

The Durham Statement on Open Access One Year Later: Preservation and Access to Legal Scholarship*

15 June 2010

In November 2008, the directors of the law libraries at the University of Chicago, Columbia University, Cornell University, Duke University, Georgetown University, Harvard University, Northwestern University, the University of Pennsylvania, Stanford University, the University of Texas, and Yale University met in Durham, North Carolina at the Duke Law School. At that meeting, those directors drafted the "Durham Statement on Open Access to Legal Scholarship." Since it was finalized and posted in February 2009, the Durham Statement has prompted discussion on dozens of blogs and listservs, and garnered over 60 online signatures from law librarians and other legal educators. It was the subject of a Law Librarian Blog Talk Radio Feed in February 2010; it has a Wikipedia entry.

What is the Durham Statement?

The Durham Statement calls for US law schools to stop publishing their journals in print format and to rely instead on electronic publication with a commitment to keep the electronic versions available in "stable, open, digital formats." It is posted on the web site of Harvard University's Berkman Center for Internet and Society. The site includes background information on the Statement, a list of signatories and an FAQ. The Statement asks for two things: 1) open access publication¹ of law school-published journals; and 2) an end to print publication of law journals. Neither action is dependent on the other: law journals can be made freely accessible on the web and still be offered in print format to libraries and other subscribers; journals can also be offered only in fee-based electronic formats without print equivalents.

Few if any to the Statement have objected to its call for open access publication of law journals. Although few law journals are registered with either the Directory of Open Access Journals (DOAJ) or the Science Commons Open Access Law Program, an increasing number of US law reviews post at least their current issues in freely accessible PDF and (in some cases) HTML formats on their journal web site, despite the possibility that the postings will affect

* Prepared by Richard A. Danner. Thanks to S. Blair Kaufman, Margaret Maes, Michelle Pearse, and Wayne Miller for their helpful comments on earlier drafts of this document.

¹ The drafters of the Statement are in general agreement with the definition of Open Access in the 2002 Budapest Open Access Initiative, which calls for:

free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself.

revenue from print subscriptions and royalty income from HeinOnline, LexisNexis, Westlaw, and other online aggregators.

The Statement's call to end print publication of law reviews did raise concerns. The Statement argued that: "If stable, open, digital formats are available, law schools should stop publishing law journals in print and law libraries should stop acquiring print law journals," reasoning that:

It is increasingly uneconomical to keep two systems afloat simultaneously. The presumption of need for redundant printed journals adds costs to library budgets, takes up physical space in libraries pressed for space, and has a deleterious effect on the environment In a time of extreme pressures on law school budgets, moving to all electronic publication of law journals will also eliminate the substantial costs borne by law schools for printing and mailing print editions of their school's journals, and the costs borne by their libraries to purchase, process and preserve print versions.

The major objections to the call to end print publication focused on the Statement's reliance on the existence, now or ever, of "stable, open, digital formats" to make the transition to all-electronic publishing. In a posting to [the law library directors list] with the heading "Why I Did Not Sign the 'Durham Statement,'" Margaret Leary of the University of Michigan wrote:

The answer is simple: I do not agree with the call to stop publishing in print, nor do I think we have now or will have in the foreseeable future the requisite "stable, open, digital formats". So long as we believe legal scholarship is worthy of permanent retention, we should encourage the existence and retention of paper, in addition to digital, copies.

In a July 25, 2009 posting to his blog: *The Life of Books*, Richard Leiter focused on the roles of print and paper in the scholarly process:

In the end, ceasing to publish in print the-already-too-many-journals is only going to dilute their importance further.... The bottom line is this: Part of the value of articles published in these journals is that they are a record of a scholar's ideas and thoughts about a legal issue. The ideas may be inspirational, challenging, enlightening, wrong, controversial, revolutionary, evolutionary, or all of the above and more. But, part of the process of scholarship is committing them to "paper", or some medium in which the author can be held accountable and called to defend them. It doesn't necessarily have to be paper. But it must be in a format that is permanent. To date, nothing in any computer format can even begin to approach anything resembling the permanence of a printed book.

In light of these and similar concerns expressed by others, a small group of law librarians and legal information technologists agreed to consider the preservation and other issues raised by the call to end print publication of law reviews, and to present the results of their efforts in a program at the July 2010 annual meeting of the American Association of Law Libraries in Denver Colorado.² This paper is intended to provide background for those discussions.

Preservation and Access

Access to legal information is essential not only for lawyers and other legal professionals, but also for citizens whose lives are affected by legislation, precedential court decisions, and administrative rulings and regulations. To be applied, the law needs to be explained and interpreted. Michael Carroll and others have argued that if “[a]ccess to law matters...access to legal scholarship matters, too.” Preservation of legal scholarship is essential to that access.

The problems posed by the need to preserve valuable information have changed in a born-digital age in which it is increasingly likely that the information will never be formally published in print, as Harvard University Librarian Robert Darnton puts it: “Information has never been stable.” Printed information does not preserve itself, but requires paper made so that it will not rapidly deteriorate over time, storage in appropriate temperature and humidification regimes, proper shelving so that items are not lost. Bob Berring has written: “One of the sad failures of librarianship has been the inability to develop reasonably priced means of preserving books,” while Kevin Guthrie notes: “One does not have to spend much time in a large library to find paper volumes and documents that cannot be used for much longer.”

For hundreds of years, libraries have provided access to books and other printed materials and tried to preserve them for future users. Publishers were not expected to maintain permanent back stock of their publications; preserving the works they published was not their responsibility; it was that of the library. Because more than one library held a given item, it was unlikely that its disappearance from a particular library meant it was lost forever.

In the US, most scholarly journals and reviews in law are published at the nation’s 200 or so law schools. For the most part, publication of legal scholarship is a small-time decentralized industry, established to provide an educational experience and credentials for student editors, and venues for scholars to disseminate their works. For the most part, the journals operate, along with authors and libraries, within a decentralized gift economy in which earning profit is not a primary goal for any participant. As described by Jessica Litman:

² “The Durham Statement on Open Access One Year Later: Preservation and Authentication of Legal Scholarship.” The program will be moderated by Margaret Maes (Legal Information Preservation Alliance); the panelists are Margaret Leary (University of Michigan), Michelle Pearse (Harvard University), and Wayne Miller (Duke University).

We rely on few commercial publishers. The majority of law journals depend on unpaid students to undertake the selection and copy editing of articles. ... At the same time, the first-copy cost of law reviews is heavily subsidized by the academy to an extent that dwarfs both the mailing and printing costs that make up law journals' chief budgeted expenditures and the subscription and royalty payments that account for their chief budgeted revenues.³

Under this long-standing model, law libraries purchase the journals at low cost and preserve them.⁴ Although subscription costs for individual law journals are generally significantly lower than in other disciplines, in a time of tight budgets, the sheer number of journals produced at US law schools makes them costly for law libraries to purchase, process and preserve.⁵ Because most academic law libraries have traditionally striven toward comprehensiveness in their journal collections, the collections also take up large amounts of space in library facilities.

In recent years, the primary audiences for law journal articles—legal academics and the legal profession—have enjoyed increased and improved electronic access to both current and older legal scholarship, not only through the primary legal databases, LexisNexis and Westlaw, but also through the extensive collections offered by Hein Online and JSTOR, and by other general aggregators of journal content, such as EBSCO and Wilson. In addition, new law journal articles are increasingly feely available upon publication on the web sites of the journals themselves⁶ and, prior to formal publication, via electronic working paper series, such as SSRN.

Electronic access has become the preferred means for accessing legal scholarship at the same time as law libraries are facing increased pressures on their budgets and their parent institutions are looking to library facilities to provide space for expanding programs. Both factors have placed under stress the library's traditional role as purchaser and preserver of print law journals,⁷ thus threatening the existing model for preservation of the legal scholarship published in law journals.

An example is seen in recent changes to the collection development policy of the nation's largest academic law library. In February 2010, the Harvard Law Library issued a new collection development policy for law journals which states that the library will acquire in print and

³ Litman's 2006 *Lewis & Clark Law Review* article includes the sample budget for a "model law review."

⁴ Historically, law journals have also shipped excess issues to jobbers such as William S. Hein & Co., which have provided hard copy, microform, and eventually electronic versions to customers on behalf of the law school publishers.

⁵ The Washington and Lee *Law Journals: Submissions and Rankings* web site suggests that there are about 640 student-edited general and specialized law journals published in the US.

⁶ The ABA *Free Full-text Online Law Review/Law Journal Search Engine* web site claims to search the texts of over 350 law journals, although the site notes that "coverage may vary."

⁷ See discussion on Law Review Subscriptions, The LawLibDirArchives, <http://lists.washlaw.edu/mailman/private/lawlibdir/>.

maintain print archives only for Harvard Law School publications, publications only available in print, and publications where the library has library of Record responsibilities for Harvard University. Other print law journals subject to moving walls on Hein Online or JSTOR will be acquired in print but retained only for five years and will not be bound. Other law libraries are making similar decisions: some to not purchase new law journals, others to rely on outside sources for access to back files.

The Durham Statement calls for law schools to end print publication of law journals in a planned and coordinated effort led by the law library community, focused on ensuring access and preservation of the electronic journal literature. Without that effort, in an environment in which external factors are more than ever impacting librarians' decisions, what can we do to assure that electronically published legal scholarship can remain available to future scholars?

Issues in the Preservation of Law Journals

The 2005 Legal Information Preservation Alliance report: *Preserving Legal Materials in Digital Formats* includes a discussion of the risk factors for digital materials. In summary, the factors are:

Storage Media Obsolescence: Because storage media (hardware) for digital materials change quickly, storing digital materials requires an ongoing commitment to moving the data from one storage medium to another. This is known as "refreshing the data." It can be costly and time consuming, especially for large quantities of data.

Software Obsolescence: Like storage media, the software needed to access stored data also changes. File formats change, and software programs may not be compatible with older files. Proprietary formats may not always have full documentation; licensing agreements are subject to change; restrictions for use and modification may apply. Open formats and systems may be preferable for preservation purposes.

Organizational and Cultural Challenges: Digital preservation is not solely a technical problem. Concerns over the quality of management of digital materials by creators and other caretakers of digital collections contribute to the risks posed by high rates of technological change. Materials may be published on the web for publication, then removed and deleted. Publishers cannot assure that their materials will be available in the long term.

Access: The emphasis on digitizing materials to improve electronic access to information may lead librarians and others to focus on access, without

addressing issues of preservation. Over time, there will be no access through time without preservation.

How will these risks be overcome? Any new model for preserving legal scholarship in digital formats has to acknowledge that, in addition to law libraries, other stakeholders will have larger roles to play than they may have played under the print-based purchase and preserve model. These may include the providers of the legal databases: LEXIS and Westlaw, the aggregators of journal content such as Hein Online and JSTOR; and the disseminators of working papers and pre-prints, such as SSRN.

Yet, it is important to recognize that those entities are not the formal first-instance publishers of most legal scholarship, but re-publishers of content that was first published by the law schools themselves.⁸ We are the publishers. The scholarly communications system of law differs from those of other disciplines in that legal scholarship is for the most part not published by commercial or society publishers but by individual law schools. There is little reason to expect this to change as print publication ends: The benefits to students of editing law journals will continue regardless of the publishing format; the legal scholar's interests in publishing in the journals of prestigious law schools will be the same.

And the format will change. If, as the ABA *Free Full-text Online Law Review/Law Journal Search Engine* suggests, there are now 350 law journals with some variety of web access available, it is increasingly likely that more editors or deans will decide that, since the articles are available on the web, there is little reason to continue publishing a journal in print.

Student editors will be looking to improve accessibility to new articles, deans to reduce costs. It is unlikely that, left to their own resources, either group will have the time or inclination to think much about the relationships of access to preservation or the need for effective search capabilities. As Tom Boone has pointed out, even now current law review posting of article PDFs:

is hardly a universal movement, and such open availability can vary wildly even among publications produced at the same school. Access is often limited to browsing tables of contents, with no search functionality to be found. In most cases, these efforts are taken on by the journals themselves. While the initiative of such student staffers deserves our praise, there are certainly limits to what they can realistically accomplish. For example, given the transitory nature of law review staffs, there is little incentive to look beyond the digitization of the current volume, let alone establish a consistent system for subsequent years or plan a long term effort to digitize previous volumes.

⁸ SSRN and other working papers services are "pre-publishers" of legal scholarship, disseminating versions of articles, but not providing the imprimatur of formal publication does not.

Joe Hodnicki adds: "On law reviews, even current "proven" technologies being used need enhancement. The ubiquitous PDF does not accommodate researchers with sight disabilities unless properly tagged and most are not."

Effective search capability is also an issue in the present environment. In April 2010, Sarah Glassmeyer described her attempt to review the searchability of the journals listed in the ABA's *Free Full-text Online Law Review/Law Journal Search Engine*:

I guess, because I'm a librarian, I just assumed that when a school mounted its law journal up on the web, it would at the very least have a basic search functionality built into their law journal online archives. If they wanted to get really wild and crazy, they'd have an index. This is not the case at all. Again, I'm just 1/6 of the way through my survey, but if trends hold, only about 15-20% of the journals are searchable. And indexed? HA! Maybe 5%? [...]

So, I guess my point is, I am concerned that these online journals are becoming PDF dumping grounds with little to no metadata or access points contained within them to assist with the "access" part of "open access."

Hodnicki again:

Hopefully the objective of the Durham Statement will be realized by following the suggestion made by ALA and ACRL. In their OSTP comments regarding public access policies for science and technology funding agencies across the federal government, ALA and ACRL called for across-the-board format standardization as being crucial to long-term public access. Instead of PDF files, authorized repositories should provide support for file conversion to a standard mark-up language (e.g., XML) because the PDF format "does not support robust searching, linking, text-mining, or reformatting over the long-term, nor does it provide full accessibility for the blind and reading impaired."

And as Tom Boone puts it:

If metadata, structure, and permanence are vital to the success of the Durham Statement's desired action, librarians must do more than simply ask their institutions to create digital access systems for law reviews. What the Durham Statement asks schools to create are digital libraries.

In the unique environment of law review publishing, there is both more need and more opportunity for law schools, law journals, and law libraries to collaborate in developing

preservation programs for electronically-published journal literature. There is also more risk if we do not.

In the words of Pogo:

“We shall meet the enemy, and not only may he be ours, he may be us.”⁹

What Can Law Schools and their Libraries Do?

Sarah Rhodes, digital collections librarian at the Georgetown Law Center, has written:

Frankly speaking, our current digital preservation strategies and systems are imperfect – and they most likely will never be perfected. That’s because digital preservation is a field that will be in a constant state of change and flux for as long as technology continues to progress. Yet, ... libraries today have a number of viable tools, services, and best practices at our disposal for the preservation of digital content. [...]

Keep in mind that no system will perfectly accommodate your needs. (Have I mentioned that digital preservation systems will always be imperfect?) And there is no use in waiting for the “perfect system” to be developed. We must use what’s available today. In selecting a system, consider its adherence to digital preservation standards, the stability of the institution or organization providing the solution, and the extent to which the digital preservation system has been accepted and adopted by institutions and user communities.

Rhodes’s comments suggest two things: one, that the Durham Statement’s reliance on the eventual development of “stable, open, digital formats” is misplaced. We may never have stable, open, digital formats. But her points also remind us that we cannot afford to wait to begin developing approaches for preserving electronically-published legal scholarship. Some suggestions:

- 1) It is time for law librarians to work in concert with the other stakeholders to explore alternatives for preserving legal scholarship, including:
 - The Legal information Archive, established in 2010 by LIPA and OCLC as “a collaborative digital archive ... to preserve and ensure permanent access to vital legal information currently published in

⁹ Walt Kelly, Zeroing in on those Polluters, in *The Source: The Best of Pogo* (Mrs. Walt Kelly & Bill Crouch Jr., eds.) 224 (usually quoted as “We have met the enemy and he is us.”)

digital formats.” (At this point, it must be noted that the OCLC Digital Archive is not certified as a trusted digital repository.)¹⁰

- The extensive libraries of law journal content held in electronic format by the legal publishers--LexisNexis and Westlaw, but perhaps primarily Hein Online with its extensive retrospective collections. Will their interests in preserving access to law journals for their commercial value mean allow libraries to rely on them to preserve digital content as libraries have preserve print content?
 - Existing preservation and electronic archiving programs such as Portico and LOCKS, which have to date worked mostly with libraries and publishers outside of law.
 - Possible roles for the Library of Congress, which already receives copies of all law journals whether in print or electronic format under the mandatory deposit requirements of the Copyright Act, and works to establish best practices for digital preservation through the National Digital Information Infrastructure & Preservation Program (NDIIPP).
 - Institutional repositories, established either locally, such as Harvard’s Digital Access to Scholarship at Harvard (DASH), or remotely, through such services as the BePress Digital Commons, which hosts repositories for the Cornell, Duke, Georgetown, Georgia, Maryland, and Yale law schools, and also hosts the Marquette Law Review. While questions remain as to whether institutional repositories can provide appropriate preservation services as well as access to scholarship, their potential needs to be explored.
- 2) It is also necessary to begin efforts to promote the use of common standards for formatting the files of the documents. Joe Hodnicki has noted ALA’s and ACRL’s calls for across-the-board format standardization as crucial to long-term public access, and the use of a standard mark-up language (e.g., XML) instead of PDF. Wayne Miller has proposed developing mutually-agreed upon formats for archiving, preservation, and other uses.

¹⁰ The Digital Archives pages of the Center for Research Libraries web site are useful source of information on digital archiving and the concept of trusted repositories.

- 3) It is time as well to take the initiative to create opportunities for dialogue with law school deans, law review editors, interested faculty, and legal information vendors on the need for concerted action regarding preservation of electronically published law journals¹¹

These activities do not answer all of the concerns raised regarding the Durham Statement's call to end print publications of law journals, but they should at least provide a start for action to meet those concerns.

Resources

American Bar Association Legal Resource Technology Center, Free Full-text Online Law Review/Law Journal Search Engine, <http://www.abanet.org/tech/ltrc/lawreviewsearch.html>.

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¹¹ At this writing, librarians at the Duke and Harvard law schools are exploring possibilities for a fall 2010 conference with student law journal editors to be held in conjunction with international Open Access Week.

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Appendix

“Why I Did Not Sign the ‘Durham Statement’”

Margaret Leary of the University of Michigan wrote:

The answer is simple: I do not agree with the call to stop publishing in print, nor do I think we have now or will have in the foreseeable future the requisite “stable, open, digital formats”. So long as we believe legal scholarship is worthy of permanent retention, we should encourage the existence and retention of paper, in addition to digital, copies. [...]

Here are the bullet points behind my conclusion:

- * Research libraries, especially those that are public and already have superb collections, should provide information/knowledge to support current and future research needs.
- * Such libraries should function as repositories of knowledge for the indefinite future, and the format of that knowledge should be able to survive the political, economic, and physical upheavals that we know have occurred in the past and are likely to occur in the future.
- * Only analog formats can now fill that need: print, or microform.
- * Digital repositories depend on: digital format that is consistent; software; hardware; and a steady source of power. We have seen rapid change in formats, software, and hardware, and there is no reason to think that may change. We have no way of knowing that we will always have a steady source of power.
- * Digital repositories should ensure the intertwined features of security and authenticity. I know IT professionals who won't do online banking. The U.S. government has only recently found a method to authenticate enacted legislation.
- * Claims of reduced cost, and reduced use of paper, require careful study of all variables. I am not informed enough to assume either claim to be true.