

## The Future Gate to Scholarly Legal Information

by Paul George and the AALL Open Access Task Force

Imagine what it would be like if scholarly legal publication was concentrated in a small number of commercial and association publishers. What if the journals were distributed to subscribers, but with subscriptions costing thousands of dollars? And what if the publishers charged authors fees for being included in the journals?

Now imagine an alternate world in which every scholarly article was available for free from an electronic source, regardless of whether it was in print or not. Furthermore, you could cite to the article and reprint it without the majority of restrictions imposed by copyright, as long as you acknowledged the original author.

The first world does not exist (yet) for us, but it is the experience of those working in the sciences. The second world is the one envisioned by those promoting what is called open access. Open access has been defined in several ways, but it is commonly described as the electronic publication of scholarly work that is available for free without copyright constraints other than attribution. In the open access environment, the author holds the copyright, not a secondary publisher.

The extremely high cost of scientific literature, in both print and electronic formats, has caused many scientists to explore open access as an alternative to traditional publication. These scholars believe their work should not be limited to the few who can afford the journal price, especially when the work is publicly funded research. For them, the solution is self-archiving and the creation of open access journals. Often these open access journals are in direct competition with expensive commercial and association journals.

### The Environment for Legal Scholarship

Until now, the legal community has felt removed from this debate, most likely because our world appears so different from that of our colleagues in the sciences. While we have an increasing number of commercially published journals, the standard for scholarly publication is the law school journal. This model is almost the direct opposite of the scientific, technical, or medical (STM) journals; we do not have a few, centralized commercial or associational publishers, but rather a decentralized publication system with as many publishers as law schools. Possibly no journal is completely self sustaining, so the law schools financially support publication. Works are not peer reviewed, but rather are selected by students, who do not charge the author for publication.

Law school journals have a unique educational function within the law school. They exist not just to provide an avenue for the dissemination of faculty members' works, but also to provide writing and editorial experiences for the students involved. Many would assert that new journals are created at law schools not because there is an unmet need to disseminate otherwise unpublished articles, but rather to provide more opportunities for students.

In law, scholarly articles are already widely available. Academic law journals are among the least expensive materials we purchase. The average price for a non-commercial journal was \$34.04 in 2003, compared with more than \$215 for a commercially published law journal, according to AALL's *Price Index for Legal Publications* ([www.aallnet.org/members/price\\_index.asp](http://www.aallnet.org/members/price_index.asp)). A substantial number

### A Growing Movement

The so-called open access movement has gained momentum in the world of scholarly communication. The focus of the movement has largely been in the area of scientific literature, but there are signs that the issue is becoming more mainstream. For instance, read Richard Atkinson's "A New World of Scholarly Communication" in the November 7, 2003, issue of *Chronicle of Higher Education*.

Further, some initiatives pertain to legal information that seem related to the principles of open access, most notably Lawrence Lessig's Law Commons, Hibbitt's Pittsburgh efforts to encourage self-publication and archiving, and Web-based law journal publications.

This *Members' Briefing* serves as an introduction to the concept and provides a preliminary analysis of ways law librarians can contribute to the development of open access models for legal literature. Thanks to the members of the Task Force on Open Access who prepared this report: Dick Danner, Anne Kleinfelter, George Pike, Donna Scheeder, Keith Ann Stiverson, and Chair Paul George.



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AALL President, 2004-2005

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of journals are available on Westlaw, Lexis, and HeinOnline, all of which are readily available for a fee to subscribers. Additional free access is available through several avenues. Besides making earlier copies of their articles available on their personal Web pages, authors will also post versions on popular repository sites, such as SSRN ([www/ssrn.com](http://www/ssrn.com)) and BePress ([www.bepress.com](http://www.bepress.com)).

About 10 years old, SSRN is the Social Science Research Network, which includes The Legal Scholarship Network (LSN). Authors may deposit papers electronically, which can then be searched by keyword. Law schools may pay to create topical series in order to promote the research of their faculty in various subject areas. The Berkeley Electronic Press is approximately one year old and functions as a repository for a variety of subject areas, including its growing legal repository.

We can see that the open access debate began in the scientific community, which does not have our long history of electronic access. However, it is still worthwhile and important for law librarians to explore this subject. We would like to address two questions in particular. Is the open access debate relevant to the legal community? And if so, how will it affect law librarians?

### Open Access for Legal Scholarship

Although the publication of legal scholarship is very different from the sciences, should we encourage open access in the legal community? Several reasons compel us to say yes. First, we cannot guarantee that our costs will remain low. Last summer, for example, the Harvard Law Review attempted to raise its annual institutional subscription to \$200 (approximating the average cost of a commercial journal). Inflation rates for legal information continue to rise at rates equal to (and sometimes far exceeding) the inflation visited upon university libraries for scientific literature. Annual price increases of 7 percent for electronic subscriptions to already-expensive Reed Elsevier scientific literature have inspired university librarians to develop Web

pages to educate faculty about the high cost of scholarly literature.

Many of us would be happy to have our inflation rates limited to a mere 7 percent. In January 2005, many of us received notice of a substantial price increase (46 percent at Penn Law School) for our HeinOnline subscriptions because of expanded coverage and services, according to a December 10, 2004, e-mail from Brian Jablonski, director of marketing and public relations at William S. Hein and Company Inc.

More importantly, the idea of open access is consistent with the culture of the legal community. We assume that legal information, including scholarship, should be readily available. We have in fact been moving toward open access, but we do not yet have all its advantages. Our authors want their work to be widely disseminated. By the time an article has been published in print, a law professor has distributed it to many colleagues working in the same field to get comments. The article has been presented to the author's own faculty and to the faculties of other institutions. It has been posted on SSRN and, increasingly, on BePress. Before the article is in print, it has perhaps already been read by the people he or she wants to read it, and those readers have provided the author with their comments.

The final step is to print the article, both to stop the endless revision cycles and to gain a wider audience (for a discussion of scholarly communication in law, see Richard A. Danner's article, "Issues in the Preservation of Born-digital Scholarly Communications," in the fall 2004 issue of *Law Library Journal*). Open access could provide greater exposure to faculty scholarship and might also provide greater exposure to less prestigious journals.

We should also keep in mind that open access is an international movement. Increased availability of electronic versions of legal scholarship will expand access not just to domestic readers, but also to a much wider international market that might not otherwise have access to these materials.

The presence of legal scholarship on faculty and law journal Web sites and in repositories, such as SSRN and BePress,

has actually complicated publication and access issues. For instance, many law journals require that when the final version of an SSRN working paper is published in its print journal, it must be withdrawn from the electronic repository, thereby eliminating an electronic resource that had served as both an archive and as a means of distributing the article. For an account of one author's experience with this problem, see Dan Hunter's article, "Walled Gardens," available on SSRN and in a forthcoming issue of the 2005 *Washington and Lee Law Review*. When the final, printed work is distributed, access is restricted to those who pay a fee for the print subscription or for a commercial online service. Earlier versions might be found on SSRN and BePress. Regardless of where the article is found or what version is available, meaningful retrieval of relevant articles via Google or other search engines is dependent upon the assignment of accurate metadata, which often is supplied by the author or an assistant without the use of a standard vocabulary.

For legal scholarship, ideal open access would mean a free electronic copy of the final paper, which need not replace the existing print copy. Open access would not require a central repository for legal works. The legal community is accustomed to decentralized publishing, and electronic versions could be hosted by the individual law schools or at a central location. Wherever the electronic versions are, appropriate metadata tags should be assigned to each article to ensure adequate retrieval.

### The Role of Law Librarians

If open access changes legal publication, what role(s) will there be for law librarians? At the very least, we should now educate ourselves, our authors, and our communities about the pros and cons of open access. This role is entirely consistent with AALL's mission statement to "provide leadership in the field of legal information." Our role has always included encouraging debate about, and exposure to, new methods of storing and accessing legal information. We need to begin to consider what role we should have in helping to improve access to legal information through the assignment of metadata for electronically published articles. We also should begin to discuss

what other possibilities the future holds for the phenomenon of open access.

We librarians are in the best position to create awareness of open access issues in our own institutions and libraries. All law librarians should educate their constituencies about the benefits and possibilities offered by open access publishing.

In academic law libraries, the faculty authors themselves often are unaware of the benefits of electronic publication. Faculty must learn that it should not assign its copyright interests to the journals, which creates barriers to future distribution of published works. Faculty also needs to learn that removal of a working paper from an electronic resource because the law review editors object is not in their best interest.

Open access education should also address cultural barriers. Law faculty/authors are not paid by academic law journals, so they have no real financial interest in the print law reviews. Journal editors, however, fear the loss of royalties from commercial vendors and cancelled subscriptions. Law school administrators are concerned that electronic publication will increase costs and decrease the already insufficient revenue of the law review. The experiences of the journals at Duke Law School, which have been freely available in electronic form for the past seven years, have demonstrated that many of these fears are not borne out (see "Duke Law School Serious about Open Access" on page 4).

Our colleagues in university libraries have already undertaken educational efforts. Campus libraries have taken an active role in educating faculty about the impact that higher prices and copyright assignments have on the distribution of their scholarship. The "Winning Independence" Web site at the University of Pennsylvania provides faculty members with access to information about their copyright options with various publishers, model agreements, data about the cost of subscriptions compared with faculty salaries, and advice on how to promote faculty works in the best way while protecting the scholar's interests ([www.library.upenn.edu/scholcomm](http://www.library.upenn.edu/scholcomm)).

This educational mission includes educating ourselves. We hope that this

*Members' Briefing* starts the discussion. We have included URLs for various Web sites that provide additional discussion on open access (see "Open Access Web Site Resources" on this page). Perhaps the next step is to create our own educational Web site, following the model that university libraries have established for science faculties.

### Application of Metadata

By definition, open access is meant to improve electronic access. Having scholarship available electronically, however, does not necessarily mean it is easily retrievable. It is extremely important that standard, well-defined metadata tags for electronically published materials be developed, and law librarians must begin to discuss this issue. Retrieval is part of the traditional work of librarians and a task that we do better than others.

Is assigning metadata a new role for the library cataloger? Should we assign the metadata tags to our faculty's articles as they are locally published on the Web? If so, what controlled vocabulary should we use? Currently BePress asks authors or staff members to assign keywords selected from a list when they post a paper in the repository. The list of 150 topics uses subject headings from the *Current Index to Legal Periodicals*, which was designed for searching a small number of articles, not the thousands available in repositories on much more specific topics. We librarians should take responsibility for developing subject and authority control. We should be involved now and start examining what metadata is necessary. AALL should help to develop metadata for the libraries that want to implement standards.

Perhaps AALL should work with the major commercial indexers and the major repositories, such as SSRN and BePress, to ensure that the materials they post are indexed with standard terms. Unfortunately, that solution will not improve the retrieval of locally posted articles. Whatever system is used, we will need to work with our users, who increasingly seem unable to perform good searches.

### A Public Library of Law?

We have thus far avoided predictions about the future of print law journals. Looking into that crystal ball is not necessary in order to begin our current

## Open Access Web Site Resources

[www.lehigh.edu/library/guides/Openaccessresources.htm](http://www.lehigh.edu/library/guides/Openaccessresources.htm)

The "Non-Exhaustive List of Resources about Open Access Publishing" is in fact an extremely comprehensive one-stop location for links to OA Web sites, journals, and other information.

[www.earlham.edu/~peters/fos/overview.htm](http://www.earlham.edu/~peters/fos/overview.htm)

**Peter Suber** is a leader in this field, and anyone interested in it needs to follow his writings. He provides an overview and links to various resources on his site.

[www.firstmonday.org](http://www.firstmonday.org)

**First Monday** is an electronic journal publishing articles about the Internet. Although its primary focus is not open access, it has published several excellent articles about it and numerous library-related topics.

[www.plos.org](http://www.plos.org)

**The Public Library of Science** is a new venture seeking to provide a place for scientists to publish their research. Their goal is to make the research as widely available as possible.

[www.arl.org/sparc](http://www.arl.org/sparc)

**The Scholarly Publishing and Academic Resources Coalition** (SPARC) was developed by the Association of Research Libraries to address "dysfunctions in the scholarly publishing system," which includes supporting and promoting open access. A substantial number of our universities our members.

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work to make legal literature accessible in open access systems. For those who want to look further into the future, we will briefly raise the question of whether it is time to discuss the possibility of a public library of law, modeled on The Public Library of Science (PLOS). PLOS, a non-profit organization that publishes scientific scholarly literature in electronic form, is one of several responses from the scientific community to the open access movement. Public access is free. The downside is that the scholars, or their institutions, must pay a publishing fee. It has not yet been determined whether the current fee of \$1,500 per article is in fact sufficient to ensure the financial viability of PLOS.

What would a public library of law look like? Should we create one through new funding sources, which might in fact be an eventual home for other types of legal materials? Or should we turn to existing entities, such as SSRN and BePress, which already have some standing in the academic community? Should we continue to embrace the decentralized model and promote individual repositories at our respective schools? Can we rely upon local maintenance, and will retrieval be sufficient through well-developed metadata?

The AALL Open Access Task Force has just begun its work. There was a lively discussion held during the January meeting of the Association of American Law Schools, and several directors have already indicated that they will initiate

open access discussions in their schools. During the spring, we will continue to discuss educational efforts, metadata standards, and the possible role(s) for AALL and its individual members. In the meantime, we encourage you to educate yourself about this topic and let us know your thoughts. Please send any comments to Open Access Task Force Chair Paul George at [pmgoerge@law.upenn.edu](mailto:pmgoerge@law.upenn.edu).

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## Duke Law School Serious about Open Access

Duke Law School is not only the home of the Center for the Study of the Public Domain ([www.law.duke.edu/cspd](http://www.law.duke.edu/cspd)), but it actually practices what it preaches in promoting the values of open access to information. Prominent examples are seen in the projects undertaken by the Duke Law Library in cooperation with other law school departments to enhance access to scholarly information published at Duke. Among these projects are the following.

- Duke's six traditional law journals are all published simultaneously in print and on the Web. All articles in each journal have been openly available on the Duke Web site ([www.law.duke.edu/journals](http://www.law.duke.edu/journals)) since 1998, with coverage extending back to 1996 or 1997 for each journal. An all-electronic journal, the *Duke Law and Technology Review* has been published regularly since 2001. The *Directory of Open Access Journals* ([www.doaj.org](http://www.doaj.org)) lists only 30 open access journals in law; six are published at Duke Law School.
- Unlike some other law reviews, all Duke law journals explicitly allow authors to post articles published in the journals without restriction on third-party Web sites, such as SSRN or BePress, as well as on sites under their own control (as allowed under the language of the AALS model publication agreement).
- Although many Duke faculty members post their papers to SSRN and the law school sponsors an SSRN working papers series, the law library and Duke's technology departments (organized as Duke Law School

Information Services) have collaborated on the creation of an open repository of current and retrospective Duke law faculty scholarship (<http://eprints.law.duke.edu>). The repository will be used to provide full-text access to all faculty scholarship through online bibliographies, curriculum vitae, and other means, as well as to provide access to working drafts, conference presentations, theses, and other student works.

The success of these efforts suggests that there is much that individual law schools can do to promote open access to legal scholarship in conjunction with, or in some instances in place of, third-party services, such as SSRN and BePress. In addition, it demonstrates the benefits of ongoing collaboration between law school libraries and IT departments.