622-23.

When the world of legal information users turns away from the old models, inevitable questions about the accuracy, authenticity and reliability of sources will arise. The logical inheritors of the mantle of the old printed reporters should be WESTLAW and LEXIS. Each is full-text. Each has an editing process that can be supported by the large publishing organizations from which they spring. Each has proven itself reasonably reliable, accurate and authentic. The problem is that access to LEXIS and WESTLAW is limited. Though large firms inevitably have one system or the other, many small offices still do not. Many smaller firms and non-profit organizations appear to be opting for the cheaper compact disk products.

LEXIS and WESTLAW are at a distinct disadvantage in this game. For generations, books were the only way to get information. By a slow process book publishers established themselves. LEXIS and WESTLAW came on the scene when the books were still there. As discussed above, the new databases had to fight an entrenched system. And they have yet to win a total victory. They could not become authoritative because they were not omnipresent.

The real key to being the authoritative source is to be trusted by *everyone*.<sup>60</sup> Neither LEXIS nor WESTLAW is pervasive enough to pull that off. When it was a matter of which set of books would be trusted, a transition from one source to another was much easier; witness the demise of the great treatise and the rise of legal newspapers.<sup>61</sup> Print sources have risen and fallen. But this is a transition from print sets to a new medium. It will be very difficult.

The same is also true of *Shepard's*. Now that *Shepard's* is in the LEXIS family, it is most likely that it will appear only on LEXIS. The competing systems of *Auto-Cite* and *Insta-Cite*, long more speedy and informative on issues of direct history and validation, will increasingly become direct rivals. *Shepard's* currently retains an advantage because it retrieves every relevant citation and allows for citation chasing in a more sophisticated form. However, it was not these features that made it a standard. It was an absolute necessity to use *Shepard's* to verify citations. Everyone used it. Everyone believed in it. For some years I have dubbed *Shepard's* the bellwether, or the canary in the print coal mine.

When it began to lose its primacy because functional equivalents had arisen that could outperform it by objective standards, one would know that the old system was dissolving. Once one begins to analyze *Shepard's* for just how good it is, for exactly how well it performs, it has lost its Tinkerbell status. I believe that this process had begun, and its

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60. See WILSON, *supra* note 17, at 131-134 (discussing authoritativeness in the professions).

61. KIM ISAAC EISLER, SHARK TANK 116, 206-07 (1990).

sale to one of the two competing giants will increase its speed. This is not to say that *Shepard's* is lost. It can fight back and stay important, but to do so it will have to change. It is changing. Once it is in that fight, it loses its special position, and becomes just another research tool. Law libraries all over the country are canceling the paper versions of everything but local *Shepard's*.<sup>62</sup> The canary looks peaked.

One reason that I hope that the National Reporter System and *Shepard's* live for another generation is so that they can ease the pain of identifying the new centers of authority. There will be new authoritative sources, but they will have to build reputations. They will either establish themselves through their quality and staying power, or they will follow the Microsoft model and establish themselves through sheer pervasiveness. Either process will take time, and it would be nice not to be working without a net.

## B. Access to Legal Information

### 1. THE WORLD OF BOOKS

The National Reporter System sits in every major law library in the country, and parts of it can be found almost everywhere. When combined with the surviving official jurisdictional reports, it provides cost-free access to those who use them. Of course such use is only cost-free in the sense set out above, i.e., that the books are part of the general overhead of the library that holds them. Most libraries do not charge for usage of their sets. The withering of the paper sets will change this ease of access. As subscriptions to the National Reporter System and *Shepard's* drop, the price for them will have to rise. This will mean that more and more libraries will cut back or jettison their collections. This process of rising prices leading to cancellations, which force a further rise in prices, is a vicious circle that can only diminish the influence of a set. As a faithful follower of LAW-LIB, a listserv for law librarians with over 2,500 registered members, I often see law firms offering sets of books for the cost of shipping.<sup>63</sup> Folks are bailing out from paper.<sup>64</sup>

For those who never trusted the West Publishing Company because of its size, its cultish attitude or its air of superiority, this is good news. "Death to the old monopolists!" reads the banners of these folks. What worries me is that no one is there to take up the standard. The stability

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62. For example, the UC Berkeley Boalt Hall Law Library has followed this path.

63. One can subscribe to this listserv by sending the following email message to listproc@ucdavis.edu: subscribe law-lib firstname lastname.

64. For instance, LAW-LIB regularly receives postings from law firms and corporate legal departments offering full sets of digests and other printed materials for the cost of shipping. Examples are on file with the author.

and predictability that were provided by the West Publishing System were central but unseen. Legal researchers could rail against them, sue them and festoon them with epithets, but in the end, they could rely on West to keep the home fires burning.

Not that the West system of books will dry up overnight. The National Reporter System and the American Digest System will struggle on. But these sets can no longer be taken for granted as the repositories of information that backstop the system. Both vendor neutral citation and the forces of the market are changing that model. At the very best, these traditional sets, representing printed information in a tangible form, were wonderful repositories of information. The new information sources can enable cheaper and quicker research, but still are not as comprehensive or accessible as the old sources. Such a model will certainly grow, but there will be growing pains.

Who might be hurt by the upheaval generated by the transition from the old model of legal information to the new? There is no need to fret over the technocowboys. Folks who enjoy the Internet, have their own web page, and telecommute, have almost no meaningful relation with the old sets anyway. This is one part of the constituency for vendor neutral citation. These are researchers who never need to look in a book, who can print out just what they need. The current system, tied as it is to the book, slows them down and annoys them. They will be well served by the change. They will lead it and serve as its heralds.

Nor need we worry about large legal entities. The two hundred largest law firms, the largest corporate departments, federal agencies, even large state agencies are served by librarians.<sup>65</sup> These law librarians can guide the organizations that they serve through the storms of transitions. Though the law librarians at these organizations will come equipped with varying skills, they at least come equipped with a map and compass in hand. Indeed, some of the large private law firms may purposefully put themselves at the cutting edge of technology in information. These firms are a desirable market, and the lawyers who work in them have been trained in the use of full-text databases. The substantial training investments of the legal database vendors have created a legal profession in which the younger generation is adept at using full-text computer systems. Law is ahead of other fields, and the high end users who can pay the way will keep it there.

But a surprisingly small percentage of lawyers works in such organizations.<sup>66</sup> The majority of lawyers are not part of one of the large

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65. See AMERICAN ASSOCIATION OF LAW LIBRARIES, AALL DIRECTORY & HANDBOOK: 1995-1996.

66. BARBARA A. CURRAN & CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990S (1994).

firms, and many state and federal agencies lack the budgetary wherewithal to keep up. And what of all of the folks who use legal information and who are not even lawyers? We need to worry about these information users.

A major complicating factor in this witches' brew is the changing nature of libraries. The changing paradigm of information is fundamentally altering our culture's vision of the library.<sup>67</sup> When information was encoded on paper in a three dimensional representation, it existed as an object. Libraries could collect these objects and hold them out for anyone who wished to use them. Copyright law recognized the right of anyone to go into a library and use a book.<sup>68</sup> Once again, no usage charge attached to the book. Usually, even libraries that charged user fees permitted unlimited use of available material. The fee might be tied to the book access, but such fees were not commonly recovered by the author. In that important sense, libraries always have competed with book stores. They have cut into the money that publishers and authors could recover from their product. This was traditionally justified through the "fair use" exception to the law of copyright. Prof. Gordon feels that this "fair use" exception was carved out by market failures.<sup>69</sup> Libraries were serving customers who could never be part of the income stream for a creator or publisher. Whatever explains it, the exception was allowed. The harm that it may have caused was ameliorated by two factors.

One factor was that for certain publications—publications that were most likely only to wind up in libraries—the publisher would tend to charge a much higher price. The publisher was recognizing that its market was not individuals, but institutions. Pricing, design, and marketing could reflect this reality. The library, with its institutional budget and its user-driven incentives, could budget for larger purchases. Important reference tools were published as sets priced so high that no normal patron would personally purchase them.<sup>70</sup> All of the players understood

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67. See *FUTURE LIBRARIES* (R. Howard Bloch & Carla Hesse eds., 1995). For the changing role of books in our culture see *DÆDALUS*, Fall 1996 (Books, Bricks & Bytes). Especially interesting in this issue is Peter Lyman, *What is a Digital Library? Technology, Intellectual Property and the Public Interest*, *id.* at 1. For a view of one specialty's view, see *TOWARD A RENAISSANCE IN LAW LIBRARIANSHIP: THE REPORT, RECOMMENDATIONS AND MATERIALS OF THE AMERICAN ASSOCIATION OF LAW LIBRARIES SPECIAL COMMITTEE ON THE RENAISSANCE OF LAW LIBRARIANSHIP IN THE INFORMATION AGE* (Richard A. Danner ed. 1997).

68. Jane C. Ginsburg, *Copyright Without Walls?: Speculations on Literary Property in the Library of the Future*, in *FUTURE LIBRARIES* (R. Howard Bloch & Carla Hesse eds., 1995).

69. See Wendy Gordon, *Fair Use as Market Failure: a Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 *COLUM. L. REV.* 1600 (1982); Robert P. Merges, *The End of Friction? Property Rights and Contract in the 'Newtonian' World of On-line Commerce*, 12 *BERKELEY TECH. L.J.* 115 (1997).

70. For example, the payment records for UC Berkeley's Boalt Hall Law Library show that Congressional Information Service's index and abstracts costs \$43,000 initially, and updates cost an additional \$2,925 per year. An annual subscription for LegalTrac costs \$6,356 in 1996/97.

that such sets would be bought by libraries and housed for general use. The system worked for everyone. It was based in the available technology, but well adapted to the research habits of its users. There is some circularity here. Publishers designed books to fit the system, and the system fit the books that they designed.<sup>71</sup> Thus, rather than serving as competitors or threats to the publishers and authors, libraries became an important distribution channel. Even publishers of normally priced literature might consider the library market in calculating strategy.

The second major factor ameliorating the way in which libraries handled intellectual property was the cultural support for the mission of libraries. The autodidact, working in a publicly accessible library, is a central myth in our culture. The idea that anyone with the gumption to pursue knowledge can run it down sounds strongly for us.<sup>72</sup> The intellectual equivalent of sweat equity is an appealing concept.

The myth penetrates only so far into reality. There have always been information elites. Those with resources could always get better data, better service, indeed, better librarians. There has never been real parity of access to information. But the thought that the hard-working anyman, through his own effort, can also have access to largely the same material is comforting.

Some of this rhetoric can be found in discussions of fair use.<sup>73</sup> It underlies the role of libraries as holders of intellectual property. If the patron took the trouble to come into the library, navigate the card catalog, penetrate the wilds of the Reference Room, and emerge triumphant, he deserved to use the book. Indeed, he ought to be able to sit down and read the whole thing. Even in areas where the copyright laws did impinge, as in the dark corridors of photocopying, library users were largely left alone. Most librarians do not make a serious attempt to enforce copyright law in their collections, because the ethos of librarianship is to distribute information, not surcharge it. I always check the copy rooms in libraries to locate the little sign that is posted telling users not to violate copyright laws. That's the extent of it. Librarians are not guardians of intellectual property, they are dispensers of it. Socialists were put in charge of the granary, and it was impossible to keep them from trying to pass out free food.

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71. The real irony is that the most valuable sets of books, the ones that were most popular, had to be given special "protection" lest they disappear. This was an element of their physicality.

72. See, e.g., James C. Billington, *Libraries, the Library of Congress, and the Information Age*, DÆDALUS, Fall 1996 (Books, Bricks & Bytes), 35, 36-37.

73. I believe that this idea of parity of access to information should bridge to the discussion of fair use. See also Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93, 100-101 (1997) (discussing accessibility of works).

Why did no publisher ever attack this system? Why did no best-selling author step forward and point to all of the sales lost through library copies? Perhaps the patrons of publicly accessible libraries were not a viable market, or perhaps the free use of libraries is just too central a part of our cultural gestalt to be restricted. Whatever the reason, the system has long since become ingrained. Our view of information, at least the sort of information presented in books, is that free copies should be available for public use.

This vein runs long and deep in the law. Our system upholds the right of anyone to access legal information. If one can argue that everyone deserves some form of access to information, how much stronger is the argument when we begin to talk about legal information? Another of our myths is that of the pro se patron, the individual who goes out on his own to parse out his rights and enforce his claims.<sup>74</sup> Nor is this just a myth. The Supreme Court has explicitly validated the right of prisoners to have access to legal information.<sup>75</sup> County law libraries, state law libraries, public libraries, many academic libraries, indeed any law library that uses the Federal Depository Program to acquire materials, allows the general public into its walls and offers them access to the paper system.<sup>76</sup> The intensive use of public access sets has been at the center of our legal information system.

## 2. ACCESS TO LEGAL INFORMATION

Electronic information, priced by the unit or by time of usage, is based on a totally different set of assumptions. First, the distribution system for electronic information is still developing, but it is highly unlikely that it will follow the paper model. The whole welter of issues brought on by the physical aspect of paper-bound information disappear in the wave of a hand. Of special importance here is that no special pricing model assumes that large or expensive sets can only be sold to libraries for redistribution. Presently no effective means exists for using libraries for such distribution. The producer of electronic information does not need libraries. The heart and soul of electronic information has

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74. *Kolender v. Lawson*, 461 U.S. 352 (1983), was popularly known as the "Walking Man" case. It was filed and briefed in pro per by Mr. Lawson, using the Boalt Hall Law Library as his source. He won. Note that the Supreme Court would not allow Mr. Lawson to argue his case. *Kolender v. Lawson*, 459 U.S. 964 (1982).

75. *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

76. The Depository Library Act is codified at 44 U.S.C. §§ 1901-1916 (West 1991 & Supp. 1997). For a discussion of the Federal Depository Library Program and other factors affecting public access to government information, see JOE MOREHEAD, INTRODUCTION TO UNITED STATES GOVERNMENT INFORMATION (5th ed. 1996). Changes in the depository system were proposed in late 1996; for current information on the status of these proposals, see *Resources of Use to Government Documents Librarians* (visited April 24, 1997) <<http://library.berkeley.edu/GODORT>>.

been direct marketing to the end user. Electronic information does not need a functional equivalent of the bookstore or the library. The incredible efficiencies of CD reproduction make direct sales of very large chunks of information possible. There is no space problem or price problem for an individual consumer. If a database is too large to sell, then access to it can be sold. Usage can be billed on an "as used" basis.

For example, consider the case of a law library that buys a set of the National Reporter System. The library pays its subscription costs and provides shelving and access. It is expected that a series of people will use the set. The users will read it, copy it, and take notes from it. The publisher is not concerned whether those users number ten or a thousand; the cost to the library is the same.

Now consider the library that instead purchases a subscription to LEXIS. Assume that the library pays a flat fee to LEXIS. If the library tried to set up a terminal in a well-lit place and invited a series of users to access the database in order to use it, copy it and take notes from it, LEXIS would care a great deal. LEXIS might allow the library to provide its service, with each individual user billed by LEXIS. Or, the library can offer to pay the cost of each search thereby subsidizing the usage of all of its patrons. In effect, this is what law firm libraries do, with the important caveat of dispersible costs discussed *infra* part II.B.

In the early years, both LEXIS and WESTLAW tied their billing to individual terminals, and those terminals were invariably in libraries.<sup>77</sup> The user came to the terminal. But this model is long gone. The end user now has her own number, and can gain access to the databases over any modem. The library can house fifty students, but each is using her own number, working on her own connection. The information is passing directly to the researcher.

This process has accelerated in recent years. The merger of Thomson and West, and the partnering of LEXIS and *Shepard's*, make it appear that the lines are being drawn around the dreadnoughts of legal information. With LEXIS at the center of one information Goliath, and WESTLAW at the center of the other, exciting days are ahead. Head-to-head rousing competition can produce large benefits for customers, and there may well be good deals and enhanced service ahead. But these price breaks most likely will be designed for end users, for the attorneys who can afford to pay, not for libraries. And if they are not for libraries, they are not for anyone else who cannot afford them. The bottom end of the system might just fall out.

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77. See comments, *supra* note 21.

### 3. SEARCH PROBLEMS AND EDUCATION

Another major problem inherent in the new form of legal information is the transparency of search protocols. Are electronic database users aware of the preemptive decisions being made for them by the system that they are using? The bulk of research and development in this field centers on developing easier and quicker means of using the systems.<sup>78</sup> Making it intuitively simple to log in and move about in the system is more important than enhancing the database or investing time in new research protocols. In a system skewed to the end user, this makes sense. Lawyers are no more likely to read directions than anyone else, and the industry standard for how much training and special skill acquisition one is willing to undergo seems to be dropping.<sup>79</sup> In a conference I attended at the University of Pennsylvania in the spring of 1996, information retrieval specialists, information vendors and librarians were brought together to search for commonalities.<sup>80</sup>

In the informal discussions I had while at the conference, it became clear that researchers in the information retrieval community felt that the big database vendors were not interested in implementing better search systems. In a fit of candor one of the vendor representatives agreed. He pointed out that lawyers are not complaining about what the system produces; instead they are complaining about how difficult it is to use and how much it costs. To invest \$5,000,000 in implementing a new search system could demonstrably improve research effectiveness, but that might raise costs and might introduce a new layer of difficulty for the user and thus would be counterproductive. The money would be better spent in marketing.

This candid assessment emphasizes a crucial point. The future seems clear. One set of future information products will be low-end. Raw information will be taken from the Internet, reformatted, and resold. The quality and credibility of these products will be open to question. The other set of information products will be high-end. These high-end products will be easy to use, full of prompts and links to other systems. Researchers will be able to sit down and use them with no training. Most likely they will be voice-activated, so users will no longer need to type.

The danger of the high-end products is that each step in the research process that is carried out automatically by the front end system, is a

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78. The University of Pennsylvania convened a conference on May 16, 1996, to commemorate the 50th Anniversary of the ENIAC "thinking" machine [hereinafter 50th Anniversary of ENIAC Conference]. The Conference was entitled "Workshop on Problems in Information Retrieval." No transcript of the Conference was produced. All references to it are from the memory of the author. See generally PENN PRINTOUT, March, 1997 (multiple articles devoted to the anniversary).

79. 50th Anniversary of ENIAC Conference, *supra* note 78.

80. *Id.*

step taken away from the purview of the researcher. Each decision that is built into the system makes the human who is doing the search one level further removed from the process. If each user of information was aware of these steps, if each user understood what was being done for her and could monitor results with a skeptical eye, the danger would not be so great. But the whole point of these systems is to work automatically. The whole point is to create an environment where the searcher does not have to know about those steps. In this environment one accepts the search results as being the best available information. The problems brought out in the string of articles on Boolean searching begun by Professors Blair and Maron's study continues on.<sup>81</sup> Most researchers do not understand how to critically evaluate search results. The emphasis from the vendors of high-end information will be to lessen that critical evaluation, not enhance it.

It could plausibly be pointed out that most researchers never understood the steps taken by the print publishers, and that West and its editorial staff did an enormous amount of sorting of information, and classification of legal concepts. The process followed at West was designed to be unobtrusive. West was most successful when it served its conduit function, and the user thought of the product as no more than the primary law itself. The researcher could go to the sources, could see the headnoting, and could grasp what was being done to the information, but few took it to that level of analysis. For most, the process was lost in the product. West only dealt with cases in the National Reporter System, and that made it easier too. The West system would spin products into tools like annotated codes, but the Digest system was safely casebound. So long as law remained mired in the world of cases, this was the best place to be.

*Shepard's* likewise used an editorial staff and exercised far more judgment than most lawyers realized, but it was once again constrained by its medium and by the cases that were its core. It did not want the lawyer to think of the team of editorial workers who were massaging the data. *Shepard's* was most successful when it was thought of as automatic and abstract. Thus the two anchors of the old system shared a strange trait. They invested a great deal in editorial work on the product, but succeeded because no one noticed all the effort that was going into it.<sup>82</sup>

The new tools that have emerged so far appear to have none of these checks. Editorial staffs cost money. Small publishers can download the judicial information that they need from a bulletin board and transfer it to a disk. This produces information cheaply and quickly.

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81. See, e.g., Daniel P. Dabney, *The Curse of Thamus: An Analysis of Full Text Legal Document Retrieval*, 78 L. LIBR. J. 5 (1986).

82. FRANK SHEPARD CO., LEGAL BIBLIOGRAPHY: SHEPARD'S CITATIONS 9-10, 40-41 (1923).

My view is that since so few lawyers realized the size and cost of the editorial efforts of the old West Publishing Company, they will not understand what they are missing. They will be missing a lot.

There is a deeper conceptual change involved in this transformation. One of the most salient features of the compact disk products already penetrating the market is that hypertext links make differences between types of information disappear. This was also true of the online systems, but the CD, inserted in one's own computer, and contained in a single package, heightens the effect. One moves from a case to a statute to a practice book seamlessly. The oldest injunctions about primary and secondary sources will be hard to enforce in a world where all information tools slide easily into one another. The impact of this may be useful or destructive, but it will change the universe of legal information, and how it is used.<sup>83</sup>

Only a focused educational program can prepare legal information users to adapt to this change. Law schools have never done a good job of research training.<sup>84</sup> The only major efforts at real training recently have come from WESTLAW and LEXIS, which have spent great sums in providing system training to law students.<sup>85</sup> However, that is not training in critical evaluation. And who will take on the burden of educating the members of the Bar who are already in practice? Who will hold their hand through these changes?

#### IV. CONCLUSION

With the purchase of the West Publishing Company by Thomson and its evolution into the West Group, as well as the purchase of *Shepard's* by LEXIS, the world has changed. The emergence of a plethora of new companies like LOIS, an aggressive company that started out in the CD market but which is now offering subscriptions to an Internet site that contains the primary authority for a number of smaller states and is moving national, adds to the mix.<sup>86</sup> Most likely the future of legal information will be determined by corporate strategies and marketing success, but the Bar and the legal education establishment should attempt to play a role. I fear that the American Bar Association, hamstrung as it

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83. See Berring, *Legal Research Universe*, *supra* note 8.

84. There is rich literature on this topic. Donald J. Dunn, *Why Legal Research Skills Declined, or When Two Rights Make a Wrong*, 85 L. LIBR. J. 49 (1993) is a good summary. The fiery exchange found in Christopher G. Wren & Jill Robinson Wren, *The Teaching of Legal Research*, 80 L. LIBR. J. 7 (1988) and Robert C. Berring & Kathleen Vanden Heuvel, *Legal Research: Should Students Learn It or Wing It?* 81 L. LIBR. J. 431 (1989) contains an extended discussion of the failures of research training from two very different perspectives.

85. Berring, *Legal Research Universe*, *supra* note 8.

86. See, e.g., LOIS Homepage, *supra* note 54.

is by its Byzantine committee structure,<sup>87</sup> and the American Association of Law Schools, (AALS) typically disorganized and unfocused,<sup>88</sup> can do little. But the effort must be made. Legal information has been very accessible and of high quality in the United States; it would be a shame to let all that slip away.

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87. Morris, *supra* note 2, at 73-74.

88. Twice in the past three years the AALS has conducted workshops on these questions as a part of its annual meeting. But the decentralized nature of its operations means that fast action of any sort is impossible.