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Walled Gardens

Dan Hunter

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Abstract

The most significant recent development in scholarly publishing is the open-access movement, which seeks to provide free online access to scholarly literature. Though this movement is well developed in scientific and medical disciplines, American law reviews are almost completely unaware of the possibilities of open-access publishing models. This Essay explains how open-access publishing works, why it is important, and makes the case for its widespread adoption by law reviews. It also reports on a survey of law review publication policies conducted in 2004. This survey shows, inter alia, that few law reviews have embraced the opportunities of open-access publishing, and many of the top law reviews are acting as stalking horses for the commercial interests of legal database providers. The open-access model promises greater access to legal scholarship, wider readership for law reviews, and reputational benefits for law reviews and the law schools that house them. This Essay demonstrates how open-access comports with the institutional aims of law schools and law reviews, and is better suited to the unique environment of legal publishing than the model that law reviews currently pursue. Moreover, the institutional structure of law reviews means that it is possible that the entire corpus of law reviews could easily move to an open-access model, making law the first discipline with a realistic prospect of complete commitment to free, open access to all scholarly output.

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* Robert F. Irwin IV Term Assistant Professor of Legal Studies, Wharton School, University of Pennsylvania. Email: hunterd@wharton.upenn.edu. I am indebted to the very many editors from law reviews across the country who responded to my survey on open-access and internet publishing policies. Thanks to Bernie Black, Mike Carroll, Stevan Harnad, Mark Lemley, Larry Lessig, Pam Samuelson, and especially Peter Suber for comments and help on this project, and to Natalie Chaquinga for research assistance.

I. Introduction

In early November 2003, I received an email message from Jean Galbraith, then editor-in-chief of the *California Law Review*.[1] I had previously published two articles with the *California Law Review*, and I was in the final editing stage of another article with them. So I knew Ms. Galbraith and it was not strange to hear from her. But the content of her message was bewildering.

She referred to our publishing agreement, in which I had assigned my copyright in the three articles to the law review, in exchange for the promise of publication.[2] She informed me that as copyright holder of my articles, the law review had asked the Social Science Research Network (SSRN) to remove the draft articles that I had posted there.[3] SSRN is an organization that acts as a free online repository for scholarly papers in the social sciences.[4] Among other disciplines, it accepts scholarship in economics, management, finance, and, most importantly for my purposes, law.[5] Its role is not to be a publisher of material in the usual sense, but rather to act as a kind of clearinghouse for research.[6] It is free to the public to access, and it only charges research institutions a small fee for services like email updates, listings of working papers by institution, and so forth. Like almost every other scholar in my field,

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1. E-mail from Jean Galbraith to Dan Hunter (Nov. 7, 2003) (on file with the Washington and Lee Law Review).

2. *Id.*

3. *Id.*

4. *See* Social Science Research Network, *at* http://www.ssrn.com (last visited Nov. 16, 2004) (describing the purposes and goals of the Social Science Research Network) (on file with the Washington and Lee Law Review). The website states:

> Social Science Research Network (SSRN) is 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. . . . Each of SSRN's networks encourages the early distribution of research results by publishing submitted abstracts and by soliciting abstracts of top quality research papers around the world.

Id.

5. *Id.*

6. *See id.* (stating that SSRN seeks to create a network of specialized research and to encourage communication between subscribers and submitting authors).

I post draft articles to SSRN in order to gather comments from other scholars and to grant access to my ideas to anyone who might be interested.

The email from Ms. Galbraith indicated that the law review had a concern with my posting material to SSRN.[7] It stated that abstracts of my articles could remain on SSRN, but that full-text drafts of articles subsequently published by the *California Law Review* must be removed.[8] The message did not indicate why the board members of the *Review* thought this a good idea, but a hint as to why was found towards the end of the message. Ms. Galbraith suggested that, though the articles would not be available from SSRN, they would be available through a number of online subscriber databases, notably Westlaw, Lexis, and Hein Online.[9] Each of these databases charges readers a significant sum for access to my articles, unlike SSRN, which is free and publicly accessible.[10] These commercial databases remit a "royalty" of sorts back to the law reviews, based on the amount of money a given article makes them.[11] Ms. Galbraith kindly encouraged me to "direct interested readers" to the pay-per-view databases, rather than granting them free access to my articles through SSRN.[12]

At first I was angry, in part with the law review, but mostly with myself. I had blithely agreed to the publishing contract with the law review, assigning away my copyright in the articles without a concern in the world. Unlike some authors, I knew perfectly well what I was doing when I assigned the copyright. I did not seek to negotiate a lesser transfer of my interests because I did not want to jeopardize the offer of publication in a top ten law review. As an untenured faculty member, I accepted the risks of this sort of assignment in exchange for publication in a journal that would significantly help my tenure case. Older and wiser professors, I have subsequently discovered, have numerous means to avoid assigning copyright to law reviews. Sometimes they refuse to sign the contract at all, or they alter the contract wording at the last

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7. Galbraith, *supra* note 1.

8. *Id.*

9. *Id.*

10. SSRN does provide various services for subscribers on a fee-for-use basis, including emailing updates and establishing an institutionally branded "working papers" series for universities. The document database, however, is accessible on the web for absolutely no charge, and it requires no fee or registration either to search or download documents from its servers. Social Science Research Network, *supra* note 4.

11. *See* Bradley J. Martineau, *The Future of Law Reviews and Legal Journals from a Student Editor's Perspective*, 2 U. PITT. J. TECH. & POL'Y 1, 4 (2001), *at* http://www.pitt.edu/~sorc/techjournal/articles/Vol2,1MARTINEAU.pdf (estimating that the average law review receives $5000 to $10,000 in royalties from Lexis-Nexis and Westlaw) (on file with the Washington and Lee Law Review).

12. Galbraith, *supra* note 1.

minute and fail to alert the editors to the change. But beyond the fact that I was lazy and stupid, the main reason I did not object to the assignment of copyright was that I could not really imagine that the *Review*'s interests and my interests could, and would, diverge so markedly. If someone asked me at the time why I held this belief, I suppose I would have suggested that law reviews are not really commercial enterprises. They, like me, are engaged in the activity of research and scholarship and the publication of ideas for the wider benefit of all of society. Or so I thought.

Another part of my anger was more diffuse. I was angry that law reviews had apparently succumbed to a pernicious problem in scholarly publishing—that of restricting access to ideas in order to make a profit. I had seen this issue emerge in some of the scientific literature, and I was aware that there was a significant backlash against this trend in other fields. But I thought that law reviews were not like commercial publishers such as Elsevier or John Wiley, who were strangling research libraries with their restrictive approach to scholarly publishing.[13] Law reviews—I reasoned—are an integral part of law schools. Their editors are drawn from law students, they often have faculty advisors, and one of their primary roles is educational.[14] I thought that the unique character of United States scholarly legal publishing would insulate it from the cancer that had afflicted other forms of scholarly publishing. It was galling to be proved so wrong.

I wrote back to Ms. Galbraith, asking her *inter alia* why the review sought removal of the SSRN papers.[15] I also asked whether the *Law Review* had agreements with the commercial publishers that align the *Review*'s interests with the commercial publisher or that forbid posting in open repositories like SSRN.[16] Ms. Galbraith's response was admirably forthright. She explained the basis for the decision was not personal, just business:

> We get no funding from our law school (outside of space) and almost all our revenue comes from our contracts with electronic subscriber databases

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13. *See infra* Part II (discussing the opposing interests of scholarly institutions and publishing companies).

14. *See, e.g.*, Roger C. Cramton, *"The Most Remarkable Institution": The American Law Review*, 36 J. LEG. ED. 1, 8–9 (1986) (suggesting that the heavy burdens associated with publishing and editing law reviews have detracted from their actual educational value to student editors). Of course, they also have other roles, like improving editors' chances of getting a job. Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1132 (1995). But this aim is not necessarily inconsistent with the other observations or the values that I suggest are shared by law review editors and authors alike.

15. Email from Dan Hunter to Jean Galbraith (Nov. 7, 2003) (on file with the Washington and Lee Law Review).

16. *Id.*

> (e.g. Lexis), not from our print issues, and often on a "per hit" basis. That's the rationale behind our policy and our enforcement of it. Finally, in answer to your last question, right now, our contracts with the databases limit where we can permit posting of our articles, but this does not now apply to SSRN.[17]

One cannot place too much blame on the law review board for their decision. They were responding to the financial realities imposed upon them by their law school. The problem is that individual decisions by law schools, in asking their law reviews to be self-supporting, and by law reviews, in looking to commercial databases like Westlaw and Lexis for revenues, lead to the socially corrosive result that law review editors seek to stop free access to the work they publish. This result is not only socially retrograde but also directly against the various values shared by the people involved in law review publishing. Legal scholarship is written by authors who have no direct commercial interest in their writing, and who instead of seeking narrow, paid dissemination of their work, would much rather have the widest possible (unpaying) audience.[18] Equally, law reviews are edited by law students who also are unpaid—indeed, perversely, they are paying for the privilege of editing the work—and who also have an interest in furthering their reputations by having the widest possible audience access the work. And the law review is published either by a law school or by a nonprofit institution controlled by the law school, neither of which is in it for the money, and neither of which seek greater royalties at the expense of greater readership. Yet the commercial database providers have somehow managed to induce well-meaning editors like Jean Galbraith to do their dirty work. They have aligned the interests of the law review with enterprises that share none of their goals and that are bound by fiduciary obligations to their shareholders and therefore care only about the bottom line.

The practical effect of this is that legal scholarship is locked up inside the "walled gardens" of commercial databases. Only those who are able to pay for access to the databases can access the scholarship, and a huge number of potential readers—the public-at-large, scholars in other fields without access to commercial legal databases, independent scholars, and scholars at institutions that cannot afford the commercial databases—are walled off from important developments in legal literature. Thus scholarship in law, the social science

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17. Email from Jean Galbraith to Dan Hunter (Nov. 8, 2003) (on file with the Washington and Lee Law Review).

18. *See* Pamela Burdman, *A Quiet Revolt Puts Costly Journals on Web*, N.Y.TIMES, June 26, 2004, at B9 (stating that authors typically "want to publish [their] best work in well-established journals to have the widest possible penetration").

that is arguably the most useful to the public and that has the greatest effect on public policy, is locked away for a privileged few to read.

Yale law professor Fred Rodell famously reduced the problems with law review writing down to only two things: style and content.[19] Since then many have added to this list: law review editors are underqualified and unpleasant,[20] law professors lack the confidence to write in anything other than a mannered style,[21] and so on.[22] To this we may now add a new criticism: law reviews, the law schools that control them, and the law faculty who direct them, have failed in their duty to make legal scholarship as widely available as possible. Furthermore, they have failed to recognize the possibilities of the Internet and the movement in scholarly publishing to use the Internet to disseminate scholarship to the world at large.

As should be obvious, I think this is a terrible thing. So, this Essay is a manifesto in favor of open access to legal scholarship and a polemic against the

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19. Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936).

20. *See, e.g.*, Roger C. Cramton, *supra* note 14, at 7–9 (discussing various problems with student-edited law reviews, including lack of continuity of the board and the tendency of law reviews to require excessively detailed citations); James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527, 537–39 (1994) (labeling the law review system as profoundly broken and listing numerous suggestions for reform of law reviews); James Lindgren, *Fear of Writing*, 78 CAL. L. REV. 1677, 1680–94 (1990) (criticizing the *Texas Law Review Manual on Style* that is commonly used by law reviews); Leo P. Martinez, *Babies, Bathwater, and Law Reviews*, 47 STAN. L. REV. 1139, 1140 (1995) (detailing how editors become arrogant); Juan F. Perea, *After Getting to Yes: A Survival Guide for Law Review Editors and Faculty Writers*, 48 FLA. L. REV. 867, 870–71 (1996) (explaining the dynamic that leads to over-editing by law review editors). *But see generally* Phil Nichols, Note, *A Student Defense of Student Edited Journals: In Response to Professor Roger Cramton*, 1987 DUKE L.J. 1122 (defending student-edited law reviews against Cramton's charges).

21. *See* Ann Althouse, *Who's to Blame for Law Reviews?*, 70 CHI.-KENT L. REV. 81, 82 (1994) (suggesting that law professors' concern at writing in a recognizable "law review" style leads authors and editors to render the articles parodies of this style); Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 932–37 (1990) (suggesting that the stale nature and style of law review articles are caused by the pressure to publish).

22. Law professors are rarely more trenchantly critical than when discussing the injustices, stupidity, or inefficiencies of the law review process in general, or law review editors specifically. Of course, with the exception of Richard Posner, they rarely do anything to change the system. For accounts of the problems with law reviews, see, for example, Arthur D. Austin, *The "Custom of Vetting" as a Substitute for Peer Review*, 32 ARIZ. L. REV. 1, 4 (1989) (arguing that using student-edited law reviews as the primary mode of scholarship in law is deserving of the disdain it attracts from other disciplines); Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615, 628–54 (1996) (summarizing and assessing the majority of complaints against law reviews); Gerald N. Rosenberg, *Across the Great Divide (Between Law and Political Science)*, 3 GREEN BAG 2d 267, 270–71 (2000) (describing the advantages of peer-review over student-editing).

walled gardens of law reviews. I want to make the case here that law reviews should provide free, public access to all their articles. Moreover, I want to demonstrate that they can do so without destroying their fundamental financial position. Finally, I want to show how law can lead the way by being the first discipline that has a realistic possibility of providing free access to all of its scholarly literature.[23]

In order to make this case, Part II examines the open-access movement in scholarly publishing generally, and further explains how it came to exist, what it stands for, and how it operates. Part III then examines how open-access models might apply to law review publishing, and how legal scholarly publishing differs from other types of scholarly publishing. This Part also reports on a 2004 survey of law review publication policies. This survey of law reviews at all ABA-accredited law schools demonstrates that law reviews are a long way behind other disciplines in adopting open access but that they are funded in a way that is consistent with open-access approaches.

II. The Rise of the Open-Access Movement

> It is a depressingly familiar story. A group of medics in Indonesia search medical literature in preparation for a study. They want to arm themselves with as much knowledge as possible, so that their own research will build on previous work. But when they go online to access the crucial articles, they are out of luck: reading the papers requires exorbitant pay per view or journal subscription fees which they cannot afford.[24]

Scholarly journal publishing—especially in the scientific, technical, and medical fields—differs from other types of publishing. For a start, the authors, editors, and readers are connected more closely than in other markets because they are engaged in an extended discussion that involves them all. To advance knowledge, one has to keep up with the state of current knowledge. Like other authors seeking professional publishing, scientists write articles for each other to read, but unlike other professional publishing fields, the scientists also provide the editorial services to decide whether an article is worth publishing.[25]

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23. Physics is close to being there already, with its Arxiv.org e-Print archive. Arxiv.org e-Print Archive, *at* http://www.arxiv.org (last visited Nov. 17, 2004) (on file with the Washington and Lee Law Review). However, this only archives preprint publications; the possibilities for law are greater, as described *infra* at Part III.

24. Dan Engber et al., *Who Should Own Medical Knowledge*, STUDENT BMJ, *at* http://www.student bmj.com/issues/0904/editorials/310.html (last visited Nov. 12, 2004) (on file with the Washington and Lee Law Review).

25. *See* Effie J. Chan, Note, *The "Brave New World" of Daubert: True Peer Review,*

As contrasted with popular magazine publishing, scholarly publishing does not involve professional commissioning editors who decide whether an article is interesting, well written, or timely. Though scholarly journals often have professional copy editors who take responsibility for layout and sub-editing tasks, scholarly articles will be assessed, critiqued, and chosen by expert scholars in the field.[26] It is therefore not uncommon for a scholar to be author, reader, and editor of professional scholarship, all in the space of a single day.[27]

These scholars are typically employed by universities or related research institutions, which effectively donate the services of the scholars as part of their commitment to research. These institutions are also the largest purchasers of the scholarly journals because, of course, their scholars need the journals to be able to keep up with advances in research and thereby contribute to further advances.[28] However, although these institutions pay the salaries of the readers and editors of the journals, and they buy the majority of journals, they usually do not publish the journals. These days, large commercial publishers own the majority of research journals.[29] And this sort of publishing is big business: In scientific, technological, and medical publishing there are approximately 2000 publishers who control about 16,000 titles, publishing 1.2 million articles per year.[30] Although these journals exist, ostensibly, so that knowledge might be advanced, the publishers are motivated by the bottom line.

This arrangement leads to a potential mismatch between the values and interests held by the scholars and those of the publisher. Scholars seek the widest possible distribution and impact of scholarly work, while the publishers seek the greatest possible return on their investment. It is possible to theorize markets where these interests will perfectly coincide, but in the real world the interests are often misaligned. One of the most important reasons for this is that the journal market is not perfectly competitive. Some journals have higher

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Editorial Peer Review and Scientific Validity, 70 N.Y.U. L. REV. 100, 119–20 (1995) (discussing role of referees in editorial peer review in scientific journals).

26. *Id.*

27. *See* Burdman, *supra* note 18 (stating that faculty write, review, and edit articles for publishers like Elsevier).

28. Pamela Bluh, *Perception Versus Reality: Electronic Data Interchange in the Law Library Environment*, 93 LAW LIBR. J. 269, 273 (2001) (stating that "in academe in general, libraries are among the largest buyers of scholarly material").

29. *See* Kent Milunovich, *Issues in Law Library Acquisitions: An Analysis*, 92 LAW LIBR. J. 203, 207 (2000) (stating that a few legal publishing companies dominate the market and are insulated from competition by copyright protection).

30. *Access All Areas*, THE ECONOMIST, Aug. 5, 2004, at 64–65, *available at* http://www.economist.com/science/displaystory.cfm?story_id=3061258 (on file with the Washington and Lee Law Review).

prestige than others. As a result, the most significant articles get published in these journals because senior scholars' reputations are enhanced, and young researchers' tenure cases are made, by publication in *The Lancet* or *Science* or *Nature*.[31] Because the most important research is published in these journals, the market is not competitive; all researchers in these fields need access to prestigious journals, and there is little opportunity for competitors to unseat those journals at the top. So publishers charge supra-competitive rents. The canonical example of this is a journal called *Brain Research*, a journal published by the scholarly publishing conglomerate, Reed-Elsevier. A single subscription costs $21,269 per year.[32]

Scholarly publishing is a quite remarkable market indeed, where the suppliers of the basic product, the authors and editors, provide their content and services for free to commercial publishers, who are then able to extract monopoly rents from the same group of individuals who provided the content in the first place. There are many troubling social costs of this peculiar system: the public pays multiple times for the scholarly product,[33] researchers from the developing world are incapable of accessing and contributing to scholarly knowledge,[34] and student tuition is unfairly inflated in a fruitless effort to keep research programs and libraries afloat.[35]

But even in the absence of rising prices, it is important to understand that the system of scholarly publishing faces a crisis brought about by its own success. Simply put, published knowledge is growing inexorably. Though nobody questions that this growth is a good thing, the practical effect is that even if journals only cost a reasonable amount, this growth would eventually break budgets and cause access problems. Of course, the monopoly rents extracted by top journals have focused attention on the problem earlier than it

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31. *Id.*

32. Burdman, *supra* note 18.

33. *See* Peter Suber, *The Credit Suisse Report*, FOS NEWSLETTER, *at* http://www.earlham.edu/~peters/fos/newsletter/05-03-04.htm#creditsuisse (May 3, 2004) ("Taxpayers and governments pay for scientific journal research three times over: (1) through research grants to scientists, (2) through university subsidies that pay the salaries of researchers, editors, and referees, and (3) through university subsidies that pay for journal subscriptions.") (on file with the Washington and Lee Law Review).

34. *See, e.g.*, Engber et al., *supra* note 24 (suggesting that medical researchers in developing countries cannot afford to access current research).

35. *See* Ass'n of Research Libraries, *Framing the Issue—Open Access*, *at* http://www.arl.org/scomm/open_access/framing.html (last visited Nov. 12 2004) (stating that journal subscription prices increased three times the rate of inflation between 1986 and 2001) (on file with the Washington and Lee Law Review).

might otherwise have been found. But the fact remains that hard-copy publishing of scholarly work simply does not scale.[36]

The huge increases in the price of some scholarly journals have led to a backlash, especially from universities whose library budgets simply cannot keep pace with the inflationary pricing schemes of the commercial publishers.[37] So institutions such as the University of California,[38] Harvard,[39]

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36. Peter Suber, *The Scaling Argument*, SPARC OPEN ACCESS NEWSLETTER, *at* http://www.earlham.edu/~peters/fos/newsletter/03-02-04.htm#scaling (Mar. 2, 2004) (suggesting that current methods of "disseminating knowledge" do not "keep pace with the rate of discovery and publication") (on file with the Washington and Lee Law Review).

37. *See* Milunovich, *supra* note 29, at 203 ("During the period from 1973 to 1996, for example, when the Consumer Price Index showed an increase of 253 percent, the average cost of legal serials rose 495 percent.").

38. *See, e.g.*, Letter from Lawrence Pitts, Chair of the Academic Senate and Head Librarian of the eleven University of California campuses, to all University of California faculty (Jan. 7, 2004) (announcing cancellation of 200 journals and urging change in scholarly publishing system), *available at* http://libraries.universityofcalifornia.edu/news/facmemo scholcomm_010704.pdf (on file with the Washington and Lee Law Review); *see also* University of California at Berkeley, *Journal Prices and Scholarly Communication*, Memorandum from Thomas Leonard, Anthony Newcomb, and Elaine Tennant, Co-Chairs of the Academic Senate Library Committee, to the Academic Senate Faculty, *at* http://www.earlham.edu/~peters/fos/lists.htm#actions (last visited Nov. 13, 2004) (announcing the cancellation of an undisclosed number of journals and urging faculty to "[s]ubmit papers to quality journals that have reasonable pricing practices") (on file with the Washington and Lee Law Review). Specifically, the memorandum urged faculty to:

> Modify any contract you sign with a commercial publisher to ensure that you retain the rights to use your work as you see fit, including posting it to a public archive. Consider declining offers to review for unreasonably expensive journals and to serve on their editorial boards.

Id.; *see also* University of California at Santa Cruz, *Resolution on Ties with Elsevier Journals*, adopted by the Committee on the Library (Oct. 8, 2003) (urging faculty to sever ties with Elsevier), *available at* http://senate.ucsc.edu/col/res.1405.pdf (on file with the Washington and Lee Law Review). The letter stated in part:

> [T]he UCSC Academic Senate resolves to call upon its tenured members to give serious and careful consideration to cutting their ties with Elsevier: no longer submitting papers to Elsevier journals, refusing to referee the submissions of others, and relinquishing editorial posts. The Senate also calls upon its Committee on Academic Personnel to recognize that some faculty may choose not to submit papers to Elsevier journals even when those journals are highly ranked.

Id.; *see also* University of California at San Francisco, *Challenges to Sustaining Subscriptions for Scholarly Publications*, Memorandum from Karen Butter, University Librarian, Leonard Zegans and David Rempel, Co-Chairs of the Committee on Library, to all UCSF faculty (Nov. 1, 2003) (noting the unsustainable nature of academic publishing and urging faculty to consider other publication models), *available at* http://www.ucsf.edu/ senate/2003-2004/ASO-11-01-03-Publications.pdf (on file with the Washington and Lee Law Review).

39. Letter from Sidney Verba, Director of University Library, to Harvard Faculty, *at* http://hul.harvard.edu/letter040101.html (Dec. 9, 2003) (announcing cuts in journals from Elsevier, and noting that, with respect to academic publishing, "Harvard is changing the ways in

and Cornell[40] have cancelled subscriptions, announced boycotts of some publishers, and urged their faculty to avoid any involvement with certain expensive journals and publishers.[41] But more than this, the price gouging by some commercial publishers has sped the growth of what is called the "open-access" movement. "Open access" is the label for the principle that scholarly publishing should be freely available to everyone, without charge, political censorship, or commercial interference.[42] The idea is, in short, to provide a publicly accessible and useable commons of scholarly literature for everyone. As one of the leading documents of this movement explains:

> Removing access barriers to this literature will accelerate research, enrich education, share the learning of the rich with the poor and the poor with the rich, make this literature as useful as it can be, and lay the foundation for uniting humanity in a common intellectual conversation and quest for knowledge.[43]

The basic idea is that all scholarly work should be made available on the Internet, for free, in a format that allows all to read it without restriction. In pursuing this goal, open access relies on a number of structural features of scholarly publishing. First, researchers and authors publish their work without any expectation of royalties or payment directly from the authorial output.[44] Authors therefore have no interest in seeking direct economic return from the

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which it does business.") (on file with the Washington and Lee Law Review).

40. Cornell University, *Resolution Regarding the University Library's Policies on Serials Acquisitions, with Special Reference to Negotiations with Elsevier*, adopted by the Faculty Senate, *at* http://www.library.cornell.edu/scholarlycomm/resolution.html (Dec. 17, 2003) (expressing the Senate's endorsement of the Library's decision to withdraw from Elsevier's publication pricing models and the cancellation of subscriptions) (on file with the Washington and Lee Law Review).

41. Many other institutions have taken similar actions. *See* Peter Suber, *Lists Related to the Open Access Movement*, *at* http://www.earlham.edu/~peters/fos/lists.htm#actions (last visited Nov. 16, 2004) (listing various actions taken by universities in response to rapidly increasing prices of journal subscriptions) (on file with the Washington and Lee Law Review).

42. *See generally Bethesda Statement on Open Access Publishing*, *at* http://www.earlham.edu/~peters/fos/bethesda.htm (June 20, 2003) [hereinafter *Bethesda Statement*] (on file with the Washington and Lee Law Review); Conference on Open Access to Knowledge in the Sciences and Humanities, *Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities*, *at* http://www.zim.mpg.de/open access-berlin/berlindeclaration.html (Oct. 22, 2003) [hereinafter *Berlin Statement*] (on file with the Washington and Lee Law Review); Open Society Institute, *Budapest Open Access Initiative*, *at* http://www.soros.org/openaccess/read.shtml (Feb. 14, 2003) [hereinafter *Budapest Initiative*] (on file with the Washington and Lee Law Review).

43. *Budapest Initiative*, *supra* note 42.

44. *See id.* (stating that open access should include "that which scholars give to the world without expectation of payment" that "encompasses their peer-reviewed journal articles").

work,[45] and instead seek only the widest possible distribution for their work and their ideas. Second, the editorial selection process that vets the quality of the work is also controlled by scholars and underwritten by the scholarly research system. Finally, there is now the technology to provide access to scholarly literature on a vast scale for next-to-no cost.[46] As has been obvious for more than a decade,[47] the Internet offers an extremely cheap means of disseminating literature across the globe, and as Google has demonstrated more recently, search engines can now consistently find relevant research. As a result, scholarly publishing represents a publishing environment that is less costly than many other arenas (which, of course, makes the inflationary pricing schemes of commercial publishers a cruel irony). Moreover, the public goods characteristics of a broad, freely available corpus of ideas and scholarly literature are such a compelling prospect that a large number of people are prepared to dedicate time and effort to develop open access as an alternative to commercial publishing models.[48]

In a series of manifestos[49] and events, various scholars, research institutions, and professional societies have dedicated themselves to open-access principles and the provision of free, online access to scholarly literature.[50] Of course, as has been noted in a related context, we might mean

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45. Of course the authors are paid through their positions in research institutions that support the production of scholarly literature.

46. *See* Burdman, *supra* note 18 (reporting the creation of a free, online, peer-reviewed journal of scientific papers).

47. *See, e.g.*, Stevan Harnad, *Scholarly Skywriting and the Prepublication Continuum of Scientific Inquiry*, 1 PSYCHOL. SCI. 342, 342 (1990) (stating that posting papers online will allow authors to receive interactive feedback from colleagues before publication); Hibbitts, *supra* note 22, at 680–82 (1996) (discussing online publications as an alternative to traditional journals); Richard A. Lanham, *The Electronic Word: Literary Study and the Digital Revolution*, 20 NEW LITERARY HIST. 265, 283–84 (1989) (suggesting that online publications would be less expensive, more accessible, and less selective than traditional journals); N. David Mermin, *Publishing in Computopia*, PHYSICS TODAY, May 1991, at 9–11 (advocating for the publication of scientific papers on online bulletin boards to allow individuals to access and assess the validity of the published work in a timely manner); Sharon J. Rogers & Charlene S. Hurt, *How Scholarly Communication Should Work in the 21st Century*, CHRON. HIGHER EDUC., Oct. 18, 1989, at A56 (proposing the creation of an electronic network for the publication of academic papers).

48. The best known initiatives (of many) include the Scholarly Publishing and Academic Resources Coalition, which is available at http://www.arl.org/sparc/, and Public Knowledge, which can be found at http://www.publicknow ledge.org/.

49. *See supra* note 42 and accompanying text (discussing official statements made in support of open access).

50. The requirements of "free" and "online" are defined in a number of these documents. For example, the *Bethesda Statement* defines an open-access publication as one that satisfies the following two conditions:

"free" as in "free beer" or "free" as in "free speech."[51] Open-access advocates argue that both concepts are possible here—the reader might be free to read any content she likes for no cost[52]—but recognize that the online dissemination of scholarly content comes at some cost and also requires changes to our typical understanding of how publication works. These advocates suggest that open access can be divided into two different approaches.[53] The first approach can be seen as "minimally invasive" and is called "open-access archiving."[54] The

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1. The author(s) and copyright holder(s) grant(s) to all users a free, irrevocable, worldwide, perpetual right of access to, and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship, as well as the right to make small numbers of printed copies for their personal use.

2. A complete version of the work and all supplemental materials, including a copy of the permission as stated above, in a suitable standard electronic format is deposited immediately upon initial publication in at least one online repository that is supported by an academic institution, scholarly society, government agency, or other well-established organization that seeks to enable open access, unrestricted distribution, interoperability, and long-term archiving (for the biomedical sciences, PubMed Central is such a repository).

Bethesda Statement, *supra* note 42 (footnotes omitted).

51. This is an aphorism usually credited to Richard Stallman: "'Free software' is a matter of liberty, not price. To understand the concept, you should think of 'free' as in 'free speech,' not as in 'free beer.'" Richard Stallman, GNU Project, *The Free Software Definition*, *available at* http://www.gnu.org/philosophy/free-sw.html (on file with the Washington and Lee Law Review); *see also* LAWRENCE LESSIG, THE FUTURE OF IDEAS 12 (2001) (stating that a resource is "'free' if (1) one can use it without the permission of anyone else; or (2) the permission one needs is granted neutrally").

52. Peter Suber, *How Should We Define 'Open Access'?*, SPARC Open Access Newsletter, *at* http://www.earlham.edu/~peters/fos/newsletter/08-04-03.htm (Aug. 4, 2003) #define (positing that for an article to be open-access it must be (1) free of unnecessary licensing restrictions, so that there is unrestricted reading, downloading, copying, sharing, storing, printing, searching, linking, and crawling; and (2) free from filters and censors, because, as scholarship becomes online scholarship, the right to visit any site becomes a critical component of academic freedom) (on file with the Washington and Lee Law Review); Peter Suber, *Praising Progress, Preserving Precision*, SPARC Open Access Newsletter, *at* http://www.earlham.edu/~peters/fos/newsletter/09-02-04.htm#progress (Sept. 2, 2004) (on file with the Washington and Lee Law Review).

53. *See, e.g.*, Peter Suber, *Open Access Overview*, *at* http://www.earlham.edu/~peters/fos/overview.htm (Nov. 9, 2004) (comparing open-access archives with open-access journals) (on file with the Washington and Lee Law Review).

54. *See* Stevan Harnad et al., *The Access/Impact Problem and the Green and Gold Roads to Open Access*, 2004 SERIALS REVIEW 30 (stating that articles in open-access archives are cited more frequently than articles contained solely in traditional journals), *available at* http://www.ecs.soton.ac.uk/~harnad/Temp/impact.html (on file with the Washington and Lee Law Review); Stevan Harnad et al., *The Green and the Gold Roads to Open Access*, NATURE WEB FOCUS (2004) (stating that articles posted to open-access archives are cited two to five times

idea here is not to challenge the business models of existing commercial publishers that still produce published editions of the articles. Instead, upon publication, the author archives the article in a free-to-all electronic repository.[55] This approach fulfills the open-access requirement that the literature be made free online to all.[56] The initial response of the publishers to open-access archiving, however, was lukewarm. They assumed that free online versions of these works would be substitutes for the published editions and that subscriptions to the journals, and especially individual access to online editions, would fall. This fear has been largely laid to rest, as publishers have discovered that the free versions are not competing with various for-payment versions.[57] Indeed, giving away free electronic versions is increasingly being seen as a smart way of driving purchases of hardcopy editions, even in traditional fiction and nonfiction markets.[58] Lawrence Lessig's recent book, *Free Culture*, is available as a free download and has been downloaded more than 180,000

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more often than pay-to-access articles), *available at* http://www.nature.com/nature/focus/accessdebate/21.html (on file with the Washington and Lee Law Review).

55. *See* Suber, *supra* note 53 (discussing the process of open-access archiving). The nature of what amounts to an open-access repository is open to discussion. Usually the possibilities are given as (1) the author herself; (2) the research institution for whom the author works or which funded the research (such as PubMed Central, the biomedical repository maintained by the National Institute of Health, which is available at http://www.pubmedcentral.nih.gov/); and (3) some other organization that hosts the content as an open-access repository (such as Social Science Research Network, which is available at http://www.ssrn.org).

56. It should be noted that the motives behind the use of open-access archives differ. Some archives and posting are intended to be disruptive of existing models. The most compelling argument for it, however, is that it delivers open access at a very low cost and fuss, and does not require journals to change their approaches. For many scholars, open-access archives are the only option because there are no open-access journals in their field. For other scholars, there might be open-access journals in the field, but they might be low-prestige or charge high processing fees.

57. *See* Peter Suber, *Elsevier Permits Postprint Archiving*, SPARC OPEN ACCESS NEWSLETTER, *at* http://www.earlham.edu/~peters/fos/newsletter/06-02-04.htm#elsevier (Feb. 6, 2004) (stating that Elsevier changed its policy to allow online postprint publication, but only on an author's website and not online repositories) (on file with the Washington and Lee Law Review). The experience of high-energy physics is instructive, as close to 100% of this field engages in open-access archiving without undermining subscription journals. *See* Peter Suber, *NIH Open Access Plan—Frequently Asked Questions*, *at* http://www.earlham.edu/~peters/fos/nihfaq.htm#subscribers (last visited Nov. 18, 2004) (stating that although in physics "nearly 100% of new articles are freely available from birth in an open-access archive, subscription-based journals have continued to thrive") (on file with the Washington and Lee Law Review).

58. *See* Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 1003–05 (2004) (discussing how dissemination on the Internet is affecting copyright), *available at* http://papers.ssrn.com/sol3/papers.cfm?abtract_id=601808 (on file with the Washington and Lee Law Review).

times, but even so, the hardback print edition published by Penguin is in its third print run.[59] Recognizing that open-access archiving is not inconsistent with continued profits in scholarly publishing, the gigantic Reed-Elsevier publishing company announced that it would permit open-access self-archiving of 1800 of its scholarly journals.[60] Governments are also increasingly looking to encourage open-access archiving. Britain's House of Commons Science and Technology Committee recently engaged in a long investigation of problems in scholarly publishing and endorsed open-access archiving as a priority.[61] Closer to home, in July 2004, the United States House Appropriations Committee adopted recommendations mandating open access to any research funded by the National Institutes of Health.[62] The proposal was recently endorsed by twenty-five Nobel Laureates[63] and the National Academy of Sciences.[64]

Another approach—complementary to open-access archiving but requiring greater changes in publication policies—involves completely open-access publishing and the creation of open-access journals. These journals are usually available in electronic form, although there are some variants,[65] and do not rely on the traditional commercial publishing paradigm to underwrite the electronic

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59. *Give It Away and They'll Buy It*, STANFORD MAGAZINE, July/August 2004, *available at* http://www.stanfordalumni.org/news/magazine/2004/julaug/farm/news/lessig.html (on file with the Washington and Lee Law Review). It should be noted that the business model for books is different than for journals, but the principle is the same.

60. *See Elsevier Permits Postscript Archiving*, SPARC OPEN ACCESS NEWSLETTER, *at* http://www.earlham.edu/~peters/fos/newsletter/06-02-04.htm#elsevier (June 2, 2004) (announcing Elsevier's decision to allow postscript, open-access archiving) (on file with the Washington and Lee Law Review). The policy announced by Elsevier only allows postprint self-archiving under certain conditions.

61. *See* Science and Technology Committee, Fourteenth Report, 2003–2004, Cmnd. 1200 (discussing the unfavorable response of the government of the United Kingdom to the committee's recommendation to develop open-access archiving), *available at* http://www.publications.parliament.uk/pa/cm200304/cmselect/cmsctech/399/39902.htm (on file with the Washington and Lee Law Review).

62. *See* H.R. REP. NO. 108-636, at 2 (2004) (discussing the distributions that would be given to various governmental health agencies), *available at* http://thomas.loc.gov/cgi-bin/cpquery/?&db_id=cp108&r_n=hr636.108&sel=TOC_338641&.

63. Letter from 25 Nobel Prize Laureates to Members of Congress (Aug. 26, 2004), *available at* http://www.fas.org/sgp/news/2004/08/nobel082604.pdf (on file with the Washington and Lee Law Review); *see, e.g.*, Dan Vergano, *Scientists Want Research Papers Freely Available*, USA TODAY, Aug. 29, 2004 (noting the interest of Nobel Laureates in the issue of open access), *available at* 2004 WL 58563400.

64. Council of the National Academy of Sciences, *Enhanced Public Access to NIH Research Information*, *at* http://www4.nationalacademies.org/news.nsf/isbn/s09162004?OpenDocument (Sept. 16, 2004) (on file with the Washington and Lee Law Review).

65. Both the Public Library of Science and BioMed Central, the two largest open-access publishers, provide hardcopy versions of their articles at cost.

version. Because they are defined by being free to readers,[66] these journals require a different type of business model to support themselves. The model here typically involves some form of direct subsidy from the author, or more often from the author's research grant funding source or her research institution. The best known example of this is the Public Library of Science,[67] which publishes *PLoS Biology*.[68] *PLoS Biology* only publishes research that is exceptional, and it has published articles that would otherwise have been published in *Science* or *Nature*.[69] An article for this journal passes through the usual refereeing process, and once it is accepted for publication, the author or author's sponsor pays about $1500 for the publication costs, including the cost of editing, running the servers, and so forth.[70] Payment by the author or author's sponsor ensures that the work is free to the reader. The Public Library of Science has attracted some extraordinary articles and continues to go from strength to strength. Indeed, the whole open-access journal movement is flourishing; at least 1220 open-access peer-reviewed journals currently are listed on Lund University's *Directory of Open Access Journals*.[71]

Although the open-access movement was galvanized by the price gouging of commercial scientific publishing, it is not really about the money. Rather, it is an appeal to authors to make their scholarship freely available, as well as an appeal to publishers not to interfere in this process and to put their publications online.[72] The open-access movement in scientific, technological, and medical

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66. *See, e.g.*, Peter Suber, *Editorial Position of the SPARC Open Access Newsletter*, SPARC Open Access Newsletter, *at* http://www.earlham.edu/~peters/fos/index.htm#author consent (last visited Nov. 14, 2004) (defining free and open access to scholarship) (on file with the Washington and Lee Law Review).

67. The Public Library of Science, *at* http://www.publiclibraryofscience.org/ (last visited Feb. 21, 2005) (on file with the Washington and Lee Law Review). According to its website, "[t]he Public Library of Science (PLoS) is a non-profit organization of scientists and physicians committed to making the world's scientific and medical literature a freely available public resource." *Id.*

68. PLoS Biology may be viewed at http://www.plosbiology.org/plosonline/. PLoS began with its Biology journals and is now adding new titles; it began publishing *PLoS Medicine* on October 19, 2004. For an account of the significance of PloS, see SPARC News, *Organizations Laud Innovative Open Access Publishing Venture*, *at* http://www.arl.org/sparc/announce/100903.html (Oct. 15, 2003) (on file with the Washington and Lee Law Review).

69. Burdman, *supra* note 18.

70. *See* PLoS Biology, *PLoS Biology Guidelines for Authors*, *at* http://www.plosbiology.org/plosonline/?request=get-static&name=guidelines (last visited Nov. 14, 2004) (explaining PLoS's publication requirements) (on file with the Washington and Lee Law Review).

71. Lund University Libraries, *Directory of Open Access Journals*, *at* http://www.doaj.org/ (last visited Nov. 14, 2004) (on file with the Washington and Lee Law Review).

72. *See* Suber, *supra* note 53 (noting to whom open-access publishing is attempting to appeal and for what purpose it exists).

publishing has already led to a number of positive outcomes: reduction in costs to libraries for these journals, a greater commitment to free access to readers, and even for the prospect of realistic alternatives to the business model of commercial scholarly publishing.[73] The movement is extremely robust and is gaining in force every day. The rise of the movement raises two questions: (1) how might this movement apply to legal scholarly publishing?; and (2) why is open access virtually unknown in legal scholarly circles?

III. Open Access and Law Reviews

The next decade could witness the end of the law review as we know it.[74]

The nature of scholarly legal publishing is different than scientific, technological, and medical publishing, and this difference probably explains how law reviews can remain unaware of the changes that are happening so fast in other areas of scholarly publishing. Subscription prices for law reviews are extremely low,[75] and there are no reviews that can easily impose supra-competitive prices for access to their journals. It is possible that those journals nationally considered the most prestigious—*Harvard Law Review*, say, or *Yale Law Journal*—could raise their prices to extortionate levels. Because they are controlled by their respective law schools[76] and not run by commercial

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73. *See* Peter Suber, *The SPARC Open Access Newsletter*, *at* http://www.earlham.edu/~peters/fos/newsletter/09-02-04.htm (Sept. 2, 2004) (discussing the benefits associated with open-access publishing) (on file with the Washington and Lee Law Review).

74. Hibbitts, *supra* note 22, at 616.

75. A sample of the subscription rates of the main law reviews from the top twenty schools, as nominated by *U.S. News and World Report*, shows a range between $40 per annum (*New York University Law Review*, *UCLA Law Review*, and *Minnesota Law Review*) and $55 per annum (*Harvard Law Review* and *Yale Law Journal*). The median price of these twenty reviews is $45. (Data from subscription rates quoted on law review web sites).

76. In common with a number of other law reviews, both of these journals have a degree of independence from their law schools and are published by nonprofit organizations affiliated with the school. For example, "[t]he *Harvard Law Review* is a student-run organization whose primary purpose is to publish a journal of legal scholarship . . . . The organization is formally independent of the Harvard Law School." Harvard Law Review, *About the Law Review*, *at* http://www.harvardlawreview.org/about.shtml (last visited Nov. 14, 2004) (on file with the Washington and Lee Law Review). However, their independence extends to day-to-day decisions and seems to exist mostly so that student editors may refuse to publish the work of their own faculty. *See* Hibbitts, *supra* note 22, at 645–46 (discussing the independence of student editors on law reviews). There is no doubt that long-term pricing and access decisions that cast the law school in a bad light would reveal the degree to which "formally" independent law reviews are controlled by the law school. For an explanation of the process by which law reviews gained their independence, see Hibbitts, *supra* note 22, at 634–35.

publishers, however, there is little likelihood that they would seek to capitalize on their commercial position. In any event, publication in these reviews, although prestigious, does not carry the same kind of imprimatur conferred by top ranked science journals, and there is not the same kind of crowding of fundamental research in a few top-ranked journals. *Harvard Law Review* and *Yale Law Journal* are not in a position to demand supra-competitive rents. If these law reviews sought to charge the kind of prices demanded by *Brain Research*[77] or *The Journal of Comparative Neurology*,[78] a law librarian could cut the titles without causing overwhelming concern to the library's users. It would be regrettable not to have access to these journals, but for the most part, a legal scholar could still contribute to scholarship without consulting them.[79]

Yet although law review subscription prices do not provide the same impetus to alternative publication models as the prices of scientific or medical publishing, the underlying motivation of the open-access movement applies to law. That is, there is an enormous benefit to the public in granting the free, unfettered access to scholarly work. Indeed, this justification is stronger in legal publishing than in many other disciplines because law is a discipline that directly affects the structure of our society. Public access to legal scholarship can only generate a more informed and reflective society. Moreover, legal writing in American law reviews is unusually readable for the lay reader; perhaps as a result of writing both for experts and for student editors, legal scholars in America are obliged to make their arguments clear and understandable for a wide audience.[80] Additionally, it is evident that there is a public audience for legal scholarship. Articles deposited in the publicly accessible SSRN are regularly mentioned in web blogs and commentary sites. For example, in the area of cyberspace law and policy, there is significant interest in legal scholarship by computer programmers and analysts. Whenever a cyberlaw paper on SSRN is picked up by Slashdot,[81] the "news for nerds"

77. A subscription to *Brain Research* is $21,269 per year. *Supra* note 32 and accompanying text.

78. The price in 2002 was $16,995 per year. *See* Association of Research Libraries, *High Priced Journals*, *at* http://db.arl.org/journals/FMPro (last modified Feb. 12, 2004) (listing prices for subscriptions to a number of scientific journals) (on file with the Washington and Lee Law Review).

79. Of course, these journals are available in electronic form from Lexis and Westlaw. For the moment I want to bracket any discussion of these databases. They are considered *infra* at notes 127–34 and accompanying text.

80. *See* Nichols, *supra* note 20, at 1130 (promoting the student-edited law review because they are less specialized and can appeal to a wider audience). *But see* Lindgren, *supra* note 20, at 527–30 (stating that student editors are unsuited for the jobs they face due to lack of understanding and lack of specialization).

81. Slashdot is a website that provides a forum for discussing various topics concerning

site, the downloads spike into the thousands within the space of a few days.[82] In other domains, a significant number of SSRN's legal articles have been downloaded thousands of times, almost certainly by people who do not have access to Westlaw or Lexis.[83] The most popular paper on SSRN is a law and economics analysis of handgun control by John Lott and William Landes, which has been downloaded more than 36,000 times.[84] Well-known legal scholars are represented among the most popular SSRN authors, including Bernard Black from the University of Texas (whose papers have been downloaded 34,100 times as of the date of writing),[85] Harvard's Lucian Bebchuk (26,960 downloads),[86] and Stanford's Mark Lemley (22,473 downloads).[87] At least one student editor of a law review has recognized the reputational benefit in posting his Note on SSRN.[88] Presumably, we will begin

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technology, computers, and cyberspace. The site's web address is at http://slashdot.org.

82. To give one recent example, Mark Lemley's draft paper entitled *Property, Intellectual Property, and Free-Riding* was posted on SSRN on August 26, 2004. Social Science Research Network Electronic Library, *at* http://papers.ssrn.com/sol3/papers.cfm?ab stract_id=582602 (Aug. 2004) (on file with the Washington and Lee Law Review). On Sept. 9, it was the subject of a Slashdot entry. *See* Slashdot, *Is IP Property*, *at* http://yro.slashdot.org/yro/04/09/09/1640255.shtml?tid=123 (Sept. 9, 2004) (discussing Professor Lemley's views on intellectual property) (on file with the Washington and Lee Law Review). By September 13, the abstract had been viewed more than 9000 times and the article had been downloaded 3112 times. Many of the most-downloaded articles in SSRN's intellectual property or cyberlaw areas have been the subject of postings on popular blogs or commentary sites.

83. One can tell that these are almost certainly not lawyers because Westlaw and Lexis provide a research corpus that is easier to use, for those who have access to it. The PDF versions of articles that are downloaded from digital repositories like SSRN are almost certainly going to be members of the public who do not have access to Lexis or Westlaw.

84. Social Science Research Network, *Multiple Victim Public Shootings, Bombings, and Right-to-Carry Concealed Handgun Laws: Contrasting Private and Public Law Enforcement*, Social Science Research Network Electronic Library, *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=161637 (Apr. 21, 1999) (on file with the Washington and Lee Law Review).

85. Social Science Research Network, *Bernard S. Black*, Social Science Electronic Publishing, *at* http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=16042 (last visited Nov. 14, 2004) (on file with the Washington and Lee Law Review).

86. Social Science Research Network, *Lucien Arye Bebchuk*, Social Science Electronic Publishing, *at* http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=17037 (last visited Nov. 14, 2004) (on file with the Washington and Lee Law Review).

87. Social Science Research Network, *Mark A. Lemley*, Social Science Electronic Publishing, *at* http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=32215 (last visited Nov. 14, 2004) (on file with the Washington and Lee Law Review).

88. *See, e.g.*, Social Science Research Network, *A Category-Specific Legislative Approach to the Internet Personal Jurisdiction Problem in U.S. Law*, Social Science Research Network Electronic Library, *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=587182 (Sept. 10, 2004) (showing that a student's note that was published in the *Harvard Law Review* is available on SSRN) (on file with the Washington and Lee Law Review).

to see students including SSRN and bepress[89] download counts in their résumés in an effort to demonstrate the importance of their work to law firm employers.

SSRN demonstrates that there are extraordinary benefits in open-access archives, and, further, that there is broad public interest in free legal scholarship. Therefore, one would think that the combination of cheap Internet dissemination and widespread public interest would by now have led to a widespread change in law review practices. Indeed, nearly ten years ago, Bernard Hibbitts gave the quotation at the beginning of this Part and predicted that law reviews would quickly move to what we think of nowadays as completely open-access publishing.[90] He suggested, for example, that legal writers would self-publish on the net—undermining the fundamental *raison d'être* of law reviews—and that this would give scholars greater control over the substance and form of their scholarship, would create more opportunities for spontaneity and creativity, and would promote more direct dialogue among legal thinkers.[91] He also suggested that it would force law reviews to adapt and move more of their publishing to net-based forms.[92]

Although legal scholars are a conservative group and few have elected to self-publish, many have moved to archive their work on SSRN or other open-access repositories. My dispute with the *California Law Review* demonstrated that, even in 2004, law reviews appear suspicious even of the minimalist position of open-access archiving, let alone the possibilities offered by a fully open-access journal model. But one should not infer too much from this, a single datapoint. Thus, in the summer of 2004, I conducted a survey of the publication policies of United States law reviews. A survey instrument was emailed to the main law review of every United States law school accredited by the American Bar Association.[93] The survey asked a small number of questions

89. The other major open-access repository for law is Berkeley Electronic Press's legal repository (bepress), which is available at http://law.bepress.com/repository/. It is less well established than its competitor, SSRN.

90. Hibbitts, *supra* note 22, at 616.

91. *Id.* at 667–83.

92. *Id.* at 683–85.

93. The list of law schools was drawn from the 2004 *U.S. News and World Report* listing of the 186 law schools accredited by the ABA, which is available at http://www.usnews.com/usnews/edu/grad/rankings/law/lawindex_brief.php. The survey instrument was sent by email to the general or main law review of each school. Some schools do not have a general law review, in which case the first listed law review was contacted. A small number of schools did not return calls to identify the appropriate place to send the email instrument. One could be more thorough and survey every law journal at every law school, but this is a task left to another day. The intention behind this survey was to gain a sense of publication policies of the main law reviews only. The policies of the secondary law journals at United States law schools is, judging from anecdotal evidence, likely to be less restrictive than the main law

about whether each law review was an open-access journal (that is, whether, how, and to what degree it posted electronic versions of articles), whether the law review allowed open-access archiving, and how the review was funded.[94]

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review.

94. The entire survey document was as follows:

This short survey is intended to gather some primary data from US general law reviews about their publication policies. The specific interest here is to discover what changes have occurred in law review publication processes and policies as a result of internet distribution, and the emerging movement to provide public access to research material.

Part A: Name of Review

Qn 1: Please insert the name of your law review here

[_____]

Qn 2: May I identify your law review in reporting on the outcome of the research?

[YES] / [NO]

Part B: Online Versions of Papers

Qn 3: Does your law review post online any part of your published papers (Articles/Essays/Notes/Commentary) in a form that is free to the public to access? (e.g. the Web is free to the public, Lexis and Westlaw are not)

[YES] / [NO]

(If your answer to this question is "NO" go to part C)

Qn 4: Do you post all papers free online, or do you only post some papers free online?

[ALL] / [SOME]

Qn 5: If you answered "SOME" to Qn 4, can you briefly explain how you select the articles which you post free online?

[_____]

Qn 6: Of the papers you post free online, do you post the full text of the papers, or some lesser amount of the papers (such as an abstract or a few pages of the paper)?

[_____]

Qn 7: In what format do you post the papers onto the free online site?

[HTML] / [TEXT] / [WORD PROCESSING FORMAT] / [PDF] /

[OTHER (please specify)]

Qn 8: How long have you been posting papers free online?

[_____]

Part C: Online Archiving by Authors and Others

Qn 9. Do you allow authors of papers published in your law review to provide open access to them by posting them to their personal web sites, or depositing them in their institutional repositories or in third party repositories such as the Social Science Research Network (SSRN)?

[YES] / [NO] / [WE HAVE NO POLICY ON THIS MATTER] /

[OTHER (please specify)]

Some 176 law reviews were identified, and 76 responded (43% response rate).[95] The responses are probably representative of general law reviews in the United States, as they were distributed evenly throughout the various tiers of United States law schools.[96]

The information gathered from the survey falls into three categories: the extent to which law reviews are open-access journals; the attitude of the reviews to open-access archiving; and the funding of law reviews. To deal first with the extent of open-access publishing, a total of twenty-eight law reviews reported that they post their articles online on the web in a freely accessible form.[97] But only fifteen of these can be considered open-access journals—that is, they posted all of the articles from their published editions.[98] The remainder posted either abstracts alone, some subset of their articles, a redacted version of the articles, or only the current volume.[99] Only one law review reported that they post additional material on the web that they do not publish in hardcopy,[100] thereby making effective use of the reduced distribution costs that the web

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Part D: Funding

Qn 10: Approximately what percentage of your funds are provided by the following revenue sources:

(a) By subscriptions?

(b) By advertising?

(c) By your law school?

(d) By a commercial publisher?

(e) Other? (please specify)

95. The anonymized survey results are available at http://openaccesslawreviews.org [hereinafter *Survey Results*].

96. The ranking used was that of the 2005 *U.S. News and World Report* rankings of law schools, which may be viewed at http://www.usnews.com/usnews/edu/grad/rankings/law/brief/lawrank_brief.php. Their methodology is explained at http://www.usnews.com/usnews/edu/grad/rankings/about/05law_meth_brief.php. The ranking methodology is flawed in many ways, yet it is probably broadly representative of the perceived position of law schools. The survey responses were not disproportionately weighted to any part of the ranking tables: 22 responses came from schools ranked in the "Top 50" (44% response rate); 21 responses came from schools ranked from 51–100 (42% response rate); 22 responses came from those ranked 101–150 (44% response rate); and 11 responses came the remaining 26 schools (42% response rate). *Survey Results*, *supra* note 95. It is possible that the responses represent a self-selected sample, but this is true of many empirical studies.

97. *Survey Results*, *supra* note 95.

98. The survey instrument did not ask whether the law reviews were posting old volumes, and no law review mentioned this in its response. We can reasonably assume that no law review is doing this, and that the journals only have a few years of volumes posted online. No review has been posting articles on the web for more than five years.

99. *Survey Results*, *supra* note 95.

100. *Id.*

offers. Of those posting articles online, the most common format used was Adobe's PDF, followed by about half this number posting in HTML or text formats.[101] A small number of journals had been posting material for upwards of four years;[102] most had been posting for a year or so.[103]

On the issue of open-access archiving, most law reviews—thirty of the sixty-five that provided useable responses to questions on this issue—either had no policy on the archiving of articles by authors or institutions or resolved the issue on a case-by-case basis when asked by authors.[104] A number of the reviews with no policy indicated that they had allowed archiving in the past, where the author had requested it.[105] Twenty-six reviews indicated that they allowed open-access archiving,[106] though the specifics of the policies in relation to this diverged: One review only allowed posting to an author's personal website and not open-access repositories,[107] but two reviews allowed archiving on open-access repositories but not the author's personal site.[108] A small number of reviews required explicit permission for open-access archiving,[109] and one of these reviews required permissions to be granted by the law school's publications department.[110] Nine reviews completely forbade all open-access archiving.[111]

Surprisingly, a majority of law reviews that responded to the survey were prepared to disclose some or all of their funding arrangements—fifty-two responses.[112] As one might expect, funding differed between law reviews, as did the mechanism for accounting for the funds.[113] For example, nine schools reported that 100% of funding came from their law school, even though it is clear that the review must take in some revenue from subscriptions.[114] In these cases, the school obviously makes a block grant to the review and the

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101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *See id.* (noting that different law reviews receive varying portions of their funding from subscriptions, ads, publishers, their respective law schools, and other sources).
114. *Id.*

subscription revenues go directly to the school to offset this grant. Of the reviews that did provide a breakdown of revenues, the most significant revenue source was the law school, followed by hardcopy subscriptions.[115] A small number of schools reported significant revenues either from endowment, sale of nonreview publications (such as the *Bluebook*), or advertisements.[116] Eight reviews reported revenues from commercial database royalties equaling 10% or more of their funding.[117] Of these eight, three allowed open-access archiving, and the remaining five had no policy.[118] Only one of these reviews posted the full text of its articles on the web.[119]

What are we to make of these data? For a start, it seems that law reviews are less suspicious of open-access archiving than my experience with the *California Law Review* would lead one to believe. Approximately thirty reviews reported that they allow open-access archiving.[120] This figure, however, obscures what are perhaps the most interesting data in the survey. The responses by six law reviews widely considered to be in the top ranks of the United States system[121] claim to allow open-access archiving, yet display the same sorts of fears that troubled the *California Law Review*.[122] Two of these reviews allow publications of drafts on SSRN until the time of publication and then demand their removal. Two other reviews only allow posting of abstracts in open-access repositories. One review only allows archiving a year after publication,[123] and one demands that archived copies have pagination removed so that they cannot be cited.[124] Each of these policies is consistent with a concern about substitution effects between the archived copy and online databases. Anecdotal reports suggest that the commercial

115. *See id.* (noting that for 34 law reviews, the law school provided at least 50% of the funding and for 16 law reviews, subscriptions provided at least 50% of the funding). Of those responses that reported anything other than 100% block grant funding from the law school, hardcopy subscription revenues ranged from 0% to 100% of review expenses, with a median response of 40%. *Id.*

116. *Id.*

117. *Id.* Three of these schools reported that 25% or greater of their revenues come from this source. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Specifically, I am referring to those law schools ranked among the top fifteen in the nation by *US News and World Report*.

122. The *California Law Review* did not respond to the survey and is not included in this group. Moreover, as discussed in the next Part, *California Law Review*'s publication policies have changed.

123. *Survey Results*, *supra* note 95.

124. *Id.*

database providers have worked hard to have top law reviews interests aligned with theirs. A number of years ago, Lexis and Westlaw representatives went to law review editors at top schools and sought to persuade them to obtain copyrights from their authors. In exchange, Lexis and Westlaw granted more favorable royalties to those reviews for the electronic rights licensed by Lexis and Westlaw.[125] The policies of these six high-ranked law reviews bear out this anecdote; only one lower ranked law review has a policy similar to these six.[126]

Whatever the reasons behind the policies of any given law review, the fact remains that the majority of law reviews that responded to the survey do not allow open-access archiving, have yet to develop a policy on archiving, or claim to allow archiving but only in a way that effectively negates the public benefit of open-access archiving. It is therefore timely to consider whether open-access archiving is appropriate for law reviews. The arguments in favor of law reviews allowing open-access archiving range from the financial to the institutional. First, consider the economics of open-access archiving. We now have evidence that there are few, if any, substitution effects from free online versions of published articles for the hardcopy version.[127] It is unlikely that there will be any cancellations of hardcopy subscriptions to law reviews because these subscriptions are to law libraries that take their hardcopy-archiving responsibilities seriously.[128]

Yet these arguments do not directly address the concern that motivated the *California Law Review*—that law review revenues have become tied to the success of commercial database providers like Lexis, Westlaw, and Hein

125. Confidential email from a law professor to the author (on file with author). Although this policy was created prior to the widespread adoption of SSRN and bepress, it is clear that the commercial database providers see the online repositories as long-term competition. This is a reasonable concern; it may be that the repositories have a long-term goal to become substitutes for the existing commercial databases, at least in respect of the dissemination of scholarly work to other scholars. But this goal is not inconsistent with open-access policies: Unlike Westlaw or Lexis, the repositories are underwritten by fees from the researchers who are posting the content, rather than the readers who seek to access the content.

126. *Survey Results*, *supra* note 95. Of course, there could be another explanation, though because none of these law reviews chose to publish this Essay, I am not in a position to ask their editors to respond.

127. *See* Suber, *supra* note 57 (noting that in the field of physics, nearly 100% of new articles are freely available, yet subscription-based journals continue to thrive).

128. Indeed, law school libraries are obligated under ABA/AALS regulations to maintain high levels of hardcopy holdings of texts, treatises, and journals. *See, e.g.*, AMERICAN BAR ASSOCIATION, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2004–2005, at 47 (noting that "no single publishing medium (electronic, print, microfilm, or audio-visual) provides sufficient access . . . to bring law school in compliance with Standard 606"), *available at* http://www.abanet.org/legaled/standards/2004-05masterstandardsbook.pdf (on file with the Washington and Lee Law Review).

Online, and that reviews gain revenue from these sources in proportion to the number of times that an article is downloaded. Thus, the appropriate question in this context is whether there is any substitution effect between the free online version of an article and the same article in an electronic version from commercial databases. This is unlikely. As I explained to Jean Galbraith, the then-editor of the *California Law Review*, in an open letter protesting the removal of my draft articles from SSRN:

> Your argument [that there will be substitution between SSRN articles and commercially available alternatives] supposes that SSRN is a commercial competitor to legal database providers like Lexis or Westlaw. I would be interested to hear of any empirical evidence you have of this, but it is surely unlikely. The subscribers to online legal databases are largely confined to law firms and law schools. Since law schools have free access to these services, then the only meaningful market for commercial legal databases is in law firms. The articles on SSRN are in pdf format and therefore not full [sic] text searchable, and moreover they are generally preliminary drafts. Your argument therefore is that practicing attorneys will spend hours searching through the SSRN database for unfinished articles in preference to the easily-searchable, published version on the commercial databases. Even given the ridiculous sums charged by these providers, it is entirely implausible that SSRN competes with Westlaw/Lexis/Hein in this market.[129]

The implausibility of the substitution argument here is borne out in the data collected about the funding of law reviews. As mentioned above, of the eight law reviews that reported gaining significant revenues from database royalties, three allowed open-access archiving.[130] Indeed, the review with the highest percentage of its funds from these sources (60%) had no policy prohibiting open-access archiving.[131]

Once law reviews recognize that there are going to be few, if any, revenue losses from substitution effects—for either their revenues from hardcopy or commercial database sources—there are obvious benefits they receive from open-access archiving of their articles. To a significant extent, law reviews are one of the public faces of the law school and provide an effective advertising medium for their school. Those schools high in the food chain use their law reviews to demonstrate how significant they are, by attracting the best articles from scholars in equivalently ranked schools. Schools lower in the rankings

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129. Dan Hunter, *An Open Letter Protesting the Removal of Publicly-Accessible Online Documents*, Nov. 19, 2003, *available at* https://mx2.arl.org/Lists/SPARC-OAForum/Message/306.html (on file with the Washington and Lee Law Review).

130. *Survey Results*, *supra* note 95.

131. *Id.*

nowadays use the law review as a way of improving their perception among their alumni, the legal profession, and the public. We see evidence of this in the efforts undertaken by a number of law reviews to attract more desirable articles and more desirable authors than they otherwise could expect to attract. Thus, many law reviews have special symposia editions with invited authors who are wined and dined at law school expense; some reviews include publication of "Distinguished Lecture" essays from luminaries who may be paid to speak at the school; and some reviews even commission and pay for articles that they publish. If law school deans did not think it was worth the investment in branding their school through the law review, then presumably they would not spend the money necessary to fund such efforts and this trend would not be so obvious.[132] But it is clear that deans see their law review as an effective branding and reputation-enhancing mechanism for the law school, and improving the law review's reach and influence is very much in the school's interest. Open-access archiving fits perfectly with this aim of the law school. It can only assist the reputation of the school to have an article attributed to its law review downloaded thousands of times from SSRN or other open-access repository. This is a way of influencing public perception of the law school in a way that is free to the reader and cheap (or free) for the school,[133] and it can have a significant effect on recognition and reputation of the school.

Moreover, law reviews need to consider aligning themselves with the interests of their authors, or else risk disadvantaging themselves in the competition for the best work. Usually law reviews do not pay authors for scholarly work, and so authors with multiple offers of publication will choose the law review that provides the greatest status and the widest distribution of their work.[134] As law scholars increasingly use open-access archives like SSRN to provide notice of their work, any journal that forbids archiving is going to

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132. Moreover, as Peter Suber has reminded me, law schools would not have publish-or-perish policies if they did not believe that research output was good for the school, the profession, and the field. Research output is the primary way we rank faculty and schools. The same interests in promoting the school, the profession, and the field mean that the school should require open-access research, not just research simpliciter, because open-access research provides the broadest access to the research.

133. If the school hosts the open-access archive, then there is a small expense for the school in the server and maintenance costs, though this cost is much smaller than other promotion expenses it cheerfully agrees to pay. If the school encourages archiving in SSRN or bepress or another repository—that is, hosted by an external provider and paid for by other revenue sources—then it is cost-free for the school.

134. Often these two interests will go hand in hand, as the highest prestige reviews will have the widest subscription base by virtue of their prestige and age.

find itself competitively disadvantaged and outbid for the best work. Authors will go elsewhere.[135]

Finally, outside the instrumental issues of economics, advertising, and competitive advantage, law reviews and their law school masters need to consider the institutional question of what they stand for. In 1999, the Massachusetts Institute of Technology (MIT) was faced with this question in a related area—that of the ownership of teaching materials produced by its faculty.[136] Like the open-access archiving issue, this problem emerged as a result of the Internet, specifically in the opportunities presented by electronic distance learning. Some schools decided that they should exert the strongest possible control over their faculty members' materials in an effort to gain commercial advantage.[137] But MIT, like a number of other schools, took a different route. MIT's Provost convened a committee of faculty, students, and administrators to determine how MIT should respond to this new opportunity.[138] The resulting recommendation was that MIT should put all of its courses on the web and make them free for everyone in the world.[139] MIT recognized that its core mission—to advance knowledge, to educate, and to serve the community[140]—meant that electronic learning was an opportunity to advance its ideals rather than just its bottom line. It created the *OpenCourseWare* initiative,[141] and today has 900 courses online, free for anyone to read, use, and reuse.[142] Its aim is to have all 1800 MIT courses

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135. This migration will only occur at such time as all law reviews permit open-access archiving, but at such a point, the work of this Essay would be complete.

136. MIT OpenCourseWare, *Our Story*, *at* http://ocw.mit.edu/ocwWeb/gloal/AboutOCW/our-story.htm (last visited Nov. 14, 2004) [hereinafter MIT OpenCourseWare, *Our Story*] (stating that in 1999, MIT addressed the issue of faculty teaching materials in the distance/e-learning environment) (on file with the Washington and Lee Law Review).

137. *See* Sara Ulius, *Intellectual Property Ownership in Distributed Learning*, EDUCAUSE, July/Aug. 2003, at 62, 62–63 (discussing the tension between professors wanting to migrate from digital or online courses to other formats and the universities' desires to control digital and online content to recoup costs or to profit from investment in technology), *available at* http://www.educause.edu/ir/library/pdf/erm0346.pdf (on file with the Washington and Lee Law Review).

138. MIT OpenCourseWare, *Our Story*, *supra* note 136.

139. *See id.* (noting that the OpenCourseWare initiative "provides users with open access to the syllabi, lecture notes, course calendars, problem sets and solutions, [and] exams . . . from 900 MIT courses").

140. *See id.* (stating that MIT's mission is "to advance knowledge and educate students in science, technology, and other areas of scholarship that will best serve the nation and the world in the 21st century").

141. MIT OpenCourseWare, *OCW Home*, *at* http://ocw.mit.edu/OcwWeb/index.htm (last visited Feb. 21, 2005) (on file with the Washington and Lee Law Review).

142. *See* MIT OpenCourseWare, *Our Story*, *supra* note 136 (describing how OCW

available by 2007. The effect of *OpenCourseWare* has been profound: Not only has MIT gained plaudits from all manner of governments, universities, and educators,[143] but also it is clearly improving the educational possibilities of those in the developing world, in rural parts of America, and others who are otherwise unable to gain access to high quality educational materials.[144]

Law reviews are being confronted with the same choice. The concern motivating the *California Law Review* to insist that my articles be removed from SSRN was a revenue concern about substitution effects between the open-access versions and the commercial database versions of articles published by the review. But as already noted, law reviews have been sold a bill of goods by commercial database providers. It is simply not true that there are meaningful substitution effects. But let us assume, *arguendo*, that such effects exist. To the extent that law reviews will lose money from open-access archiving, the shortfall can be met by law schools recognizing the value in open-access archiving and directing additional funding to the law review. This solution requires that the deans and faculty of law schools recognize that the open-access movement implicates the very mission of their schools. Like the situation with MIT and distance learning, law school deans, faculty members, and librarians must decide what their school stands for. What does the mission statement of your university or law school say? What is your institution's role in generating, producing, and disseminating legal knowledge? Although I suggest that there is no economic penalty in open-access archiving, law schools need to consider what economic burden they are prepared to shoulder in order that legal scholarship be made freely available. As MIT's Hal Abelson has said, "[T]he increasing tendency to proprietize knowledge . . . as intellectual property is hostile to traditional

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provides open access to course-related materials). The OpenCourseWare initiative uses the Creative Commons licensing standards. *See* MIT OpenCourseWare, *Legal Notices*, *at* http://ocw.mit.edu/OcwWeb/Global/terms-of-use.htm (last visited Nov. 14, 2004) (describing the main terms of the Creative Commons license: Attribution, Noncommercial, and Share Alike) (on file with the Washington and Lee Law Review). This license allows use and reuse, and encourages (indeed mandates) the dedication of derivative works to the public on the same terms as MIT grants initial use. *Id.* A large number of educational derivative works have been produced from MIT content: In a recent survey of people using the OCW courses, "47% [of educators using OCW content] have reused MIT OCW materials (or plan to), and 41% may reuse materials in the future." MIT Open CourseWare, *Impact*, *at* http://ocw.mit.edu/OcwWeb/Global/AboutOCW/impact.htm (last visited Nov. 14, 2004) (on file with the Washington and Lee Law Review).

143. *See* MIT OpenCourseWare, *World Reaction*, *at* http://ocw.mit.edu/OcwWeb/Global/AboutOCW/worldreaction.htm (last visited Nov. 14, 2004) (recounting the numerous favorable responses to the OCW from educators, self-learners, and students from around the world) (on file with the Washington and Lee Law Review).

144. *See id.* (noting the praise of individuals who have accessed MIT courses through OCW despite their locations in rural areas or their lack of resources).

academic values."[145] By this, neither Abelson nor I are trying to attack the use of copyright in protecting academic work because copyright protects interests that are consonant with traditional academic values, such as interests in maintaining attribution or removing the ability of others to make derivative works and profit from them. Instead, all that is argued for is a recognition that extracting the maximum potential amount of royalties from legal scholarly publishing is inconsistent with the mission of law schools.

As demonstrated above, the case for open-access archiving is hard to resist. The case for turning law reviews into fully open-access journals is more nuanced because it involves a change in the business models of law reviews and a greater commitment of resources on the part of law schools. It is clear that law reviews have a greater opportunity than most scholarly journals to be fully open access, simply because they are not published as commercially motivated journals. Although they must typically cover their costs, they do not pay authors or editors for their respective contributions, nor are they accountable to shareholders to post a profit. In light of their cost structure, law reviews are much more favorably oriented to a fully open-access paradigm than many other types of scholarly publication.

But although I am prepared to argue strongly in favor of open-access archiving in law, I think we are at too early a stage to understand what the effect of open-access publishing will be on law reviews generally. Because open-access archiving guarantees public access to legal scholarship, the benefits to the public—and the profession, and the law schools—accrue from open-access archiving alone. Thus, I think that we can defer any grand conclusion about open-access journals in law and leave each law review to decide the degree to which it wants to embrace the open-access model and whether it should post all of its material online.[146]

IV. Conclusion

I was angered by the decision of the editorial board of the *California Law Review* to remove my articles from public access and to place them back in the walled gardens of commercial databases. As noted above, I wrote an open letter

145. Hal Abelson, *What Is Publishing in the Future?: Institutional Repositories*, *in* ELECTRONIC SCIENTIFIC, TECHNICAL, AND MEDICAL JOURNAL PUBLISHING AND ITS IMPLICATIONS: PROCEEDINGS OF A SYMPOSIUM, *at* http://books.nap.edu/html/e-journals/ch6.html (2004) (on file with the Washington and Lee Law Review).

146. Nonetheless, I strongly urge law reviews to consider open-access publishing and to investigate the economics of it. There are significant first-mover advantages to be gained by law reviews that embrace open-access publishing.

to the board protesting this decision and explaining, along similar lines advanced here, that it had nothing to fear from open-access archiving.[147] The editors suspended their decision, went back to their faculty advisers and other interested stakeholders, and considered the possibilities.[148] Four months later, Jean Galbraith wrote to me again, this time explaining that they were instituting a new experimental policy.[149] The *California Law Review* would now allow draft articles to be posted on SSRN until publication, at which point the review would provide authors with a fully formatted PDF file that contained the same image that was printed in the hardcopy version of the article. Authors were free to post these PDF files on SSRN, and the files "may remain up indefinitely, so long as they and SSRN's search engines remain free and accessible to the general public."[150] The editors thought that this might entail some financial risk, but they were willing to change their policy to favor open access. This change in policy is to their great credit. But as I suggest above, the evidence suggests that there is no risk at all. The real risk to law reviews is in failing to recognize how well open access accords with all of the aims of law reviews and law schools. Open access to law reviews is an idea whose time has come.

Yet the survey detailed above shows that few law reviews have embraced the opportunities of open-access publishing. Law reviews still wrongly seem to believe that their economic interests are tied to those of commercial database providers. The open-access model—already transforming other scholarly publishing—promises greater public access to legal scholarship, wider readership for law reviews, and reputational benefits for law reviews and the law schools that house them. This Essay has demonstrated how open access comports with the institutional aims of law schools and law reviews, and is better suited to the unique environment of legal publishing than the restrictive approach favored by most law reviews. Most law reviews, however, do not see this yet. This myopia is particularly frustrating because the editors of law reviews are students who have grown up with the Internet and who should be able to see the extraordinary benefits they have gained through open access to other types of information.

I think it is vital to the long-term success of law reviews and legal scholarly publishing that we begin to focus on the issues and opportunities that

147. *See* Hunter, *supra* note 129 (arguing that SSRN does not compete with commercial databases like Westlaw, Lexis, or Hein Online).

148. Email from Jean Galbraith to Dan Hunter (Nov. 20, 2003) (on file with the Washington and Lee Law Review).

149. Email from Jean Galbraith to Dan Hunter (Mar. 31, 2004) (on file with the Washington and Lee Law Review).

150. *Id.*

open access presents. As faculty members at research and teaching institutions with a fundamental stake in how legal publication operates, we can no longer disclaim involvement in retrograde publication policies made by student editors. And this Essay would not be a manifesto if it did not propose some concrete calls to action. So let me suggest a number of things that stakeholders in this discussion can do right now.

First, legal scholars should make every effort to ensure that their articles are available in open-access formats. As drafts are created they should be posted to open-access repositories under nonrestrictive conditions. It would be desirable also for authors to go back to previous work and post these also—although life is short and it must be said that this is a tiresome process. If necessary, authors should request permission to post from law reviews to whom they have assigned copyright.

Second, authors must not adopt a laissez-faire approach to copyright assignments, and must insist on reserving rights necessary to post to open-access archives and to ensure that the PDFs remain online after publication. Mike Carroll of Villanova Law School has drafted a Model Author's Addendum for law review publication agreements that can be downloaded from a website established to provide resources to those interested in open access to law reviews.[151] Authors can simply complete this document and return it to the law review when they sign the regular publication agreement. Other resources are also available at this website for those interested in examining the issues surrounding open access to law reviews.

Third, deans, faculty, and law librarians should begin discussing open access among themselves and with their law review. Law reviews must revise their copyright transfer agreements to leave the author with the rights to archive their work in open-access repositories, whether those repositories are maintained by individual authors, the law school, or third party providers. The "Open Access to Law Reviews" website will shortly contain a number of resources to assist in this discussion, including a model publication agreement that law reviews may freely adopt.

Finally, there are many other positive steps that might be taken. Schools may wish to investigate fully open-access publishing for their law reviews. Or, they might look to organizing conferences to examine their mission in light of the changes that are occurring in scholarly publishing. Law reviews, for their part, might look to the experience of the *California Law Review* and ask

151. Open Access to Law Reviews, *at* http://www.openaccesslawreviews.org (last visited Feb. 21, 2005) (on file with the Washington and Lee Law Review).

whether they might be able to recast the way that they meet the interests of their school, their authors, and their readership.

In this way, we can begin a scholarly conversation that will lead to greater benefits to all. For as it now stands, there are two unbearable ironies in law reviews' inability to recognize the benefits of open access. First, law reviews are among those scholarly journals that are the most obvious candidates to benefit from open-access models. Not only are they cheap to produce, but they are published by organizations whose institutional values align neatly with those that open access offers. Indeed, it is not far-fetched to suggest that every law review could easily move to an open-access model. Law is perhaps the only discipline that has a realistic prospect of embracing complete commitment to free open access to all of its scholarly output. It is appalling that this opportunity is not known to law reviews editors and not yet championed by law faculty, deans, and librarians.

The second irony is that the lack of understanding of open access by law reviews is analogous to the old adage about the cobbler's children who must go without shoes. For it was law professors like David Lange, Jessica Litman, Wendy Gordon, and Jamie Boyle who first alerted us to the problems of commercial ownership of information.[152] And it is law professors like Larry Lessig[153] and Yochai Benkler,[154] and law school-based institutions like the Center for the Creative Commons[155] and the Center for the Study of the Public Domain,[156] that continue to demonstrate how restrictive control of information can have profoundly negative effects on our culture. It is mordantly amusing,

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152. *See generally* Dan Hunter, *Culture War*, 83 TEX. L. REV. (forthcoming 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=586463.

153. *See generally* LAWRENCE LESSIG, FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (2001) (explaining how enclosure of the commons in intellectual property and cyberspace affects society); LAWRENCE LESSIG, FREE CULTURE (2004) (demonstrating the importance of freedom to innovate in cultural production).

154. *See generally* Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002) (showing how peer production of culture is transforming our understanding of the processes of production and of the firm).

155. This center is based at Stanford Law School. "[A] single goal unites Creative Commons' current and future projects: to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules." Creative Commons, *About Us*, *at* http://creativecommons.org/learn/aboutus/ (last visited Nov. 14, 2004) (on file with the Washington and Lee Law Review).

156. This center is based at Duke Law School. "Center for the Public Domain is a non-profit foundation that supports the growth of a healthy and robust public domain by establishing programs, grants, and partnerships in the areas of academic research, medicine, law, education, media, technology, and the arts." Center for the Study of the Public Domain, *at* http://www.Law.duke.edu/cspd (last visited Feb. 17, 2005) (on file with the Washington and Lee Law Review).

or perhaps saddening, to consider that the same law reviews that have published seminal legal works on the importance of the public domain and open access to ideas might be the same law reviews that have the most restrictive policies on public access to the works that they publish.

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