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Citators: Past, Present, and Future

By Laura C. Dabney¹

Introduction

It is difficult to imagine what the practice of law would be like today without citators. These tools let the lawyer know that the case he is using is still good law. They assist him in finding new case law and secondary sources. They let him know who is talking about his case, and why. Citators have been an important legal research tool for more than 130 years. This paper intends to take a closer look at these tools, particularly the two major ones on the market today, Shepard's² and KeyCite.³ The first section will look at the history of citation indexes. The print citator, mostly Shepard's, has already been beautifully examined by Patti Ogden⁴ writing in 1993. This paper will touch on the early days, but then focus on taking the reader through the fifteen years since the Ogden paper. Those years were exciting ones for citators. They saw a great deal of development online, most importantly the introduction of KeyCite. A second section will examine comparisons between the two systems. The paper will then turn to possibilities for the future of citators, with a word about the move away from print citators. Finally, by looking at features that are available today, this paper will speculate as to future innovations.

A citator is a tool that can be easily defined; it is an index of connections between cases (and, of course, statutes and secondary sources). At the same time, though, it has a large variety of different uses for the legal researcher. The use of citators today is huge—if you do no legal research other than to find one relevant case it is often to run that case through a citator. The history of the citator is not only tied inexorably to the history of the legal profession, but also to changes in the world of legal publishing, and the creation of new legal research strategies. Because of

¹ The author of this paper would like first and foremost to offer her gratitude to both Jane Morris of LexisNexis™ and Daniel Dabney (the author's father) of Thomson West™ for providing materials, information, and several amusing anecdotes that made researching this topic thoroughly enjoyable.

² Shepard's is a registered trademark of Reed Elsevier Properties Inc.

³ KeyCite is a registered trademark of West, a Thomson Business.

⁴ Patti Ogden, *Mastering the lawless science of our law: a story of legal citation indexes*, 85 Law Libr. J. 1 (1993).

their widespread usage, citators are a perfect case study for those interested in the growth and development of legal tools. They also have a very rich and interesting history, which is an excellent place for this paper to begin its study.

The History of the Citator

A citator became necessary as soon as the law became large enough that any one lawyer, practicing in any one area, was unable to remember all the law that he needed to know. This of course happened very quickly, as the common law world is ever expanding. Today the US legal system is huge, and we argue across jurisdictions all the time. Our common law is such a morass that no one could be expected to know much outside of his direct field of study.

As mentioned above, the early history of the print citator has already been well documented by Patti Ogden, so this paper will only do a brief gloss of the most cogent points and products. Citators began in the early 19th century when lawyer Simon Greenleaf lost a case relying on precedent that, unbeknownst to him, had been recently overruled.⁵ Greenleaf saw a need, and decided to try and fill it by creating an alphabetical list of overruled cases.⁶ This was the first of several citation indexes, but the idea really reached its pinnacle in print when Frank Shepard introduced his product in 1873.⁷

Shepard came up with some innovations—for example he printed his citator on gummed paper so that notes to overruling cases could be pasted right into the reporters next to the cases themselves.⁸ He called his new product “Adhesive

⁵ *Id.* at 2.

⁶ SIMON GREENLEAF, A COLLECTION OF CASES OVERRULED, DENIED, DOUBTED, OR LIMITED IN THEIR APPLICATION: TAKEN FROM AMERICAN AND ENGLISH REPORTS (Portland, Arthur Shirley 1821).

⁷ This is actually a date of mild contention. This author chooses to use the date provided in materials published by LexisNexis, (*See* SHEPARD’S, AN ONGOING TRADITION OF “INDISPENSABLE SERVICE” TO THE LEGAL PROFESSION, (1998) and SHEPARD’S, “THE LAWYER’S ROSETTA STONE”, (2001)). However, Ogden lists the date as 1875, and notes the debate in a footnote. Ogden, *supra*, at 27.

⁸ This method of updating has posed some problems for the modern librarian who is interested in book preservation. While it is always fascinating to come across a reporter updated with the original Shepard’s method, it makes those books very delicate. Over time, as the paper of the book becomes more brittle, the edges of the citation stickers, and their adhesive become sharper, making it difficult to turn pages without tearing them. (Many thanks to Ann Nez, Librarian and Head of Bibliographic Control at the Marian

Annotations.” The Ogden article was not terribly impressed with this invention, claiming that it was difficult and time consuming to use.⁹ The modern Shepard’s, however, remembers this incarnation of their product as a key stepping-stone—it was modeled after lawyers who would hand-write notes about later overrulings into the margins of cases.¹⁰

The first Shepard’s citations were printed entirely on gummed paper. To use them the lawyer (or more likely his clerk) would tear them up into pieces smaller than a postage stamp, and stick them into the margins of his reporter set, next to the name of the case. This meant that when he looked up a case, he immediately saw references to any cases that overruled it, as well as to citations that criticized, distinguished, explained, followed, limited, or modified the decision.¹¹ It was not until several years later, by customer request, that Shepard began to print his citations into bound volumes in some jurisdictions.¹² This meant that his product was more portable. However, it also meant that Shepard’s became an extra step at the end of the research process; previously updating information was immediately presented to the user during the course of researching.

Whether the gummed paper was instrumental to the success of Shepard’s citations or not, what really made his product sell over several other competitive products was his dedication to it. Unlike many other citation index printers of the day Shepard updated and maintained his product. With the body of the common law constantly expanding this was really a necessary feature. Other citators, which were only published once, were out of date almost as soon as they came off the presses. Shepard’s was a unique alternative; an index that updated and was frequently republished.¹³ There were still other (often more innovative according to Ogden) competitors, however they dropped in and out, as time went on.¹⁴ Shepard’s had the high ground of establishment behind it.

Gould Gallagher Law Library for both her tips on book preservation, and information about Gallagher’s use of citators.)

⁹ Ogden, *supra*, at 32.

¹⁰ SHEPARD’S, AN ONGOING TRADITION OF “INDISPENSABLE SERVICE” TO THE LEGAL PROFESSION, (1998)(this is a 16 page brochure, published in honor of Shepard’s 125th anniversary, and does not have page numbers. On file with author.)

¹¹ *Id.*

¹² *Id.*

¹³ Ogden, *supra*, at 29.

¹⁴ Ogden mentions several, but for those interested in a really full history also see Michael J. Lynch, *Citators in the early twentieth century - not just Shepard's*. 5 Leg. Ref. Servs. Q. 16 (1998).

Shepard's remained much the same as it began for the next several years, not even abandoning the sticky paper until after the death of its founder in 1900. At that point, Frank's brother in law, Reid A. Kathan moved the operation to New York, where it remained until the 1940's. It was during Kathan's tenure that Shepard's dropped the Adhesive Annotations, and moved entirely to bound volumes. In 1947, William Guthrie Packard, Kathan's successor, moved the company to its final home, Colorado Springs.¹⁵ In 1966 Packard's shares were bought by McGraw-Hill, who owned Shepard's for the next thirty years.¹⁶ It was not until the leap to online citation databases that much changed in the world of citators. Even today, though KeyCite rivals Shepard's in popularity, the process of using any citation index is still called by many "Shepardizing."¹⁷

Two major print publishers of legal materials dominated the twentieth century.¹⁸ They were the West Publishing Company (West) in St. Paul (and later Eagan), Minnesota and Lawyer's Cooperative Publishing Company (LCP) in Rochester, New York.¹⁹ These two had been arch-nemeses for a long time in the print world, and they both subscribed to the Shepard's service for their citation index needs. However Shepard's was not a terribly fast service, and both companies, independently of one another, were concerned that Shepard's was not current enough to meet the needs of their editorial operations. Neither company wanted to miss a key overruling. So both companies developed their own in-house programs.²⁰ LCP developed Auto-Cite and West a program called InstaCite.

¹⁵ According to Jane Morris of Lexis this move was for several reasons—the enjoyable climate and the central location for distribution purposes among them. Possibly the most important and interesting reason was safety—New York, as a coastal city, was potentially more open for attack, and Shepard's wanted to make sure that its information was protected. Colorado Springs later became home to the U.S. Air Force Academy, and to the North American Aerospace Defense Command, making it a considerably less safe place to be. E-mail from Jane Morris, Director of Customer Programs, LexisNexis, to author (16 May 2007 20:23:22 PCT)(on file with author).

¹⁶ ONGOING TRADITION, *supra*.

¹⁷ This is an error on the part of the users. "Shepardize" and "Shepardizing" are both registered trademarks that apply specifically to the use of Shepard's. The legal department at Shepard's has tried for some time to prevent the use of these terms for other products.

¹⁸ Much of the discussion that follows over the next few pages come from a telephone interview with Daniel P. Dabney, Thomson West, in Zug, Switzerland. (April 27, 2007).

¹⁹ Lynn Foster & Bruce Kennedy, *Technological Developments in Legal Research*, 2 J. App. Prac. & Process 275, 278 (2000)(LCP was the first successful competition to West.)

²⁰ Ogden, *supra*, at 37.

Neither of these programs did what Shepard's did, either then or today.²¹ Both were designed to look only at only the most necessary case history—direct history and severe indirect negative treatment, especially overrulings. So the West or LCP editor did not get a neat list of all the cases that had ever cited to his case. He did, however, find out whether or not the case was still good law, which often was all that he was really looking for. Both systems were considerably more current than Shepard's.

In 1973 the Mead Corporation introduced electronic legal research, with a product called Lexis/Nexis (Lexis).²² West was soon competing with its own computer product, Westlaw, which debuted in 1975.²³ LCP was still West's biggest competitor in print, but LCP did not follow Lexis and West into the world of online publication. Consequently Lexis and LCP quickly became fast friends—seeing that “the enemy of my enemy is my friend.” For several years after that, even when most of the legal publishing battle was moved online, LCP's role in the competition was essentially that of the editorial arm of Lexis. They were distinct but friendly companies, and Lexis benefited greatly by offering the public exclusive online access to LCP products, probably the most notable of which was the American Law Reports. In the mid-1970's LCP made a belated foray into the online world, by going public with their in-house product, Auto-Cite. Because of the camaraderie between the two companies Auto-Cite was made available through Lexis in 1979²⁴—another LCP product Lexis to which could claim exclusive distribution rights.

Shepard's elected not to design their own online product, and instead licensed their data. So it was that in the early 1980's Lexis and West both began to offer Shepard's online.²⁵ It was not a terribly large portion of their sales, however, it still was a good way for the two companies to compete with one another. Each company offered subtle improvements in the product interface to entice customers. For example West first pulled ahead by offering hypertext links to cases themselves in its Shepard's service. Lexis was not far behind in adding this feature. Auto-Cite served as essentially a second step after Shepard's—Shepard's online would retrieve citing references and older overrulings, and then Auto-Cite

²¹ Peter Nycum, *Law and Computers: Overview Update 1975*, 68 *Law Libr. J.* 234, 244 (1975).

²² Ian Gallacher, *Forty-Two: The Hitchhiker's Guide to Teaching Legal Research to the Google Generation*, 39 *Akron L. Rev.* 151, 164 (2006).

²³ *Id.*

²⁴ LEXISNEXIS, WHAT IS THE AUTO-CITE SERVICE?, http://support.lexis-nexis.com/online/record.asp?ArticleID=Auto_Cite.

²⁵ Tobe Liebert, *The New Generation of Citators*, 10-Fall *Exper* 28, 29 (1999).

would make sure that nothing had happened so recently that it was not in Shepard's. This was only the first in a series of products by both companies aimed at improving currency for citation checking.

Sometime thereafter, in 1984, West, feeling challenged, made its own in-house citator, InstaCite, publicly available to compete with Auto-Cite.²⁶ Both companies had realized their internal need for a current electronic citation database; however it was not until the success of Auto-Cite that it occurred to them that customers might need it too. The two products were very similar, but there were small differences. InstaCite was slightly more current than Auto-Cite because both systems were primarily dependant on cases published by West, and West had a chance to process those cases before they appeared in the advance sheets. Some cases that were first printed in a looseleaf service, such as those published by CCH, appeared first on Auto-Cite. West did not use looseleaf services as a source for case law. InstaCite had a few little oddities, though. The most amusing one is probably that it did not have any negative indirect history for cases pre-1967. It would find a case that had been reversed on appeal, but not one that had been overruled by a later case.²⁷

West decided to offer yet another layer of currency. This one was called "Shepard's PreView"²⁸ although it did not actually have any relation to the Shepard's product other than to license the Shepard's trademark. Shepard's PreView offered very recent citing cases, but it did not include any of the history tags that actually told the user what they were looking at. Someone using this program could see that his case had been cited recently, but the results did not offer any explanation for why it was cited. Shepard's PreView never made much money, and it definitely did not make the Shepard's company much in the way of royalties. But it did have one significant consequence, which was that Shepard's contracted, as part of the license, to get electronic records of citations West parsed out of its most recent case law. This added greatly to Shepard's currency.

Both systems added another feature to their online updating products. This one was a program that essentially treated your citation like a search term and then ran it through all the most recent cases. This search retrieved any other cases that cited your case. Like Shepard's PreView, these products gave no explanation of

²⁶ Ogden, *supra*, at 37.

²⁷ Fortunately for West user statistics showed that most of their customers were blithely unaware of this fact, and used InstaCite no less for pre-1967 cases than for more recent cases.

²⁸ WESTLAW, SHEPARD'S PREVIEW AND SHEPARD'S CITATIONS (Supplement to the WESTLAW Reference Manual, Third Edition)(1989).

how the citing case had treated your case; it only found places where your case had been cited. The Lexis version of this product was called “LexCite,”²⁹ and the West version “QuickCite.”³⁰ This process, either using a program or manually, is probably the simplest way to do guerilla legal citation even today.

At this point there were three different steps users were supposed to take to update their cases on Lexis, and four on West—Shepard’s, Auto-Cite or InstaCite, LexCite or QuickCite, and, on Westlaw, Shepard’s Preview. Each step got the user more and more current, but told the user less and less about what they were actually looking at. It seems unlikely that anyone was actually using all three or four steps at this point, and the people in charge of training customers to use the systems were beginning to rebel.

On top of all this Shepard’s had a few other quirks, the most notable of which is that it did not handle parallel citations very well.³¹ A user could get different results based on which citation he typed into the system. This happened because the coverage between Shepard’s products was genuinely different. If you typed in the citation to the state reporter you got only citations from that state, whereas the regional reporter citation gave citations from all jurisdictions. However, headnote markers only appeared for cases that were within the same region—no reporter boundaries were crossed. The state citation would also check law reviews, but the regional citation would not, so the savvy user would have to run multiple Shepard’s searches for the same case on top of all the other steps that West and Lexis inflicted on its users. Like the pre-1967 InstaCite problem, though, users in general seemed unaware of this, and would only run one search.

This oddity was a product of Shepard’s in print—in fact since the data from the print product was the source for the online product several idiosyncrasies of the print version were carried over to the electronic products. One of the reasons that Auto-Cite and InstaCite were so important to the development of modern citators is that, since they were not relying entirely on the Shepard’s print data, they solved some of the inherent problems that arose from it.

²⁹ LEXISNEXIS, THE LEXCITE FEATURE, <http://support.lexis-nexis.com/online/record.asp?ArticleID=LEXCITE>.

³⁰ WESTLAW, DISCOVERING WESTLAW: THE STUDENT’S ESSENTIAL GUIDE, 51 (1991). This manual mentions West’s “new” citator service, QuickCite, though for several years prior to that time West materials had included a section on using Westlaw as a citator through a free text search. See WESTLAW, REFERENCE MANUAL, 17/1 (1985 ed. with 1987 inserts)(1983).

³¹ Barry D. Bayer & Benjamin N. Cohen, *West Group Unveils a New Electronic Citator*, 149 N.J.L.J. 566 (1997).

There is another important plot point that enters the story now, and that is that the Shepard's company had become increasingly unhappy with the contracts they had signed with both West and Lexis. It had long-term contracts with both companies for a relatively small percentage of the usage charges. When Lexis and West first approached Shepard's with contracts Shepard's was making a very steady profit from its book sales, and so selling information that it already had was essentially money for nothing. As time wore on, though, book sales started to fall off in favor of online usage, and Shepard's became aware of just how much money West and Lexis were making off their product.

With all this intrigue both Lexis and West were very worried about the possibility of an exclusive contract between Shepard's and their competitor, while presumably each trying to secure such a contract for themselves. Each one began to look into the possibility of creating its own rival citation product. Lexis asked its old ally LCP to possibly design a new citation index, and LCP put some time into the project (code-named project "Franklin"). They eventually decided it would be unworkable. West also conducted an internal study of the difficulties of replicating Shepard's data. Preliminary estimates were grim. West estimated it would take seven years and 300 million dollars to design the product, and these numbers were enough to make them drop the idea.

Wanting a better position in the online world, Shepard's introduced a product called "Shepard's Daily Update" the primary feature of which was, obviously, that it was updated daily.³² This was a feature of the CD-ROM version of Shepard's, and it also offered an additional currency feature. The user could call Colorado Springs and talk to someone who would look up the citation and provide up-to-the-minute currency. Shepard's then approached both West and Lexis and tried to sell them this new product at a very marked increase in price.

Neither company was very happy with this new state of affairs. Neither company wanted to destroy the market for its own product, either Auto-Cite or InstaCite, and of course, neither company wanted to pay Shepard's any more than they had to. The two companies took different stances, though. As discussed below, Lexis went ahead and bought the updated system. West, on the other hand, stood firm and claimed that their contract with Shepard's entitled them to the best Shepard's service that was available at the time.

³² *Shepard's Update Service*, 13 NO. 13 Law. PC 13 (1996).

The contracts Shepard's had with both companies each had a clause calling for a renegotiation of the service contract in the event that either company should be sold. Thus, when Mead sold Lexis to Reed Elsevier in 1994, Shepard's got to renegotiate its contract with Lexis. Lexis picked up the more current Shepard's Daily Update product, and presumably this was a much more profitable arrangement for Shepard's than the previous one.

The playing field changed again. West, previously a closely held corporation, was acquired by the Thomson Corporation of Canada for about three and a half billion dollars.³³ This had several important effects on the history of citator development.

At the time that Thomson bought West, they already owned LCP. LCP thus made an abrupt change in loyalty—where once it was an ally of Lexis it was now part and parcel of Lexis's chief competitor. Brian Hall, the president of LCP (and a former president of Shepard's) suddenly became the president of West. The merger was also dependent on the grace of the Department of Justice, which insisted that the new company divest several directly competitive products, including Auto-Cite. Essentially all of these were bought by Lexis. There was a small but important consequence of the brush between West and Auto-Cite, and that was that West ended up with a copy of the Auto-Cite data when it was sold to Lexis. This data would later be used in the creation of KeyCite, mooting the difficulty that West lacked pre-1967 data.³⁴

Another effect of the merger was that the renegotiation clause of the contract between Shepard's and West was triggered. Unlike Lexis, West declined to purchase the Shepard's Daily Update. Thus, while Shepard's probably was in a better position than it had been previously, it did not get the substantial increase in

³³ KENDALL F. SVENGALIS, LEGAL INFORMATION BUYER'S GUIDE AND REFERENCE MANUAL 2002, 8, (2002 ed.)(1996).

³⁴ Prior to the sudden acquisition of the Auto-Cite data there was some concern in the early stages of KeyCite about the pre-1967 problem. People would probably actually notice the difference in this shiny new product. So West built a special parser designed to go through case law and find overrulings. It was not a perfect system, it grabbed a lot of cases that it did not need along the way, but it did find essentially all of the overrulings. There is only one known instance in which the program missed an overruling. After West got its hands on Auto-Cite it ran the parser over all the case law and came up with 200 overruled cases that had been found by neither program. This was fairly impressive, but at the same time, it was not really something that West could advertise—"Use West—this time, we got it right." That parser is still used on occasion today.

price from West that it had selling the new product to Lexis. Maybe the biggest change in the new contract was that the duration was considerably shortened—West’s right to Shepard’s now expired in 1999.

Now, to back up the story a little bit. In December of 1994 Shepard’s entered into its first exclusive contract. It was not a particularly exciting project. They signed with the Michie Company to build a CD-ROM product for the state of Alabama, which had citations and cases on the same disk. When the announcement of this product reached the desk of the President of West, Vance Opperman, he became concerned. The product itself was not particularly worrisome, but the possible trend that Shepard’s would be willing to sign more exclusive contracts—and worse, that they were leaning in the direction of Lexis (who owned Michie)—was troubling.

So he ordered that West build a similar product. He was not envisioning a product on the national scale. That possibility had already been explored and found to be too expensive to develop. What Opperman wanted was a CD-ROM product for just the state of Alabama that would compete with the Michie product. The idea was to make sure that Shepard’s would in the future know better than to offer any more exclusive contracts. He asked Forrest Rhodes, who had served as the Chief Technical Officer of Shepard’s for a time, and thus knew a great deal about citators, to develop the product. Rhodes called upon the only person who directly reported to him, Daniel Dabney,³⁵ and they began to build the idea behind the modern KeyCite.

Neither Rhodes nor Dabney were terribly interested in building a small, Alabama-based CD-ROM product, but in the course of figuring out how it could be done they also figured out how a national system could be done—without spending \$300,000,000 and 7 years to do it. Unsure that Opperman would be willing to risk alienating Shepard’s, they made sure that their initial efforts were, to all appearances, directed only at developing an Alabama CD-ROM product. Because of this, during product testing for KeyCite all the original test data came from Alabama. Six weeks later they announced to senior management that they could do better than just Alabama, they could design a citation system for the entire country.

³⁵ Dabney for KeyCite and Jane Morris for Shepard’s are the two leading experts on these products, cited in several articles. The author of this paper would again like to thank them for their generous assistance.

This potential product looked like it was really going to force the question of whether or not West could afford to alienate Shepard's and bring about the dreaded exclusive contract to Lexis. Not an easy question to answer, so possibly it was fortunate that the point became moot with another big merger. McGraw-Hill, who owned Shepard's, sold it in 1995.³⁶ Or rather they exchanged it—McGraw-Hill traded Shepard's to Times Mirror for a line of educational products, which fit better into its line. McGraw-Hill owned no other legal publishing interests at this point. Times Mirror did; they owned Matthew Bender. Times announced its intention to share ownership of Shepard's with Reed Elsevier, the company that had, only a year earlier, become the parent company of Lexis.³⁷

Most of the legal world was concerned at this point by this potential merger. West most of all, of course, but the legal research community in general recognized how important the Shepard's citation system was to market share and free competition. The American Association of Law Libraries (AALL) took the time to write a letter to the Department of Justice expressing their concern that if Shepard's were in the hands of just one of the major competitors everyone would suffer.³⁸

For West, KeyCite became a necessity rather than a luxury at this point. InstaCite and Auto-Cite were still around, making the updating process very difficult and confusing (really, hardly better than using Shepard's in paper), and a good Lexis hold on Shepard's could shift market share decisively in favor of Lexis. KeyCite was already well under way,³⁹ but West was still concerned, and fought to secure access to Shepard's for as long as possible.⁴⁰ The idea of a real competitor for Shepard's was still a relatively new one.

³⁶ Svengalis, *supra*, at 11.

³⁷ ONGOING TRADITION, *supra*.

³⁸ Letter from Robert L. Oakley, American Association of Law Libraries, to Craig Conrath, Chief, Merger Task Force Antitrust Division, U.S. Department of Justice (Sept. 13, 2006) (available at <http://www.aallnet.org/aallwash/lt091396.html>).

³⁹ Because of the importance of not alienating Shepard's until it was absolutely unavoidable KeyCite was kept so secret even internally that someone one cubicle over from a KeyCite worker was not supposed to know about it.

⁴⁰ Among the first people outside of West to know about the KeyCite project were staff at the Justice Department. When Shepard's was sold West put in request to them so that they force a longer contract between Shepard's and West for anti-monopoly reasons, and at the time they were forced to disclose KeyCite. So West was admitting that they had this product, while at the same time arguing that it was insufficient to compete with Shepard's. The Department of Justice did not grant relief.

The KeyCite project (originally called “WestCite”) was code-named “Gabriel,” a tongue-in-cheek reference to the Archangel Gabriel in *Luke 2:9*: “And lo, the angel of the Lord came upon [the shepherds]...and they were sore afraid.” The name KeyCite is unsurprising as West made its name in great part with the West Topic and Key Number System for topically arranging cases. However, in an interesting note, Lexis had filed a notice of intent to use the trademark “KeyCite.” West scrambled to find a new name for a while. Lexis did not actually have a product attached to the name, so when West asked Reed Elsevier about the notice they withdrew it, and KeyCite was again the name of the new West product. Some within West thought that this looked like a knowing, preemptive strike against the new product, however Lexis seemed genuinely surprised when KeyCite was rolled out at the 1997 AALL meeting a short time later.

For West, this was an especially advantageous time for the unveiling of KeyCite. It was, of course, important to West for them to have a product to compete with Shepard’s once Lexis actively owned part of it. This was also, though, a time at which Shepard’s and Lexis were not as organized as usual. With Shepard’s newly owned by two companies there was some confusion. Matthew Bender, Lexis, and Shepard’s, suddenly all connected, were still all running separate marketing campaigns, as opposed to KeyCite’s one.⁴¹ The three companies were still getting used to the joint venture and thus were not as responsive to KeyCite as they might otherwise have been.⁴²

Tensions were high as the unveiling of KeyCite got close. KeyCite made its debut in 1997 at the AALL conference that year. It had a few features that were not commonly available on Shepard’s. One is that, while there had been a few earlier Shepard’s products that used the red and yellow flag system, KeyCite standardized it. It also invented the “Depth of Treatment” stars, which let a user know how

⁴¹ KeyCite’s initial marketing campaign depicted an egg, which, as time went on, slowly hatched to reveal the KeyCite logo. It was a visually well-designed campaign (back issues of the AALL spectrum and the ABA journals of the time display the ads—the September 1997 shows the fully hatched logo, and includes a smaller picture of the pre-hatched egg.). To this day, however, according to Jane Morris, there are still some Lexis sales reps who refer to any KeyCite errors as “scrambled eggs.” E-mail from Jane Morris, *supra*.

⁴² Again back issues of the ABA Journal and the AALL Spectrum are telling. Prior to 1997 there were very few advertisements for Shepard’s. Once KeyCite was on the market, though, there are several ads with very distinct approaches from the different companies.

greatly the citing case had examined the cited one.⁴³ It was also simpler—one stop shopping, rather than three or four stops, for Shepard’s, Auto-Cite or InstaCite, Shepard’s Daily, the term search, etc.⁴⁴

KeyCite was also a pioneer in that it was not tied to any print data. The origins of Shepard’s are in many ways a great strength, putting a century of experience and human editing behind the product. However, as mentioned above, there were quirks that came with a print system that KeyCite was free of, such as problems cause by differences in coverage between print products. West was aware of this—they declared KeyCite unsuited to print. While some even expressed a desire to see a KeyCite CD product, as there had been previous Shepard’s CDs, West refused, insisting that KeyCite would never appear in any form but the live, and constantly updated one.⁴⁵

In 1999 Shepard’s rolled out “New Shepard’s” which was also one stop shopping—it combined Shepard’s, Auto-Cite, and LexCite into one.⁴⁶ At the same time Shepard’s introduced FOCUS, which allowed the user to search within Shepard’s results. It was not until later that KeyCite matched this feature with “Limit KeyCite Display.”

All these nice features make a difference today, when both citators are firmly established and trusted, and ease of use is important. At the debut of KeyCite, however, these were not the features that legal information professionals were really studying at the time. Lawyers and librarians alike were far more interested in finding out which system worked better.

Comparisons Between Shepard’s and KeyCite

KeyCite was something of a surprise to the legal world. Shepard’s had been the established product for over a hundred years, and no one had any experience with

⁴³ Shepard’s organizes its display by jurisdiction. Both ways have advantages, user preference decides.

⁴⁴ Since the contract between West and Shepard’s had not yet run out, West also had the bonus of having both programs available through West, letting user try KeyCite but fall back on Shepard’s if they did not like it.

⁴⁵ David Beckman & David Hirsch, *New Approach to Cite-seeing*, ABA Journal, Oct. 1997, at 85.

⁴⁶ There is an interesting indication of a difference in corporate philosophy here. Where West has bundled all its products into KeyCite and never looked back, Lexis maintains the Auto-Cite and LexCite along with Shepard’s in its modern service, allowing the sentimental researcher to use whichever he prefers.

any other system. There had been no real competitors to Shepard's for a very long time. People suddenly had to make a choice, form an opinion, or at the very least, know the strengths and weakness of the two systems as compared to one another. With only one option there was no need to examine how that option worked, but when KeyCite was released it was not only picked apart in great detail, but it made people turn an eye towards Shepard's in a way they had not before, to see how the systems stacked up to one another. Accordingly, a flurry of comparison between the two systems ensued for the next several years.

One of the first things that Shepard's argued when KeyCite first came out is that they had significantly more negative treatment indicators than KeyCite did. This was because the program that Westlaw used to locate cases had not yet recognized the 'distinguished' treatment, which accounted for about 80% of all Shepard's negative treatment indicators. West solved this problem by building another specialized parser similar to the one for overrulings, only this time looking for distinguishing treatment. This was another cause for complaint, though, as Lexis claimed that Shepard's citations were read by editors, and thus superior to KeyCite's electronic eyes.⁴⁷ (The perception that KeyCite is more computerized and Shepard's more human is one that West has devoted considerable time to combating.)

Aside from various events aimed at comparison,⁴⁸ there were several articles written and responded to as people adjusted to the new system. Shepard's improved very rapidly, and within a year or two had fixed the parallel citation problem, had bundled all the steps that made online citation such a pain and added red stop signs and yellow triangles—its own equivalent of the West flags.⁴⁹

⁴⁷ Barry D. Bayer, *Shepard's Edges Out KeyCite—Only Because of Presentation, Ease of Use*, 157 N.J.L.J. 366 (1999).

⁴⁸ There were several events in which an employee or employees from each company represented their product in a debate, often hosted by various chapters of the AALL. These are fondly remembered alternatively as "shoot-outs" by Jane Morris or "steel cage matches" by Dan Dabney.

⁴⁹ This is a pleasant parallel to the first Shepard's product. A user looked at a case in the reporter and saw, pasted next to the name of the case, an indication of later treatment. Today a user looks up a case online, and next to the title he immediately sees a colorful indication of what kind of treatment this case has received. See SHEPARD'S, "THE LAWYER'S ROSETTA STONE", (2001).

The first article to hit the stands comparing the two was a study by Fred Shapiro, which appeared in the Legal Information Alert newsletter.⁵⁰ It was a basic numbers comparison—running 421 cases through both programs and comparing the results. KeyCite almost invariably came out on top in receiving the greatest number of citations per case. This was mostly due to its coverage of unpublished cases and significantly more law reviews and journals. The same issue included an answer to the study by Shepard's⁵¹ that made several points. It hit heavily on KeyCite's use of machines rather than human editors (going so far as to call results from the two systems "two different types of data"⁵²) and complained of misreadings. It pointed out that Shapiro was looking at numbers alone, and not actually making any quality judgments about the citations, and it belittled the use of unreported cases. The reply made several valid points. However, they were all presented very defensively (along with a few less valid points) and it suggested how new and strange the idea of a competitive product was to the Shepard's company.

The next article that came out was a few months later in the AALL Spectrum.⁵³ Again, there was a basic comparison of the numbers of citations returned, though this author, Elizabeth McKenzie, delved a little further into quality control, and the two products actually ranked fairly closely. This article made a few unique points. First of all, it quoted both Morris and Dabney saying that it was not true that KeyCite was the more automated system. Both systems, according to this article, start with human editors and the processes were, in fact, remarkably similar.

McKenzie also draws attention to the headnotes. KeyCite referenced markedly more headnotes. In the Shepard's response to the Shapiro study they made a point of remarking that their product searched several different brands of headnotes whereas KeyCite sticks to the West headnotes.⁵⁴ Headnotes had long been a problem for Lexis, because the West headnotes had always been the ones, by far, in greatest use. Shepard's had always used West headnotes, and if a user on Lexis version of Shepard's wanted to look at a headnote they had to do so by going to a West product. It was not only an extra step; it was an extra step that reminded the

⁵⁰ Fred R. Shapiro, *KeyCite and Shepard's—Coverage and Currency of Citations To Recent Cases: A Comparative Study*, Legal Info Alert, Apr. 1998, at 1.

⁵¹ Shepard's, Shepard's Response, Legal Info Alert, Apr. 1998, at 4.

⁵² *Id.*

⁵³ . McKenzie, *New Kid on the Block: KeyCite Compared to Shepard's*, AALL Spectrum, Oct. 1998, at 8.

⁵⁴ Shepard's Response, *supra*, at 14.

user of the competition.⁵⁵ It was not until 2005 that Shepard's finally fully integrated Lexis headnotes into the system. In 2006 Lexis stopped identifying headnotes from West sources, and today Lexis is actually in the process of removing Shepard's citations to West headnotes.⁵⁶

The next two comparisons in time both appeared on the Law Library Resource Xchange (LLRX), one month apart. The first article by Tobe Liebert⁵⁷ is important for a couple of reasons. One is that it marks time by noting that "New Shepard's" debuted in March of that year, i.e. 1999. It also laid out five factors to judge the two systems on; citation type, the range of citations covered, the use of the system for further legal research, the cost, and the currency and accuracy of the system—this last being the "arguably the most important basis of comparison." This article also alluded to the upcoming study by William Taylor, which is probably the most comprehensive of all studies done on comparing the two products.

The second LLRX article⁵⁸ is essentially a record of one of the shoot-outs mentioned earlier, in which speakers from both companies debated the merits of the systems, led by Dan Dabney for West (though with an unfortunate and recurring misspelling of his name) but sadly not Jane Morris for Lexis. The article did not make any serious comparisons between the two systems, though the author did do a little of her own citing later, but it is a good record of the kind of scrapping that the companies were doing at the time.⁵⁹

⁵⁵ Lexis has since designed its own headnotes—with the campaign that, unlike the West ones, they use the actual language of the court. While headnote searching has improved enormously on Shepard's there is nothing that looks quite like the West Topic and Key Number System and it is difficult to tell how Lexis organizes its headnote searches.

⁵⁶ E-mail from Jane Morris, *supra*.

⁵⁷ Tobe Liebert, *New Shepard's v. KeyCite: How Do We Compare?*, L. Libr. Resource Xchange (June 1, 1999), available at <http://www.llrx.com/features/keycite.htm>.

⁵⁸ Victoria Szymczak, *The Great Citator Debate*, L. Libr. Resource Xchange (July 1, 1999) available at <http://www.llrx.com/features/citator.htm>.

⁵⁹ At about this time also Barry Bayer was doing a series of short articles on the two systems in the New Jersey Law Journal. He finds for Shepard's by a nose. See Barry D. Bayer, *Shepard's and KeyCite: Solid Information, Reasonable Price*, 157 N.J.L.J. 246 (1999), and Barry D. Bayer, *Shepard's Edges Out KeyCite—Only Because of Presentation, Ease of Use*, 157 N.J.L.J. 366 (1999). Theoretically also Barry D. Bayer, *Sifting through the pros and cons of Shepard's vs. KeyCite*, 157.2 N.J.L.J. 34 (1999), though this author cannot find it.

In 2000 the Taylor article⁶⁰ hit the stands, so hot that responses from both Morris⁶¹ and Dabney⁶² appeared in the same issue of the same journal. Taylor started by listing all the comparisons that have come before and then recreating part of the Shapiro study. He found that very little of what Shapiro had found in 1998 was true in 2000; Shepard's had caught up quickly, to the point where it often came out just slightly ahead of KeyCite. Taylor then went on, though, to do his own study by building his own, small scale citation index, essentially just picking a jurisdiction, reading all the cases that came out of it, and then deciding which ones needed to be recognized by a citator.

Both companies answered first with congratulations for Taylor and his excellent work, and then by noting ways in which their respective products did not make as many mistakes as Taylor counted. The Morris answer pointed out that Shepard's had a more diverse scale of treatment than simply 'negative' and Taylor did not take this into account. The Dabney response explained that the appearance of a negative in one system but not the other was not necessarily a mistake by the system lacking the negative—it could be a false negative, which would make it a mistake for the system that counted it, rather than the one that did not. West apparently conducted a further experiment finding that this was true in several of what Taylor found as “mistakes” that counted against KeyCite.

In many ways the Taylor article is less a comparison between the two systems as a critique of both. One can (and probably does) compare his numbers for how many citations he got, how soon he got them, and how many cases each system missed. But really the moral of his story is that we should be more skeptical than we are of the two systems. He made suggestions for what West and Lexis could do to improve their products, but he also went on to suggest that really, lawyers should still be checking out the last two days themselves to make sure nothing had changed.

As the lack of user response to the pre-1967 problem with InstaCite and the parallel citation problems with early Shepard's show, users of these systems tend to be a little on the credulous side, and Taylor's point seems to be that our modern Shepard's and KeyCite are no different, and they are fully capable of making mistakes.

⁶⁰ William L. Taylor, *Comparing KeyCite and Shepard's for Completeness, Currency, and Accuracy*, 92 L. Libr. J. 127 (2000).

⁶¹ Jane W. Morris, *A Response to Taylor's Comparison of Shepard's and KeyCite*, 92 L. Libr. J. 143 (2000).

⁶² Daniel P. Dabney, *Another Response to Taylor's Comparison of KeyCite and Shepard's*, 92 L. Libr. J. 381 (2000).

One article came up with what it considered a serious problem with both systems.⁶³ Alan Wolf and Lynn Wishart developed a not entirely unusual sequence of events—case A relies heavily on case B, case B is later overruled by case C, and thus, case A is indirectly overruled as well, though C never actually mentions A. The McKenzie article⁶⁴ actually pointed out that KeyCite’s new, pre-flagged Table of Authorities made this less of a problem than it ever was before. However, this was still the type of problem that was hard for users to notice, so few (if any) people actually took the precaution of looking at the “underpinnings” of a case and running them through a citator as well. The Wolf/Wishart article also gets at the Taylor problem of users not asking enough questions, and complains that West and Lexis only add to the problem with deceptive advertising and slogans that draw attention away from such difficulties.

The Death of Paper

Some elements of the future of citators seem clear. Paper, for example, is getting less and less common. Not only is it extremely tedious and difficult to use the paper Shepard’s,⁶⁵ it is now quite significantly trailing online products in currency. More and more people are asking whether or not it will soon be malpractice to use Shepard’s in paper.⁶⁶

It was not entirely easy to make the transition between print and electronic citators, though. One of the main roadblocks to moving from print to online sources was public access. It was all very well for law students and faculty to do their citation checking solely through Shepard’s or KeyCite with their Lexis and Westlaw passwords. The pro-bono lawyer or member of the public off the street, however, was still reliant upon the paper because they lacked the necessary access to use either of the two major programs.⁶⁷ Few libraries have the budget to offer free public Westlaw and Lexis access.

⁶³ Alan Wolf & Lynn Wishart, *Shepard’s and KeyCite are Flawed (Or Maybe It’s Just You)*, 75-SEP N.Y. St. B.J. 24 (2003).

⁶⁴ McKenzie, *supra* at 29.

⁶⁵ Charles, *Why in the World are You Still Using Shepard’s in Print?*, 63-APR Or. St. B. Bull. 33 (2003).

⁶⁶ PENNY A. HAZELTON, ET AL., WASHINGTON LEGAL RESEARCHER’S DESKBOOK 3D, 31 (2002). Also, though it does not actually presume to answer the provocative question posed by its title Phil Johnson, *Have Online Citators Made Print Obsolete?*, 92 Ill. B.J. 155 (2004), is an example of someone else asking the all important question.

⁶⁷ It is of course still possible to do a search in a free database for the citation or case name as a term, and then simply reading though each one of the cases that mentioned it,

The problem was solved in large part by the head of the University of Washington's Marian Gould Gallagher Law Library, Penny Hazelton. The Gallagher Law Library had always been very serious about its service to the public, so Hazelton approached West and proposed that they sell just KeyCite separate from the rest of Westlaw to the Gallagher Law Library for public use at a low, affordable price. Prior to this time this kind of feature selection was not as widespread as it is today. West agreed, and thus it became possible to wean away from the time and money consuming paper versions of Shepard's to an all-online system. Gallagher was then able begin canceling its Shepard's in print,⁶⁸ to the point where today it is primarily just Washington and federal Shepard's which remain current.⁶⁹ They have cancelled more than half of their Shepard's subscriptions. Gallagher is not the only library to have the public KeyCite arrangement, but it was the first.⁷⁰

New Uses for Citators

“Although we learned to use citators primarily as a defensive tool to ensure that the cases upon which we were relying remained “good law,” it now becomes clear that the electronic citator is also a powerful tool for initial research; a single case that deals with a point of law can open the entire universe of legal research data with a click of a mouse.”⁷¹

doing essentially what LexCite and QuickCite did, but this can be a long and involved process, and free databases do not always have the best search programs.

⁶⁸ This process actually illustrated again how foreign the idea of competition was to Shepard's. When Hazelton first began to cancel print subscriptions of Shepard's in favor of the public KeyCite a representative of Shepard's suggested that he would be willing to sell her public Shepard's as well—for a price considerably less than she was paying for the print version. The price was still considerably higher than the cost of the public KeyCite. This shows the mind set that Shepard's was in—it was competing with itself in print, rather than with KeyCite. As of relatively recently a public Shepard's password is still significantly pricier than a KeyCite one. Thanks to Penny Hazelton, Associate Dean for Library and Computing Services at the Marian Gould Gallagher Law Library for all her help.

⁶⁹ Thanks again to Ann Nez, Librarian, Head of Bibliographic Control at the Marian Gould Gallagher Law Library for providing information about the Gallagher policy toward Shepard's in print.

⁷⁰ For example the University of Houston, and Rhode Island State University.

⁷¹ Barry D. Bayer & Benjamin N. Cohen, *West Group Unveils a New Electronic Citator*, 149 N.J.L.J. 566 (1997).

Though Shepard's has always been intended as a tool to do original legal research in addition to updating, the introduction of KeyCite was a sharp reminder that citators had a real role as a tool for doing legal research, rather than being the last step in the process. While it was certainly true that a good citation in Shepard's in print could lead to finding more cases on topic, the modern advent of hypertext links and the Limit and FOCUS features on KeyCite and Shepard's have made citators more widely used than ever before as research tools.⁷² The ability to search within citator results made those results useful case and secondary source finding tools.

All the new and recent innovations to citators make them as helpful a tool, if not a more helpful one, than digests for finding relevant new material, both primary and secondary. One good case often leads to other good cases, as well as citations to journals, law reviews, American Law Reports, and many other references. On top of that, the FOCUS and Limit KeyCite Display features in the respective programs make searching easier than ever.

The user, with the click of a mouse, as Bayer says above, can look only at Virginia Appeals Court cases before 1989 that deal with headnote two in great depth and contain the word "abortion." Or just look at briefs. Or secondary sources. Shepard's and KeyCite take the naturally occurring list of sources that are in some way relevant to your own and make them highly searchable and browseable. In addition, new kinds of documents are becoming citator friendly every day. When Shepard's began it was really only meant to update case law. In the years that followed citators have begun to cover statutes,⁷³ restatements, regulations, law review articles, etc. Types of documents that are not actively

⁷² The potential power of a citation system to be an even more primary research tool has been flirted with in the past. According to Dan Dabney a few years before he went to work for West he approached the Shepard's company with an idea to use Shepard's information and the West Key Number System to design a new and really powerful free text retrieval program. The project unfortunately never came to fruition.

⁷³ Despite the success of KeyCite, many people at West were still surprised and concerned when Shepard's did not renew its contract with them. The thought was that West was still a source of revenue that Shepard's would not want to lose, but at this point Matthew Bender and Lexis, and, consequently, Shepard's all belonged to Reed Elsevier, and they wanted to compete, rather than make that small profit. One thing that came out of this was a KeyCite program for statutes. Shepard's had a statutory program that comprised a very, very small percentage of their sales, but when West officially lost Shepard's they wanted to make sure that they offered as many of the same services as they could, so the statutory citator was build. The only real improvement was the addition of yellow flags for pending legislation, though that is not a negligible improvement.

covered, like treatises, often show up at least in the table of authorities, so even sources not covered by the two systems can be discovered by using a citator.

West offers a feature with KeyCite that will find the user a list of topics and key numbers that are similar to the headnotes in the case keyed into the system. Shepard's offers a summary that pulls the most important information, like overrulings, to the top of the page. KeyCite and Shepard's are now able to evaluate and predict what a user is looking for, a task far beyond simply making sure that a case is still good law.

Shepard's offers two different ways to Shepardize these days—KWIC for just finding out if your case is still good law, and the default FULL for those more interested in browsing the references than finding a quick answer. (The distinction in KeyCite between the "History" button and the "Citing References" button performs a not unrelated function, however the researcher does not get the choice. KeyCite does it automatically for each use of the system, whereas Shepard's lets the user get only the service that suits his needs.) This distinction acknowledges the separate purposes for which this tool can be used.

KeyCite recently introduced a whole new feature called "Graphical KeyCite"⁷⁴ that is not a research feature and is definitely not an updating feature. If anything, this new program might be seen as an educational feature. For some cases it is well nigh impossible to follow all the intricate twist and turns that a case can take without some sort of pictorial representation (both the *Miranda* decision⁷⁵ and the *Roe v. Wade*⁷⁶ case spring readily to mind, and both make very pretty pictures in the Graphical KeyCite feature. Most cases are not half so interesting though). The more obvious use of Graphical KeyCite, though, is that this tool will give the user a handle on what the court system looks like, and how a case progresses through it. This is good for OneLs, but, though he would not have cause to use it often, the most seasoned attorney might be thrown for a loop by New York State's middle court being called the Supreme Court, and Graphical KeyCite could help.

Shepard's cannot be far behind in coming up with a new use for their system. It is exciting to speculate about what they might be creating even now.

Probably the last thing to think about when discussing the future of citation indexes is the possibility of alternative citators. While this paper did not go into

⁷⁴ West, *Beyond Citation Checking Graphical KeyCite Paints a Picture of the Procedural History of Case Law*, 22 NO. 22 Law. PC 7 (2005).

⁷⁵ *Miranda v. Arizona*, 86 S.Ct. 1602 (1966).

⁷⁶ *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973).

great depth about any of the multitude of print citators that competed with Shepard's in the early days, the paper would like to spend some time on competitors for Shepard's and KeyCite that are on the market today.

Unfortunately, there is really very, very little to talk about. There are a variety of things that call themselves citators for specialized subject matter,⁷⁷ but none of them can compete with the vast scale or the currency of both KeyCite and Shepard's. Many of them are still in print.

Possibly the best of the topic-specific alternative citators is FedCirc.⁷⁸ This online database specializes in cases related to patent law, and is meant to keep busy patent lawyer apprised of all the latest developments in patent law. It offers a feature called "GimmeTen!" that pulls up the latest ten developments in the patent law world.⁷⁹

Though there is not much in the way of competition for Shepard's and KeyCite, there probably should be. Just as the AALL pointed out in its letter to the Justice Department on the occasion of the probable sale of Shepard's to Reed Elsevier,⁸⁰ competition makes systems develop and improve in ways that they would not otherwise be motivated to if the market was secure. While one can set up an alert on either Shepard's or KeyCite that will automatically send the user an e-mail if a recently run citation had a significant change, there is nothing that looks quite like the "GimmeTen!" feature. A similar feature would probably be welcome on KeyCite or Shepard's—a user could set the system to send out alerts about the top new cases and statutes decided based on topical considerations. FedCirc is offering a new and interesting idea, and it is this kind of competition that keeps established programs on their toes, and makes sure that citators in general will keep improving. Only time will tell what will be the next feature to revolutionize the world of citation.

Conclusion

⁷⁷ For example the UNITED STATES. DEPT. OF THE INTERIOR BOARD OF INDIAN APPEALS, IBIA CITATOR (1988) or DAN P. DANILOV, DANILOV'S U.S. IMMIGRATION LAW CITATOR, (1981).

⁷⁸ RTIP LLC, FedCirc.us, *available at* <http://www.fedcirc.us/>.

⁷⁹ RTIP LLC, FedCirc.us – About, *available at* <http://www.fedcirc.us/about.html>.

⁸⁰ Letter from Robert L. Oakley, *supra*.

The history of the citation index is a fascinating thing. Present citators are a vitally important step in any legal research process. They can be a final step to update and check to make sure that all primary sources of law are still valid, or they can be a really active part of the primary research process, finding cases, statutes, and secondary sources. The future of the citation index, if the history and the present are any indication at all, is looking bright. Both Lexis and West are committed to continuing to improve and grow. These are products strongly in the eye of the legal community. Between the necessary functions these products perform and the market forces that are constantly acting upon them citators cannot help but improve. The possible future products that will come out of not only Shepard's and KeyCite but also FedCirc and other start up products like it make this an exciting and constantly changing field, and a very applicable one to the modern lawyer or law librarian.