Access to Digital Case Law in the United States: A Historical Perspective

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Abstract:

This paper provides a historical perspective on the access rights to case law information in digital formats in the United States from the late 1960s to the present, focusing on the intertwined socio-technical factors as well as the major actors, including the government, information providers, libraries, and public interest groups, who have shaped and changed the access rights. Case law is a particular type of government information that is, by U.S. law, within the public domain and therefore should have made a strong case for open, equal, and free access. But the process to make access to this information open and free has not been easy, and the country still lacks a comprehensive digital public access system. This papers calls for government librarians and law librarians to play a more active role in promoting equal access to case law information.

Introduction

The significance of equal access to law lies in the fact that the American democracy has always been associated with an informed public. The Declaration of Independence emphasizes "the idea of public information" as a central tenet in the new governmental structure (Quinn

2003, 283). In the founding years of the federal government, an important way to disseminate the American republican ideals was "to provide access to government information" (Shuler, Jaeger, and Bertot 2010, 11). Because of such emphasis on the informed public, the law dictates that government information is free for public access. According to copyright law, information generated by the government, including primary legal information—statutes, bills, resolutions, and court opinions—is in the public domain.[1] However, although law was one of the first fields that utilized new information and communication technology and established electronic information services, access to legal information in digital formats has not been free and equal.

This paper provides a historical perspective on the access rights to case law information in digital formats, a particular type of government information that is by U.S. law within the public domain and therefore should have made a strong case for open, equal, and free access. The process to make access to this information open and free has been more complicated and difficult than one would expect (Bruce 2000a; Gallacher 2008). This study employs a historical method to analyze the evolution of access rights to digital case law information from the late 1960s to the present, focusing on the intertwined socio-technical factors as well as the major actors, including government, information providers, libraries, and public interest groups, who have shaped and changed the access rights to digital case law information.

Methodology

To understand and interpret the changes in access rights to legal information, as well as the related social-historical context, this study draws from the tradition of historical-analysis research. Historical analysis is particularly suitable for developing a rich understanding of a social world, for examining the past as a means to understand the present, and for explaining how and why the present came to be (Singleton and Straits, 1999). Historical investigation refutes simplified interpretations of the past to, specifically for this study, reveal how the access rights to legal information were shaped by different social forces (Tosh, 2002). In addition, historical analysis is especially helpful in studying an ongoing process that is undergoing rapid change.

The approach of this study is an overall historical constructionist approach. It rests on the premise that objective knowledge of the past is impossible and that history is a product of perspective-laden constructions of the past (Hobart, 1989). This study relies on carefully selected historical sources and perspective-laden interpretations to reconstruct the past. These sources include various primary sources (i.e., key stakeholders' discussions of digital legal information during the study period) and secondary documents (including mass media articles and research papers). More importantly, the author collected oral evidence by interviewing informants, including employees of commercial publishers, government librarians, academic law librarians, law firm librarians, academic librarians, and public legal information providers.

[1]Copyright Act of 1976, 17 U.S.C. §105 (1976).

Background: The Print Era of U.S. Legal Information

The practice of law has always been a learned profession that heavily relies on legal information—codes, statutes, regulations, guides, etc. There are three basic types of published legal information: primary, secondary, and tertiary sources. Primary sources include the direct products of legislative, judicial, and executive actions, such as statutes and codes enacted by legislative bodies, judicial opinions decided by courts, and administrative regulations established by governmental agencies based on statutes (Tussey 1998, 174n1; Finet 1999, 10). Secondary sources are commentary information—law reviews, monographs, treatises (in-depth commentaries and analyses of specific legal subjects written by respected authorities), casebooks (textbooks containing legal cases in particular areas), encyclopedias, and practice guides (Finet 1999, 10; 1993). The sheer volume of legal information makes it difficult to locate specific information or cases (Hanson 2002); therefore, legal publishers have developed tertiary sources such as digests and indexes that can be used to help legal researchers find legal information (Hanson 2002, 571).

The importance of legal information and legal publishing in the U.S. also lies in the nature of the U.S. legal system. In the common law jurisdiction, accumulated judicial decisions become important parts of the law, called *common law*, *case law*, or *precedent*. This body of precedent binds future decisions—when the parties disagree on the interpretation of the law, they look to past rulings of similar or relevant cases. Attorneys, judges, and legal scholars need to frequently refer to previous court decisions. They demand "speedy publication of controlling authorities and research aids providing multiavenue access" (Freeman 1972). Therefore, case law is an important part of the American legal system, and case law publishing in the U.S. has been one of "the central component(s) of American law" (Berring 1997, 190; Arewa 2006, 800). In the complicated U.S. court system, all courts—including the Supreme Court, courts of appeals, district courts, and state courts—generate court decisions that become part of the case law. This paper does not differentiate case law by type of court but roughly categorizes the case law into two types—federal case law and state case law.

In the print era, commercial publishers dominated the legal publishing industry (with the exception of legal scholarly publishing, where nonprofit publishers dominated) (Arewa 2006, 808, 813). As early as 1848, the U.S. Supreme Court held in *Wheaton v. Peters* that American democracy supported the right of anyone to freely disseminate statutes and court decisions and that written court opinions were not protected by copyright law.[2] After this ruling, commercial legal publishers began profiting from reprinting court reports (Surrency 1981, 61). The collective efforts of these publishers gradually developed into a comprehensive system of legal information, enhanced with finding aids, for the American legal system (Berring 1995, 620; Tussey 1998, 177). The U.S. government also publishes certain basic legal information at both federal and state levels (Tussey 1998, 178). For example, the Supreme Court publishes, through the Government Printing Office, *U.S. Reports*, which contains the official versions of all the opinions of the U.S. Supreme Court. Some states print their own case reports. But the information published by the government sources is often available much later than the

[2]Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

commercial products and does not contain secondary sources as commercial products do (Tussey 1998, 178).

The dominance of commercial publishers is especially evident in West Publishing's dominance in the case law publications. From the late 1870s to the 1890s,West Publishing Company established the National Reporter System, which systematically and quickly collected and published all available court decisions[3] from multiple jurisdictions of the U.S. (both federal courts and state courts)(Surrency 1981,62–3). The American Bar Association approved West's comprehensive reporting system in 1898, and West soon became the primary publisher of case reports (Lind 2004, 101). In the 20th century, West's case law publications were the "quasi-official" record for American case law information (Hanson 2002, 567).

West's case reports of judicial opinions included not only the text of the opinions but also some "value-added" secondary information, including syllabi (summarizing each opinion's general holdings), headnotes (summarizing the specific points of law recited in each opinion), and key numbers (categorizing the points of law into different legal topics and subtopics)(Tussey 1998, 178). These sources served as important finding aids and research tools for legal professionals in the print environment (Hanson 2002, 571). Although court decisions themselves are in the public domain, it is widely assumed that West has copyright on the secondary information. As a matter of fact, before the end of the 1990s, West also assumed copyright on the case law reports it published, including the text of the court decisions, selection and arrangement of the court decisions, and the pagination in the reports. Pagination was important because federal courts and many state courts required that lawyers provide West citations and page numbers for referenced court decisions (Wyman 1996, 219). The citation and pagination system had therefore become an important competitive tool in the legal publishing market.

As case law publication was dominated by commercial publishers, the dissemination of this important component of government information was also dominated by commercial practices. In the print environment, lawyers had access to legal information through physical law libraries, courthouses, and bar associations (Gallacher 2008, 14; Berring 1997, 203). The general public could also access the case law if they had access to a law library that was open to the public. But book-based legal information already presented problems. For example, not all law libraries were open to the general public. Scholars who were interested in using legal information to conduct interdisciplinary research were limited in their ability to use the finding tools in print format (Gallacher 2008, 3n11).[4]

In addition, although commercial publishers generally met lawyers' demands for legal information in the print environment, the approach to publishing all precedent exacerbated problems with the ever-increasing volume of legal information (Arewa 2006, 813, 816; Hanson 2002, 567–68). The volume impeded effective access to legal information and became one of the factors that led to computer-assisted legal research (Arewa 2006, 816; Hanson 2002, 573).

[3] Every state and federal court had rules for what court opinions should be published and what should not; West only dealt with the "published opinions" (Berring 1997, 192–93). West's approach was innovative in that most other publishers only published selective court decisions that the editors considered important (Lind 2004, 101); this made West's publications more comprehensive.

[4] Furthermore, difficult legal language has also created barriers for public access to legal information (Gallacher 2008, 4–7).

The Rise of Commercialized Digital Access

In the 1960s, the law profession became one of the first disciplines to utilize computer technology to support legal research, called *computer-assisted legal research* (CALR). The social and material foundation of CALR lay in the legal profession's information need and financial ability. For one thing, the characteristics of the U.S. legal system and its information processing cried out for computer assistance. By the early 1960s, American lawyers had found the task of locating relevant cases and secondary sources to be an intolerable burden (Hanson 2002, 573). Confronted by the growing challenges of paper-based legal research, some forward-thinking legal professionals hoped to use computer technology to speed up their searches (Kavass and Hood 1983, 116;Hanson 2002, 573). For another, the law profession had the financial ability to support the expensive development of new systems. Considering the cost of dedicated equipment, dedicated communication links, and special training, both the developers and their customers had to invest a lot for online information services. Lawyers had "relatively well-heeled customers" to whom the costs of technology could be passed directly (Brown 2002, 129). Therefore, lawyers became both "originators and beneficiaries" of the digital information service (Brown 2002, 129). With the demand for and the financial ability to support the development of online access systems, a digital access regime began to take shape.

Scholars and observers agree that LEXIS (later known as LexisNexis), introduced in 1973, was the first commercially successful, broadly accessible full-text legal information service (Hanson 2002; Bourne and Bellardo-Hahn 2003). West Publishing introduced the Westlaw database in 1975, first limiting their services to headnotes only (Berring 1997, 196) but soon developing a full-time database to compete with LEXIS (Harrington 1985). During the 1970s, LEXIS and Westlaw were still under development and only used by a limited amount of large law firms. By the mid-1980s, they had both developed into highly sophisticated services, and the market greatly expanded (Harrington 1985). The competition between LEXIS and Westlaw had been fierce since the early 1980s, and the two services have remained the dominant digital legal information services to this day. LEXIS was one step ahead in developing an online legal information system, but Westlaw benefited from West Publishing's large amount of print materials and established market, as well as its sales and marketing force (Brown 2002, 129). The continuing competition not only drove the two dominant actors to improve their services but also had a deep impact on their business and marketing strategies, which in turn largely shaped the electronic legal information market before the wide adoption of Web-based information dissemination.

Despite their fierce competition, the two actors in the American legal information arena had many similarities from the very beginning and eventually became known as a competitive duopoly. LexisNexis and Westlaw have served as comprehensive, self-contained digital legal resources (Tussey 1998, 184). Both of them were initially repositories of statutes and court decisions but soon grew into comprehensive libraries of legal information, including administrative materials, law review articles, and other secondary information (Berring 1997, 197). A great deal of the information contained in the two services is in the public domain, but from the beginning, only subscribers willing to pay premium prices could access the services (Tussey 1998, 184).

At the outset, both systems were "positioned and designed to be marketed to the legal community" (Bourne and Hahn 2003, 331) rather than the general public, or the consumer market. More specifically, they both targeted large, wealthy law firms and important government agencies as their markets, which is not surprising considering the cost and limitations of the technology—the cost of marketing and educating users was high and the technology only supported a limited number of simultaneous users. Ironically, some bar associations had supported the development of CALR in order to give solo and small-firm lawyers the same research power as large law firms (thus benefiting small businesses and lower-income and middle-class clients), but by the 1990s, digital access remained a commercialized service that only large firms and corporate legal departments could afford (McCabe 1971, 285, 287). A 1989 American Bar Association (ABA) survey showed that only 13.8% of smaller law firms surveyed had access to LexisNexis and 14.2% to Westlaw; 64% had no CALR at all (ABA Legal Technology Resource Center 1989). In this survey, smaller law firms are defined as firms with 25 or fewer attorneys. More than 82% of the attorneys and more than 96% of the firms in the U.S. fit this description.

Changes in the 1990s—Toward more Democratic Digital Access

In the 1990s, the commercialized, limited access to digital legal information began to change as a result of multiple socio-technical factors. With the development of computer and telecommunication technologies, social expectations toward information dissemination and access to legal information changed. Commercial providers' assumptions about their copyrights over digital legal information drawn from the public domain were challenged. Under social pressure, the government's role in disseminating digital information also began to change. New private-sector entities entered into the market, and there were also efforts by different stakeholders, such as government agencies, government and law libraries, universities, academicians, and the public, to expand access rights to legal information on the Internet.

Technological Changes

In the early 1990s, the information environment changed rapidly. The development of the Internet was speeding up. TELNET and FTP had been used widely, but new applications such as Gopher, Veronica, and WAIS were gaining popularity. The number of Internet users was increasing. Businesses also began to make use of the Internet to obtain information both through a wider range of commercial online services and through news groups, ListServs, and electronic journals (Krumenaker 1993).

Observers and practitioners in the information industry identified several technological trends in the electronic information market: telecommunications speeds increased, equipment prices were decreasing, modem speeds were increasing, new graphical interfaces facilitated ease of use, scanning and storage technologies improved, the number of available electronic databases continued to increase, and database connection options were expanding (Hawkins 1993, 99; Tenopir 1993, 2).

The advancement of technology gave rise to new possibilities and new services. It both challenged the traditional online services such as LexisNexis, Westlaw, and Dialog, which had

been relying on a proprietary platform to provide information access, and provided new options for them to expand their existing markets. When law firms of all sizes became able to adopt computer technology (ABA Legal Technology Resource Center 1992, ABA Legal Technology Resource Center 1991) for word processing and legal research, LexisNexis and Westlaw began to develop specialized products for midsize and smaller law firms.

Social Expectations

Legal information is relevant to all members of society, including law firms, legal and non-legal scholars, and the general public. Among all legal material, judicial opinions—case law—are probably the most frequently cited (Martin 2010). In the beginning of CALR, business models were developed to meet the needs of certain consumers, particularly commercial enterprises, while deemphasizing the needs of other consumers, including the general public (Arewa 2006, 834–35). Therefore, the legal information arena started as a closed universe where the general public had only limited access to information (Arewa 2006). With the changes in information and communications technologies, however, many considered the Internet a potentially powerful tool for government information dissemination. The social expectations toward information dissemination and access to legal information changed accordingly. Public interest groups and library associations made recommendations that the government make public-funded databases freely available (Oslund1996; Thomason 1995; McMullen 2000).

By the 1990s, the primary institutional mechanisms for legal information dissemination included law libraries, the Government Printing Office (GPO) with its Federal Deposit Library Program (FDLP), and various private-sector vendors/publishers including LexisNexis and West Publishing (U.S. Congress Office of Technology Assessment 1988, 36). In the early 1990s, public interest groups, law librarians, government librarians, and small legal publishers pushed for public access to the federal court decisions contained in JURIS, a legal information retrieval system used for in-house searching by government employees. The JURIS database was once the largest database of federal legal materials, including federal case law information (Love 1993). Despite the actions taken, this early open access effort to free the law failed because of complicated contract issues, the ambiguity in the copyright, and the hesitancy of certain government agencies in carrying out the information dissemination function (Zhu 2011). Butthe effort demonstrated rising public expectations for freely accessing primary legal materials. It showed that the public was aware of the availability of digital legal information and that there was a demand for low-cost access to this valuable information. Public interest groups formed to represent the interests of small publishers, researchers, and the general public and actively worked to change the existing use regime of legal information dominated and controlled by large publishers and providers. These groups reopened the question of who should own the legal information and attempted to make an important database available to the public.

Changes from Government Agencies and Libraries

Before the 1990s, the Office of Technology Assessment of Congress noticed that there was a significant demand for government information in digital formats among user groups, “particularly within the library community, private industry, Federal agencies themselves, and various groups with specialized needs (such as educators, researchers, and disabled persons)”

(U.S. Congress, Office of Technology Assessment 1988, 5–6;General Accounting Office 1990). As described previously, entering the 1990s, the development of telecommunication technology raised the public's expectations for accessing government information electronically and public interest groups and library associations pushed the government to free publicly funded databases. In the early 1990s, therefore, parts of the federal and local governments, including Congress, federal courts, and some state courts, began to adjust the government's role in disseminating legal information.

Meanwhile, the U.S. government's information policy began to change under the Clinton administration. Different from the Reagan and Bush administrations, which deemphasized the information dissemination functions of the government and emphasized the roles of the private-sector information providers, the Clinton administration was more active in developing an information dissemination infrastructure (Molholm, 1994; Holden &Hernon, 1996). Probably encouraged by the new information policy, expectations from library communities and the general public, and the technological advancement, government libraries and other agencies began to carry out a more active role in providing public access to legal information, including some of the case law information.

For example, the Government Printing Office (GPO) began to disseminate legislation information electronically through GPO Access, an online service. The GPO collects, maintains, and disseminates information produced by or for the U.S. government, especially legislative information produced by Congress, including congressional bills, records, reports, hearings, and laws. The GPO sends, with a few exceptions, all government publications that it prints, procures, or processes to depository libraries, and the public accesses the information in these depository libraries for free. Legal information was and is an important part of the government documents disseminated through the Federal Deposit Library Program (FDLP). GPO Access was established in 1993 with financial support from the FDLP and provided the public with digital access to legislation information through the FDLP. Soon the service became available to everyone for free on the Internet. By the end of the fiscal year in 1997, the GPO added historical Supreme Court decisions (1937–1975).

Another important government library, the Library of Congress, also established a free online legal information service for citizens, THOMAS, with support from Congress (Ryan 1997). It contained bill full text, bill history information, and *Congressional Record* data. Both GPO Access and THOMAS served the general public with free access to the essential, current legal information such as statutes, bills, resolutions, and legislative documents. It is worth noting that both contained only limited historical case law materials; therefore, it could not replace Westlaw or LexisNexis in serving people who needed to search court decisions. However, these services showed the changes in government agencies and efforts of government librarians. In addition, the extensive publicity that GPO Access and THOMAS received promoted the public's access to legislative information and increased the public's expectations about free access to legal information, which further destabilized the existing social expectations for access to digital case law.

The most important change probably came from the judicial branch, which had traditionally relied on private-sector publishers to print and disseminate its information, including case law. In the federal government, GPO had been publishing the official *Reports of the U.S. Supreme Court* since 1922 and court opinions since 1946 (GPO 2010, 108, 144). But West Publishing has been the quasi-official court reporter of the U.S. judicial system. In the 1990s, courts began to carry on the dissemination function, starting with the Supreme Court.

In June 1990, the Supreme Court began to make court opinions available on the Internet through Project Hermes (Collins 1995, 415; Carroll 2006, 744). The project started as a response to the rising demand from journalists and academicians for faster access to Supreme Court opinions (Yelin 1995, 63). The Supreme Court began to investigate options to distribute its opinions electronically in the late 1980s (Marcotte 1990, 27; Collins 1995, 417). From the beginning, the Court showed interest in a not-for-profit solution that would "make the opinions available on an equal basis to all interested parties" rather than giving any legal providers more economic advantages (Collins 1995, 418–19). After considering a variety of proposals and overcoming many "political problems" (Collins 1995, 415), in 1990 the Court accepted a proposal from an ABA-backed not-for-profit consortium of 27 legal publishers, media outlets, and lawyers' groups (Marcotte 1990, 26). This consortium offered to provide computer hardware and software and to train Court employees, and it asked for immediate transmission of Supreme Court opinions in return (Marcotte 1990, 26). The Court decided to disseminate Supreme Court opinions, syllabi, and concurring and dissenting opinions to twelve selected commercial and noncommercial organizations (including LexisNexis and West) over telephone lines within the same day of the court release (Yelin 1995, 63). Two of the twelve participants in Project Hermes, Case Western Reserve University (CWRU) and UUNET, were not commercial entities and permitted free access to the opinions over the Internet through their FTP sites (Yelin 1995, 63).

In 1991, the Administrative Office of U.S. Courts proposed creation of a public database of opinions and a public domain citation system, but Congress did not accept this proposal (Kirtley 1996, 78). Despite the lack of a central public database or unified system, the courts continued to disseminate their decisions through electronic methods. The U.S. Court of Appeals put their decisions on bulletin board systems (BBSs), from which decisions could be retrieved for 75 cents a minute (Mansnerus 1995, D5). Many state supreme courts also placed their opinions on BBSs (Efuntade 1995). But BBSs had their limitations. For example, it was difficult to keep an archive, and courts simply deleted older cases from their BBSs (Efuntade 1995). But over time the courts improved their dissemination technology and made public access more convenient.

Changes in the Legal Information Market

The private sector had always played a role in disseminating legal information and government information more broadly. Because much legal information, especially primary legal information, was in the public domain, vendors had the right to repackage it, add value, sell or resell it in different formats, and make profit from it. In the electronic information arena, before the early 1990s, only people who could afford to pay the fees for commercial online services could access legal information in digital formats. LexisNexis, West, and a handful of other commercial providers spent millions of dollars and staff hours to build massive databases with

public-domain legal information (e.g., statutes and court decisions) and had treated these databases as their own property, charging fees for access and use that not all could afford.

The development of information and communication technologies in the 1990s and the free availability of case law material from the courts helped both smaller commercial legal publishers and public legal information providers to succeed in the legal information arena. In the 1990s, many digital start-ups entered the legal information market (e.g., LoisLaw, VersusLaw, and Findlaw), in part because primary legal information was now more readily available through government agencies. These start-ups offered different sets of information services at much lower prices than Westlaw and LexisNexis. They were agents of change as well as outputs of the changes that had been occurring.

The legal academic world was another important agent of change that benefited from free access to government legal information. As part of Project Hermes, Case Western Reserve University (CWRU) has played an important role in disseminating case law to the public since 1990 (Collins 1995, 434). Other law schools also began to participate in the open access movement to legal information in the early 1990s. The most notable is the Legal Information Institute (LII) at Cornell University, established in 1992, which provides free public access to selected primary legal information, including the U.S. Code (converted from GPO data), important Supreme Court opinions (converted from the Hermes archives at CWRU), and other legal information obtained from various sources (Bruce and Martin 1994;Bruce 2010, personal communication). In addition, LII has developed editorial products that have helped increase public understanding of law. Today the LII remains a major source for the public to access important legal information.

Changes in the Law

One of the important obstacles to overcome for free access to case law material was the ambiguity surrounding the copyright ability of "edited" case law information published by West Publishing, especially digital versions of case law information. Although the *Wheaton v. Peters* case established the public nature of statutes and court decisions as early as 1848,[5] it had not been clear whether West could have copyright protection on some of the value-added contents or features of the databases. While West's headnotes, summaries, and key number system were usually accepted as copyrightable work,[6] some features were more contentious, i.e., the edited text of court decisions, the compilation, and the page numbers (the pagination system).

The U.S. does not have a database protection law. The 1991 *Feist Publications, Inc., v. Rural Telephone Service Co.* case established that a compilation of factual information could be copyrightable only if the compilation had sufficient originality and creativity.[7] The fact that someone had spent considerable time and money collecting the data was not sufficient for a

[5]Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

[6] This might be an overgeneralization. Legal scholars have different opinions about the originality of these editorial materials. See Tussey (1998, 219–20 and n168–9).

[7]Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991).

claim of copyright.[8] But the *Feist* case seemed contradictory to an earlier ruling regarding LexisNexis and West, in which the court supported the copyright ability of West's pagination system.[9] In that lawsuit, LexisNexis eventually paid West license fees to use their pagination in its case law databases. Given these two different cases, it was not clear how the *Feist* decision applied to legal information.

In the late 1990s, the court finally clarified that West does not hold copyright on the case reports it published. Hyperlaw, Inc., a New York publishing company that published legal information on CD-ROM, challenged West's claim to copyright. It sought a declaration of non-infringement with respect to use West's case law content in its CD-ROM product. The court deemed that West had copyright protection on neither the pagination system nor the text of the written court decisions of the case law it published and that Hyperlaw could copy individual case reports from West's publications.[10] The case did not change the power equation in the legal publishing market fundamentally, but it cleared certain obstacles to case law access by providing more opportunities for public information providers and small legal publishers.

Efforts from Government Libraries and Law Libraries: Citation Reform

Requiring reference to the West citation system (typically including case names, volume numbers, and page numbers) had been an established standard of practice in the law profession since the early twentieth century. For example, although the *Bluebook*, the authoritative legal citation manual in the U.S., preferred citation to *United States Reports* for U.S. Supreme Court cases, for lower federal courts with no official reports, the *Bluebook* preferred authors to cite cases from the West publications *Federal Reporter*, *Federal Supplement*, and *Federal Rules Decisions* even if the cases could be found in another print reporter (Harvard Law Review Association 1991, 193–94). West Publishing had always been highly protective of its pagination system, not allowing other publishers to use the page numbers of West case law material (except for LexisNexis, who licensed the pagination from West). Therefore, because the West page numbers were such an essential part of the traditional legal citation form, law professionals and other legal researchers, including scholars in other disciplines and members of the general public who represented themselves in litigations, had to either use legal books published by West or consult Westlaw or LexisNexis databases.

In the early 1990s, some publishers and vendors, librarians, the public, and legal scholars questioned the standard of practice based on West citation system because West's proprietary claims to the page numbers rendered court decisions obtained from other sources "useless" to lawyers who wanted to cite these cases (Wyman 1996, 219). The reliance on private-sector case law publications because of their citation systems hindered the effective access to digital legal

[8]*Id.* Feist had copied information from Rural's telephone listings to include in its own database after Rural had refused to license the information. Rural sued for copyright infringement. The court ruled that information contained in Rural's phone directory was not copyrightable and that therefore no infringement existed.

[9]West Publishing Co. v. Mead Data Central, Inc.,799 F.2d 1219 (8th Cir. 1986).

[10]Matthew Bender & Co. v. West Publishing Co., 158 F.3d 674 (2nd Cir. 1998).Hyperlaw was one of the plaintiffs in this case.

information in free or low-cost databases that did not have the West pagination (AALL Task Force on Citation Formats 1995, 585). Law libraries, many of them federal deposit libraries, became activists that pushed the courts to move away from the vendor-dependent citation forms. The citation reform movement started with the Wisconsin State Law Library then spread to many states. On January 1, 1994, the Louisiana Supreme Court adopted a "public domain" citation format, and some other courts made similar changes (Browne 1999, 77). The American Association of Law Libraries (AALL) has been an important advocate for citation reform. Since July 1995, it has been recommending that state jurisdictions adopt a vendor- and media-neutral citation system (AALL Task Force on Citation Formats 1995). Many states have followed the recommendation in recent years (AALL Citation Format Committee 2007).

If the reliance on the West pagination system had continued, then there would have been no impetus for legal researchers to use public access legal information sites; therefore, such sites would likely not have prospered (Gallacher 2007, 530). With vendor-neutral citation formats, legal researchers could find and cite legal material in all formats rather than relying on particular commercial services that might not be easily available. Thus, citation reform supported the existence of open-access legal information sites and promoted more free access to digital legal information, and it made it easier for small businesses to enter the legal information market.

Case Law Access in the 21st Century

In the transition from print to a digital environment, concerns for access to case law have heightened because when book-based legal research is inadequate or no longer an option, access to the law increasingly depends on one's ability to pay (Gallacher 2008, 4). In addition to the monetary aspect of access, commercial digital information providers hold control over access through the use of license agreement and rights management technology (Gallacher 2008; Arewa 2006). Many libraries, including law firm libraries, have come to rely solely on digital legal information (Gallacher 2008, 12). And as pro se cases increase each year, the public's access rights to digital legal information are increasingly important. However, the digital environment lacks an effective system through which the public can access comprehensive digital legal information in the manner of the public library during the print era (Arewa 2006, 828).

In 2001, the judicial branch of the U.S. government released a Web-based system called Public Access to Court Electronic Records (PACER), through which the public has complete access to docket text, court opinions, and related documents from federal appellate, district, and bankruptcy courts, except for private information. The access has not been free, however; there is a fee for anyone who uses the service. The passage of the *E-Government Act* in 2002,[11] which pushed for increased electronic dissemination of government information, encouraged more courts to make their opinions available electronically. Yet legal scholars have pointed out that some courts are more willing to embrace Internet access to their decisions than others, because "they are not likely to be enthusiastic supporters of free and open access to the law, because open access would likely encourage more and more complicated pro se filings"(Gallacher 2008, 22). Today, most court Web sites have decisions from 1999 to the present, but the coverage of available case law before the late 1990s varies among different courts.

[11] E-Government Act of 2002, 44 U.S.C. § 3501 (2000).

As mentioned previously, the increased availability of free legal information from government libraries and agencies has provided more opportunities for public information providers and small legal publishers to enter the legal information market. Some providers aim to make case law accessible to the general public. Some of the new commercial legal providers, such as Fastcase, provide part of their public-domain content freely available for the public while providing legal professionals with alternative information resources and pricing structures to Westlaw and LexisNexis offerings. Those who pay for the access to these resources get more advanced search functions and a more complete set of information.

In the trend toward more free access to primary legal information, large commercial providers have also adjusted their marketing strategies. On the one hand, they have begun making a small portion of their case law material freely available for the public. On the other hand, they strive to emphasize the "value-added" content and services they offer to their customers (Zhu 2011). Westlaw has always had proprietary value-added content such as headnotes in their case law databases. Through years of competition with Westlaw, LexisNexis has developed its own case law summaries, headnotes, and commentary to statutes and case law material. Commercial providers stress that the value of their products and services exists in the completeness and accuracy of the content, the ability to completely index the material, and the ease-of-use search functionalities. All these serve as distinctive advantages over cheaper legal information providers (personal communication with informants). In addition, some commercial providers focus on "providing solutions, not just information" (Snoody 2000). They design different products and services for different legal professional markets, so different groups of users with different information/service needs may pay different prices for different levels of access. Focusing on value-added services for the legal profession protects them from the debates about free access.

Both legal professionals and the general public have benefited from the free or low-cost online case law resources. Some lawyers at small law firms, and solo practitioners especially, have benefited from the availability of alternative information resources—some of the resources, such as Fastcase and Casemaker, are available via certain state bar associations through particular arrangements (Justiss 2011). However, the public's access to case law information is still limited. Most of the free online resources cover only very recent case law, especially the state case law. Internet-based public providers have played a role in providing equal access to legal information, but the lack of common standards, interoperability, and sustainable resources makes it difficult for them to carry out the role of providing comprehensive, equal access to the public (Bruce 2000a; Joergensen 1999, 33).

Faced with this situation, some groups, notably Public.Resource.Org, founded and led by famous activist Carl Malamud, government libraries and law libraries, and some law schools, are actively making efforts to "free" the case law. In 2007, after years of effort, Public.Resource.Org obtained the information in the JURIS database and made it publicly available (Public.Resource.Org 2008). The database included all Courts of Appeals decisions since 1950 and all Supreme Court decisions since 1754. In more recent years, Malamud has initiated another project to "recycle" the case law information in the government-provided PACER system. He made a public call for individuals to download PACER documents and send them to Public.Resource.Org for public access. Public interest activists even began to develop their own search interface for the "recycled" resources (i.e., https://www.recapthelaw.org/).

Compared with Malamud's activist approach, government libraries and law libraries have taken a more conservative, progressive approach. In 2007, seventeen federal depository libraries cooperated with the government to implement a two-year pilot program that offered free and unrestricted access to PACER in the participating libraries. The pilot was suspended abruptly because someone tried to download a massive amount of documents (in response to the public call made by Malamud) (Lyons 2009). But librarians at government libraries and law libraries continue to submit petitions to the government and are working together to develop new proposals to make PACER "part of a legal research and training program for librarians and the users" (*Pilot for PACER access* 2009).

While the developments in case law access are encouraging, the lack of a comprehensive public access system, especially the lack of state court material in public online services, makes the current public access system insufficient compared to the commercial legal information services. However, these efforts demonstrate the public's expectations for more equal access to case law information, as well as the public's potential power to "free" the law.

Discussion and Conclusion

This paper traces the history of the digital case law access in the U.S. from the late 1960s to the present. Before the 1990s, commercial publishers and information providers had developed comprehensive case law information systems. But limited by technology and resources, access was only available to large law firms and important government agencies who could afford to pay the expensive access fees. Things began to change in the 1990s as a result of technological development, changed social expectations, and efforts from many different actors in the legal information arena. The availability of digital case law information from the government and the appearance of public information providers gradually changed the power equation. Small law firm lawyers, solo practitioners, government employees, public interest lawyers, and the general public have benefited from online case law resources, but a comprehensive legal information system that provides equal and free access to this important public domain information is still lacking. In addition, as commercial providers have begun to depend upon market customization and price differentiation to create profits, different groups of users have come to have different levels of access rights: those who pay for the commercial services get better search functions, more comprehensive information, and value-added services, while those who do not pay can only access a limited range of legal information with less advanced search functions.

The public should enjoy access rights to case law information, but the question is who should provide the access. Based on the notion that the law is a public good, some scholars argue the government should replace private publishers as the primary distributor of legal information (LoPucki 2009; Oakley 1994). In the long term, it is more desirable that the creators of legal information make it freely available (Bruce 2000b).Other scholars consider radical reformation of the legal information industry premature and think that it would interfere with the normal operation of the market for legal information (Berring 1995). Some even argue that it is unwise and even "dangerous" to rely on the government to provide legal information for many reasons (Gellman 1996). Barriers to government-supported free access to primary legal information include the difficulty of collecting historical case law, the expense of maintaining a large system, the lack of legislation, the often-changing information policies of government agencies, and the

different ideologies or value systems about governments' roles in providing public access to the law. Many still hold the belief that the government should not compete with the private sector in the area of information dissemination but should leave the business opportunity to commercial information providers (Walters 2005, 245; Ebersole 1994, 70).

A related question is what kind of access the public should have. The government has started to provide current case law information (much of the state case law is available for free), but the level of value-added services the public may enjoy depends on the government's central information dissemination policy. For one thing, who is able to enter the market depends on what kind of raw data the government provides. For example, if all relevant government agencies make legal information available by self-publication (many federal and state courts have set good examples) and use standardized practices to increase the interoperability (which is much harder to realize), then it would be easier for smaller providers to provide value-added services to a less profitable "niche market," thus benefiting the public. But on the other hand, if the government itself adds value to the data (e.g., centralized archiving of all court decisions), it might create competition for the private-sector providers. Therefore, it is debatable whether the government should publish case law information, whether it should establish a standard practice for publishing and distribution, and what level of value-added data it should provide to the public and the providers.

While the debates goes on, public interests groups who represent the users of legal information are taking action to free the case law from both government fee-based services and commercial providers. Another group of stakeholders in this movement, government librarians and law librarians, have played important roles in this social negotiation around public access to primary legal information. In the print era, they made legal information in print format freely accessible to everyone. In the digital age, they are bound by contracts and licenses and do not have much freedom to provide free access to the public, but they have been exploring alternative ways to support and aid in the free law movement. As intermediaries between the government and users, these librarians are in a subtle position that requires strategic considerations and communications. But they have the potential to initiate effective mediations among all stakeholders in order to resolve the conflicts and promote equal access to case law information.

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