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The Movement for Open Access Law

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Abstract

My claim in this contribution to this important symposium is that the law and legal scholarship should be freely available on the Internet, and copyright law and licensing should facilitate achievement of this goal. This claim reflects the combined aims of those who support the movement for open access law. This nascent movement is a natural extension of the well-developed movement for free access to primary legal materials and the equally well-developed open access movement, which seeks to make all scholarly journal articles freely available on the Internet. Legal scholars have only general familiarity with the first movement and very little familiarity with the second. In this contribution, I demonstrate the linkages between these movements and briefly outline the argument for open access law.

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THE MOVEMENT FOR OPEN ACCESS LAW

MICHAEL W. CARROLL*

Imagine that it is the late 1970s. You are a sole practitioner representing a young woman who has adenocarcinoma, an aggressive and deadly cancer. Evidence shows a causal link between mothers who took diethylstilbesterol (DES) as an anti-miscarriage treatment during pregnancy and the subsequent appearance of this cancer in daughters, with a minimum latency period between ten and twelve years. Your client's mother took DES while pregnant with your client. Evidence also shows that the manufacturers of DES knew or should have known about the risk of cancer and failed to warn doctors and patients of this risk.

On the merits, the case against the DES manufacturer for liability in tort looks quite strong. But there is a problem. You cannot identify the company that manufactured the DES that your client's mother ingested. There are approximately ten potential defendants. You have had some success representing plaintiffs in product liability matters. You believe that the law should provide your client with a remedy; however, you also know from prior research that the courts have ruled in defendants' favor in analogous cases.[1] The law should change in your view, but you lack the time and resources necessary to develop a legal theory that will persuade a court to adopt a new theory of liability.

The legal theory you are searching for – industry liability – has been developed by a law student and has been published in the pages of a law journal.[2] Unfortunately, you cannot afford to

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* Associate Professor of Law, Villanova University School of Law. This article is licensed under a Creative Commons Attribution 2.5 License at http://creativecommons.org/licenses/by/2.5/. Attribution should be to me as author and to the *Lewis & Clark Law Review* as original publisher.

[1] *See, e.g.*, Gray v. United States, 445 F. Supp. 337 (S.D. Tex. 1978); McCreery v. Eli Lilly & Co., 150 Cal. Rptr. 730 (Cal. Ct. App. 1978).

[2] *See generally* Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978).

subscribe to the journal, and you do not have sufficient time to go to a law library in the hopes that such an article might lie within. With regret, you tell the young woman that you can do nothing more for her than to offer your sympathy.

Now imagine that today's Internet had been deployed in the late 1970s. You still do not have enough resources to subscribe to either Lexis's or Westlaw's database of legal periodicals. If legal scholarship were generally available on the public Internet, you would not have to travel to a library to find your legal theory because you could turn to a search engine. Whether you pursue this young woman's case now turns entirely on whether your Internet search will lead you to the student comment. For, if you were to find it, you would be willing to devote yourself to presenting this theory to a court. And if you did, and if you pursued this theory on appeal . . . you would win.[3]

Access to law matters. As this quasi-hypothetical example shows, access to legal scholarship matters too.[4] And, of course, the Internet matters. Although it is now a truism, I do not think we fully appreciate the Internet's power to distribute knowledge widely, cheaply, and quickly. Legal systems around the world, and the United States' legal system in particular, do not fully appreciate

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[3] *See* Sindell v. Abbott Laboratories, 163 Cal. Rptr. 132 (1980) (accepting theory of industry liability advanced in student comment). My thanks to my colleague, Ellen Wertheimer, for suggesting this case as an example of the importance of legal scholarship to the development of the law.

[4] Access to legal scholarship to promote doctrinal development is only the most demonstrable of many benefits that such access supplies. Another example is access to articles that reframe the way one approaches a range of legal problems. *See*, *e.g.*, Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied to Legal Reasoning*, 23 YALE L.J. 28 (1913); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Lon L. Fuller & William R. Purdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936); Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960); Charles Reich, *The New Property*, 73 YALE L.J. 732 (1964); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 88 HARV. L. REV. 1685 (1976).

this power. This situation must change. Lawyers, students of the law, clients, and inquisitive members of the public deserve ready access to the law and legal scholarship.

My claim in this contribution to this important symposium is that the law and legal scholarship should be freely available on the Internet, and copyright law and licensing should facilitate achievement of this goal. This claim reflects the combined aims of those who support the movement for open access law. This nascent movement is a natural extension of the well-developed movement for free access to primary legal materials and the equally well-developed open access movement, which seeks to make all scholarly journal articles freely available on the Internet. Legal scholars have only general familiarity with the first movement and very little familiarity with the second. In this contribution, I demonstrate the linkages between these movements and briefly outline the argument for open access law.

I. THE MOVEMENT FOR OPEN ACCESS LAW – PHASE I

One might be surprised to learn that the United States Supreme Court was at the vanguard nourishing the movement for free access to law in the United States. Although the Court refuses to permit cameras at oral argument and delays the release of tapes and transcripts from most oral arguments, the Court also has promoted immediate and widespread access to its opinions as soon as they are released. In 1990, the Court cooperated with the Hermes project at Case Western Reserve University to make the Court's opinions freely available on the Internet. The FTP site was difficult to navigate, however, and many lacked the skills or the requisite knowledge to gain access to the materials.

That began to change when, with pioneering vision, Professors Peter W. Martin and Thomas R. Bruce launched Cornell University's Legal Information Institute (hereafter "LII (Cornell)") in 1992 in order to make critical primary and secondary legal

materials freely available on the Internet.[5] The founders of LII (Cornell) recognized the potential of the World Wide Web and made access to the Hermes' files noticeably more user-friendly.[6] Rather than try to host and organize all primary legal materials in the United States, LII (Cornell) focuses on certain collections, such as the United States Code and the Code of Federal Regulations, along with Supreme Court opinions, and selected secondary legal sources.

While the judicial branch cooperated with the movement at its inception, the federal legislative branch has also joined. LII (Cornell) demonstrated the value that online publishers can add to government-supplied primary legal materials, but Newt Gingrich, then-Speaker of the House, also recognized a role for government to take direct responsibility in providing open access to law. Supporting the enlightened staff of the Library of Congress, Speaker Gingrich redirected budgeted funds in 1995 to enable creation of what is now the Library of Congress's Thomas web site,[7] which provides public access to proposed legislation as it wends its way (or not) through Congress.[8]

The executive branch joined the movement somewhat later, with the launch of FirstGov.[9] FirstGov.gov is an interagency initiative administered by the U.S. General Services Administration. Internet entrepreneur Eric Brewer, whose early research was funded by the Department of Defense, offered to donate a powerful search engine to government. In June 2000,

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[5] *See* Legal Information Institute – A Quick Overview *at* http://www.law.cornell.edu/lii.html.

[6] *See* Daniel Poulin, *Open Access to Law in Developing Countries*, 9 First Monday (2004) *at* http://firstmonday.org/issues/issue9_12/poulin/index.html.

[7] *See* Thomas *at* http://www.thomas.loc.gov.

[8] *See* Steve Gelsi, *Jefferson's Legacy*, Forbes, Sept. 17, 1997, *at* http://www.forbes.com/1997/09/17/feat_side3.html.

[9] *See* FirstGov, *at* http://www.firstgov.gov.

President Clinton instructed that FirstGov.gov be launched in 90 days, and FirstGov.gov went online on September 22, 2000.[10]

With support from all three branches of the federal government, it would seem that the road to victory for movement for open access to law would be smooth and straight. On the contrary, the movement has encountered numerous difficulties, as commercial publishers have fought or co-opted efforts to make legal materials freely available and some users have needed educating about the power of the Web. As Professor Bruce writes:

> At the core of this phenomenon is a bias induced by thirty years' experience with older computer systems and older modes of industrial organization: centrality equals reliability. The Internet approach stands in sharp contrast as it argues the contrary: decentralization equals reliability, attainability, and scalability. On some profound but subliminal level this is news that shocks and bewilders. New, distributed models of computing that are reflected in distributed information systems and distributed models of business organization must seem inherently anarchic and therefore inherently suspect, no matter their virtues. That suspicion will subside in time, to a degree. But it will never vanish entirely until we become more discerning than we are about what was necessary about older ways of doing things and what was merely incidental.[11]

What is important for present purposes is that many of the fallacious arguments about the relative unimportance of making

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[10] *See About FirstGov.gov*, *at* http://www.firstgov.gov/About.shtml. The GSA and 22 federal agencies funded the initiative in 2001 and 2002. Since 2002, FirstGov.gov has received an annual appropriation in the President's fiscal year budget. *Id.*

[11] Thomas R. Bruce, *Tears Shed Over Peer Gynt's Onion: Some Thoughts on the Constitution of Public Legal Information Providers*, 2 J. INFO., L. & TECH. (2000) *at* http://elj.warwick.ac.uk/jilt/00-2/bruce.html.

the United States Code or United States Supreme Court opinions freely available on the Web also are likely to be heard with respect to the value of making legal scholarship freely available. Professors Martin and Bruce have made their case for open access to law based on their experience at the helm of LII (Cornell), and for those unconvinced that LII (Cornell) serves a previously-underserved audience I refer you to their writings.[12]

Despite resistance in some quarters, the movement for access to primary legal materials has gone global. Following the model of LII (Cornell), Legal Information Institutes have been started in Canada, Australia, England and Ireland, Hong Kong, the Pacific Islands, and South Africa.[13] Each of these groups has taken somewhat different approaches toward the common goal of open access. In particular, the Australasian Legal Information Institute, led by Professors Graham Greenleaf and Andrew Mowbray, has secured close cooperation with government officials to provide a comprehensive database of primary legal materials.[14] Professor Mowbray also created the SINO (Size Is No Object) search engine, optimized for searching large LII databases, to promote use of LII collections.[15] These groups have joined together to form the World Legal Information Institute (WorldLII) to provide access to more than 270 databases of legal materials from 48 countries. Each institute is a signatory to the Montreal Declaration on Public Access to Law (2002), which advances the following laudable principles:

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[12] *See id.*; Thomas R. Bruce, *Public Legal Information: Focus and Future*, 1 J. INFO., L. & TECH., (2000), *at* http://elj.warwick.ac.uk/jilt/00-1/bruce.html; Peter W. Martin, *Legal Information — A Strong Case For Free Content, An Illustration Of How Difficult 'Free' May Be To Define, Realize, And Sustain*, (2000) Prepared for Conference on Free Information Ecology, Information Law Institute, New York University School of Law (31 Mar.–1 Apr.), at http://www4.law.cornell.edu/working-papers/open/martin/free.html; Peter W. Martin, *Pre–digital law: How prior information technologies have shaped access to and the nature of law*, (1995) Proceedings of Crown Copyright in Cyberspace, at http://www.lexum.umontreal.ca/conf/dac/en/martin/martin.html.

[13] *See About WorldLII*, *at* http://www.worldlii.org/worldlii/ (listing cooperating Legal Information Institutes).

[14] *See* Poulin, *supra* note XX.

[15] *Id.*

- Public legal information from all countries and international institutions is part of the common heritage of humanity. Maximising access to this information promotes justice and the rule of law;

- Public legal information is digital common property and should be accessible to all on a non-profit basis and, where possible, free of charge;

- Independent non-profit organisations have the right to publish public legal information and the government bodies that create or control that information should provide access to it so that it can be published.[16]

The principles of the Montreal Declaration are unobjectionable in the United States at the federal level because the work of federal employees is in the public domain for copyright purposes.[17] Some states and municipalities in the United States assert copyright in their local legislation. These assertions are of limited effect, however, because the open access principle is part of the constitutional bedrock of due process.[18] Other national

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[16] *See* Montreal Declaration on Public Access to Law *at* http://www.worldlii.org/worldlii/declaration/montreal_en.html. According to the Declaration, "Public legal information means legal information produced by public bodies that have a duty to produce law and make it public. It includes primary sources of law, such as legislation, case law and treaties, as well as various secondary (interpretative) public sources, such as reports on preparatory work and law reform, and resulting from boards of inquiry." *Id.*

[17] *See* 17 U.S.C. § 105 *at* http://www.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000105----000-.html.

[18] *See generally* Veeck v. Southern Building Code Cong. Int'l, (5th Cir. 2002) (en banc) (holding that publishing "the law" on the Web is constitutionally protected activity); Banks v. Manchester, 128 U.S. 244 (1888) (state judicial opinion); Howell v. Miller, 91 F. 129 (6th Cir.1898) (state statutes); Bldg. Officials & Code Adm. v. Code Tech., Inc., 628 F.2d 730, 735 (1st Cir.1980) (suggesting but not deciding that state-promulgated regulations modeled on a privately developed code are in the public domain). *But cf.* County of Suffolk, New York v. First Am. Real Estate Solutions, 261 F.3d 179 (2d Cir.

governments assert governmental copyright in their legislation,[19] however, which poses a potential barrier to open access. Encouragingly, some of these national governments have made investments to provide direct open access to primary legal materials, notably France's Legifrance project.[20]

The work of the movement for open access to primary legal materials is far from done. As Daniel Poulin, Director of the LexUM/Canada project, writes:

> There is much at stake in publishing the law of developing countries. Public and free access has the potential to uphold the rule of law and national legal institutions, while also raising the international profile of law developed in a rich variety of countries and their particular legal traditions. . . . .
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> . . . .
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> The open access to law movement emerged as the Internet was first developing to provide the legal field with a type of knowledge sharing that was, in 1994, the Internet's trademark. Ten years later, the original institutes built to make open access a reality are expanding and in continual development. Moreover, numerous new centres for open access resources have appeared. Today, the lessons learned and the combined knowledge of these legal information institutes are available for those wanting to make the law of developing countries more accessible.[21]

2001) (official county tax maps copyrightable but subject to freedom of information requests).

[19] *See*, *e.g.*, Office of Public Sector Information, Parliamentary Copyright, *at* http://www.opsi.gov.uk/advice/parliamentary-copyright/index.htm.

[20] *See* Legifrance *at* http://www.legifrance.gouv.fr/.

[21] *See* Poulin, *supra* note XX.

The growing success of the movement for open access to primary legal materials demonstrates that there is a wide audience for law other than lawyers with access to commercial legal databases. This audience forms an important part of the constituency for open access to legal scholarship. There is another part of the audience comprised of those seeking open access to scholarship in all disciplines. And it is to efforts to serve this audience that we now turn.

II. SCHOLARLY COMMUNICATION AND THE OPEN ACCESS MOVEMENT

Scholars have been communicating ideas, arguments, research findings, and analysis of all of these throughout the ages in a variety of forms. Lectures, debates, essays, monographs, books, and articles are among the most familiar. During the Enlightenment, the first scholarly periodicals, *Philisophical Transactions of the Royal Society of London* and the *Journal des sçavans*, emerged in 1665 out of leading learned societies, many of which had spread throughout Europe.[22] By the eighteenth century, the scholarly journal had become well established.

Since that time the scholarly article has become a principal mode of scholarly communication. Learned societies took primary responsibility for editing and publishing scholarly periodicals during their early life. This tradition remains well established. To this day scholarly societies publish some of the leading journals in a wide range of disciplines.[23]

After World War II, however, government investment in the United States and Western Europe in scientific research grew the

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[22] *See* JOHN WILLINSKY, THE OPEN ACCESS PRINCIPLE 14, 195-97 (2006); *see also* Karen L. MacDonnell, *Naturae Curiosi*, *Origin of the Scholarly Journal*, at http://www.slais.ubc.ca/courses/libr500/fall1999/www_presentations/K_macdonell/origin.htm (visited May 26, 2006).

[23] There are estimated to be about 4,100 scholarly societies worldwide at present. *See* University of Waterloo Library, Scholarly Societies Project, *at* http://www.scholarly-societies.org/.

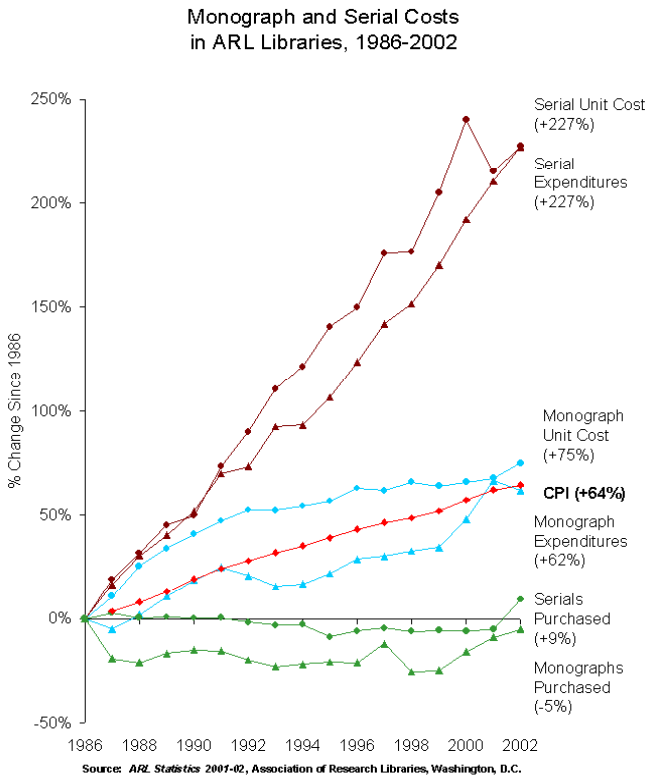
ranks of scholarly researchers, who required an increasing amount of space in the scholarly literature to communicate with their peers. The learned societies were slow to adapt to this rapid influx, and commercial publishers entered the field in increasing numbers to supply new titles in a range of disciplines.

Demand for the growing literature forced subscribers to scholarly periodicals – primarily academic libraries, government agencies, industrial research centers, and individual researchers – to invest increasing amounts to acquire access to the scholarly record. These costs began to rise with the emergence of electronic publication. Journal publishers were forced to develop their content for two platforms, the paper journal and the electronic version, hosted on a proprietary digital network. Prices of scholarly journals outpaced costs, however, and concerns about maintaining affordable access to the scholarly literature began to grow.

Enter the Internet. The emergence of the Internet, and particularly the World Wide Web, introduced a number of challenges and opportunities for scholarly communication. Publishers began to convert their electronic operations to move to the Internet platform, attracted by the opportunity to reduce costs and improve performance. New pricing arrangements arose, including prices to publishers' proprietary web-enabled systems.

Although new titles have continued to appear in the form of traditional paper journals, electronic-only journals also had begun to emerge. The possibility that scholarly journal publishing might become entirely digital raised the exciting possibility that the cost of access to the scholarly literature could be greatly reduced, making it more widely available to the growing community of Internet users. This possibility also raised alarming questions about how electronic-only scholarly resources might be authenticated and archived in light of the ease of digital manipulation and the absence of a proven long-term storage format.

However, even as the Internet promised the possibility of broadened access to the scholarly literature, the scholarly publishing industry, increasingly populated by for-profit publishers rather than non-profit scholarly societies, became increasingly consolidated. Using their collective power over price, these publishers steadily increased the price of journal subscriptions, forcing academic libraries and other subscribers to scramble to serve their patrons' hunger for the latest research.[24] For this point, a picture is worth one thousand words.



Enter the Open Access Movement. Born out of frustrations over foregone opportunities to increase Internet dissemination of scholarly research and over ever-rising journal prices, Web-savvy

[24] *See, e.g. Access All Areas*, Economist, Aug. 5, 2004, at 64-65 *at* http://www.economist.com/science/displaystory.cfm?story_id=3061258.

researchers, academic librarians, patient advocacy groups, autodidacts, and some academic leaders came together to launch the movement for open access.[25] The movement's goal is quite simple: the scholarly literature should be freely available on the public Internet for readers and researchers of all kinds. Within the movement, there are minor differences of opinion about the timing of Internet availability and the rights that users should enjoy with respect to using scholarly journal articles, but adherents all agree that the scholarly record should be freely accessible on the Internet.

Demands for open access are reasonable in light of the underlying economics of scholarly publishing.[26] Dissemination costs are the primary costs that any publisher must meet because the most significant production costs are funded largely by sources other than subscription revenues.[27] Scholarly authors of journal articles generally do not receive publishing royalties, nor do their peers who provide referee services. Funding agencies that provide research support are interested only in wide dissemination of articles reporting and analyzing the results of such research.

Like the movement for open access to law, the Open Access movement is global. Advocates from around the world have gathered to issue statements of principle and plans of action.[28] In

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[25] A starting resource for those interested in the Open Access movement is Peter Suber's Open Access Overview, *at* http://www.earlham.edu/~peters/fos/overview.htm; *see also* Peter Suber, Lists Related to the Open Access Movement *at* http://www.earlham.edu/~peters/fos/lists.htm; Jean-Claude Guédon, *In Oldenburg's Long Shadow: Librarians, Research Scientists, Publishers, and the Control of Scientific Publishing* (2001), *at* http://www.arl.org/arl/proceedings/138/guedon.html; Stevan Harnad, *Scholarly Skywriting and the Prepublication Continuum of Scientific Inquiry*, 1 PSYCHOLOGICAL SCIENCE 342 (1990) (open access pioneer reflecting on ways in which information technology will change the relation between scientific inquiry and scholarly communication) *reprinted in* 45 CURRENT CONTENTS 9 (1991).

[26] *See*, *e.g.*, Dan Hunter, *Walled Gardens*, 62 WASH. & LEE L. REV. 607, 613-23 (2005).

[27] This is not to say that scholarly publishers do not bear substantial production costs, such as staff salaries for those who coordinate peer review; edit, lay out, and typeset copy; and market journals. But these costs pale in comparison to those necessary to fund research, writing, and peer review, costs that journal publishers do not bear.

[28] These include the Budapest Open Access Initiative, Feb. 22, 2002, *at* http://www.soros.org/openaccess/read.shtml; the Bethesda Statement on Open Access Publishing, Jun. 20, 2003, *at* http://www.earlham.edu/~peters/fos/bethesda.htm; and the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, Oct.

the sciences, a supply-side funding model for scholarly communication has arisen with the Public Library of Science and BioMed Central at the forefront. Under this model, researchers devote some research grant money to defray a journal's dissemination costs and the journal publishes its research articles on the public Internet, granting readers the freedoms of a Creative Commons license.[29] Other open access advocates have pressured publishers to grant their researchers the right to post a copy of their respective articles on publicly-accessible web sites. Many publishers have changed the terms of their publication agreements to permit some self-archiving on the Internet by researchers.[30]

Research on the effects of open access is ongoing. The longest-running natural experiment is in the field of high-energy physics. Since 1991, researchers have been posting their articles to a shared online space, now at www.arXiv.org, months before publication.[31] The immediacy of Internet dissemination has greatly increased the pace of scholarly communication in that discipline. Open access also improves the impact of a scholarly article. Studies in a number of disciplines, such as computer science and physics, show that free access to scholarship on the Internet increases the number of citations an article receives.[32]

22, 2003, *at* http://www.zim.mpg.de/openaccess-berlin/berlin_declaration.pdf. In response to these initiatives, non-profit science publishers committed themselves to the Washington D.C. Principles For Free Access to Science, Mar. 16, 2004, *at* http://www.dcprinciples.org/statement.pdf.

[29] *See* www.creativecommons.org.

[30] *E.g.*, Elsevier, *Author Gateway* (permitting limited author self archiving) at http://authors.elsevier.com/getting_published.html?dc=CI (visited May 26, 2006); Nature Publishing Group, *Author License Policy* (same) at http://npg.nature.com/npg/servlet/Content?data=xml/05_news.xml&style=xml/05_news.xsl (visited May 26, 2006).

[31] *See* Paul Ginsparg, *Winners and Losers in the Global Research Village* (Feb. 1996) (describing genesis and growth of physics archive), *at* http://people.ccmr.cornell.edu/~ginsparg/blurb/pg96unesco.html; *see also* Paul Ginsparg, *Update* (Sept. 1996) (adding detail on expansion of archive beyond high-energy physics).

[32] *See* Steve Hitchcock, *The Effect Of Open Access And Downloads ('Hits') On Citation Impact: A Bibliography Of Studies* (2005) (collecting sources), *at* http://opcit.eprints.org/oacitation-biblio.html.

Regrettably, too few scholarly authors have been willing to embrace Open Access. This situation is changing gradually, but scholarly publishers have mounted canny resistance on a number of fronts. The well-financed efforts of an entrenched interest group to resist open access in most disciplines means that the broad open access movement has a long row to hoe before we can reap the benefits that the Internet promises for scholarly communication.

The one discipline where conditions are ripe for more rapid evolution to open access is law in the United States. Scholarly communication in American law also is channeled primarily through the medium of the journal article. But the editorial and economic structure of American legal scholarship is sufficiently different from other disciplines that no group stands to gain from resisting open access other than commercial legal publishers, who lack direct leverage to sabotage the movement for open access law. To understand why this is so, it is worth taking a moment to contemplate why American legal scholarly communication is *sui generis*.

III. THE LEGAL PERIODICAL AND SCHOLARLY COMMUNICATION

To understand why legal scholarship in the United States is primarily in the hands of student-edited legal periodicals, it is important to recognize that law was formalized as an academic discipline later than were the arts and sciences. Thus, while the peer-reviewed scholarly journal already was well developed in Europe and served as the model for scholarly communication in the arts and sciences, those in law were differently situated. In the early nineteenth century, when all legal decisions were not formally reported, legal periodicals emerged as a form of focused journalism, reporting cases of note and other matters of interest to the bar.[33] These publications were commercial ventures, and most

[33] *See* Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L. J. 739, 750-55 (1985) (describing early American legal periodicals); *see also* Bernard J. Hibbitts, *Last Writes?*

failed for inability to attract a subscription base that made legal periodical publishing profitable.[34]

As Professors Swygert and Bruce write in their history of the student-edited law review,[35] the turn to academic legal scholarship began with the publication of the *American Law Register* in 1852 in Philadelphia.[36] That periodical became increasingly academic as legal intellectuals began to serve as editors. Eventually, when one such editor became a law school dean, the publication was converted to what is now the *University of Pennsylvania Law Review*.[37] Although it is the oldest continuously-published legal periodical, this law review was not the first student-edited periodical. Instead, that distinction belongs to Albany Law School.

As the industrial revolution progressed, demand for increased professionalization of legal education and the practice of law grew. Two other commercially-published legal periodicals had entered the market to serve this need, the *American Law Review* and the *Albany Law Journal*.[38] The former introduced the "lead article" form, which is the progenitor of the modern law review article. The latter also featured lead articles, more analogous to articles found in modern bar journals, and was commercially very successful. In 1875, this hometown success may well have inspired the students as Albany Law School to launch the *Albany Law School Journal*, a short-lived publication that was a hybrid between a scholarly legal periodical and a school newspaper.

This experiment drew a contemptuous response from competing professional publications. The editors of the commercially-published *Central Law Journal* wrote:

Reassessing the Law Review in the Age of Cyberspace, http://www.law.pitt.edu/hibbitts/lastrev.htm, *printed in* 71 N.Y.U. L. REV. 615, 617-28 (1996) (same).

[34] *See id.*

[35] *See generally id.*

[36] *See id.* at 755.

[37] *See generally* Edwin J. Greenlee, *The University of Pennsylvania Law Review: 150 Years of History*, 150 U. PA. L. REV. 1875 (2002).

[38] *See* Swygert & Bruce, *supra* note XX, at 758-63.

> The boys at Albany Law School have had the enterprise to start a law journal. . . . . Altogether it is quite creditable. Of course it is not a man's law journal.[39]

(As we shall see in a moment, this rhetorical strategy would again be deployed in the early twentieth century to blunt their growing influence.) Students at Columbia Law School were second to launch a similar, and similarly short-lived, publication, the *Columbia Jurist*. One would think that those associated with Columbia Law School would make more of their claim to priority in legal publishing, but in fact, the prevailing view appears to be that its student-edited law review should be seen as a successor to the *Harvard Law Review*, which set the template for the modern law journal.[40]

As is well-documented elsewhere, the first issue of the *Harvard Law Review* rolled off the presses in the spring of 1887.[41] It quickly spawned imitators at a number of schools, including Yale (1891), Pennsylvania (1896), Columbia (1901), Michigan (1902), and Northwestern (1906).[42] Not all of these were self-sustaining, student-run efforts. Some of these ventures encountered financial difficulties, and others (Michigan and Northwestern) were controlled by the faculty.[43] All, however, were focused on increasing the value of the legal educational experience, improving the reputation of their respective law schools, and providing fora

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[39] *See id.* at 764 (quoting *The Albany Law School Journal*, 3 CENT. L.J. 136 (1876)).

[40] *See* Barbara Aronstein Black, *From the Archives (Such As They Are)*, 100 COLUM. L. REV. 1, 1-3 (2000). This institutional modesty is admirable, but it should be recognized that the founding editor of the *Harvard Law Review*, John Jay McKelvey, was inspired to start the journal by the *Columbia Jurist*. *See* Swygert & Bruce, *supra* note XX, at 768.

[41] *See, e.g.*, *id.* at 769-78; Michael L. Closen & Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 AKRON L. REV. 15, 34-36 (1996); John J. McKelvey, *The Law School Review*, 50 HARV. L. REV. 868 (1937) (celebrating HLR's 50th anniversary).

[42] *See* Swygert and Bruce, *supra* note XX, at 779.

[43] *See id.* at 779-87.

for theoretical and analytical discussion of the path of the law. This was done with "not one iota of commercialism" as a motivation.[44]

As an adjunct to increasingly-formalized legal education, the law review gave students an outlet for their analytical writing, portions of which affronted the judiciary by having the audacity to pass judgment on the correctness of the courts' rulings. In the early twentieth century, a lawyer arguing before the Supreme Court mentioned a law review article, which to Justice Oliver Wendell Holmes was a breach of professional etiquette, for in his view law review articles were the "work of boys."[45]

Holmes's dim view of student scholarship was not universally shared at the time, and as the opening vignette of this Essay indicates, the modern judicial reception of such work can be far more positive. Moreover, the lead articles of most law reviews were written and continue to be written by professional legal academics,[46] whose views have on occasion influenced the development of the law quite profoundly. Legal scholarship gained greater legitimacy in the early twentieth century as courts began to cite articles as sources of authority for new developments in the law.[47] Over the years, legal scholars have experimented with different forms of scholarly writing, but the fundamental institutional and compositional structure of student-edited periodicals has remained largely the same over the past 120 years.

The unique history of the student-edited law review as a medium for scholarly communication gives the reviews a much tighter connection to their institutions and to their faculties than is the case with journals published by scholarly societies or by commercial publishers. In the Internet age, it is in the interest of law schools and faculty for law review articles to be as widely

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[44] *See* McKelvey, *supra* note XX, at 871.
[45] *See* Charles E. Hughes, *Forward*, 50 YALE L.J. 737, 737 (1941).
[46] *See* Swygert and Bruce, *supra* note XX, at 778 (counting the numerous articles written by Harvard faculty published during the early years of the *Harvard Law Review*).
[47] *See id.* at 787-90 (citing examples of law reviews' influence with judiciary and legislatures); Closen & Dzielak, *supra* note XX, at 25-30 (discussing growth of Supreme Court citation to law review articles as persuasive authority).

disseminated as possible, and for that reason, the time has come for legal scholarship to be made freely available on the public Internet.

IV. THE MOVEMENT FOR OPEN ACCESS LAW – PHASE II

The time has come for legal scholars and scholarly legal periodicals in the United States to join the movement for open access law. Already a great deal of progress has been made. Years after high-energy physicists created the first online disciplinary repository for their scholarly work, American law has joined the party with two repositories – the Social Science Research Network's Legal Scholarship Network,[48] edited by Professors Bernard Black, A. Mitchell Polinsky and Ronald J. Gilson, and the Berkeley Electronic Press Legal Repository.[49] Both of these host draft articles that either have been accepted for publication or which are still designated as working papers. Posted drafts can be, and should be, updated with electronic copies of the published version once a paper appears as an article.

With two disciplinary online homes that make legal scholarship freely accessible, supplemented by open access to the scholarship posted to the many personal web sites maintained by law faculty, it would seem that the movement for open access law need do nothing more than to declare victory. Regrettably, we are not there yet.

Although legal periodicals should embrace open access to their articles, not all do. Professor Dan Hunter's eloquent telling of his dispute with the *California Law Review* demonstrates the kinds of resistance that the movement faces from student-edited periodicals.[50] While that particular dispute was resolved amicably, some legal periodicals restrict authors' freedom to post their work to the disciplinary repositories or to their own web sites.

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[48] *See* Legal Scholarship Network *at* http://www.ssrn.com/lsn/.
[49] *See* Berkeley Electronic Press Legal Repository *at* http://law.bepress.com/repository/.
[50] *See generally* Hunter, *supra* note XX.

Relatedly, student-edited legal periodicals frequently require assignment of copyright in legal scholarship, which gives the review authority to control open access. Reviews could use this power to promote open access as do science publishers, such as the Public Library of Science. Alternatively, law reviews should obtain a sufficient copyright license to publish in a sustainable manner, while leaving authors with the right and responsibility for ensuring that their work is openly accessible.

The struggle over copyright control of scholarly communication has been a key sticking point for the broader open access movement, but there is no reason why we cannot establish a reasonable and amicable allocation of rights between author and student publisher for American legal scholarship. Indeed Professor Hunter and I are promoting precisely this goal through the Science Commons Open Access Law Program.[51] The Program has three components:

- Open Access Law Journal Principles. Signatories agree that they (1) require no more than a reasonable, limited-term exclusive license for commercial publication and leave the author free to post a copy of the article online and to grant the public at least the freedoms supplied by a Creative Commons Attribution-Non-Commercial license; (2) provide the author with a citable, electronic copy of the final version of the article to the author, and (3) provide public access to the journal's standard publishing contract. In return, the author promises to attribute first publication to the journal. (I am pleased to acknowledge that the *Lewis & Clark Law Review* was an early adopter of these Principles.)

- Open Access Law Author Pledge. For authors wishing to commit publicly to open access principles, we have established an OAL Author Pledge. This pledge commits

[51] *See* Open Access Law Program, *at* http://sciencecommons.org/literature/oalawjournals.

authors to publish law review articles only in journals that adhere to a minimum OAL commitment.

- Open Access Model Publishing Agreement. The OAL Program also provides a Model Agreement that embodies the OAL Journal Principles in a fair contract that is easy for both authors and law reviews to adopt. It also provides for an easy mechanism for authors and journals to adopt Creative Commons licenses to make their work more easily available.

In addition to the many law journals that already have adopted the principles, a number of others have been initially supportive but the decision to adopt must work its way through internal processes. Some journals have expressed anxieties about potential loss of revenue from subscriptions or from Westlaw and Lexis. Professor Hunter fully addresses these concerns in *Walled Gardens*, and I ask student editors harboring doubts about the viability of open access to read his article.

Once the copyright issues have been resolved, other challenges remain. Too many legal scholars are indifferent to the need for, and benefits of, open access to legal scholarship. These legal scholars should ensure that their work is available on the public Internet for four reasons:

1. Impact. Research in the broader open access movement already has shown a positive correlation between articles available on the Internet and citation counts for such articles in a number of disciplines. There is no reason to think that this correlation would not also hold true in law. Even if most legal researchers seeking law review articles had access to Westlaw, Lexis, and HeinOnline, and they do not, such researchers also use the Web. On occasion, their Internet research will serendipitously yield a law review article related to such research. Legal scholars work hard to develop, express our ideas in law review articles. We owe it to

ourselves to enjoy the maximum impact feasible once we make this work public.

2. Serving the Underserved. Not all those researching the law can afford access to commercial databases of legal periodicals. Practitioners in small law offices, some government lawyers, pro se litigants, public interest lawyers, and autodidacts all are under sufficient financial pressure that some must forgo access to legal periodicals. Legal scholars should believe strongly enough in the value of their ideas to want to share them with this audience as well as the better-financed users of commercial databases.

Even if a scholar is too diffident or too dismissive to seek out this audience, such a scholar still has a duty to make his or her work available to the general (or, for the time being, Internet-accessible) public. If acted upon, the ideas we develop, and the arguments we make, affect the interests and rights of members of the public. Faculty authors in particular should share these ideas with those who may be affected because we developed and produced these articles with direct or indirect public support.[52]

3. Improving Interdisciplinary Dialogue. Legal scholarship has become increasingly interdisciplinary over the years, and the recent turn toward greater empiricism is likely to intensify this trend. Legal scholars have borrowed from numerous disciplines such as philosophy, economics, critical discourses, and so on. These borrowings are mutual, and legal scholars can not only increase their impact in other disciplines through open access but also can improve understanding of the law and legal thought in neighboring disciplines.

Moreover, notwithstanding the many complaints that the student-edited law review has engendered among legal authors, scholars in numerous other disciplines find legal scholarship to be unusually accessible. Legal scholars generally provide a background section for our discussion, and we often situate our

[52] Even faculty authors at private institutions enjoy an indirect public subsidy through taxpayer-supported student loan programs that help generate the revenues that form part of every law school operating budget.

claims within the broader context of an ongoing discourse.[53] As professional authors in a discipline that touches upon the subjects of most other disciplines, we should promote more, and better-informed, inter-disciplinary dialogue by making our work easily accessible to scholars in other fields.

4. Improving International Impact and Dialogue. Finally, globalization of scholarly communication is keeping apace with globalization in the economy as a whole. Lawyers and legal scholars in other jurisdictions seek access to both primary and secondary legal materials in the United States because they have matters or interests subject to U.S. law, they seek a comparative perspective, or they are internationalists seeking data about state practice. Most of this audience cannot afford access to commercial databases, and consequently open access is the only feasible means to serve this demand for American legal thinking.

Of course, demand for legal scholarship is mutual (and should be more so), and open access to American legal scholarship is one means of reciprocating with those jurisdictions that support, or seek to support, open access to their domestic legal scholarship. Indeed, legal scholars who support open access in jurisdictions outside the United States face the same hurdles as do open access advocates in other disciplines because legal scholarship generally is published by commercial publishers. The Science Commons Open Access Law program is committed to working with legal scholars in non-U.S. jurisdictions to provide open access to their work.

V. OPEN ACCESS LAW IN THE LONGER TERM

As work progresses on the near-term goals of making legal scholarship freely available over the Internet, two longer-term issues come more clearly into view. The first points up the

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[53] *See*, *e.g.*, Wendy J. Gordon, *Counter-Manifesto: Student-Edited Reviews And The Intellectual Properties Of Scholarship*, 61 U. CHI. L. REV. 541, 547-48 (1994) (defending expectation of explanatory background section in law review articles as a means of improving accessibility).

importance of technical protocols as scholarship assumes digital form, particularly the protocols that govern metadata and archiving practices.

Metadata is simply data about data. A paradigmatic off-line example of metadata is the "card catalog," which collects and displays data (such as author and title information) about data (books, periodicals, and other published matter). Rankings, such as a list of the top ten most-cited law review articles, also are a frequently used form of metadata. In an age of information surplus, metadata becomes increasingly important as a tool for organizing, searching, and ranking the information resources that surround us.

Digital computing devices are particularly adept at processing metadata, if, and only if, such metadata is machine-interpretable. To enrich scholarly communication in the digital information age, it is important first to supply useful metadata along with open access articles. Second, it is important to supply this metadata in machine-interpretable form. Currently, that form should comply with the Open Archives Initiative Protocol for Metadata Harvesting (OAI-PMH).[54] A long-term challenge for open access law is to ensure that primary and secondary legal resources are marked up with standards-compliant metadata.

As is the case with metadata, those protocols that govern archiving also concern all those involved in scholarly communication. Digital storage technologies continue to evolve. Archivisits and librarians are experimenting with a variety of models and practices for long-term preservation of the scholarly record. Open access increases the flexibility needed for this project by providing additional copies that can be stored locally by multiple sites. Moreover, it will become increasingly clear that the terms of open access should permit reformatting if necessary for long-term preservation.

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[54] *See* The Open Archives Initiative Protocol for Metadata Harvesting *at* http://www.openarchives.org/OAI/openarchivesprotocol.html.

A second, longer-term issue more specific to law is whether the growth of the digital platform should lead legal scholars in the United States to alter their practices of scholarly communication more fundamentally. Consider, for example, two questions: (1) should the "lead article" remain the dominant form of scholarly communication in law in the United States? and (2) should student-edited periodicals retain primary responsibility for publishing legal scholarship in the United States?

Both of these questions have been discussed off and on for nearly as long as student-edited law reviews have existed,[55] and this is not the place for a full recap. Here, I suggest only that as our experience with web-based scholarly communication continues to accumulate, discussion of these questions will intensify. As to format, for example, the structure of legal argument is unlikely to change any time soon, so the range of possibilities for expressing legal thought may not be as great as appears at first glance.

But in a world of open access legal scholarship, we may feel less need to delineate so clearly between a blog entry, an essay, an article, and a book. Indeed, some current developments suggest that legal scholarship may well move away from the lead article into both shorter and longer forms. A number of shorter forms already have emerged in the form of scholarly blogs.[56] The web has also demonstrated the utility of short essays, such as those written by Clay Shirky,[57] to which organs such as *The Green Bag*[58] already are devoted.

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[55] *See generally*, Hibbitts, *Last Writes?*, *supra* note XX; Bernard J. Hibbitts, *Yesterday Once More: Skeptics, Scribes and the Demise of Law Reviews*, 30 AKRON L. REV. 267 (1996) (responding to critics and reinforcing argument for Web-based self-publication by legal scholars). For a bibliography of these discussions as of 1997, see Mary Beth Beazley & Linda H. Edwards, *The Process and the Product: A Bibliography of Scholarship about Legal Scholarship*, 41 MERCER L. REV. 741 (1998).

[56] I suppose it is still necessary to explain that a "blog" is a web log, a web page structured to permit dated entries with an optional feature that permits readers (and spammers) to post comments to each entry.

[57] *See* Clay Shirky's Writings About the Internet *at* http://www.shirky.com/.

[58] *See* http://www.greenbag.org/profile.htm.

Conversely, the incentive to publish scholarly legal books rather than, or in addition to, articles is growing. One reason that promotion and tenure in the legal academy has continued to be based on a faculty member's journal articles, rather than books, is that journal articles can be found and searched through digital databases. Scholarly impact depends upon these features, and scholarly impact, however measured, is generally the metric used for promotion and tenure. Although some legal books have had significant impact,[59] many that probably should have had greater impact were largely invisible.

Developments such as the Google Book Search Project and Amazon's search-inside-the-book feature are changing the environment. If open access leads legal scholars to rely on the Web when conducting legal research, then the scholarly impact of legal books should rise. To preempt or compete with such a development, we should expect Lexis and Westlaw to seek to integrate book search into their respective databases as well.

As to the future of the student-edited scholarly publication, my own view is that this institution will remain a feature of scholarly communication in law in the United States for some time to come.[60] Students and law schools derive significant benefits from the legal periodical. Law faculty have few incentives to abandon these institutions,[61] even if the unit of communication migrates away from the lead article format. Indeed, it may be the creativity

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[59] *See*, *e.g.*, CATHARINE MACKINNON & THOMAS I. EMERSON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979) (introducing argument, subsequently accepted by the Supreme Court, that sexual harassment is a form of gender discrimination prohibited by Title VII of the Civil Rights Act of 1964).

[60] Many of the reasons for this were identified by Hank Perritt a decade ago. *See* Henry H. Perritt, Jr., *Reassessing Professor Hibbitt's Requiem for Law Reviews*, 30 AKRON L. REV. 255 (1996) (identifying functions law reviews perform in addition to dissemination).

[61] The most motivated faculty who would abandon the student-edited law review in frustration over perceived editorial tyranny and/or incompetence may well lose some of that motivation if it turns out that the grass is not so green on the peer-reviewed side of the hill.

of student publishers that leads scholarly communication in law away from the lead article format.[62]

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The time to join the Movement for Open Access Law is now. In the United States, there is still much to be done with respect to both primary and secondary legal materials. Primary legal information at the federal level is largely online, but access is still insufficient to certain materials, particularly judicial materials (such as "unpublished" opinions), and some additional regulatory materials. Far more attention also needs to be given to open access to state and local law. With respect to the secondary and tertiary literature, legal scholarship in the United States is making its way online through the disciplinary repositories. But more needs to be done to clear up the copyright-related underbrush in publication agreements and to ensure that all legal scholars provide open access to their work.

Outside the United States, the movement has significant momentum but is up against a number of challenges. Some of these simply are an absence of resources, but in many cases and places there also are vested interests that seek to keep legal information off of the publicly-accessible Internet. The movement needs your help. Now.

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[62] *See, e.g.*, The Pocket Part: A Companion to the Yale Law Journal *at* http://www.thepocketpart.org/ (providing abridged versions of lead articles and short response essays); The Harvard Law Review Forum, *at* http://www.harvardlawreview.org/forum/aboutforum.shtml (providing alternative The Forum is an online extension of our printed pages that is intended to allow for a more robust scholarly discussion of our Articles.