

OPEN ACCESS IN A CLOSED UNIVERSE
LEXIS, WESTLAW AND THE LAW SCHOOL

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Abstract

This paper considers issues of open access from the context of the broader legal information industry as a whole. The structure and contours of the legal information industry have shaped the availability of online open access publishing of legal scholarship. The competitive duopoly of Lexis and Westlaw is a particularly important factor in considerations of open access. Also significant is the relationship between Lexis and Westlaw and law schools, which form an important market segment for both Lexis and Westlaw. This paper begins by considering the important role information plays in the law. It then notes the increasing industry concentration that has occurred over the last 10-15 years among legal and other publishers. This industry concentration is believed to have contributed to significant price increases for scholarly journals generally. This industry concentration has potentially significant implications for questions of access, particularly in the current environment of increasing electronic dissemination of legal information. In addition to examining characteristics of the legal information industry, this paper also looks at the role of dominant players such as Lexis and Westlaw and the ways in which information dissemination has changed with the advent of electronic legal information services. Consumers of legal information, including law firms, law school users and the general public are also considered, particularly with respect to the implications of legal information industry organization and operation for questions of access to legal information.

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INTRODUCTION

The structure of the legal information industry has shaped the availability of online open access publishing of legal scholarship. The competitive duopoly of Lexis and Westlaw is a particularly important factor in considerations of open access. Also significant is the relationship between Lexis and Westlaw and law schools, which form an important market segment for both Lexis and Westlaw. The nature of legal information and the commercial enterprises that have developed around it distinguishes law in important respects from other disciplines and influences the nature of open access that might be required in the legal context. Much of the information contained on Lexis and Westlaw is publicly available legal information such as court decisions, statutes, legislative materials and regulations. Despite the fact that such information is publicly available, Lexis and Westlaw are a principal means by which those in the legal profession and legal academia access legal information. The underlying reasons for the dominance of Lexis and Westlaw are crucial to considerations of open access to legal information.

This paper will focus on three aspects of the legal information industry and will assess the impact of these factors on access to legal scholarship and other legal information. First of all, this paper will consider the creation and development of the legal information industry. The commercial enterprises that developed during the print era have been important factors shaping the contours of access to legal information in the digital era when debates about access have become more prominent. Access and the ease of navigation through existing legal information have, however, been continuing themes in the legal information industry since its inception. Access was, for example, a major factor in the initial development of the Lexis database, which began as a project of the Ohio Bar Association.¹

In addition to examining issues of access and the ease of navigation through legal information, this paper will examine the activities of the dominant players in the market for legal information, looking specifically at some of the implications of progressive consolidation among legal and other publishers. This increasing industry concentration has led to escalating prices for scholarly journals. These price increases have in turn led to calls for broader and cheaper means to disseminate journal articles, including through various forms of more open access. The Lexis and Westlaw law

¹ See *infra* notes 102 to 114 and accompanying text.

school pricing model reflects a pricing structure in which law schools pay little relative to commercial customers. As part of the Lexis and Westlaw law school arrangements, law schools receive open access in a closed universe of the law school and its participants. In exchange, Lexis and Westlaw gain early access to future generations of lawyers for training and marketing.

The third and final factor to be considered in this paper relates to users of legal information. As a result of the nature of legal activities and legal representation, many users require searching capabilities that are accurate and reliable in terms of results generated. This is a consequence of the potential negative impact for users of the legal system that might result from inaccurate search results. As a result, a law firm preparing for a trial will need to be able to access relevant precedents in a fairly efficient way with a relatively high degree of accuracy. Thus, despite the fact that Lexis and Westlaw compile information that is largely publicly available, they distinguish themselves from potential entrants to the broader electronic legal information market by virtue of the search and other capabilities that they have developed within their respective databases. This in turn may significantly affect the likelihood of the development of other comprehensive open access means to obtain legal scholarship and other legal information.

I. THE MARKET: THE LEGAL INFORMATION INDUSTRY

Open access publishing is a business model that has developed at least partly in response to dissatisfaction about existing publication business models.² Consequently, the structure of existing business models evident in the legal information industry is an important starting point in considering open access issues. This structure may also shed light on the potential manners of implementation and likelihood of success of current open access initiatives.

² See *infra* notes 24 to 30 accompanying text. Discussions of more open access to legal scholarship are, however, certainly not new. See David A. Rier, *The Future of Legal Scholarship and Scholarly Communication: Publication in the Age of Cyberspace*, 30 AKRON L. REV. 183, 198 (1996) (suggesting that electronic self-publication on the World Wide Web would be a more convenient and less costly way to access legal scholarship than the current system).

A. *The Importance of Information in the Law*

Information is the lifeblood of law and the legal profession.³ This is particularly true in common law jurisdictions such as the U.S. in which the importance of precedent “has made law a literature-dependent profession.”⁴ As a result, [t]hroughout the nation’s history lawyers demanded speedy publication of controlling authorities and research aids providing multiavenue access.”⁵

This demand for retrospective information by lawyers has played an important role in shaping the legal information industry both before and after the advent of the digital era and has helped put the legal publication universe “at the core of American law.”⁶ It has also influenced the development of intermediaries in the form of commercial publishers of legal information and is reflected in the importance of libraries and access to libraries in the legal profession.⁷ The commercial publishers that have met the demand for legal information have in turn potentially exacerbated problems connected to the glut of legal information.⁸ Further, the past may play a different role in the law than in many other disciplines, which means that past literature may not be set aside to the same extent in the law as elsewhere:

What is different about the law? Part of the explanation may be that the past is easier to set aside in certain other disciplines than it is in the law. While this proposition obviously would not fit a discipline such as history, medicine and the natural sciences are so intensively occupied with current approaches to current problems that the literature of a century or even a decade ago can be safely ignored. Legal reasoning, on the other hand,

³ F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 L. LIBR. J. 563, 564 (2002) (“Recorded information is simultaneously the necessary food and a potential poison for a system of common law. The toxic element comes from sheer volume.”).

⁴ Peter Freeman, *Network Prospects for the Legal Profession*, 65 L. LIBR. J. 4, 4 (1972).

⁵ *Id.*

⁶ Robert Berring, *Chaos, Cyberspace and Tradition: Legal Information Transmogrified*, 12 BERKELEY TECH. L.J. 189, 190 (1997).

⁷ Freeman, *supra* note 4, at 5 (noting the importance of commercial law publishers and law libraries).

⁸ Hanson, *supra* note 3, at 568 (“Indeed, by its profit-driven policy of publishing as many appellate decisions as possible, West materially exacerbated the problem [of the increasing difficulty of managing legal information as the case record grows over time].”).

proceeds largely by drawing analogies between the present and the past. Given the doctrine of *stare decisis*, the emphasis in law is on finding earlier cases sufficiently similar to the case at hand to serve as precedent for it. Moreover, lawyers' objectives differ from those of other professionals in a way that emphasizes the past. . . . [L]awyers aim to develop the best possible arguments *that benefit their clients*. Thus the two parties to a lawsuit try to cast the situation in different lights and scour the past for precedent pointing in opposite directions. Hence consensus that certain contributions from the past are useful and others are not is less likely to be achieved in the law than in other disciplines.⁹

The dissemination of legal information to lawyers is a continuing process. This is particularly true since even in the early 1970s an estimated 30,000 judicial decisions were added every year to the then existing 2.5 million decisions and an estimated 10,000 legislative enactments added annually.¹⁰

Legal information may be categorized into two basic types: primary sources and secondary sources.¹¹ Primary sources include statutes, cases and regulations.¹² The volume of legal information means that in addition to access, lawyers have typically needed tools to assist in navigating through such information.¹³ This also means that organizing and enhancing the ability to search existing legal information represents an important value added service for the delivery of legal information.¹⁴ A number of tools

⁹ Hanson, *supra* note 3, at 565.

¹⁰ Freeman, *supra* note 4, at 5.

¹¹ Scott Finet, *On the Road to the Emerald City: Reducing the Cost of Living in the New Legal Information Landscape*, in *THE POLITICAL ECONOMY OF LEGAL INFORMATION: THE NEW LANDSCAPE* 7, 10 (Samuel E. Trosow ed. 1999) [hereinafter, *POLITICAL ECONOMY OF LEGAL INFORMATION*].

¹² *Id.*

¹³ Hanson, *supra* note 3, at 568 (noting the increasing difficulty of managing legal information as the case record grows over time and the development of devices to help lawyers "wade through the flood"); John Dethman, *Trust v. Antitrust: consolidation in the Legal Publishing Industry*, in *LAW LIBRARY COLLECTION DEVELOPMENT IN THE DIGITAL AGE* 123, 127 (____) ("The need for help in efficiently finding law led to numerous treatises, dictionaries, encyclopedias and other finding aids from many publishers. The West Digest system and Shepard's citation system are perhaps the best known of these finding aids.").

¹⁴ Finet, *supra* note 11, at 10 (noting that value added in secondary sources is reflected in the expenditure of labor in the editing enterprise).

have developed as a consequence, largely in the form of secondary sources such as treatises, encyclopedias, loose-leaf services and law journals.¹⁵ Secondary sources typically include sources that may be considered commentary on the law such as law review articles and monographs, as well as legal treatments, which include treatises and loose-leaves.¹⁶ Cost concerns are typically heightened in the case of secondary sources: “[t]he cost to the publisher for creating the added value is manifested in the fact that secondary sources are the more expensive category and typically have more rapidly increasing costs. For consumers of legal information, secondary sources are the principle locus of the cost problem.”¹⁷

In addition to secondary sources, tertiary sources such as digests and indexes have developed that contain no substantive discussion of points of law, but which are essentially tools to find information about the law.¹⁸ One primary tertiary tool is Shepard’s citation index.¹⁹ Another is the West Digest System.²⁰ These tools created by publishers demonstrate the value added that intermediaries can bring to the publication process.²¹

The type of information lawyers need may vary by area of specialization as well as the nature of a lawyer’s practice, service as a judge or other

¹⁵ Freeman, *supra* note 4, at 4 (noting that commercial law publishers have provided access devices such as secondary sources that have given the legal profession better bibliographic organization than other disciplines).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Hanson, *supra* note 3, at 571.

¹⁹ ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 182 (1990) (noting that Shepard’s developed a publication that indicated where a case had been cited, which became an “essential part of a lawyer’s literature”); Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1695 (2000) (noting that Shepard’s Citators “rose to meet the legal profession’s demand for verification” and that a competent researcher “had to ‘Shepardize’ his research results” to verify whether a case had been affected by subsequent decisions).

²⁰ Hanson, *supra* note 3, at 568-69 (noting that digests were developed to help lawyers deal with the flood of legal information and discussing some problems associated with West digest system, including the inability of the system to adapt to new circumstances, particularly in certain rapidly developing areas of law).

²¹ Henry H. Peritt, Jr., *Reassessing Professor Hibbitts’s Requiem for Law Reviews*, 30 AKRON L. REV. 255, 255 (1996) (noting that the selection and editing process is what makes the publishing process valuable); David Y. Atlas, Comment: *Taming the Wild West: The Scope of Copyright Protection for Compilations after Matthew Bender & Co., Inc. v. West Publishing Co.*, 38 IDEA 491, 494 (1998) (noting that West provides an invaluable service to law students and practicing attorneys by publishing decisions of the U.S. federal courts through reporters).

activities.²² Accuracy is another desired characteristic in retrieval of legal information. The need for accuracy is closely connected to the nature of law and legal practice. Concerns about accuracy and authenticity are major issues potentially confronting new entrants into the market for legal information services.²³

B. *Legal Scholarship, Legal Information and Journal Prices:
Some Distinctive Characteristics of the Legal Arena*

1. The Increasingly High Costs of Scholarly Journals

The high cost of scholarly journals is an issue of increasing concern across a wide range of disciplines.²⁴ Industry consolidation in the scholarly publishing industry and an increasing proportion of journals published by commercial publishers as compared with nonprofits such as professional societies and university presses have been two factors cited in explaining the increasing costs of scholarly journals.²⁵ Scholarly publishing is big business

²² Freeman, *supra* note 4, at 4-5 (discussing practitioners' and judges' use of legal materials).

²³ L. Kurt Adamson, *European Union Legal Research: A Guide to Print and Electronic Sources*, 6 COMP. L. REV. & TECH. J. 67, 68 (2001) (noting that accuracy of information is a potential limitation to conducting research on the Internet); Berring, *supra* note 6, at 193 (noting that the greatest achievement of the West Publishing Company was garnering credibility and producing products that were reliable, standard and relatively quickly available).

²⁴ See Theodore C. Bergstrom, *Free Labor for Costly Journals*, 15 J. ECON. PERSPECTIVES 183, ___ (2001); Mark McCabe & Christopher M. Snyder, *The Economics of Open-Access Journals* 1, Oct. 22, 2004 (manuscript on file with author), at www.prism.gatech.edu/~mm284/OA.pdf (noting that real journal prices have risen substantially with average library subscription fees more than doubling from the 1988-1994 period to the 1995-2001 period); Journal Price Study of Core Agricultural and Biological Journals, Faculty Taskforce, College of Agricultural and Life Sciences, and Division of Biological Sciences, Cornell University, November 1998, *available at* <http://jps.mannlib.cornell.edu/jps/jps.htm> ("Scholarly communication patterns are being threatened by high prices of scholarly journals. Libraries are having financial difficulties with this acceleration and have resorted to cutting journal subscriptions, particularly those with extraordinary price increases. Others have chosen to cut a large number of less expensive journals, thus greatly reducing diversity."); Carol Kaesuk Yoon, *Soaring Prices Spur a Revolt in Scientific Publishing*, N.Y. TIMES, Dec. 8, 1998, at ___ (noting that entrance of large commercial publishers into scientific publishing arena once dominated by nonprofit science societies has led to skyrocketing prices with some journals costing more than \$15,000 annually).

²⁵ Aviv Nevo, Daniel L. Rubinfeld & Mark McCabe, *Academic Journal Pricing and the Demand of Libraries*, 95 AM. ECON. ASSOC. 447, 447 (2005) (noting rapid increase in past decade of prices of for-profit academic journals) Bergstrom, *supra* note 24, at 183 (noting

and a significant commercial sector.²⁶ For example, scientific publishing is a \$7 billion dollar industry that in 2002 was the fastest-growing media sub-sector of the prior 15 years.²⁷ The demand for open access scholarship has been one response to the increasing prices of scholarly journals.²⁸ Other responses have included academic libraries choosing to reduce journal holdings as a result of increased costs, negotiating price reductions in the

that the average price per page of commercial journals in the economics field is six times as high and the average price per citation sixteen times as high as for nonprofit journals); Theodore Bergstrom & R. Preston McAfee, *An Open Letter to All University Presidents and Provosts Concerning Increasingly Expensive Journals*, at <http://www.hss.caltech.edu/~mcafee/Journal/OpenLetter.pdf> (“The symbiotic relationship between academics and for-profit publishers has broken down. The large for-profit publishers are gouging the academic community for as much as the market will bear. Moreover, they will not stop pricing journals at the monopoly level, because shareholders demand it.”); Mary Case, *Information Access Alliance: Challenging Anticompetitive Behavior in Academic Publishing*, 65 C&RL NEWS, June 2004, at <http://www.ala.org/ala/acrl/acrlpubs/crlnews/backissues2004/june04/iaa.htm> (noting consolidation of scholarly publications over the last 10 to 15 years, resulting in “fewer and fewer publishers in the commercial marketplace”); Mark J. McCabe, *The Impact of Publisher Mergers on Journal Prices: A Preliminary Report*, ARL 200, Oct. 1998, at <http://www.arl.org/newsltr/200/mccabe.html> (“Briefly, our results for journals sold by commercial publishers indicate that prices are indeed positively related to firm portfolio size, and that mergers result in significant price increases.”); Thomas M. Susman, David J. Carter, & the Information Access Alliance, *Publisher Mergers: a Consumer-Based Approach to Antitrust Analysis*, June 2003, at www.informationaccess.org/WhitePaperV2Final.pdf.

²⁶ Brendan J. Wyly, *Competition in Scholarly Publishing? What Publisher Profits Reveal*, 200 ARL BIMONTHLY REPORT (1998), at <http://www.arl.org/newsltr/200/wyly.html> (discussing financial figures for scholarly publishers, indicating that 1997 net sales for Thomson, Reed, and Wolters Kluwer were in excess of \$17 billion); Pritpal S. Tamber, *Editorial: Is Scholarly Publishing Becoming a Monopoly?*, 1 BMC NEWS AND VIEWS (2000), at <http://www.biomedcentral.com/1471-8219/1/1#IDAEUNSJ> (discussing business practices of scientific and medical publishers).

²⁷ Morgan Stanley Equity Research Report, *Scientific Publishing: Knowledge is Power*, Sept. 30, 2002, at 2, available at <http://www.econ.ucsb.edu/%7Etedb/Journals/morganstanley.pdf>.

²⁸ *Id.* at 2 (noting that the attempts of organizations to encourage direct publication over the Internet and to encourage defections from commercial publishers to nonprofit publishers are unlikely to change the nature of the scientific publishing industry as a result of barriers to entry enjoyed by incumbent journals); Bergstrom, *supra* note 24, at 13-16 (recommending a number of strategies to move to a new equilibrium that would better serve the academic community, including expanding nonprofit journals, publishing in new electronic journals, including Berkeley Electronic Press, and boycotting overpriced journals) McCabe & Snyder, *supra* note 23, at 2 (noting that the open-access model is a new business model that reflects dissatisfaction with the traditional business model for journals).

costs of journals or joining forces in negotiations with publishers.²⁹ The advent of electronic distribution of commercial scholarly journals has added a layer of complexity in the form of site licenses to electronic subscriptions, which may have led to increased prices for electronic journals.³⁰

The nature of the legal information market had led to distinctive issues of cost and access in the legal arena. First of all, the legal scholarly publishing arena is dominated by nonprofit publishers, particularly student-edited law reviews.³¹ In addition to serving a pedagogical function that essentially

²⁹ See David B. Kirkpatrick, *As Publishers Perish, Libraries Feel the Pain*, NY Times, Nov. 3, 2000, at ___ (noting that the average price of a scholarly journal had tripled in the past 14 years, causing libraries to reduce purchases); Memo from Peter Lange, Provost, Duke University, James Oblinger, provost and Executive Vice Chancellor, NCSU and Robert Shelton, Executive Vice Chancellor and Provost, UNC-Chapel Hill to Faculties of Duke University, North Carolina State University, The University of North Carolina at Chapel Hill, Jan. 14, 2004 at <http://www.econ.ucsb.edu/%7Etedb/Journals/trlnbigdeal.html> (discussing the decision after months of unsuccessful negotiations with Reed Elsevier of the member universities of the Triangle Research Libraries Network to “discontinue the consortial arrangement by which they provided access to electronic journals published under the Elsevier Science imprint”); Letter from Sidney Verba, Harvard University Library, at <http://www.econ.ucsb.edu/%7Etedb/Journals/harvardbigdeal.html> (noting elimination of a number of journals published by Elsevier); Elsevier License Agreement by and between The Regents of the University of California and Elsevier B.V., dated as of December 30, 2003, at <http://www.econ.ucsb.edu/%7Etedb/Journals/ucelsevier.pdf> (setting terms of U.C. system use and access to Elsevier print and electronic journals); Theodore Bergstrom, *UC Agrees to Big Deal*, at <http://www.econ.ucsb.edu/%7Etedb/Journals/ucbigdealpage.html> (“The [U.C. System] library gained two useful concessions. 1) The amount of money paid to Elsevier for electronic access will be reduced from \$8 million in 2003 to \$7.3 million in 2004. 2) The UC libraries will also drastically reduce their holdings of paper editions of Elsevier journals, cutting their spending on paper journals from \$2.3 million in 2003 to \$400,000 in 2004. Thus in total, the UC will spend about 25% less on Elsevier journals in 2004 than they did in 2003.”); Martin Enserink, *Librarians Join Forces on Journal Prices*, 278 SCI. 1558, Nov. 1997 (noting that following the announcement of the proposed merger between Reed Elsevier and Wolters Kluwer, Dutch librarians announced plans to join forces in negotiations with publishers); Alan D. Krieger, *?SPARC: One Answer to Escalating Journal Prices*, at <http://www.nd.edu/~ladvance/access/issues/1998/December/sparc.htm> (discussing the launch of SPARC (Scholarly Publishing and Academic Resources Coalition), an alliance of libraries that seeks to promote competition in scholarly communication).

³⁰ Carl T. Bergstrom & Theodore C. Bergstrom, *The Costs and Benefits of Library Site Licenses to Academic Journals*, 101 PNAS 897, 897 (2004) (noting that scholars are likely to be worse off when universities purchase electronic site licenses to journals than if access were by individual subscriptions only).

³¹ M.H. Hoeflich, *The Origins of the Kansas Law Review*, 50 KAN. L. REV. 375, 376 (2002) (noting that Harvard Law Review, the first student-edited law review, was founded in 1887 as a vehicle to circulate the best legal scholarship and that within 50 years general

results in student editors not being paid for their services,³² law reviews are typically subsidized by law schools that “provide financial support, office space, and professors as advisors.”³³

The typical publication of legal scholarship in student-run law reviews contrasts significantly with other scholarly disciplines in which peer-reviewed journals distributed by commercial publishers are dominant, as well as other aspects of the broader legal information industry, such as looseleaves, treatises and primary sources such as cases and statutes, whose publication is dominated by commercial publishers.³⁴ This difference is reflected in economist Theodore Bergstrom’s comparative journal cost data of 5,000 scholarly journals.³⁵ Of the 91 legal scholarly journals included in the database, 72 or 79% were nonprofit journals.³⁶ This figure is more than double that of other scholarly fields generally, where only 34% of scholarly journals were published by nonprofit publishers.³⁷

The relative dominance of nonprofit publishers of legal scholarship is

agreement existed that first-rate law schools needed their own student-edited law reviews); Bruce Ryder, *The Canadian Law Review Experience: The Past and Future of Canadian Generalist Law Journals*, 39 ALBERTA L. REV. 625, 626 (2001) (noting the fact that characteristic features of the American model of law review includes beginners being responsible for editing a scholarly journal without substantial faculty involvement and distinguishing the Canadian law review model from some of the “distinctly absurd features of the dominant American model”); Michael L. Closen & Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 AKRON L. REV. 15, 34 (1996) (noting that the first student-run legal periodical was the *Albany Law School Journal* in 1875, which was published for a year, and the second was the *Columbia Jurist*, which ended after approximately two years, but which motivated Harvard Law School students to create the *Harvard Law Review* in 1887).

³² Bernard J. Hibbitts, *Yesterday Once More: Skeptics, Scribes and the Demise of Law Reviews*, 30 AKRON L. REV. 267, 300 (1996) (noting that some commentators hold that law review service “educates law students in legal research and writing, appraises them of significant issues in the legal community and/or hones their analytic judgment”).

³³ Closen & Dzielak, *supra* note 31, at 43; George L. Priest, *Triumphs or Failings of Modern Legal Scholarship and the Conditions of its Production*, 63 U. COLO. L. REV. 725, 726 (1992) (noting that all law reviews are subsidized in some way, most by the law schools at which they are published).

³⁴ See *supra* notes 15 to 21 and accompanying text.

³⁵ Summary tables for the Bergstrom data are available at <http://www.hss.caltech.edu/~mcafee/Journal/Summary.pdf> [hereinafter, “Bergstrom Summary Data”].

³⁶ See Bergstrom Summary Data, *supra* note 35.

³⁷ Bergstrom’s data indicates that 1,653 of 4,803 or 34% of non-legal scholarly journals in his database were published by nonprofit publishers. See Bergstrom Summary Data, *supra* note 35.

evident in relative costs figures. According to the Bergstrom data, average cost of legal journals is significantly less on average than costs in other disciplines: the mean journal price in law is only 17% of the mean price of all journals of \$1,068 (including law journals); the median journal prices in law are even less, constituting 8.6% of the median price of all journals (including law journals).³⁸ The per article costs figures in law are also lower, with the mean price per article constituting 70% of the mean price per article of all journals in the sample (including law journals) and median prices constituting 23.5%. Cost figures for the law journals in the Bergstrom sample are, however, higher in some instances on a per citation basis. The mean price per citation of law journals is 165%, while the median price per citation is 37%.³⁹ The higher mean per citation cost figures for law journals are consistent with other data that indicates that a significant proportion of legal scholarship is never cited: one recent empirical study indicates that 43 percent of legal scholarly works, including law journal articles, notes, and comments, have never been cited by a single court or commentator.⁴⁰ The relatively small number of legal scholarly works that are cited account for a lion's share of citations: less than 1 percent of all law review articles account for 96 percent of all judicial and scholarly citations.⁴¹

2. The Legal Information Industry and Access to Legal Information

The structure of the broader legal information industry has significant implications for discussions of open access to legal scholarship. First of all, the high proportion of nonprofit publishers of scholarly legal works means that costs are likely lower in law than in other professions for print publications.⁴² This, combined with the nature of electronic access at law schools through discounted prices to the Lexis and Westlaw databases, suggests that issues of costs in relation to legal scholarly works are likely less acute in the print arena than in other scholarly fields, particularly with respect to legal academics.⁴³

³⁸ See Bergstrom Summary Data, *supra* note 35.

³⁹ *Id.*

⁴⁰ Thomas A.C. Smith, *A Voice, Crying in the Wilderness, and Then Just Crying*, The Right Coast, July 13, 2005, at <http://therightcoast.blogspot.com/2005/07/voice-crying-in-wilderness-and-then.html> (weblog) (discussing preliminary results from an empirical study of 38,000 Lexis citations).

⁴¹ *Id.*

⁴² See *supra* notes 38 to 41 and accompanying text.

⁴³ See *infra* notes 186 to 190 and accompanying text.

Issues of cost do, however, arise more frequently with respect to the electronic dissemination of legal scholarly works, a process in which commercial publishers such as Lexis, Westlaw, HeinOnline and the Social Science Research Network (SSRN) are dominant.⁴⁴ This is even true with respect to pieces that appear in print in law reviews since law reviews typically license electronic distribution rights to companies such as Lexis, Westlaw and HeinOnline.⁴⁵ The electronic distribution of law review articles has influenced the structure of law reviews.⁴⁶ Further, the sale of electronic distribution rights is a significant issue that has arisen more generally in the digital era as is reflected in the Supreme Court *Tasini* case,⁴⁷ as well as recent commentary on blogs about sales of law review articles on Amazon.⁴⁸

⁴⁴ HeinOnline is a service launched in 2000 offered by William S. Hein & Co. a legal publisher for more than 80 years; HeinOnline has four major library collections: the Law Journal Library, the Federal Register Library, the Treaties and Agreements Library and the U.S. Supreme Court Library, all of which are image-based and fully-searchable. *See* HeinOnline: The Modern Link to Legal History, at <http://heinonline.org/front/front-about> (last visited Feb. 23, 2006); Welcome to William S. Hein & Co., at <http://www.wshein.com> (last visited Feb. 23, 2006). SSRN describes itself as being “devoted to the rapid worldwide dissemination of social science research and is composed of a number of specialized research networks in each of the social sciences.” *See* Leading Social Science Delivered Daily, at <http://www.ssrn.com/> (last visited Feb. 28, 2006).

⁴⁵ Authority for grants of electronic reproduction and distribution rights to Lexis, Westlaw and other database companies is often a standard provision in law review copyright license agreements. *See, e.g.*, University of Michigan Law Review License Agreement § 2, at <http://students.law.umich.edu/mlr/agreement.html> (“The Michigan Law Review Association has granted several electronic database companies, including Mead Data Central, West Publishing, and JSTOR, the right to reproduce and distribute each volume’s contents. Accordingly, you hereby assign to the Michigan Law Review Association the nonexclusive right to authorize the above database companies and other present or future database companies to reproduce and distribute your article.”) (last visited Mar. 1, 2006).

⁴⁶ Bernard J. Hibbitts, *Last Writes? Re-Assessing the Law Review in the Age of Cyberspace*, 30 AKRON L. REV. 175, 177 (noting that the computer-mediated technologies embodied in Lexis, Westlaw and electronic journals have changed and to some extent improved the prevailing law review structure).

⁴⁷ *New York Times v. Tasini*, 533 US 483, 488 (2001) (finding that electronic distribution of pieces previously published with permission in print periodicals constituted copyright infringement by both the print publishers and the electronic publishers).

⁴⁸ Orin Kerr, *Law Review Articles From Amazon.com*, Apr. 21, 2005 (noting that Amazon was selling copies of law review articles for \$5.95 per article) (weblog), at http://volokh.com/archives/archive_2005_04_17-2005_04_23.shtml#1114061450; Larry Ribstein, *Steal This Article*, Apr. 21, 2005 (discussing the sale of electronic distribution rights to Amazon and noting that distribution through Amazon will encourage publishers to cling to distribution rights) (weblog), at http://busmovie.typepad.com/ideoblog/2005/04/steal_this_arti.html; Paul L. Caron, *Buying*

SSRN reflects the emergence of new business models to facilitate dissemination of scholarly works. SSRN is sometimes characterized as a place where articles can be downloaded for free.⁴⁹ Although this is true to some extent, this characterization does not fully take account of the ways in which SSRN makes revenues. SSRN operates on a business model in which law schools and other institutions may pay site subscription license fees. Consequently, users may access certain articles on SSRN and pay no fee directly, although their institution may have paid license fees to SSRN.⁵⁰ Although individuals may subscribe to SSRN,⁵¹ in the case of the Legal Scholarship Network, for example, law schools, law firms and other institutions pay site license subscription fees both to have journals on SSRN and for access to elements of the SSRN network.⁵² The SSRN publication model does, however, mean that its fees may be less transparent because users can then essentially download many papers without paying a fee. SSRN also charges separate fees for advertising and listings on its periodic Professional Announcements and Job Listings Posts.⁵³

Certain distinguishing features of the legal information industry also mean that discussions of open access to legal information may vary somewhat from those in other disciplines. Discussions in law must generally take account of areas of legal information other than legal scholarship, particularly in areas in which commercial publishers are more dominant.

Law Review Articles on Amazon.com, Apr. 24, 2005 (noting that the new Amazon venture may give law reviews another reason to try to restrict posting by authors to SSRN) (weblog), at http://taxprof.typepad.com/taxprof_blog/2005/04/buying_my_tax_a.html.

⁴⁹ Caron, *supra* note 48 (“As one who fights with law reviews to retain the right to post my articles on SSRN so they can be downloaded for free”).

⁵⁰ See Legal Scholarship Network Site Subscriptions, at http://www.ssrn.com/update/lisn/lisn_site-licenses.html (listing the 380 schools, university departments, firms and other organizations with site licenses to the Legal Scholarship Network) (last visited Feb. 28, 2006).

⁵¹ Individual subscription fees are currently \$60 per year. See Legal Scholarship Network Site Subscriptions, at http://www.ssrn.com/update/lisn/lisn_site-licenses.html (discussing individual subscription fees) (last visited Feb. 28, 2006).

⁵² See *id.*

⁵³ For the Legal Scholarship Network, SSRN charges \$350 for the first page and \$100 for each additional page for educational institutions and \$450 for the first page and \$100 for each additional page for non-educational institutions for professional announcements such as conferences. See Placing a Professional Announcement in LSN's Professional Announcements, at http://www.ssrn.com/update/lisn/lisnann/lisn_app.html (last visited Feb. 28, 2006) (“Friday Professional Announcements which reaches over 17,000 people involved with Legal Scholarship (academic and corporate) in over 60 countries around the world by Email. We then place the announcement in LSN's Professional Announcements which is accessed at no charge by finance professionals worldwide.”).

These areas would include primary sources and secondary materials such as treatises and looseleaves.⁵⁴

Discussions of open access to legal scholarly works must also consider the fact that sources of authority in the legal profession are broader in many respects than in other professions. In the legal area, such broader sources of authority include primary sources such as cases and statutes and secondary sources other than scholarship, including treatises and looseleaves. Judicial opinions, for example, are likely the most cited sources in the U.S. legal system.⁵⁵ As a result, open access to legal scholarly works alone would provide only a limited window in that the pursuit of legal scholarship and other inquiries or investigations in the legal area typically also require access to primary sources as well as secondary sources such as scholarly legal articles. The costs of access to other types of legal information do reflect many of the same patterns of increasingly industry consolidation and access costs that are evident with respect to scholarly works more generally.⁵⁶ Consequently, the structure of the commercial legal information industry is a key factor in questions of access. Many of the current players in this market were created during the print era (Lexis is one notable exception). How such players met the demand for access to legal information during the print era is thus important in establishing the context for discussions of access in today's digital environment.

C. *Access to Legal Information in the Print Era*

Prior to the digital era, commercial law publishers generally met lawyers' demand for information and access to both primary and secondary sources.⁵⁷ Legal scholarship is somewhat distinguishable from other legal information

⁵⁴ See *infra* notes 11 to 17 and accompanying text.

⁵⁵ Peter W. Martin, Introduction to Basic Legal Citation (LII 2006 ed.), §2-200 – How to Cite Judicial Opinions, at <http://www.law.cornell.edu/citation/2-200.htm> (“In the U.S. legal system, judicial opinions are probably the most frequently cited category of legal material.”).

⁵⁶ Finet, *supra* note 11, at 10 (noting that secondary sources are the principal locus of costs problems with respect to legal publications); Mark J. McCabe, *Law Serials Pricing and Mergers: A Portfolio Analysis*, 3 CONTRIBUTIONS TO ECON. ANALYSIS AND POL'Y 1, 1 (2004), at <http://www.bepress.com/bejeap/contributions/vol3/iss1/art11> (noting that law periodical prices increased 75% between 1991 and 2000 as compared with consumer price increases (as measured by the CPI) of just 26%).

⁵⁷ Freeman, *supra* note 4, at 4; SURRENCY, *supra* note 19, at 31 (noting that “[m]uch of the legal literature which is used at the close of the Twentieth Century was introduced in the decades after the Civil War” and that new forms of legal publishing were introduced by West Publishing Company and other commercial legal publishers).

in this regard because such scholarship has been historically primarily disseminated through student-edited law reviews.⁵⁸

The dominant role of commercial legal publishers in the dissemination of legal information is evident in the development and standardization of case reporters. The development of this market was facilitated by the 1834 Supreme Court decision in *Wheaton v. Peters*,⁵⁹ which established that written court opinions were not protectable by copyright.⁶⁰ Court reporters do, however, hold copyrights in their headnotes.⁶¹ Following this decision, which significantly affected how publishers financed reporting,⁶² legal publishers made profits by producing volumes of selected cases “with precedential value to be sold to an already established market desperate for practice materials.”⁶³ This led to high costs associated with a “multiplicity of reports” in a variety of citation methods.⁶⁴ West Publishing Company,

⁵⁸ See *supra* notes 31 to 33 and accompanying text.

⁵⁹ *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

⁶⁰ *Wheaton* at 668 (“the court are unanimously of the opinion, that no reporter has or can have any copyright in the written opinions delivered by this court”); *Banks v. Manchester*, 128 U.S. 244, 253 (1888) (finding that the “whole work done by judges . . . is free for publication to all”); *Callaghan v. Myers*, 128 U.S. 617, 649 (1888) (noting that the only aspect of the *Wheaton Reports* that could have been subject to copyright were the areas not relating to the written opinions of the court, including the title-page, table of cases, headnotes, statements of facts, arguments of counsel and index); *Banks Law Publishing Co. v. Lawyers’ Co-operative Publishing Co.*, 169 F. 386, 391 (2d Cir. 1909) (per curiam), *appeal dismissed per stipulation*, 223 U.S. 738 (1911) (noting that the “arrangement of reported cases in sequence, their paging and distribution into volumes, are not features of such importance as to entitle the reporter to copyright protection of such details.”).

⁶¹ See, e.g., *Little v. Gould*, 15 F. Cas. 612 (C.C.N.D.N.Y. 1852) (no. 8,395); *West Pub. Co. v. Lawyers’ Co-Operative Pub. Co.*, 79 F. 756, 761 (2d Cir. 1897) (noting that a reporter of court opinions may acquire a valid copyright for the headnotes, footnotes, table of cases, indexes, statements of facts and abstracts of the arguments of counsel, “where these are prepared by him and are the result of his labor and research”).

⁶² Erwin C. Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48, 60 (1981) (noting that after the *Wheaton v. Peters* case, reporters could not depend on receiving money from the sale of reports; instead, states began attaching salaries to reporter positions).

⁶³ Douglas W. Lind, *An Economic Analysis of Early Casebook Publishing*, 96 L. LIBR. J. 95, 95 (2004) (noting that insufficient attention has been given to the “determining role the legal publishing industry played in the early years, which resulted in the successful transition in legal instruction from lecture and textbooks to the case method.”).

⁶⁴ Francine Biscardi, *The Historical Development of the Law Concerning Judicial Report Publication*, 85 L. LIBR. J. 531, 533 (1993) (noting that the multiplicity of reports led to a publishing war between 1834 and 1888); John B. West, *Multiplicity of Reports*, 2 L. LIBR. J. 4, 5 (1909) (noting that the problem of a multiplicity of reports is caused by duplication of decisions in different publications); M. ETHAN KATSH, THE ELECTRONIC MEDIA AND

which began operating in 1876,⁶⁵ “dramatically changed case reporter publishing by introducing the *Northwestern Reporter*,” which was the first element of West’s National Reporter System.⁶⁶ West’s approach was innovative in that West collected and published all decisions from multiple jurisdictions:⁶⁷ “West’s philosophy was that its customer would be a better lawyer by having available the entire body of law on which to base arguments and defenses.”⁶⁸ West also was able to publish its reports quickly, which was a significant improvement from official state reports.⁶⁹ West’s approach of comprehensive reporting was approved by the American Bar Association in 1898.⁷⁰ West’s market strategy enabled its titles to become “essential to practicing lawyers’ libraries.”⁷¹ By the turn of the century, West had become the primary publisher of case reports and digests.⁷² West’s reporters also achieved quasi-official status for American case law.⁷³

THE TRANSFORMATION OF LAW 45 (1989) (noting increase in number of volumes of American case reports from 18 in 1810 to 473 in 1836 to 3,800 in 1885).

⁶⁵ Berring, *supra* note 6, at 191 (noting that the West Publishing Company was founded in St. Paul, Minnesota by the West Brothers in 1876).

⁶⁶ Lind, *supra* note 63, at 100.

⁶⁷ See Hanson, *supra* note 3, at 566 (noting that the approach by West came to characterize case reporting in the U.S. and is clearly distinguished from the British strategy of publishing selective precedents that modify principles of law, enunciate a new principle, settle a doubtful question, or that are otherwise instructive); Berring, *supra* note 6, at 192-93 (noting that West did not publish unpublished opinions that reflect state and federal court rules for what should and should not be published).

⁶⁸ Lind, *supra* note 63, at 101.

⁶⁹ Robert Berring, *On Not Throwing Out the Baby: Planning the Future of Legal Information*, 83 CAL. L. REV. 615, 623-24 (1995) (noting that although the National Reporter System has become the backbone of American legal publishing, it is just one way to report and organize cases that is far from perfect but that nonetheless provided relatively inexpensive distribution of case law); Susan W. Brenner, *Of Publication and Precedent: An Inquiry into the Ethnomethodology of Case Reporting in the American Legal System*, 39 DEPAUL L. REV. 461, 494-95 (1989) (noting that official state reports were published in bound form only with a typical delay of at least a year after the decision date and that West published its reports in parts that could later be bound into volumes); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 409 (1985) (noting that states published decisions very slowly, while West published them fast and bound them into regional reporters).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* SURRENCY, *supra* note 19, at 51, 57 (noting that as early as 1902 West began urging the Bar to “demand that all citations in texts include the reference to the National Reporter System” and that by the end of World War II the trend was to discontinue official state reports and substitute the National Reporter System).

⁷³ Hanson, *supra* note 3, at 567 (“As it happened, one private publisher did succeed, without government backing, in gaining for its volumes quasi-official status as the place of record for American case law.”); Berring, *supra* note 6, at 192 (“West’s form of standardized case

The Lawyers' Co-operative Publishing Company, which published its own regional reporters, was a key competitor of West in the legal publishing arena for over 100 years.⁷⁴

Publishers also played a role in the development of the case method of teaching at U.S. law schools following the introduction of this method by Christopher Langdell at Harvard Law School in 1870.⁷⁵ By 1914, the case method had become the primary method of teaching at many law schools.⁷⁶ The relative quick spread of the case method was facilitated by the standardization and marketing of textbooks by legal publishers such as West.⁷⁷ Not uncoincidentally, the legal curriculum as redesigned by Langdell used the same categories of law as the West digest system,⁷⁸ which has important implications for how law students and lawyers categorize and think about the law.⁷⁹

Despite the valuable role at times played by intermediaries in the development of the legal information industry,⁸⁰ the American approach to publishing precedent in the print era as exemplified by West led to an ever increasing volume of legal information, which impeded effective access to legal information.⁸¹ This ever increasing volume of legal information was a

reporting, with unified indexing, became the accepted standard for case information.”) (citations omitted).

⁷⁴ SURRENCY, *supra* note 19, at 50, 55, 119 (noting that the Lawyers Co-operative Publishing Company began publishing regional reporters after West published its reporters and started publishing a digest two full years before West began the *American Digest*); Joe K. Stephens, *The Merger: What Will It Cost Law Libraries?*, in POLITICAL ECONOMY OF LEGAL INFORMATION, *supra* note 11, at 13, 15 (noting that West and Lawyer's Co-op were major competitors in legal publishing for well over a hundred years).

⁷⁵ Lind, *supra* note 63, at 101.

⁷⁶ *Id.* at 110.

⁷⁷ *Id.* at 110.

⁷⁸ Hanson, *supra* note 3, at 571; SURRENCY, *supra* note 19, at 111 (noting that digests are recognized as an index to points of law found in cases and an essential tool for any practicing lawyer).

⁷⁹ Hanson, *supra* note 3, at 571 (noting that the lawyers took the organizing decisions of Langdell and the West Publishing Company to be the “intrinsic structure of the law”).

⁸⁰ See Richard Delgado, *Eliminate the “Middle Man”?*, 30 AKRON L. REV. 233, 235 (noting the important role played by law review editors as intermediaries and the fact that publishing on the Internet is likely to result in more variable quality because of the lack of an intermediary).

⁸¹ Thomas J. Young, Jr., *A Look at American Law Reporting in the 19th Century*, 68 L. LIBR. J. 294, 305 (1975) (noting that the West Publishing Company was “responsible for a great accumulation of reports”); Byron D. Cooper, *Anglo-American Legal Citation: Historical Development and Library Implications*, 75 L. LIBR. J. 3, 18-19 (1982) (noting

factor in the adoption of computer aided legal research.⁸²

D. *The Creation of Online Law Information Services*

The first broadly accessible commercial full-text legal information service was launched by Mead Data Central.⁸³ Their Lexis service began in 1973 “to help legal practitioners research the law more efficiently.”⁸⁴ Lexis, together with the Nexis news and information service, which was launched in 1979,⁸⁵ now operate as the LexisNexis Group, which is the global legal publishing arm of Reed Elsevier, the Anglo-Dutch publisher and information provider.⁸⁶ In 2004, LexisNexis had revenues of approximately \$2.37 billion and operating profits of approximately \$564 million.⁸⁷

West soon countered the new Lexis database by introducing Westlaw in 1975.⁸⁸ Although the Westlaw database at first consisted solely of West headnotes,⁸⁹ by 1983-1984, a decade after the launch of Lexis,⁹⁰ Westlaw became a research service comparable to Lexis.⁹¹ Westlaw is now owned by The Thomson Corporation.⁹² The Lexis database was created from West print reporters: “Lexis hired workers to scan and enter data from West

that complaints about the number of law books have been common since the seventeenth century but were an acute problem in the U.S. in the middle of the nineteenth century).

⁸² Hanson, *supra* note 3, at 573 (noting that by the early 1960s American lawyers were finding the task of locating relevant cases and secondary sources to be an intolerable burden and responded by introducing electronic databases and artificial intelligence to assist with the management of legal information); KATSH, *supra* note 54, at 43 (noting that computerized systems “arrived on the scene when the growth of printed reporters threatened to become unmanageable for libraries.”) (citations omitted).

⁸³ See *infra* notes 108 to 114 and accompanying text.

⁸⁴ See “About LexisNexis,” at <http://www.lexisnexis.com/about/> (last visited Feb. 13, 2006).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See *Reed Elsevier Announces 2004 Full Year Results*, Press Release, Feb. 17, 2005, at <http://www.ReedElsevier.com/index.cfm?articleid=1278> (noting that revenues were up 7% to £1.292m/€1.899 and operating profit was up 11% to £308m/€453m at constant currency rates). The dollar figures were calculated by converting the pound financial figures at the average conversion rates for 2004 using the conversion function at FXHistory. See FXHistory: Historical Currency Exchange Rates, at <http://www.oanda.com/convert/fxhistory> (last visited Feb. 28, 2006) (indicating that average pound conversion rate for period from 1/1/2004 to 12/31/2004 was 1.83277 and the average Euro conversion rate for the same period was 1.24368).

⁸⁸ Hanson, *supra* note 3, at 573.

⁸⁹ *Id.*

⁹⁰ See *supra* notes 83 to 84 and accompanying text.

⁹¹ Hanson, *supra* note 3, at 573.

⁹² See *infra* notes 159 to 160 and accompanying text.

reporters so it could compile its own legal research databases. The result was a competing product that used public information but was taken from a format initially published by West.⁹³ The creation of Lexis was legally permissible because copyright protection did not extend to the opinions in West print reporters.⁹⁴ The copyright status of such databases is less certain today. Although the *Feist* decision limits the ability to protect certain types of factual compilations with copyright,⁹⁵ recent court precedents have held that the star pagination in Westlaw's database is protectable by copyright.⁹⁶ These judicial precedents are effectively limited by the Thomson-West consent decree with the U.S. Department of Justice in connection with their merger that requires that they license star pagination.⁹⁷ Further, database protection, which has been adopted in Europe,⁹⁸ is strongly supported by publishers such as Thomson and Reed Elsevier.⁹⁹ The adoption of database protection in the United States could have significant implications for access to legal information as well as the development of competitors to existing market players.¹⁰⁰ Database protection for legal databases might, for example, have prevented or at least seriously hampered the development of the Lexis database.¹⁰¹

Although Lexis was the first successful commercial online law service, it actually reflected and was based on initiatives that date back to the 1950s and 1960s. The University of Pittsburgh Health Law Center and Computational Data Processing Center are generally credited with creating

⁹³ Debra Baker, *Treading on Titans' Turf*, 80 A.B.A.J. 44 (July 2000).

⁹⁴ See *supra* notes 59 to 61 and accompanying text.

⁹⁵ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) ("The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author.") (citations omitted).

⁹⁶ *West Pub. Co. v. Mead Data Central, Inc.*, 616 F. Supp. 1571, 1575 (D. Minn. 1985), *aff'd* 799 F.2d 1219 (8th Cir. 1986), *cert denied*, 479 U.S. 1070 (1987).

⁹⁷ See *infra* note 115 and accompanying text.

⁹⁸ Directive 96/9/EC of the European Parliament and of the Council of 11, March 1996 on the legal protection of databases at <http://europa.eu.int/ISPO/infosoc/legreg/docs/969ec.html> (giving 15 years *sui generis* protection for makers of databases that show qualitatively and/or quantitatively substantial investments in the obtaining, verification of presentation of the contents to prevent extraction and/or reutilization of the whole or of a substantial part).

⁹⁹ Dethman, *supra* note 13, at 138-39 (noting that database owners have scurried to Congress for help and have supported legislation that would permit protection of legal databases).

¹⁰⁰ See *infra* notes 141 to 148 and accompanying text.

¹⁰¹ Dethman, *supra* note 13, at 142 (noting that H.R. 354 may have prevented Lexis from copying cases from West).

the first-full text online legal information service.¹⁰² This project, known as the Horthy Project, was implemented under the leadership of John F. Horthy, Jr., then a professor at the University of Pittsburgh Law School.¹⁰³ This project actually arose in 1959 out of the research needs of Professor Horthy, who was developing a “Hospital Law Manual”.¹⁰⁴ By 1961, Horthy had placed the full text of all Pennsylvania Statutes online and launched a commercial service to provide access to this information.¹⁰⁵ The Horthy Project was thus the basis for Aspen Systems Corporation, a commercial service for searching statutory material.¹⁰⁶ In 1964, Horthy demonstrated a computer aided legal research system at an American Bar Association meeting.¹⁰⁷

In contrast to the Horthy Project, which involved online statutory material, the Lexis information service was initially based on online case law materials. What later became Lexis initially began as an initiative of the Ohio State Bar,¹⁰⁸ which later established a nonprofit corporation named Ohio Bar Automated Research (“OBAR”).¹⁰⁹ The Horthy project in fact

¹⁰² Kathleen Carrick, Interview Notes: John F. Horthy, at 1 (document on file with author); *see also* A Guide to Framing Computer Searches for Statutes, Health Law Center, University of Pittsburgh (no date) (document on file with author) (describing the tools and attributes for searching in a full-text retrieval system for statutes).

¹⁰³ Carrick, *supra* note 102, at 1.

¹⁰⁴ Lee Loevinger, *The Computer Revolution and the Law*, JURIS DOCTOR (Dec. 1971), at 6 (“Finding collation of the laws of the 50 states too difficult to handle by conventional means, Horthy and his associates began putting health law statutes on computer tape. By designing appropriate programs, the statutes could be retrieved as desired for incorporation into various sections of the text. In this fashion, a loose-leaf manual of hospital law was made.”).

¹⁰⁵ *Id.*; *see also* Michael A. Geist, *Where Can You Go Today?: The Computerization of Legal Education from Workbooks to The Web*, 11 HARV. J. LAW & TECH. 141, 147 (1997) (“Using card-punch machines, Professor Horthy first coded all Pennsylvania public health laws onto punch cards and then transferred the information to computer tape, enabling users to search the statutes by keyword.”)

¹⁰⁶ *See* Robert P. Bigelow, *How Lawyers Can Use Computers to Practice Law—Now!*, RHODE ISLAND BAR J. (Dec. 1971), at 8 (describing services of Aspen Systems Corporation).

¹⁰⁷ Berring, *supra* note 6, at 195; Geist, *supra* note 105, at 147 (noting that Horthy first demonstrated his system at the American Bar Association Annual Meeting in 1960).

¹⁰⁸ *See* William G. Harrington, H. Donald Wilson & Robert L. Bennett, *The Mead Data Central System of Computerized Legal Research*, 64 L. LIBR. J 184, 184 (1971); James F. Preston, Jr., *OBAR and the Mead Data Central System*, . 64 L. LIBR. J 190, 190 (1971) (discussing OBAR and Mead Data Central).

¹⁰⁹ Bigelow, *supra* note 106, at 8 (describing OBAR); William G. Harrington, *Computers and Legal Research*, AM. BAR ASSOC. J. 1145 (Dec. 1970) (discussing pioneering effort of the Ohio State Bar and Mead Data Central).

inspired the development of the OBAR project.¹¹⁰ The initial events that led to Lexis were connected to concerns about lawyers' access to legal information in Ohio. In 1966, the Ohio State Bar began an initiative to explore what type of computerized legal research system it could offer its members.¹¹¹ In 1967, the Ohio State Bar signed an agreement with the Data Corporation of Dayton, Ohio for the development of a computerized system.¹¹² In 1968 the Data Corporation had merged with the Mead Corporation, which created a subsidiary, Mead Data Central, which focused on the development of a computerized legal research system.¹¹³ By 1971, OBAR had placed online the full text of reported Ohio decisions and the Ohio General Code.¹¹⁴

The development of computer services in the legal information market has significant implications for law and legal practice. The use of computers to search full-text databases in legal research has been characterized as fast, objective and flexible.¹¹⁵ Through online research, lawyers can complete tasks that would have been extremely difficult or impossible with print sources.¹¹⁶ Computer aided legal research has also changed the use and function of the library.¹¹⁷ Use of computers in legal research may also

¹¹⁰ Geist, *supra* note 105, at 147 ("Following an appearance by Professor Harty in 1965 at the Bar Association's annual dinner, the president of the Bar Association, James F. Preston, Jr., decided to take the necessary steps to make the CALR service a reality. Soon after, the Bar Association appointed William Harrington as research counsel. Harrington held a series of meetings with Professor Harty in order to gauge the relative merits of the available hardware and software.") (citations omitted).

¹¹¹ Bigelow, *supra* note 106, at 8; Hanson, *supra* note 3, at 573 (noting that the Ohio State Bar Association became aware of a system developed by the Data Corporation to help the Air Force manage its procurement contracts and reached an agreement with the Data Corporation to cooperate and modify that system for legal research).

¹¹² Bigelow, *supra* note 106, at 8; William G. Harrington, *What's Happening in Computer Assisted Legal Research*, 60 AM. BAR ASSOC. J. (Apr. 1974).

¹¹³ *Id.*

¹¹⁴ Bigelow, *supra* note 106, at 8 (describing OBAR online services).

¹¹⁵ Philip Slayton, *Electronic Legal Retrieval—The Impact of Computers on a Profession*, 14 JURIMETRICS J. 29, 32 (1973) (noting that computers in legal research are fast for reasons of mechanical design, objective in the case of full-text systems because no human intelligence intervenes between the searcher and the database and flexible because of the lack of an hierarchical index).

¹¹⁶ Hanson, *supra* note 3, at 575-76 (noting the fact that hyperlinked cases can make searching for other cases much easier and that Westlaw is a much more powerful research tool than the print digest system using key numbers)

¹¹⁷ *Id.* at 577 (noting that no single source gives sufficient access to the range of legal materials, which means that most library collections are a mix of print, electronic, microfiche and audiovisual sources).

change the nature of precedents that might be consulted in a case.¹¹⁸ Computers may also have promoted use of persuasive authorities from other jurisdictions.¹¹⁹ Furthermore, computers have virtually unlimited storage capacity, allow rapid distribution of court opinions within hours or days rather than months and have expanded the amount of nonlegal information available to lawyers and perhaps facilitated interdisciplinary scholarship and work.¹²⁰

Most importantly, from the perspective of legal scholarship, computer aided legal research has changed the hierarchy of sources that had existed in law.¹²¹ Consequently, legal scholarship is now more accessible because it can now be readily searched using online tools,¹²² whereas search tools in the print era primarily indexed primary sources.¹²³ In the print era, the primary tools for searching for legal scholarship pieces published in journals were the Index to Legal Periodicals and the Current Legal Index.¹²⁴ At the same time, in the digital era it has become more apparent that an increasing divide exists between legal scholarship and the legal profession and that practicing lawyers may view legal scholarship as of little value.¹²⁵ Citation

¹¹⁸ *Id.* at 580 (noting that automated research has an open-ended quality and potential to be highly customized, which is more likely to turn up novel cases, whereas in the print era, most lawyers would tend to develop arguments based on the same cases).

¹¹⁹ *Id.* at 585-86.

¹²⁰ KATSH, *supra* note 54, at 43 (noting expansion in amount of nonlegal information available to lawyers); Hanson, *supra* note 3, at 587-92 (discussing how computerized systems have facilitation interdisciplinary work by lawyers and legal academics).

¹²¹ *Id.* at 584.

¹²² *Id.* at 584-85; Howard Denmark, *How Valid is the Often-Repeated Accusation That There Are Too Many Legal Articles and Too Many Law Reviews?* 30 AKRON L. REV. 215, 220 (1996) (noting that Lexis and Westlaw have limited coverage of law review articles, “but enjoy the advantage of powerful search capabilities for those articles within their databases”).

¹²³ Hanson, *supra* note 3, at 584.

¹²⁴ Denmark, *supra* note 122, at 220 (noting that traditional paper indices such as the *Current Legal Index* and the *Index to Legal Periodicals* are research tools that could be used to find articles).

¹²⁵ *Id.* at 585; Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34-5S (1992) (discussing the increasing disjunction between legal scholarship and the legal profession); Jordan H. Leibman & James P. White, *How the Student-Edited Law Journals Make Their Publication Decisions*, 39 J. LEG. ED. 387, ____ (1989); Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1921 (1993) (commenting on Judge Edward’s discussion); Michael J. Saks, Howard Larsen & Carol J. Hodne, *Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart*, 28 SUFF. L. REV. 1163, 1183 (1994) (comparing characteristics of law review articles published in 1960 and 1985).

figures for legal scholarship highlight the fact that a significant proportion of legal scholarship is never cited by anyone,¹²⁶ which raises questions about the nature and manner of access that might be needed to such material.

II. THE PLAYERS: LEXIS AND WESTLAW AS COMPETITIVE DUOPOLY

A. *The Development of the Lexis and Westlaw Databases*

Legal publishers have not surprisingly played a significant role in the development of the legal information industry. They have also served an important role by facilitating the organization of legal information and creating avenues for access to and dissemination of such information to a variety of interested parties. Although the dominance of Lexis and Westlaw have led some to refer to them collectively as “Wexis,”¹²⁷ the online legal information industry can be characterized as a duopoly in which Lexis and Westlaw are the principal players.¹²⁸ The organization of the legal information industry has certain oligopolistic characteristics, including industry concentration and interdependence among several firms in which members have at times adopted intensely competitive behavior.¹²⁹ Consideration of the print market does not alter the significant concentration that exists among legal publishers. The legal publishing industry is characterized by three major players: the Thomson Corporation, which owns Westlaw, Reed Elsevier, which owns Lexis, and Wolters Kluwer.¹³⁰

The legal publishing market is one that has typically included dominant firms. West Publishing Company, for example, achieved dominance beginning in the 1870s at least in part by virtue of superior performance: it published its reporters quickly, it worked closely with the judiciary, had high production standards, hired only lawyers as its book salespeople and

¹²⁶ See *supra* notes 40 to 41 accompanying text. See also Hanson, *supra* note 3, at 590-91 (noting that the proportion of citations to legal periodicals declined from 75% to 64% in comparing two periods (1974-1977 and 1999-2001)).

¹²⁷ See *LexisNexis*, Wikipedia, <http://en.wikipedia.org/wiki/LexisNexis> (last visited Feb. 8, 2006).

¹²⁸ The structure of market relations between Lexis and Westlaw suggests elements of a noncollusive duopoly. See WILLIAM G. SHEPHERD, *THE ECONOMICS OF INDUSTRIAL ORGANIZATION* 246 (4th ed. 1997) (discussing examples of noncollusive duopolies such as Boeing and Airbus and Mattel and Hasbro).

¹²⁹ *Id.* at 205, 245 (noting that oligopoly “involves interdependence among several firms (actually from two to about ten). Members of the group can either coordinate or adopt intensely competitive behavior.”).

¹³⁰ Berring, *supra* note 19, at 1698.

had a reputation for humorless intensity.¹³¹ West has supplemented this factor with successful lobbying that led to its reporters becoming essentially de facto official reporters in many respects.¹³² In more recent years, the dominance of West and other principal players in the legal information industry has been solidified by merger.¹³³

Although Lexis and Westlaw were clumsy at their inception,¹³⁴ since their introduction, Lexis and Westlaw have progressively increased the volume of material contained in their respective databases. They have also continually expanded their range of services. Although both began as “repositories of decisions,” statutory and legislative material was quickly added and later administrative materials.¹³⁵ In 1982, both Lexis and Westlaw added law review articles.¹³⁶ In racing to provide the most useful material, both built “enormous libraries of information.”¹³⁷ The relatively early development of online information services in the legal arena has meant that law “leads all other fields in the distribution of digital information.”¹³⁸

B. *Competition in the Legal Information Industry*

The ongoing competition between Lexis and Westlaw is not atypical in the

¹³¹ L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 812 (1989) (noting that in the late nineteenth and early twentieth centuries, West established its preeminent place in the [legal publishing] industry for almost a century and noting that West has been an “intelligent and paternalistic monopolist, serving the bench and bar well”); SHEPHERD, *supra* note 128, at 205 (noting that although superior performance is cited as a reason for monopolies and dominant firms, little research exists that shows that dominance is justified by superior performance); Berring, *supra* note 6, at 199-200 (noting that West had the only nationally based system, worked closely with the judiciary, had long been known among law librarians for overdoing its production standards, hired only lawyers as book salespeople, started out new hires as proofreaders and had a reputation for humorless intensity); *see also supra* notes 23 and 69.

¹³² SURRENCY, *supra* note 19, at 51 (noting that West began to urge the Bar as early as 1902 to demand that all citations in texts include references to the National Reporter System).

¹³³ SHEPHERD, *supra* note 131, at 206 (noting that the merger boom in the 1980s and 1990s brought back dominance-creating mergers).

¹³⁴ Berring, *supra* note 19, at 1696; Geist, *supra* note 105, at 148 (“By today’s standards, the service’s searching speed was positively glacial, though this did not seem to disturb prospective users. For example, Harrington describes a demonstration search during an ABA convention that ran over four hours, but which the lawyers present still regarded as extremely efficient.”) (citations omitted).

¹³⁵ Berring, *supra* note 6, at 189.

¹³⁶ Hibbitts, *supra* note 46, at 177.

¹³⁷ *Id.*

¹³⁸ Berring, *supra* note 69, at 620.

legal information industry. Competition between market players has been a characteristic feature of legal publishing since its inception. In 1889, for instance, West Publishing Company “increased its market share by driving Little, Brown & Company out of the legal digest market. By the turn of the century, West had become the leader in legal indexing and publishing of case reporters.”¹³⁹ In the print era, the Lawyers’ Co-operative Publishing Company (now owned by Thomson) was a key competitor of West.¹⁴⁰

In addition to offering competitive products, competition between legal publishers is evident in legal actions between companies. In such actions, companies attempt to use the law strategically for their commercial benefit. A number of recent cases have centered around the copyrightability of the information in legal databases. This is reflected, for example, in copyright litigation among players in the legal information industry through which companies have tried with varying degrees of success to restrict access to their printed and electronic publications by invoking copyright protection.¹⁴¹

This approach is evident in a number of cases in the electronic publishing era. In 1985, Lexis proposed to use the star pagination from West court reporters as a feature in its database.¹⁴² West then sued Lexis for copyright infringement and asserted copyright ownership over the star pagination from West’s National Reporter System.¹⁴³ The District Court found that West could hold a copyright interest in its star pagination.¹⁴⁴ The Eighth Circuit upheld the District Court’s granting of an injunction and found that West’s arrangement, including star pagination is copyrightable and that the intended

¹³⁹ Lind, *supra* note 63, at 97 (citations omitted).

¹⁴⁰ See *supra* note 74 and accompanying text.

¹⁴¹ Atlas, *supra* note 21, at 491 (“West Publishing seems to spend much of its time these days in litigation over whether the judicial opinions it publishes in its Supreme Court Reporter and Federal Reporter series are subject to copyright protection.”).

¹⁴² Stephen C. Carlson, *The Law and Economics of Star Pagination*, 2 GEO. MASON L. REV. 421, 422 (1995) (“In 1985, Mead announced that it would add a ‘star pagination’ feature, which would embed the internal page numbers of West’s reporter volumes at their page breaks within the opinions stored in its computer database. As a result, star paginating the opinions inside LEXIS allows Mead’s customers to provide ‘jump’ or ‘pinpoint’ citations to West’s reporters without having to purchase them.”) (citations omitted).

¹⁴³ West Pub. Co. v. Mead Data Central, Inc. 616 F. Supp. 1571, 1575 (D. Minn. 1985) (noting that star pagination involves the insertion of numbers from West’s National Reporter System publications within the body of LEXIS reports and that Lexis’s use of star pagination would displace West’s print reporters by eliminating the necessity to look at a the actual West volume).

¹⁴⁴ West Pub. Co., at 1578 (granting preliminary injunction and finding that copyright protection not barred for “West’s laboriously prepared, voluntary arrangement of cases”).

use by Mead Data Central constituted copyright infringement.¹⁴⁵ The view in these cases that star pagination is copyrightable may have been overruled by the *Feist* case.¹⁴⁶ More recently, *Matthew Bender*, which was subsequently acquired by Reed Elsevier, sought a declaratory judgment that “West does not possess a federal copyright in the pagination of its case compilations and that Bender’s use of that pagination in its own product is thus a noninfringing use.”¹⁴⁷ HyperLaw, a small legal publisher that at the time produced a CD-ROM product, intervened in the *Bender-Westlaw* litigation. The *Matthew Bender* cases found that West’s star pagination was not protectable by copyright.¹⁴⁸

C. *Growth through Acquisition: Consolidation in the Legal Information Industry*

Consolidation in the legal information industry has led to upward pressure on pricing of products of commercial legal publishers.¹⁴⁹ Although currently three major corporate umbrellas exist in the legal information

¹⁴⁵ *West Pub. Company V. Mead Data Central, Inc.*, 799 F.2d 1219, 1223 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987) (“We concur in the District Court’s conclusion that West’s arrangement is a copyrightable aspect of its compilation of cases, that the pagination of West’s volumes reflects and expresses West’s arrangement, and that MDC’s intended use of West’s page numbers infringes West’s copyright in the arrangement.”).

¹⁴⁶ See U.S. Department of Justice, Brief for Amicus Curiae in Support of Appellant, *Oasis Publishing Co., Inc. v. West Publishing Co.*, No. 96-2887, at 5 (noting that *Mead* is no longer controlling law and cannot be reconciled with the Supreme Court’s rejection of “the sweat of the brow” doctrine in *Feist*), *but see* *Oasis Publ. Co. v. West Publ. Co.*, 924 F. Supp. 918, 925 (D. Minn. 1996) (noting that *Mead* was not overruled by *Feist* and finding that: “West’s arrangement of cases in the Southern Reporter possesses the requisite creativity for copyright protection. Pagination of that arrangement is an integral part of the arrangement and shares in any copyright protection in the arrangement itself.”); *Atlas*, *supra* note 21, at 498-99 (noting that West settled the dispute with Oasis Publishing and reportedly paid legal costs and money damages of Oasis, entered into a license deal that permitted Oasis to use West’s volume and page citation system in return for Oasis’s agreement not to appeal the district court decision, thus preserving a favorable precedent for West in the Eighth Circuit).

¹⁴⁷ *Matthew Bender & Company, Inc. and Hyperlaw, Inc. v. West Publishing Company*, 1995 U.S. Dist. LEXIS 17688 (S.D.N.Y. 1995).

¹⁴⁸ *Matthew Bender & Co., Inc. v. West Publishing Company; Hyperlaw, Inc., v. West Publishing Company*, 1997 U.S. Dist. LEXIS 6915, at *11-12 (S.D.N.Y. 1997) (noting that the changes West makes to the cases it reports are trivial and not protectable by copyright); *Matthew Bender & Company, Inc., Hyperlaw, Inc., v. West Publishing Co.*, 158 F.3d 693, 708 (2d Cir. 1998) (finding that West’s star pagination may be lawfully copied).

¹⁴⁹ McCabe, *supra* note 56, at 26 (noting significant and substantial increase in prices in four of five legal publisher mergers).

industry,¹⁵⁰ in 1977, “at least 23 legal publishers of some size and reputation were separately owned (along with a score of smaller ones).”¹⁵¹ A significant amount of consolidation occurred in the 1990s: in 1990 eighteen publishers of commercial law serials were active; by 2000, this number had fallen to 12, leading to the emergence of three large publishers of law materials in the U.S.: Thomson, Reed Elsevier and Wolters Kluwer, which collectively control 90% of the legal publishing business in the U.S.¹⁵² The increasing concentration among legal publishers has led to increased antitrust scrutiny: the U.S. Department of Justice required divestiture of property rights to textbooks in order to resolve competitive concerns in Thomson’s 2001 acquisition of certain Harcourt General Inc. assets from Reed Elsevier following Reed’s acquisition of Harcourt General.¹⁵³ Concerns of the European Union with respect to the legal information industry were apparently a factor in the failure of the proposed merger between Wolters Kluwer and Reed Elsevier.¹⁵⁴

The acquisition by both Lexis and Westlaw by global publishing concerns in the 1990s led to greater recognition of and concern about consolidation among legal publishers.¹⁵⁵ Prior to purchasing Lexis in 1994, Reed Elsevier

¹⁵⁰ See *supra* note 130 and accompanying text.

¹⁵¹ Berring, *supra* note 19, at 1698 (quoting Ken Svengalis).

¹⁵² Mark J. McCabe, *Merging West and Thomson: Pro- or Anti-Competitive*, 97 L. LIBR. J. 423, 428-29 (2005); Dethman, *supra* note 13, at 124 (noting that Thomson, Reed Elsevier and Wolters Kluwer control 90% of the legal publishing business in the U.S.).

¹⁵³ Press Release, Justice Department Requires Divestitures in Thomson’s Acquisition of Certain Assets of Harcourt General, June 27, 2001, at <http://www.usdoj.gov/opa/pr/2001/June/288at.htm> (noting that in order to resolve competitive concerns about Thomson’s acquisition of certain Harcourt assets that Reed Elsevier would purchase all of Harcourt for approximately \$4.6 billion and then sell Harcourt’s Higher Education and Corporation and Professional Services Groups to Thomson for approximately \$2.06 billion); David Malakoff, *Librarians Seek to Block Merger of Scientific Publishing Giants*, 290 SCIENCE 910, 910 (2000) (noting that librarians asked the U.S. government to block Reed Elsevier’s acquisition of Harcourt General, one of the biggest ever science publishing mergers); Daniel Golden, *Reed, Thomson Attempt to Buy Harcourt Could Face Tough Antitrust Scrutiny*, WALL ST. J., Nov. 3, 2000 (noting that the Department of Justice could seek divestitures as a condition of approving the acquisition of Harcourt by Reed Elsevier and Thomson).

¹⁵⁴ News Release, Proposed Merger of Reed, Elsevier and Wolters Kluwer, PR Newswire, Oct. 13, 1997, at <http://www.prnewswire.co.uk/cgi/news/release?id=27687> (last visited Feb. 23, 2006); Dethman, *supra* note 13, at 128 (noting that the proposed merger of Reed Elsevier and Wolters Kluwer fell apart in 1998 apparently due to antitrust concerns raised by the EU); William M. Hannay, *The Publishing Merger That Failed: Reed Elsevier and Wolters Kluwer*, 26 ACQUISITIONS LIBR. 173 (2001).

¹⁵⁵ McCabe, *supra* note 152, at 423 (discussing the 1996 purchase of West Publishing Company by Thomson Financial and Professional Publishing Group and noting that the

had purchased Martindale-Hubbell in 1990.¹⁵⁶ Reed followed its purchase of Lexis with acquisitions of Matthew Bender and Shepard's, for a total cost of more than \$3 billion.¹⁵⁷ Wolters Kluwer, a Dutch conglomerate, purchased Prentice Hall Law and Business in 1994, Commerce Clearing House (CCH) in 1995 and Little Brown & Company in 1996, for a total purchase price of more than \$2 billion.¹⁵⁸ The Thomson Corporation purchased Bancroft-Whitney, Lawyers Co-op, Research Institute of America, Clark-Boardman and West.¹⁵⁹ The purchase price of West was more than \$3 billion.¹⁶⁰

Despite this progressive industry consolidation, a number of small legal publishers remain active in the marketplace.¹⁶¹ These companies use technology as part of their operations: "the Internet plays at least some part in every business (product delivery, marketing, customer communication, etc.)."¹⁶² This indicates that business opportunities exist despite the significant concentration in the legal information industry.¹⁶³ This also suggests that considerations of ways to achieve greater open access to legal scholarship and legal information could have a positive influence of the broader marketplace by giving incentives for entrepreneurs to create new business models in the legal information industry. These new business models may form a counterweight to the recent experiences of greater industry concentration and significant price increases, provided that incumbents do not use their market dominance to foreclose potentially competitive new business models.

Industry concentration can lead to increased prices and a tendency toward

companies agreed to divest dozens of titles to satisfy concerns about potential anticompetitive impacts).

¹⁵⁶ Dethman, *supra* note 13, at 127 (noting that prior to the Reed Elsevier acquisition of Lexis, it acquired Martindale-Hubbell).

¹⁵⁷ *Id.* at 128 (noting acquisition of Matthew Bender and Shepard's by Reed).

¹⁵⁸ *Id.* (noting that Wolters Kluwer purchased Prentice Hall Law and Business, Commerce Clearing House (CCH) and Little Brown & Company for a total price of \$2 billion).

¹⁵⁹ *Id.* (noting that The Thomson Corporation purchased Bancroft-Whitney, Lawyers Co-op, Research Institute of America, Clark-Boardman and finally West).

¹⁶⁰ *Id.* (noting that Thomson acquired West for over \$3 billion).

¹⁶¹ Susan M. Yoder, *The Rise of the Small: The Effects of Industry Consolidation on Small Legal Publishers*, in POLITICAL ECONOMY OF LEGAL INFORMATION, *supra* note 11, at 59, 62 (discussing a range of small companies, including Alert Publications, Findlaw, Niche Publishers, PLI and VersusLaw).

¹⁶² *Id.*

¹⁶³ *Id.* at 73 (noting that smaller entrepreneurs in the legal information industry are finding fertile plots for new ideas, new products and new customers).

monopolistic behavior.¹⁶⁴ Consequently the price increases associated with increasing industry concentration among legal publishers as well as publishers more generally are an increasing focus of concern.¹⁶⁵ Evidence of price movements following legal publishing mergers indicate that prices increased at a rate greater than inflation.¹⁶⁶ Anticompetitive practices are another concern as is reflected in the Department of Justice settlement in the Westlaw-Thomson merger. In addition to requiring divestitures of certain publication titles and production assets, the Thomson-Westlaw settlement required that they “license openly the right to use the pagination of individual pages in West’s National Reporter System [in which Westlaw claims copyright ownership] to any interested third party for a fee.”¹⁶⁷

D. *Profiting from Legal Information: Lexis and Westlaw Financial Figures*

The level of profit of players in the legal publishing industry reflects pricing power that is likely influenced by industry structure. The dominant legal publishers have profited from industry consolidation. Reed Elsevier, for example, derives a significant portion of its revenue from the legal market. In 2000, 32% of Reed Elsevier revenue (\$1.2 billion) was derived from the

¹⁶⁴ SHEPHERD, *supra* note 128, at 258-59 (noting that both Cournot output-setting and Bertrand price-setting models “illustrate what is known from intuition and mainstream experience: namely, that fewness, cost advantages, and product differentiation tend to breed monopoly behavior.”).

¹⁶⁵ McCabe, *supra* note 152, at 424 (noting that prices for both West-Thomson’s titles and divested titles purchased by Reed Elsevier experienced significant post-merger price increases); Carolyn E. Lipscomb, *Mergers in the Publishing Industry*, 89 BULL. MED. LIBR. ASSOC. 307, 307 (2001) (noting increasing concentration in publishing industry generally and significant price increases that have accompanied this consolidation); Dethman, *supra* note 13, at 124 (noting that the history of legal publishing in the U.S. mirrors the publishing industry as a whole); Kathleen Robertson, *Mergers, Acquisitions and Access: STM Publishing Today*, in LIBRARY AND INFORMATION SERVICES IN ASTRONOMY IV 95, 96 (B. Corbin, E. Bryson & M. Wolf eds. ____) (noting the merger mania in the publishing industry generally in the 1980s and 1990s); *see also supra* notes 24 to 41 and accompanying text.

¹⁶⁶ Stephens, *supra* note 74, at 16-17 (noting that the price increases following the Lawyer’s Co-op acquisition by Thomson increased in price at twice the rate of legal publications generally).

¹⁶⁷ *See* Notices, Department of Justice Antitrust Division, *United States of America v. The Thomson Corporation and the West Publishing Company; Proposed Final Judgment and Competitive Impact Statement*, 61 FED. REG. 35250, 35250, 35252-54 (1996) (setting license fees not to exceed \$0.09 per format per year in the first year of the license, \$0.11 in the second year and \$0.13 in subsequent years of the license, with increases limited to the change in the Producer Price Index).

legal market.¹⁶⁸ Operating profits for the legal market were \$237 million or 30% of total Reed Elsevier operating profit. The operating margins for the legal division were between 21% and 23% in 2000 to 2002 and were projected by Morgan Stanley to increase to 25.3% in 2007.¹⁶⁹ Conversion of Reed Elsevier operating results into dollars demonstrates that Reed Elsevier has experienced continuous increases in revenue and operating profit for a sustained period of time.¹⁷⁰ In 1997, Reed Elsevier's net margins were said to be higher than 473 of the Fortune 500 companies.¹⁷¹

III. THE CONSUMERS: USERS' ACCESS TO LEGAL INFORMATION

A. *Electronic Legal Information, Access and Consumer Differentiation*

The increasing predominance of online legal information services has significant implications for access. In the print era, any individual with access to a library with legal materials could use the West National Reporter System, which is widely distributed in its entirety and in parts.¹⁷² In the online legal research era, access may be much more circumscribed by commercial legal publishers through use of technology and may depend on the nature of the user and type of use desired.

Lexis and Westlaw charge heavily discounted fees to law schools for use of their services. In contrast to the law school market, the fees charged by Lexis and Westlaw for commercial users such as law firms can be quite high, with government pricing falling somewhere between the law firm and law school levels.¹⁷³ This differential pricing structure means that professors and students, for example, already have something close to open access with respect to the legal materials on Lexis and Westlaw. Commercial users, who pay high prices for Lexis and Westlaw access, subsidize this relatively open access within the law school. The benefits of this market and pricing structure flow to all parties involved.

¹⁶⁸ Morgan Stanley Equity Research Report, *supra* note 27, at 13.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* Since the dominant portion of LexisNexis legal market revenues is the U.S., the changing value of the dollar can significantly influence reported results in British pounds and Euros. As a result, Lexis reported results in pounds and Euros may vary from the dollar figures used here due to dollar fluctuations.

¹⁷¹ Wyly, *supra* note 26.

¹⁷² Berring, *supra* note 6, at 203.

¹⁷³ See *infra* notes 182 to 185 and accompanying text.

Further, differential access structures can benefit commercial legal publishers in a number of ways. In the electronic era, different users may have different levels of access to legal information. In the Lexis and Westlaw arena, for example, law students become trained in the use of Lexis and Westlaw and arrive at their post-law school employment at least conversant with using the Lexis and Westlaw databases. Although law firms pay a high cost, they benefit by getting new employees who are already trained in the use of Lexis and Westlaw. Lexis and Westlaw, which invest significant amounts of resources in the legal market, benefit by getting early access to future generations of potential Lexis and Westlaw users.

Law students, staff and professors also benefit from Lexis and Westlaw law school marketing strategies. They typically have something close to open access to online materials at a low cost. This open access takes place in a closed universe in that it is limited in two respects. It may include only the online electronic databases and not print and other potential sources of information such as CD-ROM. It is also limited in that such open access is really only given to the law school market. In contrast, this limited universe of open access does not typically extend beyond the boundaries of the law school: commercial and government users often do not have such unfettered access to online databases, particularly in the case of commercial users, for whom online legal databases can be quite expensive.

B. *Commercial Users*

Despite the conservatism of the legal profession and initial reservations about the adoption of online research in the law,¹⁷⁴ Lexis and Westlaw have been highly successful in marketing their services to commercial legal users. Lexis and Westlaw, most importantly, have marketed their services to law firms as dispersible or chargeable directly to law firm clients.¹⁷⁵ This has meant that law firms could adopt Lexis and Westlaw at little cost to themselves. Lexis and Westlaw costs could be allocated and passed through

¹⁷⁴ Geist, *supra* note 105, at 148 (“Although taken for granted today, [full-text computer aided research] met with considerable opposition at the time, particularly from legal academia. For example, many law librarians expressed concern that the nonindexed nature of the service would bypass the well-established index and digest system, confusing researchers. Furthermore, some viewed the use of full-text searching as a serious mistake since, given the perceived difficulty of searching full-text, it was believed to be a prohibitively expensive use of computer resources.”) (citations omitted).

¹⁷⁵ Berring, *supra* note 6, at 197.

directly to clients at cost or even subject to a surcharge.¹⁷⁶ As a result, use of databases such as Lexis and Westlaw could actually generate profits for law firms.¹⁷⁷ Lexis and Westlaw were thus an important part of the transformation of legal information from overhead cost to commodity or cost item.¹⁷⁸

All potential legal users do not, however, have the same ability to pay for Lexis and Westlaw services. Online legal information publishers have much greater control over access than do publishers of print materials, at least in part because of the mediating role played by libraries in providing access to print materials.¹⁷⁹ Lexis and Westlaw services are particularly suited to large law firms that bill clients. The high costs of Lexis and Westlaw may, however, limit access to their services by lawyers at state and federal agencies,¹⁸⁰ smaller law firms,¹⁸¹ solo practitioners and in-house lawyers, particularly at smaller companies, as well as non-lawyers who may need access to legal information.¹⁸²

C. Law School Users

From the early days of online legal services, Lexis and Westlaw have been

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* (noting that dispersing costs based on billing at a surcharge was never universal and soon became controversial).

¹⁷⁸ *Id.* (noting that a firm could not charge a client for a portion of the annual subscription to the National Reporter System, but could bill a client for its share of the cost of online information).

¹⁷⁹ Berring, *supra* note 6, at 203-07.

¹⁸⁰ Mary Ann Neary, *State Government Procurement of Electronic Legal Services*, in POLITICAL ECONOMY OF LEGAL INFORMATION, *supra* note 11, at 43, 46 (noting that standard government contract rates for Lexis and Westlaw were lower than those offered to corporate subscribers but higher than those given to academic institutions).

¹⁸¹ LexisOne is a resource for small law firms and Access Full LexisNexis Research service including primary law, Shepard's citation, secondary analysis, news, company information can be purchased for \$251 for a day, \$408 for a week and \$830 for a month. See LexisNexis Research for Small Firms, at <http://www.lexisone.com/lx1/specialoffer/getOffer?mode=home&action=signup&packageid=5> (last visited Feb. 28, 2006).

¹⁸² Berring, *supra* note 6, at 204-05 (noting that large legal entities are well served by Lexis and Westlaw, but that a small percentage of lawyers work in such organizations and that other users of legal information do not have such easy access); Jean Stefancic & Richard Delgado, *Outsider Jurisprudence and the Electronic Revolution: Will Technology Help or Hinder the Cause of Legal Reform?*, 52 OHIO ST. L.J. 847, 856 (1991) (noting that computer assisted legal research is costly, which means that law reformers and oppositional scholars located at small schools or in practice with small firms may not have access to unlimited computerized resources).

extremely generous with the law school market, giving students and professors individual passwords for free use and at times 24 hour access to the whole database, with toll-free phone support, free software for home computers, free assistance and training in law schools and written aid.¹⁸³ The entrance of Lexis and Westlaw into the law school market received a significant boost in 1990 when both services offered free passwords to law students.¹⁸⁴

Lexis and Westlaw have thus expended enormous resources in the law school market.¹⁸⁵ This strategy has helped Lexis and Westlaw in a number of respects. It helps them in marketing to law firms since the vast majority of graduates leave law school with some exposure, if not facility, with respect to their databases.

Lexis and Westlaw law school contracts reflect the relatively low prices that law school customers pay. For example, Westlaw's Plan 4 Law School Service contract provides for two fee schedules for law schools in the U.S. and its territories and possessions operating under this agreement.¹⁸⁶ The law school access price is based on the number of full-time equivalent students (FTEs) and is set at a specific per FTE fee subject to a specified floor and ceiling.¹⁸⁷ The FTE fee is set at \$51.75 with minimum Annual Charges of \$13,125 and maximum charges of \$38,220 if the law school is responsible for communications charges and consumables for attached printers.¹⁸⁸ These fees increase to \$62.75 per FTE with minimum and maximum Annual charges set at \$15,095 and \$51,480, respectively, where West is responsible for communications charges and consumables for attached printers.¹⁸⁹ For a law school with 700 FTEs, these charges would be between \$19 and \$55 per FTE per year if the law school is responsible for communications and consumables and between \$22 and \$74 per FTE per

¹⁸³ Berring, *supra* note 6, at 197 ("To build a constituency of users, the databases initiated astoundingly generous giveaway programs for law schools").

¹⁸⁴ Geist, *supra* note 105, at 149 ("From a legal education perspective, the single most important improvement in LEXIS and Westlaw took place in 1990, when both systems offered a free password to every law student in the United States.") (citations omitted); see also Ronald W. Staudt, *An Essay on Electronic Casebooks: My Pursuit of the Paperless Chase*, 68 CHI.-KENT L. REV. 291, 293-94 (1992) (noting that prior to the fall of 1990, access to Lexis and Westlaw was very rare and law schools had 3 or 4 terminals that were not available during peak time periods).

¹⁸⁵ Berring, *supra* note 69, at 620.

¹⁸⁶ See Schedule A to Westlaw Subscriber Agreement, Plan 4 Law School Service (7/1/99).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

year if Lexis is responsible for communications and consumables. These fees are markedly lower than the fees for even Lexis small firm users, for example. A single LexisOne small law firm subscriber would pay approximately \$10,000 in Lexis fees per year for a much more limited level of access than is typically the case with law schools.¹⁹⁰

D. *The Public*

The advent and increasing dominance of electronic legal information services has significant implications for public access to legal materials. Online legal services are different from the libraries that were a main avenue of access to legal information in the print era. Questions of what type of access to legal information and who should have such access are thus likely to be of increasing concern and discussion in coming years.¹⁹¹ Public access to some legal information is mandated in some instances by law, although a “crazed quilt” of contradictory federal and state constitutional, statutory, and common law” exists governing public access to judicial documents.¹⁹²

CONCLUSION

Considerations of open access to legal scholarship must consider access to what information and by whom. Furthermore, legal scholarship exists within a broader range of legal information, much of which is needed for both legal scholarship and other legal inquiries both by lawyers and nonlawyers. Ironically, the very issues of access to members of the bar that led to the Ohio Bar collaborating with The Data Corporation to develop the computer aided legal research system that later became Lexis have come full circle. The high costs of access to online legal database services for smaller law firms and solo practitioners have led the Ohio Bar to adopt technologies through which its members can access legal information.¹⁹³ The newest

¹⁹⁰ See *supra* note 181 and accompanying text.

¹⁹¹ Michael Duggan & David Isenbergh, Commentary: *Poststructuralism and the Brave New World of Legal Research*, 86 L. LIBR. J. 829, 705 (1994) (“There has been too little discussion about the ramifications of disparities in access to legal information and the increased reliance on expensive, privately owned databases and other electronic sources of legal information.”).

¹⁹² Kelly Browne, *Does the Law Governing Public Access to Judicial Opinions Mandate Citation Reform? It Depends*, in POLITICAL ECONOMY OF LEGAL INFORMATION, *supra* note 11, at 75, 86.

¹⁹³ See T.R. Halvorson & Margi Heinen, *Casemaker: Ohio Incubates Another Legal Information Service*, LLRX.com, at <http://www.llrx.com/features/casemaker.htm> (noting that the Ohio State Bar Association, which has a history of innovative and entrepreneurial legal research technology products, has incubated another legal information service, pairing

initiative of the Ohio State Bar Association is Casemaker, a product that is being marketed to state bar associations and that is currently used by a number of bar associations, including those in Connecticut, Idaho, Indiana, Massachusetts, Nebraska, New Hampshire, North Carolina, Rhode Island and Vermont.¹⁹⁴ The development of Casemaker underscores the fact that the questions of access that led to the development of Lexis and Westlaw were not necessarily resolved by the adoption of new technologies of dissemination and access. Rather, these new technologies paradoxically enabled greater ease of access while at the same time reinforcing existing impediments to access and likely created new ones.

Open access models are now being contemplated more generally as potential ways to address persistent and recurring issues of access to legal information. The development of open access means of accessing legal scholarship and other legal information may provide an increasingly important counterweight in the current environment of greater industry concentration. Commercial publishers have historically served an important and useful function as intermediaries in the development of the legal information industry. The current degree of industry concentration in the long run is likely to be a negative factor in the continued development of the legal information industry. It is also associated with significant price increases that can profoundly influence access to legal information. Questions of access are thus likely to become of greater concern as electronic access becomes even more pervasive.

up with a technology company (Lawriter) and releasing Casemaker, an Internet legal research library marketed to Bar Associations) (last visited Mar. 1, 2006).

¹⁹⁴ *Id.*