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## Foreword: Why Open Access to Scholarship Matters

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# SYMPOSIUM

## FOREWORD: WHY OPEN ACCESS TO SCHOLARSHIP MATTERS

by  
*Joseph Scott Miller\**

On March 10, 2006, the *Lewis & Clark Law Review* sponsored a day-long symposium entitled *Open Access Publishing and the Future of Legal Scholarship*.<sup>1</sup> That gathering led to the eight papers in this issue of the *Review*. In this Foreword, I offer some thoughts about why all law professors should take an interest in the movement promoting open access to scholarship.

What, then, does “open access scholarship” (or “open access publishing”) mean? Varied definitions appear in different open access movement source documents, such as the Budapest Open Access Initiative,<sup>2</sup> the Bethesda Statement on Open Access Publishing,<sup>3</sup> and the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities.<sup>4</sup> One can also derive working definitions from the open access publishing approaches various actors have taken.<sup>5</sup> The Budapest declaration, for its part, sums up the concept this way:

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<sup>1</sup> Conference materials, including podcasts of the presentations, are available on the web at <http://www.lclark.edu/dept/blaw/springsympos2006.html>. To learn more about the movement to promote open access to legal scholarship, please consult the resource website we created in conjunction with the symposium, at [http://lawlib.lclark.edu/research/open\\_access/](http://lawlib.lclark.edu/research/open_access/). The *Review*'s general website is at <http://www.lclark.edu/org/lclr/>.

<sup>2</sup> Budapest Open Access Initiative (Feb. 14, 2002), <http://www.soros.org/openaccess/read.shtml>.

<sup>3</sup> Bethesda Statement on Open Access Publishing (June 20, 2003), <http://www.earlham.edu/~peters/fos/bethesda.htm>.

<sup>4</sup> Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities (Oct. 22, 2003), <http://www.zim.mpg.de/openaccess-berlin/berlindeclaration.html>.

<sup>5</sup> See, e.g., JOHN WILLINSKY, *THE ACCESS PRINCIPLE: THE CASE FOR OPEN ACCESS TO RESEARCH AND SCHOLARSHIP* 211 (MIT Press 2006), available at <http://mitpress.mit.edu/catalog/item/default.asp?tid=10611&ttype=2> (“group[ing] the current variations” of open access publishing “into ten flavors or models, based largely on how they are financed and the nature of the access that they provide”).

By “open access” to this literature, we mean its 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. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.<sup>6</sup>

And, as Professor Willinsky has observed, the common thread running through open access publishing approaches is that “all increase access to the journal literature over traditional models of scholarly publishing.”<sup>7</sup>

Scholars in the physical and biological sciences have led the way in showing the viability of Internet-based, open access scholarly publishing. For example, physicist and Cornell University professor Paul Ginsparg<sup>8</sup> launched the arXiv.org e-print platform in August 1991,<sup>9</sup> and the National Institutes of Health launched PubMed Central in February 2000.<sup>10</sup> In these fields, “a steady escalation in journal prices ... ‘four times faster than inflation for nearly two decades’” has fueled the drive toward open access methods for distributing, and accessing, scholarly papers.<sup>11</sup> Law review subscription rates have, by comparison, remained quite flat, and thus have not pushed law professors toward open access publishing.<sup>12</sup>

Even without the pressure of rapidly rising subscription rates, open access models have begun to make their way into the legal academy. Perhaps the best known open access resource for law professors is the Social Science Research Network (SSRN),<sup>13</sup> a repository for full-text research papers in many disciplines (including law). SSRN, first launched in October 1994,<sup>14</sup> today has more

<sup>6</sup> Budapest Open Access Initiative, *supra* note 2, ¶ 3.

<sup>7</sup> WILLINSKY, *supra* note 5, at 211.

<sup>8</sup> Wikipedia, Paul Ginsparg, [http://en.wikipedia.org/wiki/Paul\\_Ginsparg](http://en.wikipedia.org/wiki/Paul_Ginsparg).

<sup>9</sup> Peter Suber, Timeline of the Open Access Movement, <http://www.earlham.edu/~7Epeters/fos/timeline.htm>.

<sup>10</sup> *Id.*

<sup>11</sup> WILLINSKY, *supra* note 5, at xiii (quoting Peter Suber).

<sup>12</sup> For example, the total annual subscription price a U.S. law library paid in 2005 for the five most cited general, student-edited law reviews (*Harvard Law Review (HLR)*, *Yale Law Journal*, *Columbia Law Review*, *Stanford Law Review*, and *Michigan Law Review*) is \$411. In 1995, the total price was \$195 (in 1995 dollars). In 1985, the total price was \$152 (in 1985 dollars). In other words, the price change from 1985 to 2005, stated in 2005 dollars, is just 52% (from \$269.75 to \$411). It must be noted that much of the increase in the 2005 total is due to the *Harvard Law Review*'s move to differential pricing: institutions pay \$200 for a subscription, whereas individuals pay \$55. Were *HLR* to charge institutions the same price it now charges individuals, the 2005 total for the reviews would be \$266 (not \$411), i.e., a drop of \$3.75 from 1985 to 2005 stated in 2005 dollars.

<sup>13</sup> Social Science Research Network (SSRN) Home Page, <http://www.ssrn.com/>.

<sup>14</sup> Suber, *supra* note 9.

than 126,000 abstracts and more than 97,900 full-text articles on hand.<sup>15</sup> And formally published law review articles increasingly cite to papers in their SSRN form. Consider the following, based on a search of Westlaw's JLR database I conducted on November 17, 2006: the number of articles in which either of two search strings—"www.papers.ssrn.com!" or "ssrn.com!"—appeared has grown from only one article prior to the year 2000, to 403 articles thus far in 2006. The annual counts from 2000 to 2006, inclusive, are set forth in the margin.<sup>16</sup> Discussion of open access publishing itself still lags in the law reviews, however. In Westlaw's JLR database, only six articles contained the phrase "open access publishing" as of November 17, 2006, and all were from 2004 or after. None contained the phrase "open access scholarship." The fruits of this *Lewis & Clark Law Review* symposium are, together, a large step forward in the discussion.

There are at least four reasons why all law professors should take an interest in the movement promoting open access to scholarship. Three relate to current circumstances, and one is more aspirational. The central reason open access scholarship matters is because it extends the reach of every scholar who participates in it. Simply put, placing one's article in an open access repository (such as SSRN or Berkeley Electronic Press's Legal Repository<sup>17</sup> ("bepress")) dramatically reduces the cost at which people *outside* the U.S. law school community (i.e., people other than law professors and current law students) can find and read that article. So long as the means for distributing articles doesn't undermine the incentive for producing them in the first place, reducing the access cost is a social gain.

Scholars try to grow the body of public knowledge. Sharing the written results of their investigations is a vital means for doing so. It is a small step from that basic practice to conclude that, the more broadly one shares, the more robustly one grows the body of public knowledge. Professor Willinsky transforms this view from an *is* to an *ought*, coining an "access principle":

[A] commitment to the value and quality of research carries with it a responsibility to extend the circulation of this work as far as possible, and ideally to all who are interested in it and all who might profit by it.<sup>18</sup>

As it happens, and as Willinsky himself recognizes, this duty's dictate coincides quite well with the contemporary academic's desire to be recognized—most especially, to be cited—for his or her contributions to the field.<sup>19</sup> If vanity

<sup>15</sup> Social Science Research Network, Display Journal Browse, <http://papers.ssrn.com/sol3/DisplayJournalBrowse.cfm>.

<sup>16</sup> In Westlaw's JLR database, I made a year-by-year search for articles in which the following search string appeared: > www.papers.ssrn.com! or ssrn.com! <. The annual totals (or, for 2006, the partial total through November 17) are as follows: 2000 – 5; 2001 – 6; 2002 – 18; 2003 – 79; 2004 – 195; 2005 – 296; 2006 – 403.

<sup>17</sup> Berkeley Electronic Press, bepress Legal Repository, <http://law.bepress.com/repository/>.

<sup>18</sup> WILLINSKY, *supra* note 5, at 5 (emphasis omitted).

<sup>19</sup> *Id.* at 22 ("Open access is not only about human rights and the greater circulation of knowledge. It is about increasing *research impact*, to use the constant focus of Stevan Harnad's compelling campaign for open access. . . . So it is hardly surprising that during discus-

or avarice drives one to act in accord with the access principle, so much the better for open access to scholarship.<sup>20</sup> Further, given that the added cost of putting one's article in an open access repository is vanishingly small, and that the eternity which starts the day one does so is a long time, even quite a small prospective benefit (e.g., one more interested reader per year finds and uses the article) justifies putting the article there. One does not, of course, need to know who any future interested reader is, or how to target her, when depositing the work in an open access database; search technology lets that reader find the article when needed. Indeed, the greater degree to which open access publishing taps users' knowledge of their own wants and needs to deliver useful results, when compared to traditional publishing's more limited, niche-driven marketing efforts, is a distinct advantage precisely because a user's localized knowledge is best known to him.<sup>21</sup>

Two secondary reasons that open access publishing matters, under current circumstances, are increased distribution speed and additional impact measures. Depositing a new paper with SSRN, or bepress, makes it available to others *immediately*. There is no delay from editing, printing, or transporting a print volume. SSRN emphasizes this point in the heading on its search page, offering "Tomorrow's Research Today."<sup>22</sup> Putting a paper in SSRN, in particular, also makes the frequency that people either view the abstract or download the paper into fodder for SSRN's measures of scholarly impact. Specifically, from the SSRN homepage, one can request a real-time, rank-ordered list of the most frequently downloaded papers (both for all time, and for the last 60 days), the 1,500 most frequently downloaded authors in law (both for all time, and for the last 12 months),<sup>23</sup> and "the top law schools" as measured by paper downloads

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sions of open access, the necessary vanity of academic life—publish well or perish badly—quickly surfaces, as faculty members ask about what this new publishing approach will mean for the current order of things.") (internal citation omitted).

<sup>20</sup> Cf. ADAM SMITH, *THE WEALTH OF NATIONS* 400 (J.M. Dent & Sons Ltd. 1977) (1776) ("He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.") (Book IV, ch. 2, ¶ 9). You can consult a plain text copy of Smith's *Wealth of Nations* at the Project Gutenberg site. See <http://www.gutenberg.org/etext/3300>.

<sup>21</sup> Cf. F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519–20 (1945) ("The peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess. The economic problem of society . . . is rather a problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know. Or, to put it briefly, it is a problem of the utilization of knowledge not given to anyone in its totality.").

<sup>22</sup> Social Science Research Network Electronic Library, <http://papers.ssrn.com/sol3/DisplayAbstractSearch.cfm>.

<sup>23</sup> About SSRN Top Law Authors, [http://www.ssrn.com/institutes/about\\_top\\_law\\_authors.html](http://www.ssrn.com/institutes/about_top_law_authors.html).

(both for all time, and for the last 12 months).<sup>24</sup> (Bepress offers no similar rankings.) A number of people criticize these impact measures on various grounds,<sup>25</sup> and others defend them.<sup>26</sup> Whether such rankings data are a net plus or minus, however, it is plain that SSRN's open access repository enables such data collection. And law professors, like it or not, now live in a world where the data's ready availability affects them.

The fourth, and final, reason that open access matters is just starting to come into view. Open access scholarship, by virtue of its openness on the web, can spark the creation of a new social layer of metadata that connect and comment on that scholarship. Specifically, given the availability of social bookmarking software,<sup>27</sup> we can build on web-available scholarly articles as new foundations for networked social capital<sup>28</sup> in the form of user-written semantic tags<sup>29</sup> that others can see and aggregate in illuminating ways. For example, I can tag web-based articles according to the concepts I think they discuss in an especially interesting and important way, their level of difficulty, the substantive areas with which they are most concerned, or any other dimension of interest to me.<sup>30</sup> If others also tag them, a dynamic folksonomic network bubbles up from our tagging.<sup>31</sup> Two websites familiar to many, Flickr<sup>32</sup> and Del.icio.us,<sup>33</sup>

<sup>24</sup> About SSRN Top Law Schools, [http://www.ssrn.com/institutes/about\\_top\\_law\\_schools.html](http://www.ssrn.com/institutes/about_top_law_schools.html).

<sup>25</sup> See, e.g., Gordon Smith, Conglomerate, Gaming SSRN (Nov. 10, 2005), [http://www.theconglomerate.org/2005/11/gaming\\_ssrn.html](http://www.theconglomerate.org/2005/11/gaming_ssrn.html); Brian Leiter, Brian Leiter's Law School Reports, Problems with the SSRN Rankings (Aug. 17, 2005), [http://leiterlawschool.typepad.com/leiter/2005/08/problems\\_with\\_t.html](http://leiterlawschool.typepad.com/leiter/2005/08/problems_with_t.html).

<sup>26</sup> See, e.g., Bernard S. Black & Paul L. Caron, *Ranking Law Schools: Using SSRN to Measure Scholarly Performance*, 81 IND. L.J. 83 (2006), available at [http://www.law.indiana.edu/ilj/volumes/v81/no1/7\\_Black.pdf](http://www.law.indiana.edu/ilj/volumes/v81/no1/7_Black.pdf).

<sup>27</sup> "Social bookmarking is a web based service, where shared lists of user-created Internet bookmarks are displayed." Wikipedia, Social Bookmarking, [http://en.wikipedia.org/wiki/Social\\_bookmarking](http://en.wikipedia.org/wiki/Social_bookmarking).

<sup>28</sup> I borrow the term from John Quiggin, Crooked Timber, Why Do Social Networks Work? (May 30, 2006), <http://crookedtimber.org/2006/05/30/why-do-social-networks-work/>.

<sup>29</sup> "A tag is a keyword or descriptive term associated with an item as means of classification by means of a folksonomy. Tags are usually chosen informally and personally by the author/creator of the item—i.e. not usually as part of some formally defined classification scheme. Tags are typically used in dynamic, flexible, automatically generated internet taxonomies for online resources such as computer files, web pages, digital images, and internet bookmarks (both in social bookmarking services, and in the current generation of web browsers—see Flock and Mozilla Firefox 2.0x)." Wikipedia, Tags, <http://en.wikipedia.org/wiki/Tags>.

<sup>30</sup> Mike Madison discusses this possibility in his contribution to this symposium. See Michael J. Madison, *The Idea of the Law Review: Scholarship, Prestige and Open Access*, 10 LEWIS & CLARK L. REV. 901, 918–19 (2006).

<sup>31</sup> A folksonomy is a collaboratively-generated, open-ended labeling system for categorizing information on the web. Wikipedia, Folksonomy, <http://en.wikipedia.org/wiki/Folksonomy>. In contrast to controlled vocabularies or formal taxonomies, "folksonomies are inherently open-ended and can therefore respond quickly to changes and innovations in the way users categorize Internet content." *Id.*

<sup>32</sup> Flickr, <http://www.flickr.com/>.

<sup>33</sup> del.icio.us Hotlist, <http://del.icio.us/>.

exemplify the powerful way that user tags connect and comment on information—with Flickr, for photos<sup>34</sup>; and with Del.icio.us, for websites. Indeed, if one simply treats an online abstract or journal article as a website, one can already use Del.icio.us to tag the article. I have done so, for illustration, with the SSRN abstract for Mike Madison's contribution to this symposium.<sup>35</sup> There is also a social bookmarking site tailored to the needs of academics, called Connotea.<sup>36</sup>

Why would one add tags to a webpage for an article? And, having added them, why would one share them with others? Adding tags for oneself is simply another way to organize and retrieve information.<sup>37</sup> Sharing tags encourages others to share tags too, and, interlinking all this metadata, one can find other articles according to their tags, find other users whose tags indicate common interests, and explore the articles those other users have tagged. With the resulting networked social capital, we go beyond merely increasing access to providing qualitatively richer access. Connotea describes the possibilities this way:

Because tags are simply words, other users will end up using the same tags as you. This is an interesting way of finding related content—if you click on one of the tag names underneath an article title, you'll be taken to a page that lists all the links that have been given that tag by other users. Connotea also gives you a list of related tags. Clicking on those tag names is another way of finding similar content.

If more than one user has saved the same article, the number of users who have is indicated with a link. Clicking on that link shows you a list of all the users who have bookmarked the article, and a list of the tags they used for it. You can then view another user's entire library by clicking on their username. Because that user saved the same article as you, you may be interested in other articles in their library.<sup>38</sup>

This new layer of commentary cannot help but broaden and deepen one's grasp of the literature on a topic. It is also a powerful complement to the searches one can conduct on commercial databases such as Westlaw or Lexis.

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<sup>34</sup> For example, if I want to find a picture of Portlandia, a famous statute in Portland, Oregon, see Wikipedia, Portlandia, <http://en.wikipedia.org/wiki/Portlandia>, I can search for Flickr photos tagged "Portlandia." (I think the one at <http://www.flickr.com/photos/luckyplanet/74967265/> is especially good.)

<sup>35</sup> del.icio.us, Tag for The Idea of the Law Review: Scholarship, Prestige, and Open Access, <http://del.icio.us/url/b464cf7edfd12dfd674908706c106e3c>.

<sup>36</sup> Connotea, About Connotea, <http://www.connotea.org/about>. See also Ben Lund et al., *Connotea: A Free Online Reference Management Service for Students*, D-LIB MAG., Mar. 2005, <http://www.dlib.org/dlib/march05/03inbrief.html>. According to Lund et al., the site "was created by Nature Publishing Group's New Technology team. The ideas behind it come from del.icio.us, a general collaborative bookmarking service. Connotea takes this concept and adds extra features to tailor it to the needs of scientists." *Id.*

<sup>37</sup> Perhaps the most personalized tag at Del.icio.us is "toread," a popular tag people use simply to put an item on a reading list for future reference. See del.icio.us, Popular Tags, <http://del.icio.us/tag/> (listing popular tags).

<sup>38</sup> Lund et al., *supra* note 36.

Of course, more is needed here than a collaboration technology. Norms, too, are a vital part of creating a sustained social practice.<sup>39</sup> It remains to be seen whether a norm will emerge that encourages law professors to contribute to a new collaborative layer of semantic tags for legal scholarship. If such a norm were to emerge, we would doubtless be better off as scholars with the insights these networked tags would promote.

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The articles in this symposium on open access legal scholarship tackle engaging questions about how we share our writings with one another, and with the world at large. I hope you enjoy exploring them as much as I have.

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<sup>39</sup> See generally Henry Farrell, Crooked Timber, Norms and Networks (May 30, 2006), <http://crookedtimber.org/2006/05/30/norms-and-networks/>.



