Full Text Legal Research: Implications for the Future

By Robert Berring

I have been asked to discuss the issues involved in full-text legal research. It is a subject that is close to my heart and one that is of enormous concern to researchers and librarians in the United States. I believe many of the problems that the Canadian libraries and legal research communities will be facing are common, and I would like to describe the implications of full-text legal research and the future that it holds for us.

In the United States computer systems were late in coming to the field of law. One of the reasons is that the traditional printed materials that had been designed for law were of such high quality. Over the course of years we had developed finding tools, citing tools, and coordinating and indexing systems that were the envy of other disciplines. Therefore, when the age of computer retrieval came upon us, the advantages these computer systems offered researchers in other fields did not hold the same attraction for lawyers since they could already rely on traditional methods of retrieval. One could make an observation that the traditionally conservative nature of law itself and the reverence that we hold for our materials were basic factors in impeding progress.

However, the more important factor was that our existing tools were so good, that we did not feel the need for the use of computers. In other words, we questioned what more computers could offer us, since we already possessed speed, retrieval and the scanning of large numbers of documents in our existing tools. In the interim, other fields moved ahead. Most systems developed for other fields were automating traditional indexing and sorting processes. The early databases and a large measure of the databases that are still available consist of automated indexes and abstracts that permit the computer to find information in a timely fashion, sometimes using search terms or indexing tags that would not be available in a manual index. These systems were eventually superseded by new developments in the law.

Within the United States information community, the full-text experience in law is being studied widely today. Why full-text? The law demanded more than the existing indexes. More specifically, American legal research is dominated by a concept that I call "an obsession with comprehensiveness." The West Publishing Company is responsible in large part for this. A doctrinal battle was fought out towards the end of the nineteenth century in the United States over how best to report the decisions of the courts. The concern was whether to use the model developed in Britain or to forge ahead with a different style. The West Company, which based its appeal to legal purchasers on total comprehensiveness of the publication, "won the day:"

One can go back and look at the literature of the time and find that the West Company, in developing its national reporter system, promised to publish in a systematic organized format, every decision from every jurisdiction in the United States (state or federal). Comprehensive case reporting was John B. West's first great insight. The West Company discussed their system to lawyers in terms of, "If you do not buy our system, you may be missing the important decisions." In contrast, the competitors contended, "You do not need all of these opinions, many of them are pointless, do not advance the law and are repetitious. Allow us to construct a system that will choose only the important decisions, or those that are new or that contain something worthwhile:"

West countered that with a simple, (what I call paranoid) philosophy of saying, "Who is doing the choosing? Who will pick that case? Do you trust them?" I have published a number of articles on this subject in which I have gone into greater detail about the enormous impact this had on American law since it started an obsession with comprehensiveness. The belief that every possible piece of information had to be gathered together has had a profound effect upon the way we think about the law, the way we teach the law and the way the law is practiced in the United States. That very philosophy makes a great deal of sense, in the full-text context.

On the other hand, if you were trying to market a system to lawyers which offered a way to get fast index access or fast abstracting access, the lawyer might reply, "Who is doing the indexing? Who is doing the abstracting? Why would I want to pay more money to learn a new system that may in fact lack the essential information for me?" These problems created a real barrier to entry.

The other great insight that John B. West (one of my favorite historical characters) had, was to arrange the decisions in a comprehensive digest. While I studied the origin of the great American blue ribbon conservative law firms, I found that a high percentage of these entities were founded by highly idiosyncratic individuals. Frequently there is an apparent lunatic in the beginning whom no one believes and everyone thinks is crazy. He starts an enterprise and as soon as he finishes that, often they ease him out as quickly as possible and set up a system based on his ideas.

We all think of the West Publishing Company as the most formal, serious and sober publishing house in the United States. However, most people who knew John B. West, the founder, thought of him as a very strange person. Again, it is noteworthy that he had two great ideas, first, the comprehensive reporting of decisions and the second, arranging them in a comprehensive digest. In considering the concept, it was amazing to attempt to set up a subject system which would index and arrange every possible legal point which could ever be decided. Under the West system there is no legal issue that has been decided in American courts that does not have a location somewhere in that West digest system. That is the beauty of the system. There is a topic and subtopic for everything. Of course that has had an enormous impact upon American law as well. That arrangement, which was actually purchased in large part by West from

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1. This is the text of a paper presented by Robert Berring at the Annual CALL Conference held at Jasper Park Lodge, Alberta in May, 1988.
someone else and then modified in the late nineteenth century, still reflects the way most American decisions are arranged. This also tracks many of the ways we break up the law in the courses that we teach in our law schools.

There is a theory of information science now that claims that we can only think about things in the categories that they are presented to us. The West Company has really had an impact here. We have every case being reported and indexed. How do you beat this system? Well, you beat it by going one step further. Lexis, as it was originally marketed, understood the basic principles of this comprehensive paranoia and took it one step further.

What had always been one of the major complaints about the West digesting system in the United States was, “Who is doing the indexing?” Note that even the West Company could not escape the requirement of having to have human input. Despite having gathered and published every decision, they still had to have a human being write the headnotes. Because I work with the West Company, I have had the privilege of meeting the people who write the headnotes for the West reporter system. They take this so seriously that it is almost a religious experience. Every headnote is written by a team of lawyers (you have to be a lawyer), and in every case they write the headnotes, they assign the key number, and then it is passed to one of four senior headnote editors. These four “edi-knights” [taken from Star Wars] review in detail every headnote. They obviously have accumulated momentous records of good headnote writing, sound judgment and true understanding of the system. An enormous amount of standardization is achieved by directing information through this small funnel. The editors tell me that they do make modifications in roughly a third of the headnotes that come through. This is very old fashioned, but is a very comforting style, in which large amounts of expertise and training are riding herd over the organization of the information.

I always use the following example to explain to my students the problem with human input. Let us assume that the headnote that is crucial for your research was written by a West editor on a Monday morning after a three day weekend in which a long-term emotional relationship reached its end. Now that is not to say that the editor could not write as well as he or she could nor to say that the standards would not be applied, but just to say that his or her mind might not be entirely on work. To show you how serious the West Company is, I was speaking in Washington, D.C. two years ago and I described this scenario. At the break, a member of the audience came to me and said, “I am the Washington, D.C. representative of the West Company and I want you to know we do not hire emotionally insecure people.” On the contrary, I believe even headnote editors have personal lives.

Seizing on that little strand of paranoia, Lexis could go one better and say, “We do not have to have that intervening human intelligence, we do not have to have an editor, we do not have to have someone read the case and write the headnotes, we do not have to have someone take the headnotes and put them into a classification system. Instead, we eliminate that intervening intelligence, allowing you to construct your own search strategy and key your own buzz words. It’s all a matter for you.” Of course, there is a big upside to this as well as a big downside. The upside is the elimination of all possibility of mistakes and the elimination of the dead hand of the eighteen nineties in the arrangement of subjects. The downside is the problem of how many of us are as skilled at researching and understanding as these four senior headnote editors? How many of us understand the nuances of judicial publication as well as the people at West?

The big tradeoff of elimination of human intervention allowed the breakthrough for full-text in the United States. By stressing full-text, Lexis began slowly and intelligently to work with bar associations in their marketing pattern. Eventually West entered the market. But in a spectacular misjudgment of the market, something that is so philosophically counter to everything that I have come to believe in my obsession with the history of the West Company, they marketed only the headnotes at the beginning, maintaining that we did not need every word of every case, we had their headnotes. John B. West must have been spinning someplace, since scores of American lawyers rejected this. The whole advantage of computers was not speed and certainly not saving money, it was obtaining more information (every word of every decision). I must say that the American information community as I watched it, stood by in horror as first Lexis and then Westlaw went full-text. The amount of resources involved in loading every word, every decision into these enormous central files then loading on fantastic software and finding tools was an expensive proposition that no one could believe. I am convinced that both Lexis and Westlaw were willing to underwrite huge losses in their early years, although now they are both established. Every American law school has at least one terminal of each and every American law firm with fifteen or more lawyers has at least one of the two systems.

Now we are into a new phase where we must step back and look at where we stand historically and what will happen to us in the future. The questions that I perceive as crucial to resolve are first, the cost of the systems, second, the efficiency of the systems, and third, training of individuals to use the systems.

Cost is something that has continued to be a problem. If we are to centrally store these enormous amounts of information, we are going to have a long row to hoe before we can find a way to cost them out at a level where every lawyer or in fact every person who needs legal information can get access to them, and that ties in with the training issue as well. If you must train individuals in the use of the system, that immediately causes an obstacle to the system’s eventual use. I do believe the future holds some form of breaking down of our present use of centrally structured computers.

In regard to computer terminals themselves, I earned the undying enmity of some of my friends at Lexis by calling their deluxe terminal the “moron cadillac.” My reason for that was, when Lexis wanted to sell those terminals (and they were the ones who had to make the market), they had to design a terminal for lawyers to use and they realized some important things. The first observation was that no lawyer would sit through a training session, at least not while paying attention. They also recognized that lawyers would be unwilling to learn protocols or search language, nor would they be willing to wrestle with computer “jargon.” In recognition of this, they designed the LEXIS DELUXE terminal. It is absurdly easy to use, at least at a mechanical level. If you want to turn it on, you find a button that says ON. If you want to change files, you hit a button that says CHANGE FILE. If you want to look at the case you just looked at, you find a button that says SEE PREVIOUS.

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If you want to page ahead, you look for a button that says PAGE AHEAD. A chimpanzee can operate this terminal, which meant that most lawyers had a fighting chance. These dedicated terminals were an enormous waste of cost. One still finds these Lexis deluxe hardwired terminals, which require special accommodations. For a long time we could not access anything over them except Lexis, although now we can get a few other databases. Fortunately, both companies appear to be backing away from this style of terminal.

In addition to cost, these systems posed the problem of search efficiency. For example, West has the "WALT" terminal. I am proud to say that a member of my staff thought the name up as part of a contest. It was West's version of the Deluxe and it shared similar problems. An inherent problem with this type of terminal is that teaching people to mechanically operate the system is so simple that they believe they know what they are doing and assume they are an efficient researcher. The ability to operate a deluxe Lexis or Westlaw WALT terminal or even their prompted PC programs on their own PC, in contrast to successful full-text, free-searching is a very different proposition. The training and principles involved in understanding the nuances of full-text, free-text searching are still being grappled with. In fact, even the people on my faculty at the Library School at Berkeley are not fully convinced yet that we understand the parameters of successful full-text searching. I am sure many of you are acquainted with an article written by Dan Dabney, entitled, "The Curse of Thamus." It appeared in the Law Library Journal an American Association of Law Libraries publication. It is a wonderful story from mythology about the curse put on this poor Greek. The curse was writing. The idea was before writing you had to memorize everything so everyone could only know what they knew and you could only remember what you needed to remember. Writing was a curse because immediately people would start writing things down and then there would be information that you needed to know but did not know. Eventually you would have to figure out ways to find this information.

Dabney claims this problem has just gotten worse culminating with the huge databases we have today. We have to conduct training sessions to learn how to use the terminals and access indexes in order to obtain the information which we cannot understand when we find it. Dabney took some of the best thinking in the field of information science and pointed out the genuinely difficult problems of searching with large free-text databases. For example, the size of the files in Lexis and Westlaw for the Federal courts of the large American states is just too big to do any efficient searching unless you really know what you are doing. This has been proven with objective tests on large database files which demonstrate that you are not as good at searching as you might think you are.

On my reference staff I have one member who does nothing but monitor and work with these databases every day. Although everyone on my staff is responsible for training students on these databases, this woman is responsible for knowing how to "massage" those databases. Yet, as our in-house consultant, she still finds it difficult to keep current with both databases and contends, "I may keep up with one but working with both constantly, I just know I am missing things. I am not keeping up." Now the vendors are trying to help by offering training sessions. For example, West recently flew reference librarians from all over the United States to St. Paul, Minnesota for training. Lexis and West provide more and more terminals in my library now (I believe we have a dozen Lexis and a dozen Westlaw terminals), most of them given to us for free so we can train students. They are offering video programs with the assistance of their own trainers. We use our staff for training, but training (the third element) is still a huge problem because we are not quite sure what we are doing. Furthermore, the databases are growing every day and getting to be more difficult to work with.

A final note on Lexis and Westlaw in the libraries is that I have significant doubts whether the two full-text databases can survive the riches. The mix is almost too rich and as you might know Lexis and Westlaw are suing each other all over the United States at the present time. One matter has actually come to trial and that is a matter which is viewed by some as a death knell for traditional legal publication. It is a matter where Lexis, two years ago, announced that it would begin to star page its database to existing print reporters. Up until very recently, if you found a case online, and you wanted to provide an accurate citation to it internally to a quotation within the case, you had to go to the printed source. So, Lexis announced two years ago that they would provide star paging in their database so that the researcher would not have to consult the written reporter. Theoretically if you had the computer database, you would not need to have the written books for citation or brief writing. West sued on a copyright action saying that was a violation of their copyright. Taking the numbering of the books and the formulation of the pages was violation of copyright and they got an injunction which was granted by a federal court in the United States. The injunction was appealed all the way to the U.S. Supreme Court which upheld it, the trial in the matter was held last April. The death knell part I am talking about is that both sides have submitted affidavits from experts saying that if in fact one could cite to the databases there would be a significant loss of subscriptions to printed materials. That is a projection both sides have come up with. They contend that if we do not need the books for citation purposes, there are people who will not want the books.

That leads me to my three points that I want to leave you with regarding full-text. The first is acceptance. How true is the premise that we have accepted the fact that we may not need books, that we may be able to survive solely with the databases? I view this as a generational matter. I believe that law students today (at least the ones I work with at my law school) view the computers as the first line of legal research. They do not go to the law books first and back them up with the computers, they go to the full-text systems first. Many of them have accumulated computer skills since their grade school days, through high school and college, making them quite familiar with databases. They find the full-text system something that they can manage, perhaps because of innate understandings of working with these systems over the years. Some of us who grew up using books and traditional systems will just never have this understanding. But they are accepted by the students. They are also perfectly comfortable reading their text on the screen. While many of us complain that no one will ever read text on a computer screen, these students are perfectly happy to do so. Many of them find reading text in a book to be odd. I think that acceptance is coming. In fact, I believe we will also see the citation systems in the United States (the Blue Book and the new Uni...
students of Chicago maroon book) go online. When working on some litigation between West and Lexis, I found that many of the courts will now accept citations to non-standard formats and that will grow.

A second thought I want to leave you with is that there may well be some major implications for the way we think about the law because of full-text databases. The common law system that we have based our jurisdictions upon was one that believed that there was a set body of doctrine which was revealed through writings of judges. The full-text databases are allowing individual researchers to construct their own systems of organizing legal information. In many ways the West digest system and the various encyclopedias and abridgments though the commonwealth world helped to hold together the myth of the common law for many of us. It helped to organize things into recognizable patterns. As we go to a full-text system I can foresee the final stage of that process. It will no longer make sense to even talk about a larger majestic whole to the law. There will be no one forcing it into those categories and with the thousands and tens of thousands and hundreds of thousands and even millions of cases coming down it is very hard to support the myth that there is a larger structure of law being revealed by the judges. Law is becoming quite statutory, quite focused and quite particular.

A final observation reflects the ethics involved in all of this. While we have never been expert at training people to use manual systems, it was always possible to make the books available in the public form allowing individuals to access the law themselves. Sets of reporters and statutes are available in public libraries and universities and are accessible to members of the public. However, the computer systems are going to be quite different. Will we be taking away the ability of individuals to find the law themselves either because of the difficulty of the searching, or the cost of getting at the terminal, or the availability of the terminal itself? In the United States there is a good bit of debate these days about what is happening to small firms. Are individual and small practices going to wither and die? Not only are they going to be faced with the large corporate law firms and government agencies that are growing in size, but also they will not have access to the same research tools. The individual lawyer will not be able to have his or her own terminal and even if he or she can work through a central research facility of a library that allows for paying as you go, it won't be their own terminal. They will not be able to have the kind of research specialists that large firms will be able to afford. Are there some ethical questions here?

Now those last three points, the acceptance, the changing of the pattern of the common law and the ethical one are all very large issues, ones that I hope to write a piece about individually. I feel strongly that they are issues that we should all be thinking about.

To summarize, in some ways the questions we are dealing with are the oldest possible questions. What have libraries always been about? Gathering information, sorting it, and making it available. Despite all of its confusion and jargons, law has had some of the most sophisticated tools, tools that we didn't always understand and may have been the product of the "craziness" of someone like John West. Today, we have again led the rest of the information world. In the United States many other database companies are looking at full-text. They see its popularity, and its applicability to other areas. I just hope that as we push into this quite expensive and complicated area, we give it sufficient consideration in planning our future. I feel the implications of the online systems are even more dangerous and at the same time more full of hope than they were for the manual system.

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