
OPEN ACCESS IN A CLOSED UNIVERSE:
LEXIS, WESTLAW, LAW SCHOOLS, AND THE LEGAL
INFORMATION MARKET

by
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This Article considers issues of open access from the context of the broader legal information industry as a whole. The structure and contours of the legal information industry have shaped the availability of legal scholarship and other legal information. The competitive duopoly of Lexis and Westlaw is a particularly important factor in considerations of open access. Also significant is the relationship between Lexis and Westlaw and law schools, which form an important market segment for both Lexis and Westlaw. This Article begins by considering the important role information plays in the law. It then notes the increasing industry concentration that has occurred over the last 10–15 years among legal and other publishers. This industry concentration is believed to have contributed to significant price increases for scholarly publications in scientific and other nonlegal fields. This industry concentration has potentially significant implications for questions of access, particularly in the current environment of increasing electronic dissemination of legal information. In addition to examining characteristics of the legal information industry, this Article also looks at the role of dominant players, such as Lexis and Westlaw, and the ways in which information dissemination has changed with the advent of electronic legal information services, including through new publication models such as SSRN and bepress. Consumers of legal information, including commercial users, law school users, and the general public are also considered, particularly with respect to the implications of legal information industry structure for questions of access to legal information in the digital era.

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I. INTRODUCTION

The structure of the legal information industry has shaped the availability of legal scholarship and other legal information. The competitive duopoly of Lexis and Westlaw is a particularly important factor in considerations of open access. Also significant is the relationship between Lexis and Westlaw and law schools, which form an important market segment for both Lexis and Westlaw. The nature of legal information and the commercial enterprises that have developed around it distinguishes law in important respects from other disciplines and influences the nature of open access that might be required in the legal context. Much of the information contained on Lexis and Westlaw is publicly available legal information such as court decisions, statutes, legislative materials, and regulations. Despite the fact that such information is publicly available, Lexis and Westlaw are a primary means by which those in the legal profession and legal academia access legal information. The underlying reasons for the dominance of Lexis and Westlaw are thus crucial to considerations of open access to legal information.

This Article will focus on three aspects of the legal information industry and will assess the impact of these factors on access to legal scholarship and other legal information. Part II of this Article will consider the creation and development of the legal information industry. The commercial enterprises that developed during the print era have been important factors shaping the contours of access to legal information in the digital era, when debates about access have become more prominent. Access and the ease of navigation through existing legal information have, however, been continuing themes in the legal information industry since its inception. Access was, for example, a major factor in the initial development of the Lexis database, which began as a project of the Ohio Bar Association.¹

Part III of this Article will examine the activities of the dominant players in the market for legal information, looking specifically at some of the implications of progressive consolidation among legal and other publishers. This increasing industry concentration has led to escalating prices for legal information other than scholarship as well as nonlegal scholarly publications. Such price increases have in turn led to calls for broader and cheaper means to disseminate scholarship, including through various forms of more open access. The structure of pricing in the legal arena is fairly distinctive. Further, the Lexis and Westlaw law school model reflects a pricing structure in which law schools pay little relative to commercial customers. As part of Lexis and Westlaw law school arrangements, law schools receive inexpensive access with few barriers that can be conceptualized as open access in a closed universe of the law school and its participants. In exchange, Lexis and Westlaw gain early access to future generations of lawyers for training and marketing.

The third and final factor, considered in Part IV of this Article, relates to consumers of legal information. As a result of the nature of legal activities and legal representation, many users require search capabilities that are accurate and reliable in terms of results generated. This need for reliable information is a consequence of the potential negative impact that might result from inaccurate search results. As a result, a law firm preparing for a trial, for example, will need to access relevant precedents in a fairly efficient way with a relatively high degree of accuracy. Thus, despite the fact that Lexis and Westlaw compile information that is largely publicly available, they distinguish themselves from potential entrants to the broader electronic legal information market by virtue of the search and other capabilities that they have developed within their respective databases. This may significantly affect the likelihood of the development of other comprehensive open access means to obtain legal scholarship and other legal information.

II. THE MARKET: THE LEGAL INFORMATION INDUSTRY

Open access publishing is a business model that has developed at least partly in response to dissatisfaction about existing publication business

¹ See *infra* notes 130–42 and accompanying text.

models.² Open access is typically defined as involving the elimination of both price and permission barriers.³ Open access publishing can take two distinct forms: the archiving of scholarly works in institutional repositories and the creation of online scholarly journals that are available to the public without subscription fees.⁴ Many of the pricing and permission impediments to open access to scholarship are a result of publishing industry business practices.⁵ Consequently, the structure of existing business models evident in the legal information industry is an important starting point in considering open access issues. This structure may also shed light on the potential manners of implementation and likelihood of success of current open access initiatives.

A. *The Importance of Information in the Law*

Information is the lifeblood of law and the legal profession.⁶ This is particularly true in common law jurisdictions such as the U.S., where the importance of precedent “has made the law a literature-dependent profession.”⁷ As a result, “[t]hroughout the nation’s history lawyers demanded speedy publication of controlling authorities and research aids providing multiavenue access.”⁸

This demand for retrospective information by lawyers has played an important role in shaping the legal information industry, both before and after the advent of the digital era, and has helped put the legal publication universe

² See *infra* notes 27–35 and accompanying text.

³ Peter Suber, SPARC Open Access Newsletter (Aug. 4, 2003), <http://www.earlham.edu/~peters/fos/newsletter/08-04-03.htm> (noting that “[m]ost scientific research is still published behind both price and permission barriers,” which include restrictions emanating from copyright law, licensing barriers, and hardware and software barriers such as digital rights management); Carol A. Parker, Institutional Repositories and Principles of Open Access: Changing the Way We Think About Legal Scholarship, 37 NEW MEXICO L. REV. (forthcoming Summer 2007), *draft available at* <http://law.bepress.com/expresso/eps/1705/> (noting that open access involves making legal scholarship available to the public via the Internet without subscription or access fees).

⁴ Parker, *supra* note 3.

⁵ *Id.* at 53–54 (noting growing dissatisfaction with traditional publishing business models that had led to skyrocketing profits for commercial publishers and increases in journal subscription prices at a rate four times that of inflation, which led to problems of access as libraries cut subscriptions to journals in response to escalating costs, all of which contributed to the development of open access models, whose early proponents were in the fields hit hardest by commercial journal subscription price increases).

⁶ F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 LAW LIBR. J. 563, 564 (2002), *available at* <http://www.aallnet.org/products/2002-36.pdf> (“Recorded information is simultaneously the necessary food and a potential poison for a system of common law. The toxic element comes from sheer volume.”).

⁷ Peter Freeman, *Network Prospects for the Legal Profession*, 65 LAW LIBR. J. 4, 4 (1972).

⁸ *Id.*

“at the core of American law.”⁹ It has also influenced the development of intermediaries in the form of commercial publishers of legal information and is reflected in the importance of libraries and access to libraries in the legal profession.¹⁰ The commercial publishers that have met the demand for legal information have, in turn, potentially exacerbated problems connected to the glut of legal information.¹¹ Further, the past may play a different role in the law than in many other disciplines, which means that past literature may not be set aside to the same extent in the law as elsewhere:

What is different about the law? Part of the explanation may be that the past is easier to set aside in certain other disciplines than it is in the law. While this proposition obviously would not fit a discipline such as history, medicine and the natural sciences are so intensively occupied with current approaches to current problems that the literature of a century or even a decade ago can be safely ignored. Legal reasoning, on the other hand, proceeds largely by drawing analogies between the present and the past. Given the doctrine of *stare decisis*, the emphasis in law is on finding earlier cases sufficiently similar to the case at hand to serve as precedent for it. Moreover, lawyers’ objectives differ from those of other professionals in a way that emphasizes the past . . . [L]awyers aim to develop the best possible arguments *that benefit their clients*. Thus the two parties to a lawsuit try to cast the situation in different lights and scour the past for precedent pointing in opposite directions. Hence consensus that certain contributions from the past are useful and others are not is less likely to be achieved in the law than in other disciplines.¹²

The dissemination of legal information to lawyers is a continuing process. This is particularly true since even in the early 1970s an estimated 30,000 judicial decisions were added every year to the then existing 2.5 million decisions, and an estimated 10,000 legislative enactments were added annually.¹³

Legal information may be categorized into two basic types: primary sources and secondary sources.¹⁴ Primary sources include statutes, cases, and regulations.¹⁵ The volume of legal information means that, in addition to requiring access, lawyers have typically needed tools to assist in navigating

⁹ Robert Berring, *Chaos, Cyberspace and Tradition: Legal Information Transmogrified*, 12 BERKELEY TECH. L.J. 189, 190 (1997), available at http://btlj.boalt.org/data/articles/12-1_spring_1997_symp_8-berring.pdf.

¹⁰ Freeman, *supra* note 7, at 5 (noting the importance of commercial law publishers and law libraries).

¹¹ Hanson, *supra* note 6, at 568 (“Indeed, by its profit-driven policy of publishing as many appellate decisions as possible, West materially exacerbated the problem [of the increasing difficulty of managing legal information as the case record grows over time].”).

¹² *Id.* at 565.

¹³ Freeman, *supra* note 7, at 5.

¹⁴ Scott Finet, *On the Road to the Emerald City: Reducing the Cost of Living in the New Legal Information Landscape*, in THE POLITICAL ECONOMY OF LEGAL INFORMATION: THE NEW LANDSCAPE 7, 10 (Samuel E. Trosow ed., 1999).

¹⁵ *Id.*

through such information.¹⁶ This also means that organizing and enhancing the ability to search existing legal information represents an important value added service for the delivery of legal information.¹⁷ A number of tools have developed as a consequence, largely in the form of secondary sources such as treatises, encyclopedias, loose-leaf services, and law journals.¹⁸ Secondary sources typically include sources that may be considered commentary on the law, such as law review articles and monographs, as well as legal treatments, which include treatises and loose-leaves.¹⁹ Cost concerns are typically heightened in the case of secondary sources: “[t]he cost to the publisher for creating the added value is manifested in the fact that secondary sources are the more expensive category and typically have more rapidly increasing costs. For consumers of legal information, secondary sources are the princip[al] locus of the cost problem.”²⁰

In addition to secondary sources, legal publishers have developed tertiary sources such as digests and indexes that can be used to find information about the law.²¹ One major tertiary tool is Shepard’s citation index;²² another is the West American Digest System.²³ These tools, created by publishers, demonstrate the value that intermediaries can bring to the legal information publication process.²⁴

¹⁶ Hanson, *supra* note 6, at 568 (noting the increasing difficulty of managing legal information as the case record grows over time, and the development of devices to help lawyers “wade through the flood”); John Dethman, *Trust v. Antitrust: Consolidation in the Legal Publishing Industry*, in LAW LIBRARY COLLECTION DEVELOPMENT IN THE DIGITAL AGE 123, 127 (Michael Chiorazzi & Gordon Russell eds., 2003) (“The need for help in efficiently finding the law led to numerous treatises, dictionaries, encyclopedias and other finding aids from many publishers. The West Digest system and Shepard’s citation system are perhaps the best known of these finding aids.”).

¹⁷ Finet, *supra* note 14, at 10 (noting that value added in secondary sources is reflected in the expenditure of labor in the editing enterprise).

¹⁸ Freeman, *supra* note 7, at 4 (noting that commercial law publishers have provided access devices such as secondary sources that have given the legal profession better bibliographic organization than other disciplines).

¹⁹ Finet, *supra* note 14, at 10.

²⁰ *Id.*

²¹ Hanson, *supra* note 6, at 571.

²² ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 182 (1990) (noting that Shepard’s developed a publication that indicated where a case had been cited, which became “an essential part of a lawyer’s literature”); Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1695 (2000) (noting that “Shepard’s Citators rose to meet the legal profession’s demand for verification” and that “a competent researcher had to ‘Shepardize’ his research results” to verify whether a case had been affected by subsequent decisions).

²³ Hanson, *supra* note 6, at 568–69 (noting that digests were developed to help lawyers deal with the flood of legal information and discussing some problems associated with West digest system, including the inability of the system to adapt to new circumstances, particularly in certain rapidly developing areas of law).

²⁴ Henry H. Perritt, Jr., *Reassessing Professor Hibbitts’s Requiem for Law Reviews*, 30 AKRON L. REV. 255, 255 (1996), available at <http://www.uakron.edu/law/docs/perritt.pdf> (noting that the selection and editing process is what makes the publishing process valuable); David Y. Atlas, Comment, *Taming the Wild West: The Scope of Copyright Protection for*

The type of information lawyers need may vary by area of specialization as well as the nature of a lawyer's practice, service as a judge, or other activities.²⁵ Accuracy is another desired characteristic in retrieval of legal information. The need for accuracy is closely connected to the nature of law and legal practice. Concerns about accuracy and authenticity are major issues potentially confronting new entrants into the market for legal information services.²⁶

B. Legal Scholarship, Legal Information, and Journal Prices: Some Distinctive Characteristics of the Legal Arena

1. The Increasingly High Prices of Nonlegal Scholarly Journals

The high cost of scholarly journals for users of such journals is an issue of increasing concern across a wide range of disciplines.²⁷ Such cost concerns, at least with respect to scholarship, are less acute in the legal arena, particularly since much legal scholarship is published by student-edited nonprofit journals.²⁸ The situation in the legal scholarship arena contrasts with that of a number of other disciplines, including scientific publishing. In such other arenas, sharp price increases have been of significant concern in recent years.²⁹

Compilations after Matthew Bender & Co., Inc. v. West Publishing Co., 38 IDEA 491, 494 (1998), available at http://www.idea.piercelaw.edu/articles/38/38_3/15.Atlas.pdf (noting that "West provides an invaluable service to law students and practicing attorneys" by publishing decisions of the U.S. federal courts through reporters).

²⁵ Freeman, *supra* note 7, at 4-5 (discussing practitioners' and judges' use of legal materials).

²⁶ L. Kurt Adamson, *European Union Legal Research: A Guide to Print and Electronic Sources*, 6 COMP. L. REV. & TECH. J. 67, 68 (2001), available at <http://www.smu.edu/csr/articles/2001/Fall/Adamson.pdf> (noting that accuracy of information is a potential limitation to conducting research on the Internet); Berring, *supra* note 9, at 193 (noting that the greatest achievement of the West Publishing Company was garnering credibility and producing products that were reliable, standard and relatively quickly available).

²⁷ See Theodore C. Bergstrom, *Free Labor for Costly Journals?*, J. ECON. PERSP., Fall 2001, at 183, 188 (noting that the average real subscription price for top economics journals increased by 80 percent in the case of "the top ten nonprofit journals and by 379 percent for the top ten commercial journals"); Mark McCabe & Christopher M. Snyder, *The Economics of Open-Access Journals 1* (May 2006), available at <http://www.prism.gatech.edu/~mm284/OA.pdf> (noting that real journal prices have risen substantially with "average library subscription fees more than doubl[ing] from the 1988-1994 period to the 1995-2001 period"); Faculty Taskforce, Cornell Univ., *JOURNAL PRICE STUDY: CORE AGRICULTURAL AND BIOLOGICAL JOURNALS* (1998), available at <http://jps.mannlib.cornell.edu/jps/jps.htm> ("Scholarly communication patterns are being threatened by high prices of scholarly journals. Libraries are having financial difficulties with this acceleration and have resorted to cutting journal subscriptions, particularly those with extraordinary price increases. Others have chosen to cut a large number of less expensive journals, thus greatly reducing diversity.").

²⁸ See *infra* notes 35-50 and accompanying text.

²⁹ Carol Kaesuk Yoon, *Soaring Prices Spur a Revolt in Scientific Publishing*, N.Y. TIMES, Dec. 8, 1998, at F2 (noting that the entrance of large commercial publishers into a scientific publishing arena once dominated by nonprofit science societies has led to skyrocketing prices with some journals costing more than \$15,000 annually).

Industry consolidation and an increasing proportion of journals published by commercial publishers as compared with nonprofits such as professional societies and university presses have been two factors cited in explaining the rapidly increasing prices of nonlegal scholarly journals.³⁰ Scholarly publishing is big business and a significant aspect of the commercial publishing industry.³¹ For example, scientific publishing alone is a \$7 billion dollar industry that in 2002 was the fastest-growing media sub-sector of the prior 15 years.³² The demand for open access scholarship has been one response to the increasing prices of scholarly journals.³³ Other responses have included academic libraries

³⁰ Aviv Nevo et al., *Academic Journal Pricing and the Demand of Libraries*, 95 AM. ECON. REV. 447, 447 (2005) (noting rapid increase in past decade of prices of for-profit academic journals); Bergstrom, *supra* note 27, at 183 (noting that the average price per page of commercial journals in the economics field is six times as high and the average price per citation sixteen times as high as for nonprofit journals); Theodore Bergstrom & R. Preston McAfee, *An Open Letter to All University Presidents and Provosts Concerning Increasingly Expensive Journals*, available at <http://www.hss.caltech.edu/~mcafee/Journal/OpenLetter.pdf> (last visited Sept. 13, 2006) (“The symbiotic relationship between academics and for-profit publishers has broken down. The large for-profit publishers are gouging the academic community for as much as the market will bear. Moreover, they will not stop pricing journals at the monopoly level, because shareholders demand it.”); Mary Case, *Information Access Alliance: Challenging Anticompetitive Behavior in Academic Publishing*, 65 C. & RES. LIBR. NEWS 310 (2004), available at <http://www.ala.org/ala/acrl/acrlpubs/crlnews/backissues2004/june04/iaa.htm> (noting consolidation of scholarly publications over the last 10 to 15 years, “resulting in fewer and fewer publishers in the commercial marketplace”); Mark J. McCabe, *The Impact of Publisher Mergers on Journal Prices: A Preliminary Report*, ARL BIMONTHLY REP., Oct. 1998, available at <http://www.arl.org/newsltr/200/mccabe.html> (“Briefly, our results for journals sold by commercial publishers indicate that prices are indeed positively related to firm portfolio size, and that mergers result in significant price increases.”); THOMAS M. SUSMAN ET AL., *PUBLISHER MERGERS: A CONSUMER-BASED APPROACH TO ANTITRUST ANALYSIS* 17–20 (2003), available at <http://www.informationaccess.org/WhitePaperV2Final.pdf> (noting that research shows a strong correlation between publishing mergers and subscription price increases).

³¹ Brendan J. Wyly, *Competition in Scholarly Publishing? What Publisher Profits Reveal*, ARL BIMONTHLY REP., Oct. 1998, available at <http://www.arl.org/newsltr/200/wyly.html> (discussing financial figures for scholarly publishers, indicating that 1997 net sales for Thomson, Reed, and Wolters Kluwer were in excess of \$17 billion); Pritpal S. Tamber, *Is Scholarly Publishing Becoming a Monopoly?*, BMC NEWS & VIEWS, Oct. 3, 2000, <http://www.biomedcentral.com/1471-8219/1/1#IDAEUNSJ> (discussing business practices of scientific and medical publishers).

³² PAUL GOODEN ET AL., *MORGAN STANLEY, SCIENTIFIC PUBLISHING: KNOWLEDGE IS POWER 2* (2002), available at <http://www.econ.ucsb.edu/%7Etedb/Journals/morganstanley.pdf>.

³³ *Id.* (noting that the attempts of organizations to encourage direct publication over the Internet and to encourage defections from commercial publishers to nonprofit publishers are unlikely to change the nature of the scientific publishing industry as a result of “barriers to entry enjoyed by the incumbent journals”); Bergstrom, *supra* note 27, at 192–94 (recommending a number of strategies to move to a new equilibrium that would better serve the academic community, including expanding nonprofit journals, publishing in new electronic journals, including Berkeley Electronic Press, and boycotting overpriced journals); McCabe & Snyder, *supra* note 27, at 2 (noting that the open access model is a new business model that reflects “dissatisfaction with the traditional business model for journals”).

choosing to reduce journal holdings as a result of increased costs, negotiating price reductions in the costs of journals, or joining forces in negotiations with publishers.³⁴ The advent of electronic distribution of commercial scholarly journals has added a layer of complexity in the form of site licenses to electronic subscriptions, which may have led to increased prices for electronic journals.³⁵

2. *Lower Cost Legal Scholarship: The Dominance of Nonprofit Student-Edited Legal Scholarly Journals*

The nature of the legal information market had led to distinctive issues of cost and access in the legal arena. First of all, the legal scholarly publishing arena is dominated by nonprofit publishers, particularly student-edited law reviews.³⁶ In addition to serving a pedagogical function that essentially results

³⁴ See David B. Kirkpatrick, *As Publishers Perish, Libraries Feel the Pain*, N.Y. TIMES, Nov. 3, 2000, at C1 (noting that the average price of a scholarly journal had tripled in the past 14 years, causing libraries to reduce purchases); Memorandum from Peter Lange, Provost, Duke Univ. et al. to Faculties of Duke Univ. et al. (Jan. 14, 2004), available at <http://www.econ.ucsb.edu/%7Etedb/Journals/trlnbigdeal.html> (discussing the decision of the member universities of the Triangle Research Libraries Network, after months of unsuccessful negotiations with Reed Elsevier, to “discontinue the consortial arrangement by which they provided access to electronic journals published under the Elsevier Science imprint.”); Letter from Sidney Verba, Dir. of Libraries, Harvard Univ. <http://www.econ.ucsb.edu/~tedb/Journals/harvardletter040101.htm> (last visited Sept. 6, 2006) (noting elimination of a number of journals published by Elsevier); Elsevier License Agreement between Regents of Univ. of Cal. & Elsevier B.V. (Dec. 30, 2003), available at <http://www.econ.ucsb.edu/%7Etedb/Journals/ucelsevier.pdf> (setting terms of U.C. system use and access to Elsevier print and electronic journals); Theodore C. Bergstrom, UC Agrees to Big Deal, <http://www.econ.ucsb.edu/%7Etedb/Journals/ucbigdealpage.html> (last visited Oct. 15, 2006) (“The [U.C. System] library gained two useful concessions. 1) The amount of money paid to Elsevier for electronic access will be reduced from \$8 million in 2003 to \$7.3 million in 2004. 2) The UC libraries will also drastically reduce their holdings of paper editions of Elsevier journals, cutting their spending on paper journals from \$2.3 million in 2003 to \$400,000 in 2004. Thus in total, the UC will spend about 25% less on Elsevier journals in 2004 than they did in 2003.”); Martin Enserink, *Librarians Join Forces on Journal Prices*, 278 SCIENCE 1558, 1558 (1997) (noting that following the announcement of the proposed merger between Reed Elsevier and Wolters Kluwer, “Dutch librarians announced plans to join forces in negotiations with publishers.”); Alan D. Krieger, *SPARC: One Answer to Escalating Journal Prices*, ACCESS (Univ. of Notre Dame), Dec. 1998, at 1, available at <http://www.library.nd.edu/advancement/documents/Access73December1998.pdf> (discussing the launch of SPARC (Scholarly Publishing and Academic Resources Coalition), an alliance of libraries that seeks to promote competition in scholarly communication).

³⁵ Carl T. Bergstrom & Theodore C. Bergstrom, *The Costs and Benefits of Library Site Licenses to Academic Journals*, 101 PROC. NAT’L ACAD. SCI. U.S. 897, 897 (2004), available at <http://www.pnas.org/cgi/reprint/101/3/897> (noting that scholars are likely to be worse off when universities purchase electronic site licenses to journals than if access were by individual subscriptions only).

³⁶ M.H. Hoeflich & Lawrence Jenab, *The Origins of the Kansas Law Review*, 50 U. KAN. L. REV. 375, 377 (2002) (noting that Harvard Law Review, the first student-edited law review, was founded in 1887 as a vehicle to circulate the best legal scholarship and that within 50 years general agreement existed that first-rate law schools needed their own student-edited law reviews); Bruce Ryder, *The Past and Future of Canadian Generalist Law*

in student editors not being paid for their services,³⁷ law reviews are typically subsidized by law schools that “provide financial support, office space, and professors as advisors.”³⁸

As is the other case in other scholarly disciplines, the publishing of legal scholarship may have a significant impact on academic career progress.³⁹ However, unlike law, questions of open access in other scholarly disciplines, particularly in scientific fields, are magnified by virtue of the connection between open access and the progress of science, which has been the subject of much discussion in relation to the patenting of scientific knowledge.⁴⁰ In

Journals, 39 ALTA. L. REV. 625, 626 (2001) (noting the fact that characteristic features of the American model of law review include “beginners being responsible for editing a scholarly journal without substantial faculty involvement” and distinguishing the Canadian law review model from some of the “distinctly absurd features of the dominant American model”); Michael L. Closen & Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 AKRON L. REV. 15, 33–34 (1996), available at <http://www.uakron.edu/law/docs/closen.pdf> (noting that the first student-run legal periodical was the *Albany Law School Journal* in 1875, which was published for a year, and the second was the *Columbia Jurist*, which ended after approximately two years, but which motivated Harvard Law School students to create the *Harvard Law Review* in 1887).

³⁷ Bernard J. Hibbitts, *Yesterday Once More: Skeptics, Scribes and the Demise of Law Reviews*, 30 AKRON L. REV. 267, 300 (1996), available at <http://www.law.pitt.edu/hibbitts/akron.htm> (noting that some commentators “hold that law review service educates law students in legal research and writing, appraises them of significant issues in the legal community, and/or hones their analytic judgment.”).

³⁸ Closen & Dzielak, *supra* note 36, at 43; George L. Priest, *Triumphs or Failings of Modern Legal Scholarship and the Conditions of its Production*, 63 U. COLO. L. REV. 725, 726 (1992) (noting that “[a]ll law journals are subsidized in some way: most by the law schools at which they are published”).

³⁹ Ronen Perry, *The Relative Value of American Law Reviews: A Critical Appraisal of Ranking Methods*, 11 VA. J.L. & TECH. 1, 4 (2006), available at http://www.vjolt.net/vol11/issue1/v11i1_a1-Perry.pdf (“Second, scholars who wish to publish a paper in an American law review probably ask themselves what the best possible forum for their masterpiece will be. Sure enough, the choice is very frequently limited. The author may submit his or her paper to dozens of law reviews, and receive offers to publish from only a few. Yet even within this limited range, the author must determine his or her preferences. Usually, authors would rather publish in the most prestigious periodical from among those that extended offers of publication. The more prestigious the forum, the higher the benefit accruing to the author from publishing in it in terms of reputation, direct material gains (such as job offers, promotion, and tenure), and impact on legal thought and practice.”).

⁴⁰ Paul A. David, *The Economic Logic of “Open Science” and the Balance between Private Property Rights and the Public Domain in Scientific Data and Information: A Primer* (Stanford Inst. for Econ. Policy Research, Discussion Paper No. 02-30, 2003), available at <http://siepr.stanford.edu/papers/pdf/02-30.pdf> (“The progress of scientific and technological knowledge is a cumulative process, one that depends in the long-run on the rapid and widespread disclosure of new findings, so that they may be rapidly discarded if unreliable, or confirmed and brought into fruitful conjunction with other bodies of reliable knowledge. ‘Open science’ institutions provide an alternative to the intellectual property approach to dealing with difficult problems in the allocation of resources for the production and distribution of information.”); Rebecca S. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 56 U. CHI. L. REV. 1017, 1017 (1989) (noting that many observers of research science “believe that science advances most rapidly when the community enjoys free access to new discoveries.”); SUSMAN ET AL., *supra* note 30, at 1–3 (“Access to a broad array of research information is critical to the health and

contrast, questions of open access to legal information are often more magnified in discussions of open access to primary legal materials and secondary materials other than scholarship.⁴¹

The typical publication of legal scholarship in student-edited law reviews contrasts significantly with other scholarly disciplines in which peer-reviewed journals distributed by commercial publishers are more prevalent.⁴² Publication of legal scholarship also differs significantly from other segments of the broader legal information industry, including secondary sources such as looseleaves, treatises, as well as primary sources such as cases and statutes, whose publication is dominated by commercial publishers.⁴³ This difference is reflected in economist Theodore Bergstrom's comparative journal cost data of 4,894 scholarly journals.⁴⁴ Of the 91 legal scholarly journals included in the database, 72 (79%) were nonprofit journals.⁴⁵ This figure is more than double that of other scholarly fields generally, where only 35% of scholarly journals were published by nonprofit publishers.⁴⁶

The relative dominance of nonprofit publishers of legal scholarship is also evident in relative costs figures. According to the Bergstrom data, the average cost of legal journals is significantly less on average than costs in other disciplines: the mean journal price in law is only 17% of the mean price of all journals of \$1,068 (including law journals); the median journal prices in law are even less, constituting 8.5% of the median price of all journals (including law journals).⁴⁷ The per article cost figures in law are also lower, with the mean price per article constituting 67% of the mean price per article of all journals in the sample (including law journals) and median prices constituting 23.5%. Cost figures for the law journals in the Bergstrom sample are, however, higher in some instances on a per citation basis. The mean price per citation of law journals is 165% of the mean citation price of all journals (including law journals), while the median price per citation is 37% of the median per citation price of all journals (including law journals).⁴⁸ The higher mean per citation cost figures for law journals are consistent with other data that indicates that a significant proportion of legal scholarship is never cited: one recent empirical

wealth of society . . . Academic journals have long been the vehicle through which researchers disseminate this work . . . the unchecked increases in subscription prices for STM and legal serial publications over the past two decades portend trouble.”).

⁴¹ See *infra* notes 241–45 and accompanying text; see also SUSMAN ET AL., *supra* note 30, at 2 (“In the realm of legal publishing, serial publications, including reporters, codes, digests, citators, encyclopedia, looseleaf services, newsletters, and treatises, provide students, lawyers, researchers, and judges with vital information on the current state of the law in virtually all legal fields.”).

⁴² See *infra* notes 43–50 and accompanying text.

⁴³ See *supra* notes 18–24 and accompanying text.

⁴⁴ Summary tables for the Bergstrom data are available at <http://www.hss.caltech.edu/~mcafee/Journal/Summary.pdf> [hereinafter Bergstrom Summary Data].

⁴⁵ See Bergstrom Summary Data, *supra* note 44.

⁴⁶ Bergstrom's data indicates that 1,684 of 4,803 or 35% of non-legal scholarly journals in his database were published by nonprofit publishers. See *id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

study indicates that 43% of legal scholarly works, including law journal articles, notes, and comments, have never been cited by a single court or commentator.⁴⁹ The relatively small number of legal scholarly works that are cited account for a lion's share of citations: less than 1% of all law review articles account for 96% of all judicial and scholarly citations.⁵⁰ Citation figures for legal scholarship highlight the fact that a significant proportion of legal scholarship is never cited by anyone,⁵¹ which raises questions about the nature and manner of access that might be needed to such material.

The structure of the broader legal information industry has significant implications for discussions of open access to legal scholarship. The high proportion of nonprofit publishers of scholarly legal works means that costs for scholarly print publications are lower in law than in other disciplines.⁵² Issues of cost do, however, arise in the legal arena with respect to access to primary sources as well as secondary sources other than scholarship.⁵³ In addition, the legal field was an early adopter of methods of electronic dissemination of information. As a result, the legal arena presents an important case for understanding the role of traditional print publishers in the electronic dissemination of information, as well as the implications of new business models of publishing and dissemination.

3. *Electronic Dissemination of Legal Information: SSRN and bepress as New Publishing Models*

The increasing electronic dissemination of legal scholarly works in recent years, however, raises a number of questions about existing business models. Traditional commercial publishers such as Lexis, Westlaw and HeinOnline have typically been dominant in the electronic dissemination of legal scholarship.⁵⁴ This is even true with respect to pieces that appear in print in law reviews since law reviews typically license electronic distribution rights to

⁴⁹ Tom Smith, *The Right Coast, A Voice, Crying in the Wilderness, and Then Just Crying* (July 13, 2005), <http://therightcoast.blogspot.com/2005/07/voice-crying-in-wilderness-and-then.html> (discussing preliminary results from an empirical study of 385,000 Lexis citations).

⁵⁰ *Id.*

⁵¹ See *supra* notes 49–50 and accompanying text. See also Hanson, *supra* note 6, at 590–91 (noting that the proportion of citations to legal periodicals declined from 75% to 64% in comparing two periods (1974–1977 and 1999–2001)).

⁵² See *supra* notes 47–50 and accompanying text.

⁵³ See *infra* notes 236–40 and accompanying text.

⁵⁴ HeinOnline is a service launched in 2000 offered by William S. Hein & Co. a legal publisher for more than eighty years; HeinOnline has a number of major library collections, including the Law Journal Library, the Federal Register Library, the Treaties and Agreements Library and the U.S. Supreme Court Library, all of which are image-based and fully-searchable. See HeinOnline, *The Modern Link to Legal History*, <http://heinonline.org/front/front-about> (last visited Aug. 29, 2006); Welcome to William S. Hein & Co., <http://www.wshein.com> (last visited Feb. 23, 2006); HeinOnline, *The World's Largest Image-Based Research Collection!* <http://heinonline.org/HeinDocs/insert.pdf> (last visited Sept. 23, 2006).

commercial publishers such as Lexis, Westlaw, and HeinOnline.⁵⁵ The electronic distribution of law review articles has thus influenced the structure of law reviews.⁵⁶ Further, the sale of electronic distribution rights is a significant issue that has arisen more generally in the digital era as is reflected in the *Tasini* Supreme Court case,⁵⁷ as well as recent commentary on blogs about sales of law review articles on Amazon.⁵⁸

In addition to traditional commercial distribution methods, a number of alternative business models have arisen that focus on the dissemination of scholarly works.⁵⁹ New entrants in this area include Berkeley Electronic Press (bepress) and the Social Science Research Network (SSRN).⁶⁰ SSRN and

⁵⁵ Authority for grants of electronic reproduction and distribution rights to Lexis, Westlaw and other database companies is often a standard provision in law review copyright license agreements. *See, e.g.*, Orly Lobel, Prawfsblog, SSRN and Law Review Copyright (Oct. 3, 2006), http://prawfsblawg.blogs.com/prawfsblawg/2006/10/ssrn_and_law_re.html (discussing the policy of some law reviews that requires that articles be removed from SSRN after the law review volume is released); Dan Hunter, *Walled Gardens*, 62 WASH. & LEE L. REV. 607, 608–10 (2005) (discussing the influence of licensing of electronic distribution rights on law reviews' decisions about articles posted on the Social Science Research Network (SSRN) (*see infra* note 61), using an example with respect to *California Law Review*, which required that Professor Hunter remove articles to be published by *California Law Review* from SSRN); University of Michigan Law Review, Typical License Agreement, http://students.law.umich.edu/mlr/submit_licenseagreement.htm (last visited Sept. 6, 2006) (“The Michigan Law Review Association has granted several electronic database companies, including Mead Data Central, West Publishing, and JSTOR, the right to reproduce and distribute each volume’s contents. Accordingly, you hereby assign to the Michigan Law Review Association the nonexclusive right to authorize the above database companies and other present or future database companies to reproduce and distribute your article.”).

⁵⁶ Bernard J. Hibbitts, *Last Writes? Re-assessing the Law Review in the Age of Cyberspace*, 30 AKRON L. REV. 175, 177 (1996), available at <http://www.uakron.edu/law/docs/hibbitt.pdf> (noting that the computer-mediated technologies embodied in Lexis, Westlaw, and electronic journals have changed and to some extent improved the prevailing law review structure).

⁵⁷ N.Y. Times Co. v. Tasini, 533 US 483, 488 (2001) (finding that electronic distribution of pieces previously published with permission in print periodicals constituted copyright infringement by both the print publishers and the electronic publishers).

⁵⁸ Orin Kerr, *The Volokh Conspiracy*, Law Review Articles from Amazon.com (Apr. 21, 2005), http://volokh.com/archives/archive_2005_04_17-2005_04_23.shtml#1114061450 (noting that Amazon was selling copies of law review articles for \$5.95 per article); Larry Ribstein, *Ideoblog*, *Steal This Article* (Apr. 21, 2005), http://busmovie.typepad.com/ideoblog/2005/04/steal_this_arti.html (discussing the sale of electronic distribution rights to Amazon and noting that distribution through Amazon will encourage publishers to cling to distribution rights); Paul L. Caron, *TaxProf Blog*, *Buying Law Review Articles on Amazon.com* (Apr. 24, 2005), http://taxprof.typepad.com/taxprof_blog/2005/04/buying_my_tax_a.html (noting that the new Amazon venture may give law reviews another reason to try to restrict posting by authors to SSRN).

⁵⁹ *See* Parker, *supra* note 3 (noting that open access to legal scholarship, or making scholarship freely available to the public without subscription or access fees, is a good fit for legal scholarship and already exists through online institutional repositories such as SSRN’s Legal Scholarship Network, the bepress Legal Repository, and NELLCO’s Legal Scholarship Repository).

⁶⁰ Berkeley Electronic Press, *Mission Statement*, <http://www.bepress.com/aboutbepress.html> (last visited Sept. 6, 2006) (“The Berkeley Electronic Press (“bepress”)

bepress reflect the emergence of new business models to facilitate the electronic dissemination of scholarly works.⁶¹ Scholarly articles can be downloaded at no cost from the SSRN and bepress web sites.⁶² Both SSRN and bepress offer models that focus on providing low-cost access to, distribution of, and communication about legal, scholarly, and other works.⁶³ In the case of legal scholarship, in addition to such services, SSRN and bepress both provide other fee-based services relating to legal scholarship.

SSRN is organized into a number of subject matter networks, including the Accounting Research Network, the Economics Research Network, the Entrepreneurship Research & Policy Network, the Financial Economics Network and the Legal Scholarship Network (LSN).⁶⁴ The SSRN Network services also include email abstracting journals that cover over 400 different subject areas as well as research paper series sponsored by subscribing institutions.⁶⁵ Since the SSRN electronic paper collection “currently contains over 104,700 downloadable electronic documents,”⁶⁶ these abstracting journals are an important means by which the large number of scholarly works in the SSRN database are organized and accessed by users.

SSRN derives revenues from abstracting journals, some of which are free, but others of which are fee-based.⁶⁷ SSRN operates on a business model in which insitutional users may pay site subscription license fees.⁶⁸ Individuals

produces tools to improve scholarly communication. These tools provide innovative and effective means of content production and dissemination.”).

⁶¹ SSRN describes itself as being “devoted to the rapid worldwide dissemination of social science research and . . . composed of a number of specialized research networks in each of the social sciences.” Social Science Research Network (SSRN) Home Page, <http://www.ssrn.com/> (last visited Sept. 6, 2006); Richard A. Danner, *Issues in the Preservation of Born-Digital Scholarly Communications in Law*, 96 LAW LIBR. J. 591, 592 (2004) (“As scholars increasingly employ electronic media to create and to distribute both formal and informal forms of scholarly communications, the distinctions between formal and informal communications have become increasingly blurred.”); Richard A. Danner, *Electronic Publication of Legal Scholarship: New Issues and Models*, 52 J. LEGAL EDUC. 347, 360–61 (2002).

⁶² Caron, *supra* note 58 (“As one who fights with law reviews to retain the right to post my articles on SSRN so they can be downloaded for free, . . .”); SSRN, Frequently Asked Questions, http://ssrn.com/update/general/ssrn_faq.html (last visited Sept. 23, 2006); Research Now, a bepress Portal, Frequently Asked Questions, <http://researchnow.bepress.com/faq.html> (last visited Sept. 23, 2006).

⁶³ SSRN, Legal Scholarship Network, <http://www.ssrn.com/lsn/index.html> (last visited Oct. 21, 2006) (“SSRN’s objective is to provide worldwide distribution of research to authors and their readers and to facilitate communication among them at the lowest possible cost.”).

⁶⁴ See SSRN, *supra* note 61.

⁶⁵ SSRN, *supra* note 62; see also SSRN, *supra* note 63.

⁶⁶ SSRN, *supra* note 62.

⁶⁷ For example, the author’s current subscription page to SSRN, which reflects the organizational site license of her university, indicates that the author has subscriptions to 34 Fee-Based Journals and 122 Free Journals on SSRN.

⁶⁸ See SSRN, LSN Site License Frameset, http://www.ssrn.com/update/lsn/lsn_site-licenses.html (last visited Oct. 21, 2006) (listing the 382 schools, university

may directly subscribe to SSRN networks.⁶⁹ Although individual users without subscriptions may access many articles on SSRN and pay no fee directly, their affiliated institution may have paid site license fees to SSRN. In the case of the LSN, for example, law schools, law firms, and other institutions may pay SSRN for sponsored research paper series where SSRN users may download faculty papers at no cost.⁷⁰ The SSRN model includes three different levels of hosting fees, with higher fees payable for higher levels of promotional service by LSN for sponsored collections.⁷¹ SSRN also charges for email announcements relating to abstracting journals.⁷² LSN partners with commercial publishers to host abstracts of content that can be downloaded by SSRN users for a fee.⁷³ SSRN charges separate fees for advertising and listings on its periodic Professional Announcements and Job Listings Posts.⁷⁴ SSRN also provides a free eSubmission service through which legal academics can submit legal scholarship to law reviews.⁷⁵ SSRN gives free subscriptions to all abstracting journals to users in developing countries on request.⁷⁶

Bepress represents another new publishing model that focuses on the production, archiving, and dissemination of scholarship.⁷⁷ For example, through the bepress Legal Repository, institutions can pay to have paper series that users may download without cost.⁷⁸ ExpressO is one of several other services provided by bepress.⁷⁹ ExpressO helps legal academics manage the

departments, firms and other organizations with site licenses to the Legal Scholarship Network).

⁶⁹ Individual subscription fees are currently \$65 per year. *See id.* (discussing individual subscription fees).

⁷⁰ Parker, *supra* note 3.

⁷¹ *Id.*

⁷² *Id.* at 29 (noting that unlike SSRN, bepress does not charge for email announcements of new submissions to its ExpressO Preprint Series).

⁷³ *Id.* at 27.

⁷⁴ For the Legal Scholarship Network, SSRN charges \$350 for the first page and \$100 for each additional page for educational institutions and \$450 for the first page and \$100 for each additional page for non-educational institutions for professional announcements such as conferences. *See* SSRN, Placing LSN Professional Announcements, http://www.ssrn.com/update/lsn/lsnann/lsn_app.html (last visited Sept. 6, 2006) (“Friday Professional Announcements . . . reaches over 17,000 people involved with Legal Scholarship (academic and corporate) in over 60 countries around the world by Email. We then place the announcement in LSN’s Professional Announcements which is accessed at no charge by finance professionals worldwide.”).

⁷⁵ *See* SSRN, *supra* note 63 (“SSRN’s eSubmission is a free service allows you to submit a paper to over 300 law reviews that allow electronic submission. The eSubmission service allows users to send customized messages to each journal, and to submit to different journals at different times. To use eSubmission, you must first include your paper in the SSRN eLibrary.”)

⁷⁶ *Id.*

⁷⁷ Berkeley Electronic Press, <http://www.bepress.com/> (last visited Oct. 21, 2006) (“The Berkeley Electronic Press develops and licenses technologies to help the academic community produce, archive, and disseminate scholarly work.”).

⁷⁸ Berkeley Electronic Press, About the bepress Legal Repository, <http://law.bepress.com/repository/about.html> (last visited Oct. 21, 2006).

⁷⁹ *See* ExpressO, <http://law.bepress.com/expresso/> (last visited Aug. 29, 2006).

law review submission process.⁸⁰ Unlike some disciplines, legal academics typically make multiple simultaneous submissions to law reviews.⁸¹ In the past, legal academics often made submissions by sending a separate physical copy of an article to large numbers of law reviews, supplemented in recent years by individual electronic submissions to law reviews such as *Columbia Law Review*, *The Yale Law Journal*, and *Emory Law Journal*, that are some of a number of law reviews with websites where articles may be submitted electronically.⁸² ExpressO provides a valuable service in the law review submission process by providing a single place where legal academics can submit articles. ExpressO then sends the submitted article to the law reviews specified by the submitter, either electronically or in hard copy. ExpressO charges for such submissions on a per submission basis, typically charging \$2 for each electronic submission and \$6.50 for each hard copy submission,⁸³ although schools with ExpressO institutional accounts may have different pricing plans.⁸⁴ ExpressO reflects a service targeted toward the legal academic market and the distinctive law review submission process, which is one important distinguishing feature of the legal scholarship process.

4. *Legal Scholarship, Legal Sources of Authority, and Open Access*

Discussions of open access in the legal arena bear similarities to those occurring in other disciplines. Consequently, what constitutes online open access remains an ongoing topic of discussion. Questions about the meaning of open access in the digital era were reflected in dialogue on the CyberProf Email List in September 2006, which discussed the implications of SSRN site registration requirements for effective open access to users who want to download articles from the SSRN Network.⁸⁵

At the same time, the broader legal information industry also has important distinguishing characteristics that have implications for discussions

⁸⁰ *Id.*

⁸¹ Perry, *supra* note 39, at 4 (noting that legal academics may submit articles to dozens of law reviews).

⁸² See *Columbia Law Review*, Electronic Essay and Review Submissions, <http://www.columbialawreview.org/information/onlineessayssubmit.cfm> (last visited Aug. 29, 2006); *Yale Law Journal*, Submissions, <http://www.yalelawjournal.org/submissions.html> (last visited Sept. 6, 2006); *Emory Law Journal*, Electronic Submission Website, http://www.law.emory.edu/students/elj/article_submission.php (last visited Aug. 29, 2006).

⁸³ See ExpressO Pricing Details, <http://law.bepress.com/expresso/pricing.html> (last visited Aug. 29, 2006).

⁸⁴ See ExpressO Institutional Account Signup, http://law.bepress.com/expresso/ExpressO_brochure.pdf (last visited Aug. 29, 2006) (discussing two types of ExpressO institutional accounts, the Open Account Plan, which gives a 15% discount on electronic deliveries, with a charge of \$6.50 for hardcopy deliveries and quarterly billing for ExpressO services, and the Complete Prepaid Plan, which permits unlimited electronic deliveries for \$2,000, with a charge of \$6.50 for hardcopy deliveries and quarterly billing for ExpressO services).

⁸⁵ An Exchange Posted to the CyberProf Email List Regarding SSRN and Open Access, http://madisonian.net/ssrn_exchange.htm (last visited Oct. 21, 2006) (discussing the requirement that users log in to the SSRN network to access abstracts and articles and the implications of such requirements for open access).

of open access. Such distinguishing features mean that discussions of open access to legal information may vary somewhat from those in other disciplines. Discussions of open access to legal scholarly works must thus also consider the fact that sources of authority in the legal profession are broader in many respects than in many other disciplines.⁸⁶ In the legal area, such broader sources of authority include primary sources such as cases and statutes and secondary sources other than scholarship, including looseleafs. Judicial opinions, for example, are likely the most cited sources in the U.S. legal system.⁸⁷ As a result, open access to legal scholarly works alone would provide only a limited window in that the pursuit of legal scholarship and other inquiries or investigations in the legal area typically also require access to primary sources in addition to secondary sources such as scholarly legal articles. The costs of access to other types of legal information do reflect some of the same patterns of increasing industry consolidation and access costs that are evident with respect to nonlegal scholarly works more generally.⁸⁸ The structure of the commercial legal information industry is a key factor in questions of access. Many of the current players in this market came into being during the print era. How such players met and shaped the demand for access to legal information during the print era is thus important in establishing the context for discussions of access in today's digital environment.

C. *Access to Legal Information in the Print Era*

Prior to the digital era, commercial law publishers generally met lawyers' demands for information and access to both primary and secondary sources.⁸⁹ Legal scholarship is somewhat distinguishable from other legal information in this regard because such scholarship has been historically primarily disseminated through student-edited law reviews.⁹⁰

The dominant role of commercial legal publishers in the dissemination of legal information is evident in the development and standardization of case reporters. The development of this market was facilitated by the 1834 Supreme Court decision in *Wheaton v. Peters*,⁹¹ which established that written court

⁸⁶ See *supra* notes 14–20 and accompanying text.

⁸⁷ PETER W. MARTIN, INTRODUCTION TO BASIC LEGAL CITATION § 2-200 (2006), available at <http://www.law.cornell.edu/citation/2-200.htm> (“In the U.S. legal system, judicial opinions are probably the most frequently cited category of legal material.”).

⁸⁸ Finet, *supra* note 14, at 10 (noting that secondary sources are the principal locus of cost problems with respect to legal publications); Mark J. McCabe, *Law Serials Pricing and Mergers: A Portfolio Approach*, 3 CONTRIBUTIONS TO ECON. ANALYSIS & POL'Y 1, 1 (2004), available at <http://www.informationaccess.org/mccabe.pdf> (noting that law periodical prices increased 75% between 1991 and 2000 as compared with consumer price increases (as measured by the CPI) of just 26%).

⁸⁹ Freeman, *supra* note 7, at 4; SURRENCY, *supra* note 22, at 31 (noting that “[m]uch of the legal literature which is used at the close of the Twentieth Century was introduced in the decades after the Civil War” and that new forms of legal publishing were introduced by West Publishing Company and other commercial legal publishers).

⁹⁰ See *supra* notes 36–38 and accompanying text.

⁹¹ 33 U.S. (8 Pet.) 591 (1834).

opinions were not protectable by copyright.⁹² Court reporters do, however, hold copyrights in their headnotes.⁹³ Following the *Wheaton* decision, which significantly affected how publishers financed reporting,⁹⁴ legal publishers made profits by producing volumes of selected cases “with precedential value to be sold to an already established market desperate for practice materials.”⁹⁵ This led to high costs associated with a “multiplicity of reports” in a variety of citation methods.⁹⁶ West Publishing Company, which began operating in 1876,⁹⁷ “dramatically changed case reporter publishing by introducing the *Northwestern Reporter*,” which was the first element of West’s National Reporter System.⁹⁸ West’s approach was innovative in that West collected and published decisions from multiple jurisdictions:⁹⁹ “West’s philosophy was that

⁹² *Id.* at 668 (“the court are unanimously of the opinion, that no reporter has or can have any copyright in the written opinions delivered by this court”); *Banks v. Manchester*, 128 U.S. 244, 253 (1888) (finding that the “whole work done by judges . . . is free for publication to all”); *Callaghan v. Myers*, 128 U.S. 617, 649 (1888) (noting that the only aspect of the *Wheaton* Reports that could have been subject to copyright were the areas not relating to the written opinions of the court, including the title-page, table of cases, headnotes, statements of facts, arguments of counsel and index); *Banks Law Publ’g Co. v. Lawyers’ Coop. Publ’g Co.*, 169 F. 386, 391 (2d Cir. 1909) (per curiam), *appeal dismissed per stipulation*, 223 U.S. 738 (1911) (noting that the “arrangement of reported cases in sequence, their paging and distribution into volumes, are not features of such importance as to entitle the reporter to copyright protection of such details.”).

⁹³ *See, e.g.*, *Little v. Gould*, 15 F. Cas. 612, 612 (C.C.N.D.N.Y. 1852) (No. 8,395) (noting with respect to the *Wheaton* case that “the written opinions of the judges . . . were regarded as having become the property of the public, and, therefore, as not the subject of a copyright.”); *West Publ’g Co. v. Lawyers’ Coop. Publ’g Co.*, 79 F. 756, 761 (2d Cir. 1897) (noting that a reporter of court opinions “may acquire a valid copyright for the headnotes, footnotes, tables of cases, indexes, statements of facts, and abstracts of the arguments of counsel, where these are prepared by him and are the result of his labor and research.”).

⁹⁴ Erwin C. Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48, 60 (1981) (noting that after the *Wheaton v. Peters* case, reporters could not depend on receiving money from the sale of reports; instead, states began attaching salaries to reporter positions).

⁹⁵ Douglas W. Lind, *An Economic Analysis of Early Casebook Publishing*, 96 LAW LIBR. J. 95, 95, 100 (2004), available at <http://www.aallnet.org/products/2004-06.pdf> (noting that insufficient attention has been given to the “determining role the legal publishing industry played in the early years, which resulted in the successful transition in legal instruction from lecture and textbooks to the case method.”).

⁹⁶ Francine Biscardi, *The Historical Development of the Law Concerning Judicial Report Publication*, 85 LAW LIBR. J. 531, 533 (1993) (noting that the multiplicity of reports led to a publishing war between 1834 and 1888); John B. West, *Multiplicity of Reports*, 2 LAW LIBR. J. 4, 5 (1909) (noting that the problem of a multiplicity of reports is caused by duplication of decisions in different publications); M. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 45 (1989) (noting increase in number of volumes of American case reports from 18 in 1810 to 473 in 1836 to 3,800 in 1885).

⁹⁷ Berring, *supra* note 9, at 191 (noting that the West Publishing Company was founded in St. Paul, Minnesota by the West Brothers in 1876).

⁹⁸ Lind, *supra* note 95, at 100.

⁹⁹ *See* Hanson, *supra* note 6, at 565–67 (noting that the approach by West came to characterize case reporting in the U.S. and is clearly distinguished from the British strategy of publishing selective precedents that modify principles of law, enunciate a new principle, settle a doubtful question, or that are otherwise instructive); Berring, *supra* note 9, at 192–93

its customer would be a better lawyer by having available the entire body of law on which to base arguments and defenses.”¹⁰⁰ West was also able to publish its reports quickly, which was a significant improvement from official state reports.¹⁰¹ West’s approach of comprehensive reporting was approved by the American Bar Association in 1898.¹⁰² West’s market strategy enabled its titles to become “essential to practicing lawyers’ libraries.”¹⁰³ By the turn of the century, West had become the primary publisher of case reports and digests.¹⁰⁴ West’s reporters also achieved quasi-official status for American case law.¹⁰⁵

Publishers also played a role in the development of the case method of teaching at U.S. law schools following the introduction of this method by Christopher Langdell at Harvard Law School in 1870.¹⁰⁶ By 1914, the case method had become the primary method of teaching at many law schools.¹⁰⁷ The relatively quick spread of the case method was facilitated by the standardization and marketing of textbooks by legal publishers such as West.¹⁰⁸ Not coincidentally, the legal curriculum, as redesigned by Langdell, used the same categories of law as the West digest system,¹⁰⁹ which has had important

(noting that West did not include unpublished opinions in its reporters; every state and federal court had rules for what should and should not be published).

¹⁰⁰ Lind, *supra* note 95, at 101.

¹⁰¹ Robert Berring, *On Not Throwing Out the Baby: Planning the Future of Legal Information*, 83 CAL. L. REV. 615, 623–24 (1995) (noting that although “the National Reporter System has become the backbone of American legal publishing,” it is just one way to report and organize cases that is far from perfect but that nonetheless provided relatively inexpensive distribution of case law); Susan W. Brenner, *Of Publication and Precedent: An Inquiry into the Ethnomethodology of Case Reporting in the American Legal System*, 39 DEPAUL L. REV. 461, 494–95 (1990) (noting that official state reports were published in bound form only with a typical delay of at least a year after the decision date and that West published its reports in parts that could later be bound into volumes); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 409 (2d ed. 1985) (noting that states published decisions very slowly, while West published them fast and bound them into regional reporters).

¹⁰² Lind, *supra* note 95, at 101.

¹⁰³ *Id.*

¹⁰⁴ *Id.*; SURRENCY, *supra* note 22, at 51, 57 (noting that as early as 1902 West began urging the Bar to “demand that all citations in texts include the reference to the National Reporter System” and that by the end of World War II the trend was to discontinue official state reports and substitute the National Reporter System).

¹⁰⁵ Hanson, *supra* note 6, at 567 (“As it happened, one private publisher did succeed, without government backing, in gaining for its volumes quasi-official status as the place of record for American case law.”); Berring, *supra* note 9, at 192 (“West’s form of standardized case reporting, with unified indexing, became the accepted standard for case information.”) (citations omitted).

¹⁰⁶ Lind, *supra* note 95, at 95.

¹⁰⁷ *Id.* at 110.

¹⁰⁸ *Id.*

¹⁰⁹ Hanson, *supra* note 6, at 570–71; SURRENCY, *supra* note 22, at 111 (noting that digests are recognized as an index to points of law found in cases and an essential tool for any practicing lawyer).

implications for how law students and lawyers categorize and think about the law.¹¹⁰

Despite the valuable role at times played by intermediaries in the development of the legal information industry,¹¹¹ the American approach to publishing precedent in the print era (as exemplified by West) led to an ever-increasing volume of legal information which impeded effective access to such information.¹¹² This ever-increasing volume of legal information was a factor in the adoption of computer aided legal research.¹¹³

D. *The Creation of Online Legal Information Services*

The first broadly accessible commercial full-text legal information service was launched by Mead Data Central.¹¹⁴ Its Lexis service began in 1973 “to help legal practitioners research the law more efficiently.”¹¹⁵ Lexis, together with the Nexis news and information service, which was launched in 1979,¹¹⁶ now operates as the LexisNexis Group, which is the global legal publishing arm of Anglo-Dutch publisher Reed Elsevier.¹¹⁷ West soon countered the new Lexis database by introducing Westlaw in 1975.¹¹⁸

Although the Westlaw database at first consisted solely of West headnotes,¹¹⁹ by 1983–1984, a decade after the launch of Lexis, Westlaw became a research service comparable to Lexis.¹²⁰ Notably, the Lexis database was created at least in part from West print reporters: “Lexis hired workers to scan and enter data from West reporters so it could compile its own legal

¹¹⁰ Hanson, *supra* note 6, at 571 (noting that the lawyers took the organizing decisions of Langdell and the West Publishing Company to be the “intrinsic structure of the law”).

¹¹¹ See Richard Delgado, *Eliminate the “Middle Man”?*, 30 AKRON L. REV. 233, 235 (1996) (noting the important role played by law review editors as intermediaries and the fact that publishing on the Internet is likely to result in more variable quality because of the lack of an intermediary).

¹¹² Thomas J. Young, Jr., *A Look at American Law Reporting in the 19th Century*, 68 LAW LIBR. J. 294, 305 (1975) (noting that the West Publishing Company was “responsible for a great accumulation of reports”); Byron D. Cooper, *Anglo-American Legal Citation: Historical Development and Library Implications*, 75 LAW LIBR. J. 3, 18–19 (1982) (noting that complaints about the number of law books have been common since the seventeenth century but were an acute problem in the U.S. in the middle of the nineteenth century).

¹¹³ Hanson, *supra* note 6, at 573 (noting that by the early 1960s American lawyers were finding the task of locating relevant cases and secondary sources to be an intolerable burden and responded by introducing electronic databases and artificial intelligence to assist with the management of legal information); KATSH, *supra* note 96, at 43 (noting that computerized systems “arrived on the scene when the growth of printed reporters threatened to become unmanageable for libraries.”) (citations omitted).

¹¹⁴ See *infra* notes 136–42 and accompanying text.

¹¹⁵ See About LexisNexis, <http://www.lexisnexis.com/about/> (last visited Sept. 6, 2006).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Hanson, *supra* note 6, at 573.

¹¹⁹ *Id.*

¹²⁰ *Id.*

research databases. The result was a competing product that used public information but was taken from a format initially published by West.”¹²¹ The creation of Lexis was legally permissible because copyright protection did not extend to the opinions in West print reporters.¹²² Further, the Supreme Court in the *Feist* decision limited the ability to protect certain types of factual compilations with copyright,¹²³ although prior to *Feist* the Eighth Circuit had held that Lexis’s use in its online database of star pagination based on the pagination in Westlaw’s print reporters constituted copyright infringement.¹²⁴ This Eighth Circuit precedent is effectively limited both by the *Feist* decision and by the Thomson-West consent decree with the U.S. Department of Justice in connection with their merger that requires Thomson-West to license its star pagination.¹²⁵ However, database protection, which has been adopted in Europe,¹²⁶ is strongly supported by publishers such as Thomson and Reed Elsevier.¹²⁷ The adoption of database protection in the United States could have significant implications for access to legal information as well as the development of competitors to existing market players.¹²⁸ Database protection for legal databases might, for example, have prevented or at least seriously hampered the development of the Lexis database.¹²⁹

Although Lexis was the first successful large scale commercial full-text online legal information service, it actually reflected and was based on

¹²¹ Debra Baker, *Treading on Titans’ Turf*, A.B.A. J., July 2000, at 44, 44–45.

¹²² See *supra* notes 91–93 and accompanying text.

¹²³ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (“This inevitably means that the copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another’s publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement.”).

¹²⁴ See *infra* notes 170–76 and accompanying text; *West Publ’g Co. v. Mead Data Cent., Inc.*, 616 F. Supp. 1571, 1578 (D. Minn. 1985), *aff’d*, 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987) (“Based on the foregoing, this Court finds that *Callaghan* supports and *Banks* does not bar copyright protection for West’s laboriously prepared, voluntary arrangement of cases.”); *West Publ’g Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1223 (8th Cir. 1986) (“We do not agree with MDC that West’s claim here is simply one for copyright in its page numbers. Instead, we concur in the District Court’s conclusion that West’s arrangement is a copyrightable aspect of its compilation of cases, that the pagination of West’s volumes reflects and expresses West’s arrangement, and that MDC’s intended use of West’s page numbers infringes West’s copyright in the arrangement.”).

¹²⁵ See *infra* note 196 and accompanying text.

¹²⁶ See Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L77) 20, available at <http://europa.eu.int/ISPO/infosoc/legreg/docs/969ec.html> (giving 15 years sui generis protection for makers of databases that show qualitatively and/or quantitatively substantial investments in the obtaining, verification of, or presentation of the contents to prevent extraction and/or reutilization of the whole or of a substantial part).

¹²⁷ Dethman, *supra* note 16, at 138–39 (noting that database owners have scurried to Congress for help and have supported legislation that would permit protection of legal databases).

¹²⁸ See *infra* notes 169–76 and accompanying text.

¹²⁹ Dethman, *supra* note 16, at 143 (noting that H.R. 354 may have prevented Lexis from copying cases from West).

initiatives that date back to the 1950s and 1960s. The University of Pittsburgh Health Law Center and Computational Data Processing Center are generally credited with creating the first full-text online legal information service.¹³⁰ This project, known as the Horthy Project, was implemented under the leadership of John F. Horthy, Jr., then a professor at the University of Pittsburgh Law School.¹³¹ The project actually arose in 1959 out of the research needs of Professor Horthy, who was developing a "Hospital Law Manual."¹³² By 1961, Horthy had placed the full text of all Pennsylvania Statutes online and launched a commercial service to provide access to this information.¹³³ The Horthy Project was thus the basis for Aspen Systems Corporation, a commercial service for searching statutory material.¹³⁴ In 1964, Horthy demonstrated a computer-aided legal research system at an American Bar Association meeting.¹³⁵

In contrast to the Horthy Project, which involved statutory material, the Lexis information service included case law materials. What later became Lexis initially began as an initiative of the Ohio State Bar,¹³⁶ which later established a nonprofit corporation named Ohio Bar Automated Research ("OBAR").¹³⁷ The Horthy Project, in fact, inspired the development of the OBAR project.¹³⁸ The initial events that led to Lexis were connected to

¹³⁰ Interview by Kathleen Carrick with John F. Horthy, Professor of Law, Univ. of Pittsburgh Law Sch. 1 (on file with author); *see also* A Guide to Framing Computer Searches for Statutes, Health Law Ctr., Univ. of Pittsburgh (on file with author) (describing the tools and attributes for searching in a full-text retrieval system for statutes).

¹³¹ Carrick, *supra* note 130, at 1.

¹³² Lee Loevinger, *The Computer Revolution and the Law*, JURIS DR., Dec. 1971, at 6 ("Finding collation of the laws of the 50 states too difficult to handle by conventional means, Horthy and his associates began putting health law statutes on computer tape. By designing appropriate programs, the statutes could be retrieved as desired for incorporation into various sections of the text. In this fashion, a loose-leaf manual of hospital law was made.").

¹³³ *Id.*; *see also* Michael A. Geist, *Where Can You Go Today?: The Computerization of Legal Education from Workbooks to the Web*, 11 HARV. J. L. & TECH. 141, 147 (1997) ("Using card-punch machines, Professor Horthy first coded all Pennsylvania public health laws onto punch cards and then transferred the information to computer tape, enabling users to search the statutes by keyword.").

¹³⁴ *See* Robert P. Bigelow, *How Lawyers Can Use Computers to Practice Law—Now!*, R.I.B. J., Dec. 1971, at 8 (describing the services of Aspen Systems Corporation).

¹³⁵ Berring, *supra* note 9, at 195; Geist, *supra* note 133, at 147 (noting that Horthy first demonstrated his system at the American Bar Association Annual Meeting in 1960).

¹³⁶ *See* William G. Harrington, H. Donald Wilson & Robert L. Bennett, *The Mead Data Central System of Computerized Legal Research*, 64 LAW LIBR. J. 184 (1971); James F. Preston, Jr., *OBAR and Mead Data Central System*, 64 LAW LIBR. J. 190 (1971) (discussing OBAR and Mead Data Central).

¹³⁷ Bigelow, *supra* note 134, at 8 (describing OBAR); William G. Harrington, *Computers and Legal Research*, 56 A.B.A. J. 1145 (1970) (discussing pioneering effort of the Ohio State Bar and Mead Data Central).

¹³⁸ Geist, *supra* note 133, at 147 ("Following an appearance by Professor Horthy in 1965 at the Bar Association's annual dinner, the president of the [Ohio] Bar Association, James F. Preston, Jr., decided to take the necessary steps to make the CALR service a reality. Soon after, the [Ohio] Bar Association appointed William Harrington as research counsel.

concerns about lawyers' access to legal information in Ohio. In 1966, the Ohio State Bar began exploring what type of computerized legal research system it could offer its members.¹³⁹ In 1967, the Ohio State Bar signed an agreement with the Data Corporation of Dayton, Ohio for the development of a computerized system.¹⁴⁰ In 1968, the Data Corporation merged with the Mead Corporation, creating a subsidiary, Mead Data Central, which focused on the development of a computerized legal research system.¹⁴¹ By 1971, OBAR had placed online the full text of reported Ohio decisions and the Ohio General Code.¹⁴²

The development of computer services in the legal information market has significant implications for law and legal practice. The use of computers to search full-text databases in legal research has been characterized as fast, objective, and flexible.¹⁴³ Through online research, lawyers can complete tasks that would have been extremely difficult or impossible with print sources.¹⁴⁴ Computer-aided legal research has also changed the use and function of the library.¹⁴⁵ Use of computers in legal research may also change the nature of precedents that might be consulted in a case.¹⁴⁶ Computers may have also promoted use of persuasive authorities from other jurisdictions.¹⁴⁷ Furthermore, computers have virtually unlimited storage capacity, allow rapid distribution of court opinions within hours or days rather than months, and have expanded the amount of nonlegal information available to lawyers.¹⁴⁸ This may have even

Harrington held a series of meetings with Professor Harty in order to gauge the relative merits of the available hardware and software.”) (citations omitted).

¹³⁹ Bigelow, *supra* note 134, at 8; Hanson, *supra* note 6, at 573 (noting that the Ohio State Bar Association became aware of a system developed by the Data Corporation to help the Air Force manage its procurement contracts and reached an agreement with the Data Corporation to cooperate and modify that system for legal research).

¹⁴⁰ Bigelow, *supra* note 134, at 8; William G. Harrington, *What's Happening in Computer-Assisted Legal Research?*, 60 A.B.A. J. 924 (1974).

¹⁴¹ Harrington, *supra* note 140, at 924.

¹⁴² Bigelow, *supra* note 134, at 8 (describing OBAR online services).

¹⁴³ Philip Slayton, *Electronic Legal Retrieval—The Impact of Computers on a Profession*, 14 JURIMETRICS J. 29, 32 (1973) (noting that computers in legal research are fast for reasons of mechanical design, objective in the case of full-text systems because no human intelligence intervenes between the searcher and the database, and flexible because of the lack of an hierarchical index).

¹⁴⁴ Hanson, *supra* note 6, at 575–76 (noting the fact that hyperlinked cases can make searching for other cases much easier and that “Westlaw is a much more powerful research tool than the print-digest system using key numbers”).

¹⁴⁵ *Id.* at 577 (noting that no single source gives sufficient access to the range of legal materials, which means that most library collections are a mix of print, electronic, microfiche and audiovisual sources).

¹⁴⁶ *Id.* at 580 (noting that automated research has an open-ended quality and potential to be highly customized, which is more likely to turn up novel cases, whereas in the print era, most lawyers would tend to develop arguments based on the same cases).

¹⁴⁷ *Id.* at 585–86.

¹⁴⁸ *Id.* at 587.

facilitated interdisciplinary scholarship and work.¹⁴⁹ During this same time period, some commentators have also noted an increasing divide between legal scholarship and the legal profession and the view that practicing lawyers may see legal scholarship as having little value.¹⁵⁰

Computer-aided legal research has also potentially changed the hierarchy of legal information sources and made legal scholarship more easily accessible and searchable.¹⁵¹ Legal scholarship is now more accessible because it can be readily searched using online tools,¹⁵² whereas search tools in the print era primarily indexed primary sources.¹⁵³ The primary print-based tools for searching for legal scholarship pieces published in journals have been the Index to Legal Periodicals and the Current Law Index.¹⁵⁴ In addition to potentially influencing the hierarchy of legal sources and production of legal scholarship, the development of online legal information services has contributed to current legal information industry configurations in which a small number of significant players remain dominant.

III. THE PLAYERS: LEXIS AND WESTLAW AS A COMPETITIVE DUOPOLY

A. *Industry Concentration in the Legal Publishing Industry*

Legal publishers, not surprisingly, have played a significant role in the development of the legal information industry. They have also served an important role by facilitating the organization of legal information and creating

¹⁴⁹ KATSH, *supra* note 96, at 43 (noting expansion in amount of nonlegal information available to lawyers); Hanson, *supra* note 6, at 587–92 (discussing how computerized systems have facilitated interdisciplinary work by lawyers and legal academics).

¹⁵⁰ Hanson, *supra* note 6, at 585; Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34–50 (1992), available at <http://www.questia.com/PM.qst?a=o&d=96433079> (discussing the increasing disjunction between legal scholarship and the legal profession); Jordan H. Leibman & James P. White, *How the Student-Edited Law Journals Make Their Publication Decisions*, 39 J. LEGAL EDUC. 387, 389 (1989); Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921 (1993) (commenting on Judge Edward's discussion); Michael J. Saks, Howard Larsen & Carol J. Hodne, *Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart*, 28 SUFFOLK U. L. REV. 1163, 1182–83 (1994) (comparing characteristics of law review articles published in 1960 and 1985).

¹⁵¹ Hanson, *supra* note 6, at 584–85.

¹⁵² *Id.*; Howard Denemark, *How Valid is the Often-Repeated Accusation That There Are Too Many Legal Articles and Too Many Law Reviews?*, 30 AKRON L. REV. 215, 220 (1996), available at <http://www3.uakron.edu/lawrev/denemar1.html> (noting that Lexis and Westlaw have limited coverage of law review articles, “but enjoy the advantage of powerful search capabilities for those articles within their databases”).

¹⁵³ Hanson, *supra* note 6, at 584.

¹⁵⁴ Denemark, *supra* note 152, at 220 (noting that traditional paper indices such as the *Current Legal Index* and the *Index to Legal Periodicals* are research tools that could be used to find articles).

avenues for access to and dissemination of such information to a variety of interested parties. Although the dominance of Lexis and Westlaw have led some to refer to them collectively as “Wexis,”¹⁵⁵ the online legal information industry can be characterized as a duopoly in which Lexis and Westlaw are the most important players.¹⁵⁶ The organization of the legal information industry more generally has certain oligopolistic characteristics, including industry concentration and interdependence among several firms in which members have at times adopted intensely competitive behavior.¹⁵⁷ Consideration of the print market does not alter the significant concentration that exists among legal publishers. The legal publishing industry is characterized by three major players: the Thomson Corporation, which owns Westlaw, Reed Elsevier, which owns Lexis, and Wolters Kluwer.¹⁵⁸

Industry concentration is by no means a recent phenomenon, and the legal publishing market has typically included dominant firms. West Publishing Company, for example, achieved dominance beginning in the 1870s at least in part by virtue of superior performance: it published its reporters quickly, worked closely with the judiciary, had high production standards, hired only lawyers as its book salespeople, and had a reputation for humorless intensity.¹⁵⁹ West supplemented this factor with successful lobbying that led to its reporters becoming essentially de facto official reporters in many respects.¹⁶⁰ In more recent years, the dominance of West and other major players in the legal information industry has been solidified by merger.¹⁶¹

¹⁵⁵ See Wikipedia, LexisNexis, <http://en.wikipedia.org/wiki/LexisNexis> (last visited Sept. 1, 2006).

¹⁵⁶ The structure of market relations between Lexis and Westlaw suggests elements of a noncollusive duopoly. See WILLIAM G. SHEPHERD, *THE ECONOMICS OF INDUSTRIAL ORGANIZATION* 246 (4th ed. 1997) (discussing examples of noncollusive duopolies such as Boeing and Airbus and Mattel and Hasbro).

¹⁵⁷ *Id.* at 205, 245 (noting that oligopoly “involves interdependence among several firms (actually from two to about ten). Members of the group can either coordinate or adopt intensely competitive behavior.”) (emphasis omitted).

¹⁵⁸ Berring, *supra* note 22, at 1698.

¹⁵⁹ L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 *UCLA L. REV.* 719, 812 (1989) (noting that in the late nineteenth and early twentieth centuries, West established its preeminent place in the legal publishing industry for almost a century and noting that West has been an “intelligent and paternalistic monopolist, serving the bench and bar well”); SHEPHERD, *supra* note 156, at 205 (noting that although superior performance is cited as a reason for monopolies and dominant firms, little research exists that shows that dominance is justified by superior performance); Berring, *supra* note 9, at 199–200 (noting that West had the only nationally based system, worked closely with the judiciary, had long been known among law librarians for overdoing its production standards, hired only lawyers as book salespeople, started out new hires as proofreaders, and had a reputation for humorless intensity); see also *supra* notes 26 and 101.

¹⁶⁰ SURRENCY, *supra* note 22, at 51 (noting that West began to urge the Bar as early as 1902 to demand that all citations in texts include references to the National Reporter System).

¹⁶¹ See *infra* notes 177–88 and accompanying text; SHEPHERD, *supra* note 156, at 206 (noting that the merger boom in the 1980s and 1990s brought back dominance-creating mergers).

B. *Competition in the Legal Information Industry*

Although Lexis and Westlaw were clumsy at their inception,¹⁶² since their introduction, Lexis and Westlaw have progressively increased the volume of material contained in their respective databases. They have also continually expanded their range of services. Although both began as “repositories of decisions,” statutory and legislative material was quickly added and administrative materials were added later.¹⁶³ In 1982, both Lexis and Westlaw added law review articles.¹⁶⁴ In racing to provide the most useful material, both built “enormous libraries of information.”¹⁶⁵ The relatively early development of online information services in the legal arena has meant that law “leads all other fields in the distribution of digital information.”¹⁶⁶

The ongoing competition between Lexis and Westlaw is not atypical in the legal information industry. Competition between market players has been a characteristic feature of legal publishing since its inception. In 1889, for instance, West Publishing Company “increased its market share by driving Little, Brown & Company out of the legal digest market. By the turn of the century, West had become the leader in legal indexing and publishing of case reporters.”¹⁶⁷ In the print era, the Lawyers’ Co-operative Publishing Company (now owned by Thomson), which published its own regional reporters, was a key competitor of West in the legal publishing arena for over 100 years.¹⁶⁸

In addition to offering competitive products, competition between legal publishers is evident in legal actions between companies. In such actions, companies attempt to use the law strategically for their commercial benefit. A number of recent cases have centered around the ability to copyright the information in legal databases. This is reflected, for example, in copyright litigation among players in the legal information industry through which

¹⁶² Berring, *supra* note 22, at 1696; Geist, *supra* note 133, at 148 (“By today’s standards, the service’s searching speed was positively glacial, though this did not seem to disturb prospective users. For example, Harrington describes a demonstration search during an ABA convention that ran over four hours, but which the lawyers present still regarded as extremely efficient.”) (citations omitted).

¹⁶³ Berring, *supra* note 9, at 197.

¹⁶⁴ Hibbitts, *supra* note 56, at 177.

¹⁶⁵ Berring, *supra* note 9, at 197.

¹⁶⁶ Berring, *supra* note 101, at 620.

¹⁶⁷ Lind, *supra* note 95, at 97 (citations omitted).

¹⁶⁸ SURRENCY, *supra* note 22, at 50, 119 (noting that the Lawyers Co-operative Publishing Company began publishing regional reporters after West published its reporters and started publishing a digest two full years before West began the *American Digest*); Joe K. Stephens, *The Merger: What Will It Cost Law Libraries?*, in *THE POLITICAL ECONOMY OF LEGAL INFORMATION: THE NEW LANDSCAPE* 13, 15 (Samuel E. Trosow ed., 1999) (noting that West and Lawyer’s Co-op were major competitors in legal publishing for well over a hundred years).

companies have tried, with varying degrees of success, to restrict access to their printed and electronic publications by invoking copyright protection.¹⁶⁹

The litigation emphasis that incumbents at times use to block new market entry and competitive products is evident in a number of cases in the electronic publishing era. In 1985, Lexis proposed to use the star pagination from West print court reporters as a feature in its database.¹⁷⁰ West then sued Lexis for copyright infringement and asserted that Lexis's use of star pagination constituted a "copy" of West's National Reporter System print case compilations.¹⁷¹ The District Court found that West could hold a copyright interest in its star pagination.¹⁷² The Eighth Circuit upheld the District Court's granting of an injunction and found that West's arrangement, including star pagination, is copyrightable and that the intended use by Mead Data Central constituted copyright infringement.¹⁷³ The view in these cases is not consistent with the later *Feist* case.¹⁷⁴ More recently, *Matthew Bender*, which was

¹⁶⁹ Atlas, *supra* note 24, at 491 ("West Publishing seems to spend much of its time these days in litigation over whether the judicial opinions it publishes in its Supreme Court Reporter and Federal Reporter series are subject to copyright protection.").

¹⁷⁰ Stephen C. Carlson, *The Law and Economics of Star Pagination*, 2 GEO. MASON L. REV. 421, 422 (1995) ("In 1985, Mead announced that it would add a 'star pagination' feature, which would embed the internal page numbers of West's reporter volumes at their page breaks within the opinions stored in its computer database. As a result, star paginating the opinions inside LEXIS allows Mead's customers to provide 'jump' or 'pinpoint' citations to West's reporters without having to purchase them.") (citations omitted).

¹⁷¹ *West Publ'g Co. v. Mead Data Cent., Inc.*, 616 F. Supp. 1571, 1575 (D. Minn. 1985), *aff'd*, 799 F.2d 1219 (8th Cir. 1986) (noting that star pagination involves the insertion of numbers from West's National Reporter System print publications within the body of LEXIS online reports and that Lexis's use of star pagination would displace West's print reporters by eliminating the necessity to look at the actual West volume).

¹⁷² *Id.* at 1578 (granting preliminary injunction and finding that copyright protection is not barred for "West's laboriously prepared, voluntary arrangement of cases").

¹⁷³ *West Publ'g Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1223 (8th Cir. 1986) ("[W]e concur in the District Court's conclusion that West's arrangement is a copyrightable aspect of its compilation of cases, that the pagination of West's volumes reflects and expresses West's arrangement, and that MDC's intended use of West's page numbers infringes West's copyright in the arrangement.").

¹⁷⁴ *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991) ("This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art."); Brief for Amicus Curiae United States in Support of Appellant, *Oasis Publishing Co. v. West Publishing Co.*, No. 96-2887 (8th Cir. Sept. 9, 1996), available at <http://www.usdoj.gov/atr/cases/f0800/0860.htm> (noting that *Mead* is no longer controlling law and cannot be reconciled with the Supreme Court's rejection of "the sweat of the brow" doctrine in *Feist*); *but see Oasis Publ'g Co. v. West Publ'g Co.*, 924 F. Supp. 918, 925 (D. Minn. 1996) (noting that *Mead* was not overruled by *Feist* and finding that "West's arrangement of cases in the Southern Reporter possesses the requisite creativity for copyright protection. Pagination of that arrangement is an integral part of the arrangement and shares in any copyright protection in the arrangement itself."); Atlas, *supra* note 24, at 498-99 (noting that West settled the dispute with Oasis Publishing, reportedly paid legal costs and money damages of Oasis, and entered into a license deal that

subsequently acquired by Reed Elsevier, sought a declaratory judgment that “West does not possess a federal copyright in the pagination of its case compilations and that Bender’s use of that pagination in its own product is thus a noninfringing use.”¹⁷⁵ HyperLaw, a small legal publisher that at the time produced a CD-ROM product, intervened in the Bender-Westlaw litigation. The Matthew Bender cases held that West’s star pagination is not protectable by copyright.¹⁷⁶

C. *Growth through Acquisition: Consolidation in the Legal Information Industry*

Consolidation in the legal information industry has led to upward pressure on the pricing of products of commercial legal publishers.¹⁷⁷ Although currently three major corporate umbrellas comprise the overwhelming majority of the legal information industry,¹⁷⁸ in 1977, “at least 23 legal publishers of some size and reputation were separately owned (along with a score of smaller ones).”¹⁷⁹ A significant amount of consolidation occurred in the 1990s. In 1990, 18 publishers of commercial law serials were active; by 2000, this number had fallen to 12, leading to the emergence of three large publishers of law materials: Thomson, Reed Elsevier, and Wolters Kluwer, which collectively control 90% of the legal publishing business in the U.S.¹⁸⁰ The increasing concentration among legal and other publishers resulting from consolidation through mergers and acquisitions has led to increased antitrust scrutiny: the U.S. Department of Justice required divestiture of property rights to textbooks in order to resolve competitive concerns in Thomson’s 2001 acquisition of certain Harcourt General Inc. assets from Reed Elsevier following Reed’s acquisition of Harcourt General.¹⁸¹ Concerns of the European Union with respect to the legal

permitted Oasis to use West’s volume and page citation system in return for Oasis’s agreement not to appeal the district court decision, thus preserving a favorable precedent for West in the Eighth Circuit).

¹⁷⁵ *Matthew Bender & Co. v. West Publ’g Co.*, 94 Civ. 0589, 1995 U.S. Dist. LEXIS 17688, at *2 (S.D.N.Y. Nov. 28, 1995).

¹⁷⁶ *Matthew Bender & Co. v. West Publ’g Co.*, 94 Civ. 0589, 1997 U.S. Dist. LEXIS 6915, at *11–12 (S.D.N.Y. May 19, 1997), *aff’d*, 158 F.3d 674 (2d Cir. 1998) (noting that the changes West makes to the cases it reports are trivial and not protectable by copyright); *Matthew Bender & Co. v. West Publ’g Co.*, 158 F.3d 693, 708 (2d Cir. 1998) (holding that West’s star pagination may be lawfully copied).

¹⁷⁷ McCabe, *supra* note 88, at 26 (noting a significant and substantial increase in prices in four of five legal publisher mergers); MARGARET MAES AXTMANN, PRICE INDEX FOR LEGAL PUBLICATIONS 1996 (1996); KENDALL F. SVENGALIS, LEGAL INFORMATION BUYER’S GUIDE AND REFERENCE MANUAL 5 (2005).

¹⁷⁸ *See supra* note 158 and accompanying text.

¹⁷⁹ Berring, *supra* note 22, at 1698 (quoting Kendall F. Svengalis, *Legal Publishing on the Eve of the Millennium*, AALL SPECTRUM, July 1999, at 22).

¹⁸⁰ Mark J. McCabe, *Merging West and Thomson: Pro- or Anti-Competitive*, 97 LAW LIBR. J. 423, 428–29 (2005), available at http://www.aallnet.org/products/pub_llj_v97n03/2005-25.pdf; Dethman, *supra* note 16, at 124 (noting that Thomson, Reed Elsevier, and Wolters Kluwer control 90% of the legal publishing business in the U.S.).

¹⁸¹ Press Release, U.S. Dep’t of Justice, Justice Department Requires Divestitures in Thomson’s Acquisition of Certain Assets of Harcourt General (June 27, 2001),

information industry were apparently a factor in the failure of the proposed merger between Wolters Kluwer and Reed Elsevier.¹⁸²

The acquisitions of Lexis and Westlaw by global publishing concerns in the 1990s led to greater recognition of and concern about consolidation among legal publishers.¹⁸³ Prior to purchasing Lexis in 1994, Reed Elsevier had purchased Martindale-Hubbell in 1990.¹⁸⁴ Reed followed its purchase of Lexis with acquisitions of Matthew Bender and Shepard's, for a total cost of more than \$3 billion.¹⁸⁵ Wolters Kluwer, a Dutch conglomerate, purchased Prentice Hall Law and Business in 1994, Commerce Clearing House (CCH) in 1995, and Little Brown & Company in 1996, for a total purchase price of more than \$2 billion.¹⁸⁶ The Thomson Corporation purchased Bancroft-Whitney, Lawyers Co-op, Research Institute of America, Clark-Boardman and West.¹⁸⁷ The purchase price of West was more than \$3 billion.¹⁸⁸

Despite this progressive industry consolidation, a number of small legal publishers remain active in the marketplace.¹⁸⁹ These companies use technology as part of their operations: "the Internet plays at least some part in

<http://www.usdoj.gov/opa/pr/2001/June/288at.htm> (noting that in order to resolve competitive concerns about Thomson's acquisition of certain Harcourt assets, Reed Elsevier would purchase all of Harcourt for approximately \$4.6 billion and then sell Harcourt's Higher Education and Corporation and Professional Services Groups to Thomson for approximately \$2.06 billion); David Malakoff, *Librarians Seek to Block Merger of Scientific Publishing Giants*, 290 SCIENCE 910 (2000) (noting that librarians asked the U.S. government to block Reed Elsevier's acquisition of Harcourt General, one of the biggest ever science publishing mergers); Daniel Golden, *Reed, Thomson Attempt to Buy Harcourt Could Face Tough Antitrust Scrutiny*, WALL ST. J., Nov. 3, 2000, at A3 (noting that the Department of Justice could seek divestitures as a condition of approving the acquisition of Harcourt by Reed Elsevier and Thomson).

¹⁸² Press Release, Proposed Merger of Reed, Elsevier and Wolters Kluwer (Oct. 13, 1997), <http://www.prnewswire.co.uk/cgi/news/release?id=27687> (last visited Feb. 23, 2006); Dethman, *supra* note 16, at 128 (noting that the proposed merger of Reed Elsevier and Wolters Kluwer fell apart in 1998 apparently due to antitrust concerns raised by the EU); William M. Hannay, *The Publishing Merger That Failed: Reed Elsevier and Wolters Kluwer*, 26 ACQUISITIONS LIBR. 173 (2001).

¹⁸³ McCabe, *supra* note 180, at 423 (discussing the 1996 purchase of West Publishing Company by Thomson Financial and Professional Publishing Group and noting that the companies agreed to divest dozens of titles to satisfy concerns about potential anti-competitive impacts).

¹⁸⁴ Dethman, *supra* note 16, at 127 (noting that prior to the Reed Elsevier acquisition of Lexis, it acquired Martindale-Hubbell).

¹⁸⁵ *Id.* at 128 (noting acquisition of Matthew Bender and Shepard's by Reed).

¹⁸⁶ *Id.* (noting that Wolters Kluwer purchased Prentice Hall Law and Business, Commerce Clearing House (CCH), and Little Brown & Company for a total price of \$2 billion).

¹⁸⁷ *Id.* (noting that the Thomson Corporation purchased Bancroft-Whitney, Lawyers Co-op, Research Institute of America, Clark-Boardman, and finally West).

¹⁸⁸ *Id.* (noting that Thomson acquired West for over \$3 billion).

¹⁸⁹ Susan M. Yoder, *The Rise of the Small: The Effects of Industry Consolidation on Small Legal Publishers*, in *THE POLITICAL ECONOMY OF LEGAL INFORMATION: THE NEW LANDSCAPE* 59, 62 (Samuel E. Trosow ed., 1999) (discussing a range of small companies, including Alert Publications, Findlaw (now owned by Thomson-West), Niche Publishers, PLI, and VersusLaw).

every business (product delivery, marketing, customer communication, etc.).”¹⁹⁰ This suggests that business opportunities may exist, particularly at the low end of the market in terms of pricing, despite the significant concentration in the legal information industry.¹⁹¹ This also suggests that considerations of ways to achieve greater open access to legal scholarship and legal information could have a positive influence on the broader marketplace by giving incentives for entrepreneurs to create new business models in the legal information industry. These new business models may form a counterweight to the recent experiences of greater industry concentration and significant price increases, provided that incumbents do not use their market dominance to foreclose potentially competitive new business models.

Industry concentration can lead to increased prices and a tendency toward monopolistic behavior.¹⁹² Consequently, the price increases associated with increasing industry concentration among legal publishers, as well as publishers more generally, are an increasing focus of concern.¹⁹³ Evidence of price movements following legal publishing mergers indicate that prices increased at a rate greater than inflation.¹⁹⁴ Anti-competitive practices are another concern as is reflected in the Department of Justice settlement in the Westlaw-Thomson merger.¹⁹⁵ In addition to requiring divestitures of certain publication titles and production assets, the Thomson-Westlaw settlement required that Thomson “license openly the right to use the pagination of individual pages in West’s

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 73 (noting that smaller entrepreneurs in the legal information industry are finding fertile plots for new ideas, new products and new customers).

¹⁹² SHEPHERD, *supra* note 156, at 258 (noting that both Cournot output-setting and Bertrand price-setting models “illustrate what is known from intuition and mainstream experience: namely, that fewness, cost advantages, and product differentiation tend to breed monopoly behavior.”).

¹⁹³ Michael Ginsborg, “A Nickel Isn’t Worth a Dime Today:” *Soaring Legal Publishing Costs Strain Law Library Budgets*, S. F. DAILY J., June 23, 2006, <http://www.nocall.org/Daily%20Journal%20Update/dj060623.htm> (noting that escalating price increases have been the norm for many years as a result of increased industry consolidation and that such price increases have strained law library budgets); McCabe, *supra* note 180, at 424 (noting that prices for both West-Thomson’s titles and divested titles purchased by Reed Elsevier experienced significant post-merger price increases); Carolyn E. Lipscomb, *Mergers in the Publishing Industry*, 89 BULL. MED. LIBR. ASS’N 307 (2001), available at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=34566> (noting increasing concentration in publishing industry generally and significant price increases that have accompanied this consolidation); Dethman, *supra* note 16, at 124 (noting that the history of legal publishing in the U.S. mirrors the publishing industry as a whole); Kathleen Robertson, *Mergers, Acquisitions and Access: STM Publishing Today*, in LIBRARY AND INFORMATION SERVICES IN ASTRONOMY IV 95, 95–96 (Brenda G. Corbin et al. eds., 2003) (noting the merger mania in the publishing industry generally in the 1980s and 1990s); *see also supra* notes 27–50 and accompanying text.

¹⁹⁴ Stephens, *supra* note 168, at 16–17 (noting that the price increases following the Lawyer’s Co-op acquisition by Thomson increased in price at twice the rate of legal publications generally).

¹⁹⁵ *See infra* note 196 and accompanying text.

National Reporter System, in which Westlaw claims copyright ownership, to any interested third party for a fee.”¹⁹⁶

D. Profiting from Legal Information: Lexis and Westlaw Financial Figures

Financial performance figures of the dominant legal publishers reflect the fact that the legal information business is quite profitable. In 2005, LexisNexis had revenues of approximately \$2.7 billion and operating profits of \$617 million, an increase of approximately 13% in revenues and 9% in operating profit from 2004 revenues of approximately \$2.37 billion and operating profits of approximately \$564 million.¹⁹⁷ Westlaw is part of the Thomson Legal and Regulatory division, which includes other brands such as FindLaw, Thomson & Thomson, Sweet & Maxwell, and BAR/BRI.¹⁹⁸ Thomson Legal and Regulatory had 2005 revenues of \$3.491 billion and operating profit of \$982 million, which gave it operating profit margins of 28.1%.¹⁹⁹ Thomson Legal and Regulatory’s 2005 financial performance reflects an increase of 6.6% in revenues and 9.5% in operating profit from 2004 when revenues were \$3.276 billion and operating profit \$897 million, giving Thomson Legal and Regulatory 2004 operating profit margins of 27.4%.²⁰⁰

The legal information segments of both Reed Elsevier and Thomson comprise a significant amount of their respective revenues. Thomson Legal and Regulatory represents the single biggest portion of Thomson Corporation revenues and comprised 40% of total revenues in 2005.²⁰¹ Reed Elsevier derives a significant portion of its revenue from the legal market. In 2000, 32%

¹⁹⁶ See *U.S. v. Thomson Corp.*, Proposed Final Judgment and Competitive Impact Statement, 61 Fed. Reg. 35250, 35254 (July 5, 1996) (setting license fees not to exceed \$0.09 per format per year in the first year of the license, \$0.11 in the second year and \$0.13 in subsequent years of the license, with increases limited to the change in the Producer Price Index).

¹⁹⁷ REED ELSEVIER, ANNUAL REVIEW AND SUMMARY FINANCIAL STATEMENTS 2005 22 (2006), available at http://www.reed-elsevier.com/media/pdf/8/7/FINAL_Reed%20Review2.pdf (noting that LexisNexis 2005 revenues were £1,466m/€1,140m and operating profit was £338m/€493m); Press Release, Reed Elsevier, Reed Elsevier Announces 2004 Full Year Results (Feb. 17, 2005), <http://www.ReedElsevier.com/index.cfm?articleid=1278> (noting that LexisNexis 2004 revenues were up 7% to £1,292m/€1,899m and operating profit was up 11% to £308m/€453m at constant currency rates). The dollar figures were calculated by converting the pound financial figures at the average conversion rates for 2004 and 2005 using the conversion function at FXHistory. See FXHistory, Historical Currency Exchange Rates, <http://www.oanda.com/convert/fxhistory> (last visited Aug. 29, 2006) (indicating that average pound conversion rate for period from 1/1/2004 to 12/31/2004 was 1.83277 and the average Euro conversion rate for the same period was 1.24386; the pound rate was 1.82069 and the Euro rate was 1.24539 for the period from 1/1/2005 to 12/31/2005).

¹⁹⁸ THOMSON CORP., THOMSON CORPORATION 2005 ANNUAL REPORT 25 (2005), available at http://www.thomson.com/cms/assets/pdfs/corporate/2005_Annual_rpt/AR05_Full.pdf.

¹⁹⁹ *Id.* at 33.

²⁰⁰ *Id.* at 33.

²⁰¹ *Id.* at 25.

or \$1.2 billion of Reed Elsevier total revenues was derived from the legal market.²⁰² Operating profits for the legal market were \$237 million or 30% of the total Reed Elsevier operating profit. The operating margins for the Reed Elsevier legal division were between 21% and 23% in 2000 to 2002 and were projected by Morgan Stanley to increase to 25.3% in 2007.²⁰³ Reed Elsevier has experienced continuous increases in revenue and operating profit for a sustained period of time.²⁰⁴ In 1997, Reed Elsevier's net margins were said to be higher than 473 of the Fortune 500 companies.²⁰⁵ The operating margins of the Thomson Legal and Regulatory Division rose from 26.9% in 2003 to 28.1% in 2005.²⁰⁶

The dominance of commercial publishers in the legal information industry has significant implications for questions of access. This is particularly true with respect to consumers who are not able to pay the prices charged by commercial publishers for their services. Concerns about pricing and access have become heightened in the digital era, at least in part as a result of the lack of an effective library through which information in digital databases might be accessed by the public in the manner of the public library during the print era. Consequently, access to legal information is a critical question in the current era in which digital information is becoming increasingly prevalent.

IV. THE CONSUMERS: USERS' ACCESS TO LEGAL INFORMATION IN THE DIGITAL ERA

A. *Electronic Legal Information, Access, and Consumer Differentiation*

The increasing predominance of online legal information services has significant implications for access. In the print era, any individual with access to a library with legal materials could use the West National Reporter System, which is widely distributed in its entirety and in parts.²⁰⁷ In the online legal research era, access may be circumscribed by commercial legal publishers through use of technology and may depend on the nature of the user and type of use desired. Price discrimination is one way in which commercial legal publishers can segment access to their databases.²⁰⁸ In the digital era, different users may also have different levels of access to legal information.

The ways in which commercial legal publishers use differential pricing and access in the digital era is evident in their activities in the law school market. Lexis and Westlaw charge heavily discounted fees to law schools for

²⁰² GOODEN ET AL., *supra* note 32, at 13.

²⁰³ *Id.*

²⁰⁴ *Id.* Since the dominant portion of LexisNexis legal market revenues is in the U.S., the changing value of the dollar can significantly influence reported results in British pounds and Euros due to exchange rate fluctuations.

²⁰⁵ Wyly, *supra* note 31.

²⁰⁶ THOMSON CORP., *supra* note 198, at 33.

²⁰⁷ Berring, *supra* note 9, at 203.

²⁰⁸ *See infra* notes 211–42 and accompanying text.

use of their services. In contrast to the law school market, the fees charged by Lexis and Westlaw for commercial users such as law firms can be quite high, with government pricing falling somewhere between the law firm and law school levels.²⁰⁹ This differential pricing structure means that professors and students have relatively low cost access to the legal materials on Lexis and Westlaw. Commercial users, who pay high prices for Lexis and Westlaw access, subsidize this relatively open access within the law school. The benefits of this market and pricing structure flow to all parties involved: law students become trained in the use of Lexis and Westlaw and arrive at their post-law school employment at least conversant with using the Lexis and Westlaw databases. Although law firms pay a high cost, they benefit by getting new employees who are already trained in the use of Lexis and Westlaw. Lexis and Westlaw, which invest significant amounts of resources in the legal market, benefit by getting early access to future generations of potential Lexis and Westlaw users.

Law students, staff, and professors also benefit from Lexis and Westlaw law school marketing strategies. They, as a result, typically have something close to open access to online materials at a low cost. This access takes place in a closed universe that it is limited in two respects. It may include only the online electronic databases and not print and other potential sources of information such as CD-ROM. Further, this limited universe of access constitutes relatively open access in a closed universe and does not typically extend beyond the boundaries of the law school: commercial and government users often do not have such unfettered access to online databases, particularly in the case of commercial users, for whom online legal databases can be quite expensive. Similarly, the general public may also have limited access to such online legal materials.²¹⁰

B. Commercial Users

Despite the conservatism of the legal profession and initial reservations about the adoption of online research in the law,²¹¹ Lexis and Westlaw have been highly successful in marketing their services to commercial legal users. Lexis and Westlaw, most importantly, have marketed their services to law firms as dispersible or chargeable directly to law firm clients.²¹² This has meant that law firms could adopt Lexis and Westlaw at little cost to themselves. Lexis and Westlaw costs could be allocated and passed through directly to clients at

²⁰⁹ See *infra* notes 228–35 and accompanying text.

²¹⁰ See *infra* notes 241–45 and accompanying text.

²¹¹ Geist, *supra* note 133, at 148 (“[A]lthough taken for granted today, [full-text computer aided research] met with considerable opposition at the time, particularly from legal academia. For example, many law librarians expressed concern that the nonindexed nature of the service would bypass the well-established index and digest system, confusing researchers. Furthermore, some viewed the use of full-text searching as a serious mistake since, given the perceived difficulty of searching full-text, it was believed to be a prohibitively expensive use of computer resources.”) (citations omitted).

²¹² Berring, *supra* note 9, at 197.

cost or even subject to a surcharge.²¹³ As a result, use of databases such as Lexis and Westlaw could actually generate profits for law firms.²¹⁴ Lexis and Westlaw were thus an important part of the transformation of legal information from overhead cost to commodity or cost item.²¹⁵

Law firm costs for Lexis and Westlaw can be quite high. Lexis and Westlaw pricing may be based on a transactional, hourly, or fixed cost basis, or on some combination of the above.²¹⁶ Before volume discounts, the hourly rates for Lexis and Westlaw for commercial users in 2003 were said to range from \$75 to \$825 per hour and varied depending on the size and importance of the database(s) being searched.²¹⁷ During this same time period, the costs per search on a per transaction basis ranged from \$0 to \$175.²¹⁸ In addition to potential per transaction or hourly charges, Westlaw and Lexis also charge for downloading and printing documents.²¹⁹ Printing charges in 2003 were said to be \$3 per document for Lexis and \$5 per document for Westlaw.²²⁰ Lexis's Lexsee service cost \$5 per citation,²²¹ while citator services such as Autocite, KeyCite and Shepard's cost approximately \$4 per citation.²²² As a result of the high costs of Lexis and Westlaw, many commercial users have opted for fixed rate contracts that are typically based on prior usage levels,²²³ the terms of which are typically confidential.²²⁴

All potential legal users do not, however, have the same ability to pay the high prices that Lexis and Westlaw typically charge for their services. Online legal information publishers have much greater control over access than do publishers of print materials, at least in part because of the mediating role played by libraries in providing access to print materials.²²⁵ Lexis and Westlaw services are particularly suited to large law firms that bill clients. The high costs of Lexis and Westlaw, however, means that users in certain market

²¹³ *Id.*

²¹⁴ *Id.* (noting that dispersing costs based on billing at a surcharge was never universal and soon became controversial).

²¹⁵ *Id.* (noting that a firm could not charge a client for a portion of the annual subscription to the National Reporter System, but could bill a client for its share of the cost of online information).

²¹⁶ Georgetown Law Library, Cost-Effective Research Guide (Oct. 1, 2003), <http://www.ll.georgetown.edu/guides/cost.cfm> (noting that Lexis and Westlaw can bill on a transactional, hourly, or fixed rate basis).

²¹⁷ *Id.* (noting that before volume discounts, Westlaw hourly rates range from \$30 to \$725 and Lexis hourly rates from \$175 to \$885).

²¹⁸ *Id.* (noting that Westlaw per search costs range from \$0 to \$130 and Lexis per search costs range from \$0 to \$175).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* ("More and more organizations are opting for fixed rate plans which are based on anticipated or past use. These contracts are customized and sometimes restrict access to parts of the service. The terms are confidential.")

²²⁴ *Id.*

²²⁵ Berring, *supra* note 9, at 203-07.

segments may not be able to pay the prices that Lexis and Westlaw charge under their traditional pricing models. Such potentially excluded users include lawyers at state and federal agencies,²²⁶ smaller law firms,²²⁷ solo practitioners and in-house lawyers, particularly at smaller companies, as well as non-lawyers who may need access to legal information.²²⁸

In recognition of the potential problems some users may have in paying for use of their databases, Lexis and Westlaw both have modified versions of their databases that are priced for the small firm and solo practitioners market. LexisOne is a resource for small law firms, which such firms can use to purchase access to portions of LexisNexis Research services, including primary law, Shepard's citation, secondary analysis, news, and company information for \$251 for a day, \$408 for a week and \$830 for a month.²²⁹ WestLawPRO is the Westlaw product targeted for the solo practitioner and small firm market.²³⁰ Lexis and Westlaw have thus responded to the needs of other users by using price discrimination to price discrete segments of their databases in portions targeted for particular audiences such as smaller law firms or solo practitioners.²³¹ The Lexis and Westlaw responses in the small firm market, for example, reflect their adoption of flexible pricing arrangements targeted at a particular market segment and are likely also a response to the appearance of a range of competitors in the low end of the market in terms of pricing.²³² Lexis and Westlaw have also shown significant flexibility in pricing in the law school market.

²²⁶ Mary Ann Neary, *State Government Procurement of Electronic Legal Services*, in *THE POLITICAL ECONOMY OF LEGAL INFORMATION: THE NEW LANDSCAPE* 43, 46 (Samuel E. Trosow ed., 1999) (noting that standard government contract rates for Lexis and Westlaw were lower than those offered to corporate subscribers but higher than those given to academic institutions); Georgetown Law Library, *supra* note 216 (noting that hourly rates for government users are discounted significantly).

²²⁷ See LexisNexis, Research for Small Firms, <http://www.lexisone.com/lx1/specialoffer/getOffer?mode=home&action=signup&packageid=5> (last visited Sept. 6, 2006).

²²⁸ Berring, *supra* note 9, at 204–05 (noting that large legal entities are well served by Lexis and Westlaw, but that a small percentage of lawyers work in such organizations and that other users of legal information do not have such easy access); Jean Stefancic & Richard Delgado, *Outsider Jurisprudence and the Electronic Revolution: Will Technology Help or Hinder the Cause of Legal Reform?*, 52 OHIO ST. L.J. 847, 856 (1991) (noting that computer assisted legal research is costly, which means that law reformers and oppositional scholars located at small schools or in practice with small firms may not have access to unlimited computerized resources).

²²⁹ LexisNexis, *supra* note 227.

²³⁰ Westlaw, Welcome to WestLawPRO, <http://www.westlaw.com/SubOptions/WestlawPRO> (last visited Sept. 6, 2006) (“Now solo practitioners, small and midsize law firms, corporate legal departments with one to five attorneys; state, county and municipal government agencies with one to five attorneys; and judiciary in state trial courts can have the research power of Westlaw for a monthly flat rate—with WestlawPRO”).

²³¹ See *supra* note 227 and accompanying text.

²³² See *supra* notes 189–91 and accompanying text.

C. Law School Users

From the early days of online legal services, Lexis and Westlaw have been extremely generous with the law school market, giving students and professors individual passwords for free use and, at times, twenty-four hour access to their databases, with toll-free phone support, free software for home computers, free assistance and training in law schools, and written aid.²³³ The entrance of Lexis and Westlaw into the law school market received a significant boost in 1990 when both services offered free passwords to law students.²³⁴ Lexis and Westlaw have thus expended enormous resources in the law school market.²³⁵ This strategy has helped Lexis and Westlaw in a number of respects. It helps them in marketing their services to law firms since the vast majority of graduates leave law school with some exposure, if not facility, with their databases.

Lexis and Westlaw law school contracts reflect the low prices that law school customers pay. Westlaw's Plan 4 Law School Service contract provides fee schedules for law schools in the U.S. and its territories and possessions operating under this agreement.²³⁶ Law school access prices are based on the number of full-time equivalent students (FTEs), are set at a specific per-FTE fee, and may also be subject to a specified floor and ceiling.²³⁷ For the 2006–07 academic year, the price per FTE for Westlaw was set at \$61.22 per FTE, which for a school of 400 FTEs would amount to \$24,488 for the academic year.²³⁸ Lexis law school costs for the 2006–2007 academic year for law schools with 345–400 students are approximately \$68.39 per FTE, which for a law school with 400 students would total approximately \$27,357 for the academic year.²³⁹ These fees are significantly less than the amounts paid by large law firm users and markedly lower than the fees for even small firm users, for example. A single LexisOne small law firm subscriber could pay as much as \$10,000 in Lexis fees per year for a much more limited level of access than is typically the case with law schools.²⁴⁰

²³³ Berring, *supra* note 9, at 197 (“To build a constituency of users, the databases initiated astoundingly generous giveaway programs for law schools . . .”).

²³⁴ Geist, *supra* note 133, at 149 (“From a legal education perspective, the single most important improvement in LEXIS and Westlaw took place in 1990, when both systems offered a free password to every law student in the United States.”); *see also* Ronald W. Staudt, *An Essay on Electronic Casebooks: My Pursuit of the Paperless Chase*, 68 CHI.-KENT L. REV. 291, 293–94 (1992) (noting that prior to the fall of 1990, access to Lexis and Westlaw was very rare and law schools had three or four terminals that were not available during peak time periods).

²³⁵ Berring, *supra* note 101, at 620.

²³⁶ *See* Schedule A to Westlaw Subscriber Agreement, Plan 4 Law School Service (July 1, 2006) (on file with author).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *See* 2007 LexisNexis® Educational Subscription Contract (on file with author).

²⁴⁰ *See supra* note 229 and accompanying text.

D. The Public

The advent and increasing dominance of electronic legal information services has significant implications for public access to legal materials. Online legal services are different in terms of their availability from print materials that were made available in libraries and that were a main avenue of open access to legal information in the print era. Questions of what type of access to legal information should exist and who should have such access are thus likely to be of increasing concern and discussion in coming years.²⁴¹ Public access to some legal information is mandated in some instances by law, although a “‘crazy quilt’ of contradictory federal and state constitutional, statutory, and common law” exists governing public access to judicial documents.²⁴²

Concerns about open access for the public are reflected, for example, in the Washington State Access to Justice Technology Principles adopted by the Washington Supreme Court on December 3, 2004.²⁴³ The Washington State Access Principles reflect an increasing concern in relation to questions of access to legal information in the digital age.²⁴⁴ The Washington State Access Principles also highlight recognition of the relationship between access to legal information and justice.

The continued availability of access to such materials to noncommercial users such as the public is, however, of significant concern as such materials are likely to be increasingly available through use of private databases, with no digital library equivalent yet apparent.²⁴⁵ The lack of smooth transition from the library of the print era to the concept of a digital era library is also evident in responses to the Google Library Project, which is part of Google Book Search.²⁴⁶ As part of the Google Library Project, Google has made arrangements with libraries, including the Harvard and University of Michigan libraries, that enables such libraries to scan the works in their collections into

²⁴¹ Nazareth A. M. Pantaloni III, *Legal Databases, Legal Epistemology, and the Legal Order*, 86 LAW LIBR. J. 679, 705 (1994) (“There has been too little discussion about the ramifications of disparities in access to legal information and the increased reliance on expensive, privately owned databases and other electronic sources of legal information.”).

²⁴² Kelly Browne, *Does the Law Governing Public Access to Judicial Opinions Mandate Citation Reform? It Depends*, in THE POLITICAL ECONOMY OF LEGAL INFORMATION: THE NEW LANDSCAPE 75, 86 (Samuel E. Trosow ed., 1999).

²⁴³ In re Access to Justice Tech. Principles, Order No. 25700-B-449 (Wash. Dec. 3, 2004) [hereinafter Washington State Access Principles].

²⁴⁴ *Id.* (“The use of technologies in the Washington State justice system must protect and advance the fundamental right of equal access to justice. There is a particular need to avoid creating or increasing barriers to access and to reduce or remove existing barriers for those who are or may be excluded or underserved, including those not represented by counsel.”).

²⁴⁵ See *supra* notes 207–08 and accompanying text.

²⁴⁶ Hal R. Varian, *The Google Library Project 2* (Feb. 10, 2006), available at <http://www.ischool.berkeley.edu/~hal/Papers/2006/google-library.pdf>; see also Google Book Search Program Basics, <http://books.google.com/intl/en/googlebooks/about.html> (last visited Oct. 21, 2006); University of Michigan Library, Michigan Digitization Project, <http://www.lib.umich.edu/mdp/> (last visited Oct. 21, 2006).

digital format at Google's expense.²⁴⁷ Google offers differing levels of access to such scanned books on the Internet, depending on whether the books are protected by copyright and whether the copyright owner has requested that its content not be made available through the Google Library.²⁴⁸ The Google Library Project permits users to search within scanned books to find relevant material within such books that would be otherwise difficult to find.²⁴⁹ The Google Library Project has generated a significant amount of controversy, as is reflected in lawsuits filed in 2004 and 2005 by the Authors Guild and Association of American Publishers alleging copyright infringement.²⁵⁰ Existing legal structures inhibit the development of open access digital libraries,²⁵¹ which may impose limitations on the development of such digital libraries. The Google Library Project reveals some of the difficulties that may arise from attempts to develop digital libraries. The Google Library Project also underscores some of the potential barriers to the development of open access models, even in cases such as library books to which some form of open access may already exist in a nondigital form. As such, the Google Library Project illustrates the types of permission barriers that are already evident in some instances in cases of open access dissemination of legal information such as law review articles.²⁵²

E. Consumers and the Adoption of Open Access Publishing Models

Successful dissemination of open access publishing models will require attention to the varied constituencies that may need access to legal information and the diverse range of legal information that such constituencies may require. Current discussions of open access tend to be focused on the realm of legal scholarship. Law, however, is distinct from many other academic disciplines both with respect to the nature of legal information that users might access and the types of users that desire such access. For example, practicing lawyers and the public may access the same legal information as legal scholars. Existing business models have consequently developed to meet the needs of certain consumers, particularly commercial enterprises such as law firms. Such models, however, do not necessarily address the needs of other consumers,

²⁴⁷ Varian, *supra* note 246, at 2–4; Hannibal Travis, Building Universal Digital Libraries: An Agenda for Copyright Reform 17–18 (Aug. 25, 2005), <http://ssrn.com/abstract=793585> (noting that Google announced in December 2004 an agreement with five research libraries to digitize and provide full-text search capabilities for most of the collections at Stanford and the University of Michigan and portions of the collections at Harvard, Oxford and the New York Public Library).

²⁴⁸ Varian, *supra* note 246, at 2–5.

²⁴⁹ *Id.* at 2–3; Travis, *supra* note 247, at 17–18.

²⁵⁰ Varian, *supra* note 246, at 6; Paul Ganley, Google Book Search: Fair Use, Fair Dealing and the Case for Intermediary Copying 5–7 (Jan. 13, 2006), <http://ssrn.com/abstract=875384> (discussing lawsuits against Google and Google responses to such suits).

²⁵¹ Travis, *supra* note 247, at 26–27 (discussing the copyright status of digital libraries); Ganley, *supra* note 250, at 7–21 (discussing the copyright status of the Google Library Project under U.S. and U.K. copyright laws).

²⁵² See *supra* notes 54–58 and accompanying text.

including smaller commercial enterprises, solo practitioners, and the general public.

The digital era has changed the nature of the value added by intermediaries such as legal publishers or other purveyors of legal information. Although disintermediation is clearly occurring and will likely continue to occur, the role of intermediaries in the legal information industry is likely to continue in at least some respects, particularly with relation to commercial users of legal information. Consequently, although the value added by tools such as headnotes may have changed in the digital era, legal publishers may still serve an important certification function with respect to legal documents by giving assurance that a document is an accurate and authentic text. Technological changes may diminish the importance of such services in certain instances. Portable Document Format (PDF) documents, for example, may reduce concerns about accuracy since they are a copy in original format of the original document itself. Reliability of searching will also continue to be a key aspect of any electronic legal databases. This factor tends to favor existing large players by virtue of the increased utility of the searching function that a comprehensive database search can bring.

As a result of the role and function of current intermediaries, new entrants have tended to be niche players. Open access providers may at first follow this pattern of gaining a foothold in the legal information marketplace by first providing access to a particular segment of legal information. Such entry may provide a basis for expansion into provision of a broader range of legal information. In order to successfully diffuse into the broader legal information marketplace, open access models will need to expand, perhaps from an initial niche of providing open access to legal scholarship in the legal scholar community. The key to the success of open access models will be the ability to provide reliable and easily searchable access to a broad range of legal information that may be accessed by varied users.

Considerations of open access to legal scholarship must thus consider access to what information and by whom. Ironically, the very issue of access to members of the bar that led to the Ohio Bar collaborating with The Data Corporation to develop the computer aided legal research system that later became Lexis have come full circle. The high costs of access to online legal database services for smaller law firms and solo practitioners have led the Ohio Bar to adopt technologies through which its members can access legal information.²⁵³ The newest initiative of the Ohio State Bar Association is Casemaker, a product that is being marketed to state bar associations and that is currently used by a number of bar associations, including those in Connecticut, Idaho, Indiana, Massachusetts, Nebraska, New Hampshire, North Carolina,

²⁵³ See T. R. Halvorson & Margi Heinen, *Casemaker: Ohio Incubates Another Legal Information Service*, LLRX.COM, Sept. 16, 2002, <http://www.llrx.com/features/casemaker.htm> (noting that the Ohio State Bar Association, which “has a history of innovative and entrepreneurial legal research technology products,” has incubated another legal information service, pairing up with a technology company (Lawriter) and releasing Casemaker, “an Internet legal research library marketed to Bar Associations.”).

Rhode Island, and Vermont.²⁵⁴ The development of Casemaker underscores the fact that the questions of access that led to the development of online services such as Lexis and Westlaw were not necessarily resolved by the adoption of new technologies of dissemination and access. Rather, these new technologies paradoxically enabled greater ease of access while at the same time reinforcing existing impediments to access and likely creating new ones.

Casemaker and other similar initiatives that target the low end of legal information market in terms of pricing are also not open access products. As was the case with other similar services, including TheLaw.net,²⁵⁵ Loislaw,²⁵⁶ and VersusLaw,²⁵⁷ Casemaker attempts to address a market segment that may not be able to pay the prices of access to Lexis or Westlaw. The advent of such competitors underscores the limited inroads made thus far by comprehensive open access models in the legal field in the United States.

A number of government initiatives may, however, provide potential models for open access to legal information. Such initiatives typically provide open access to limited segments of legal information, including the U.S. Patent and Trademark Office patent and trademark databases²⁵⁸ and the U.S. Securities and Exchange Commission Electronic Data Gathering, Analysis, and Retrieval system (EDGAR).²⁵⁹ Similarly, the U.S. Government Printing Office and Federal Library Depository Program have also made government information available to U.S. citizens for over 140 years.²⁶⁰ But other open access projects, including Project Hermes, which involved the publication of U.S. Supreme Court opinions on the Internet,²⁶¹ and the Legal Information Institute based at Cornell Law School,²⁶² have not led to widespread adoption

²⁵⁴ *Id.*

²⁵⁵ See TheLaw.net, <http://www.thelaw.net> (last visited Sept. 6, 2006).

²⁵⁶ See LoisLaw, <http://www.loislaw.com> (last visited Sept. 6, 2006).

²⁵⁷ See VersusLaw, About Us, <http://www.versuslaw.com/company/about.asp> (last visited Sept. 6, 2006).

²⁵⁸ See U.S. Patent & Trademark Office, <http://www.uspto.gov/patft/index.html> (last visited Sept. 6, 2006) (providing online access to patent filings); U.S. Patent & Trademark Office, Trademarks, <http://www.uspto.gov/main/trademarks.htm> (last visited Sept. 6, 2006) (providing online access to trademark filings).

²⁵⁹ SEC Filings & Forms (EDGAR), <http://www.sec.gov/edgar.shtml> (last visited Sept. 6, 2006) (“All companies, foreign and domestic, are required to file registration statements, periodic reports, and other forms electronically through EDGAR. Anyone can access and download this information for free.”).

²⁶⁰ Parker, *supra* note 3.

²⁶¹ *Id.* at 3–4; Bruce D. Collins, *SCON is Dead! . . . Long Live Project Hermes*, 10 GOV'T INFO. Q. 415, 428, 436 (1993) (discussing Project Hermes); Tony Mauro, *Chief Justice William Rehnquist, the News Media and the Need for Dialogue between Judges and Journalists*, 56 SYRACUSE L. REV. 407, 411 (2006) (same); Paul Marcotte, *High-Tech High Court*, A.B.A. J., March 1990, at 26 (same).

²⁶² See Cornell Law School, Legal Information Institute, <http://www.law.cornell.edu> (last visited Sept. 6, 2006) (“The Legal Information Institute (LII) is a research and electronic publishing activity of the Cornell Law School.”); Linda Myers, *CU Law Institute Website Has Latest Legal Information, From Miranda to Elian*, CORNELL CHRON., Apr. 27, 2000, at 1, 4, available at http://www.news.cornell.edu/Chronicle/00/4.27.00/Legal_Info_Inst.html (describing the Cornell Legal Information Institute); Thomas R. Bruce

of open access initiatives in the U.S. that target the full range of potential users of legal information or methods that include open access to legal scholarship as part of a broader collection of legal information.

However, the Legal Information Institute based at Cornell Law School reflects a model that also exists in other jurisdictions that may offer examples of ways in which open access models might be further developed in the United States. Eight other jurisdictions have also adopted the Legal Information Institute (LII) open access model.²⁶³ The other LIIs include a broad range of legal materials, ranging from primary sources such as cases and statutes to secondary sources such as law review articles.²⁶⁴ These models have been initiated in a number of jurisdictions including Canada (the Canadian Legal Information Institute (CanLII)),²⁶⁵ Australasia (the Australasian Legal Information Institute (AustLII)),²⁶⁶ and Britain and Ireland (the British and Irish Legal Information Institute (BAILII)).²⁶⁷ AustLII includes both primary materials and secondary materials such as law review articles.²⁶⁸ The CanLII and BAILII projects involve professional law societies and the legal profession to a significant extent,²⁶⁹ which may be an important factor in addressing the needs of that segment of users of legal information. The BAILII project is explicitly intended to provide an open access resource to potential users of legal information who might be otherwise excluded from access to such information:

& Peter W. Martin, *The Legal Information Institute: What Is It and Why Is It?*, CORNELL L. FORUM, Mar. 1994, at 2, 3–6.

²⁶³ Parker, *supra* note 3 (noting that a total of eight LIIs now exist).

²⁶⁴ *Id.* (noting that the LIIs adopted the Montreal Declaration on Public Access to Law in 2002).

²⁶⁵ See Canadian Legal Information Institute (CanLII), About CanLII, http://canlii.org/about-apropos_en.html (last visited Sept. 6, 2006) (“The Canadian Legal Information Institute (CanLII) is a not-for-profit organization initiated by the Federation of Law Societies of Canada. CanLII’s goal is to make primary sources of Canadian law accessible for free on the Internet. CanLII seeks to gather legislative and judicial texts, as well as legal commentaries, from federal, provincial and territorial jurisdictions on a single Web site.”).

²⁶⁶ See Australasian Legal Information Institute (AustLII), About AustLII, <http://www.austlii.edu.au/austlii> (last visited Sept. 6, 2006) (“The Australasian Legal Information Institute (AustLII) provides free internet access to Australasian legal materials. AustLII’s broad public policy agenda is to improve access to justice through better access to information. To that end, we have become one of the largest sources of legal materials on the net, with over 20 gigabytes of raw text materials and over 4 million searchable documents.”).

²⁶⁷ See British and Irish Legal Information Institute (BAILII), About BAILII, <http://www.bailii.org/bailii> (last visited Sept. 6, 2006).

²⁶⁸ AustLII, *supra* note 266.

²⁶⁹ See CanLII, *supra* note 265 (noting that all Canadian Law Societies are involved in the creation of CanLII); BAILII, What Is The Open Law Project?, <http://www.bailii.org/openlaw> (last visited Sept. 6, 2006) (noting that BAILII relies upon donations and support from a variety of sources, including “the legal profession, academic community, and organizations such as the Society for Computers and Law (SCL), the British and the Irish Legal Education Technology Association (BILETA), British and Irish Association of Law Librarians (BIALL), and Institute of Advanced Legal Studies (IALS).”).

BAILII came into being because of the difficulties in accessing legal judgments and legislation facing many lawyers, especially those in small practices. While these were often available from commercial sources, they were fragmented and very expensive to access. . . . BAILII exists to make the raw data of UK law available freely and easily accessible on the Internet to a wide community: practicing lawyers, legal academics, historians, university students, school students, further education students, and to the wider world of the European Community and smaller overseas commonwealth jurisdictions.²⁷⁰

The nature of legal information suggests that open access models will need to consider and potentially meet the needs of a broad range of potential consumers, including practicing lawyers, legal academics, and the public. This further suggests that the involvement of various consumer segments of the legal information market would likely be essential to any successful broad open access models in the United States.

Open access publishing models continue to offer potentially new approaches to persistent problems of access. The broad adoption of open access models will be facilitated by greater attention to the needs of users of legal information other than scholars and the need for open access models for legal scholarship as well as other legal information. One of the biggest potential barriers to new entrants in the legal information industry is the scope and depth of existing proprietary publishing business models. These databases have fostered a market in which consumers expect to have access and the ability to search a large range of potential legal information. Lexis and Westlaw have thus built legal databases with millions of documents; the creation of such databases and the functionality that such players bring to their databases has shaped many users' expectations of what electronic legal databases should offer. Broader adoption of open access models will require adapting such models to the expectations of a potentially broad range of consumers of legal information or, alternatively, fostering changes in consumer behavior that might facilitate broader adoption of open access publishing models.

V. CONCLUSION

Open access models are now being contemplated more generally as a potential way to address persistent and recurring issues of access to legal information. The development of open access means of accessing legal scholarship and other legal information may provide an increasingly important counterweight in the current environment of greater industry concentration. Commercial publishers have historically served an important and useful function as intermediaries in the development of the legal information industry. From an access perspective, the current degree of industry concentration in the long run is likely to be a negative factor for a significant portion of users, particularly noncommercial users not located at law schools. Such industry concentration is also associated with significant price increases that can

²⁷⁰ BAILII, *supra* note 269.

profoundly influence access to legal information. Questions of access are thus likely to become of greater concern as electronic access becomes even more pervasive.

As questions of access become of greater concern, a number of open access models exist that may be used to develop open access resources for legal information. In developing such resources, consideration should be given to the potentially broad nature of those who might access such information with a goal of providing the broadest possible access to the varied interested constituencies who might need or desire access to legal information.