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Reaping the Digital Dividend: Is it Time to Take the Great Leap?

NICHOLAS PENGELLEY*

1. Introduction

Five years ago I wrote about some of the key issues and problems that confronted academic law libraries, and speculated about what the future might hold.¹ I discussed trends in legal education and developments in legal research instruction; the changing physical environment of the library, including an idea that was once anathema, the growing move to allow patrons to eat and drink in the library. Time has passed all too quickly and there have been many momentous changes in the world, including the trauma of September 11, 2001, and the protracted war in Iraq.

It might be said that little of great moment has changed in academic law libraries in the past five years. Although there has been no major upheaval there have still been important developments. The trend towards online access over print which was still developing in 2001 is now unquestionable and the amount of law-related material on the Web has expanded exponentially. In itself this is a major development even though it has happened incrementally and is now taken for granted. Because of the continued growth of law material on the Web and its widespread general acceptance, we are arguably now in a position to take some radical steps which would allow us to reap the 'digital dividend'.

In 2001 I wrote of the "great debate: electronic Vs print" and said that as of 2011, I was sure there would still be books in the law library, many of them. I also said that as of 2021, this scenario might have changed completely. Over the past five years, however, we have reached a point in the digital revolution – or evolution – where I would now say that there might

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¹ N.Pengelley, 'The Virtual Law School Library', (2001) 29 *International Journal of Legal Information*, 615.

well be only a very small number of books on the shelves after the passing of a further five years. It will take some courage to arrive at that point however.

2. Law student demand spurs the digital leap

In the past five years it has become very clear that the marked preference of our users, who are primarily law students, is for electronic sources over print. Arguably this is more than a preference. Outright disdain for printed sources is more the norm. Library borrowing statistics confirm this, most obviously for ‘undergraduate’ (i.e., LLB or JD students), but the decline is also apparent with respect to graduate students, research assistants and academics. For specific information, discrete items including cases, legislation, government documents, journal articles and treaties, there are few who do not prefer online access. It is only books, or monographs, which continue to be sought in print, although of course few of these are yet available online. This is changing rapidly; however, it is fairly easy to predict that the preference for online access for books will also grow as we see the results of the massive digitization efforts by Google, Amazon and others.

Some argue that there is still widespread resistance to reading on screen and that this will continue to slow the leap to the digital medium for books; that nothing will ever replace the comfort and ease of reading a book.² It is true that we have not yet made the “great leap forward” in onscreen reading to something that is as friendly as paper, even if that is possible; however, it is also true that students are continually more comfortable with viewing all sorts of material on increasingly smaller screens, and they do so happily. They browse the Web, read documents and view movies on tiny Blackberry and cell phone screens. Although publishers have invested, and wasted, millions in development of the electronic book, there is greater willingness to view large quantities of material via the electronic medium than ever before.³

Academic law libraries are seeing the impact of this movement in various ways. Book borrowing has dropped, consequently so has the need for re-shelving and general stack maintenance. Photocopying has declined markedly but printing has not picked up the slack. Although the onscreen reading revolution has not arrived, it is in process. The ready availability of cheap home printers means that more students are choosing that option over sending to the library printer. Printers have become cheaper and so have

² A.Beam, ‘The Brave New Book’ *Boston Globe*, June 7 2006.

³ K.Kelly, ‘Scan this book!’ *New York Times*, May 14 2006.

personal and laptop computers. The ubiquitous spread of wireless, continued advances in miniaturization and consequent greater portability as well as lower prices, means that now the majority of students have some kind of personal device from which they can search the Web, read email, send digital material to printers, use as a phone, camera and for game-playing. All of which, of course, has been a source of frustration for many a lecturer who now competes not just with cross-word puzzles as in times past, but with instant messaging, Ebay auctions, ‘brick-breaker’ and much more.⁴ Some have chosen to impose restrictions, even banning laptops and other devices entirely from the classroom; others have adopted an “if you can’t beat ‘em, join ‘em” approach and embraced the technology, setting up class blogs and using a mix of media in their teaching.

The demands from students have changed little in five years although they have grown more vociferous. More than ever, they want comfortable places to sit (and the exclusion of non-law students from ‘their’ domain), power outlets (laptop batteries are increasingly efficient but we still seem to be a long way from the time when they might last for days without re-charging), access to beverages and snack-food, wireless Internet access and wireless printing. But much more importantly, for the future of law libraries, is the fact that our students expect all of the resources that they want to be online, either via a free Web site or one of the fee-based services (although law students, who have access to everything for free, take little account of the distinction, which raises its own problems when they move into the workforce).

This expectation, that everything should be online, is much closer to reality than it was in 2001, as is only to be expected, however it is still a long way from the perfection that our students would wish. To take a particular bugbear: the online availability of legislation has continued to move forward at a rapid pace. There have been numerous enhancements in many jurisdictions which allow for point-in-time searching, linkages to parliamentary debates, proclamation of coming in to force information and the like, but there has been very little movement backwards, to extend coverage before the 1990s or mid 1980s. In Ontario, Canada we are well provided for with up-to-date legislation from 1990 on, however anything that pre-dates the official “consolidation” of that year must still be searched the old-fashion way – reconstructing by the “cut and paste” method. There is a wealth of anecdotal evidence from reference librarians describing the disbelief, not to mention

⁴ See, e.g., ‘What sort of revolution?’, *The Economist* April 22, 2006, Vol. 379, Iss 8474, p15.

horror, with which law students greet the information that they must work with a paper Act from the 1980s and consult print indexes to find amendments. Tales also abound of panic-stricken articling students (now usually without unlimited access to Westlaw, Lexis or Quicklaw) confronted with such tasks in their first weeks in the “real world.”

Collections of case law, treaties and historical documentation of various kinds have continued to blossom online. Journal coverage has grown enormously thanks in large part to the epic work of HeinOnline,⁵ and the availability of historical texts has hugely expanded, for those libraries that can afford it, through Gale’s magnificent Making of Modern Law.⁶ HeinOnline is making an increasingly important contribution in this area too, as is LLMC Digital.⁷ The continued development of the free Google-type projects will, as noted, add enormously to the online coverage.

Undoubtedly, we will continue along this digital continuum until such time as all recorded knowledge is available online. I am aware of assorted projects to digitize early decisions of appellate courts, parliamentary debates and unreported decisions from court archives and early newspapers. For every one that I know of there are many more projects under development, or under consideration for funding. The technology and cost of digitization keeps dropping. Much of this work is now done by outsourcing to countries such as China and India where labor is cheaper.⁸ I do not think that we will have reached this point (i.e., that all recorded knowledge is available online) by the end of the next five years, but we will be very close by the end of ten years. Even so, developments will be complicated by copyright restrictions which will continue to mean that, even if online, much of what has been published in the last century will not be available without payment – or at least the need to deal with a large amount of red-tape.⁹

3. Media convergence

The lines that once clearly separated different types of media will continue to blur and overlap, to converge, as will the line between creators and users of media, which used to be very well-defined. This distinction is blurring and vanishing as anyone and everyone assumes the role of creator,

⁵ HeinOnline <online> <http://heinonline.org>

⁶ The Making of Modern Law, <online> <http://www.gale.com/ModernLaw/> (the price of this collection is around \$US 120,000).

⁷ LLMC Digital, <online> http://www.llmc.com/digital_toc.htm

⁸ K. Kelly, *supra*, n 3.

⁹ *Ibid.*

using Wikis to create Web pages and blogging every topic imaginable, uploading text, pictures, music and moving images to the Internet. Another recent survey in *The Economist* cited findings to the effect that 57% of American teenagers create content for the Internet.¹⁰ Law students, professors and researchers both contribute material themselves and routinely search it. These developments have changed the research environment radically and forever. In just a few years we have moved away from a largely static environment wherein we researched well-defined categories of materials, authored through known and ‘approved’ processes, from well known and respected sources, whether they be print or online. Now RSS feeds link current information to the desktop or laptop from “traditionally” published print sources from those well known and respectable publishers, and also from journals that are “born digital;” from newspapers and newsmagazines, Web sites and blogs. Some academics now publish online first – or in preference – and place drafts on the Legal Scholarship Network to facilitate awareness and encourage discussion and debate.¹¹ All of these sources are legitimate for research and while librarians would argue that some of them are less reliable than others, or even inaccurate, our students believe that they have the ability to discern this for themselves, whether or not this is the case. The notorious example in this respect is that of the online encyclopedia, Wikipedia to which hundreds of people with no necessary qualifications contribute entries. A battle royal erupted when the journal *Nature* published an article which stated that it was hardly less accurate than the *Encyclopedia Britannica*.¹² Regardless, Wikipedia and other online sources have achieved legitimacy in the eyes of our students.

Our students are increasingly proficient with the new media and its multiple converging uses. A walk around a computer lab, or a view from the back of a classroom will show student screens open to multiple windows: basic word-processing for note taking, views of professorial hand-outs and presentations, course and topic-related Web sites, and an arcade of mainstream and arcane personal uses, as varied as the student body, from chat to games, to online movies.

A recent survey of the digital revolution in *The Economist* opines that ‘society is in the early phases of what appears to be a media revolution on the

¹⁰ ‘Among the audience’, *The Economist*, April 20, 2006.

¹¹ <http://www.ssrn.com/lsn/>

¹² See, e.g., “‘Encyclopedia Britannica’ assails article that put it on a par with Wikipedia’, *The Chronicle of Higher Education*, April 7, 2006.

scale of that launched by Gutenberg in 1448'.¹³ The survey argues that the use of 'participatory media', enhances, rather than 'dumbs down' the cognitive abilities of the younger generations. As one who has taught classes in legal research techniques, as well as substantive law, I must concur. Teaching that utilizes a variety of the available media, including online use of Web sites, video, Powerpoint presentations and online discussion rooms have enormously enhanced both the teaching and learning experience. Feedback in class from students which (if it came at all) was once limited to questions based on information presented in class or digested (sometimes) beforehand in the form of assigned readings is now often supplemented by questions and information found online during class. This means of course that the professor has to keep on his toes to a degree unknown more than a few years ago.

4. Leaping the divide

All of this being so, particularly the desire, rather demand, from our students (tomorrow's professors) for online material over print, the question must be asked, why do law libraries continue to purchase, in print, so many of the resources to which they have online access, often free online access? In this respect little also has changed since 2001. As I wrote then, some decisions are relatively easy and uncontroversial. The South Dakota Law Review is a relatively straightforward cancellation decision for a Canadian library (meaning no disrespect to the publishers of that journal, but it is in little demand in Ontario, as the Osgoode Hall Law Journal is likewise probably little requested in South Dakota). Also an easy cancellation decision, something like the UN Treaty Series, given the presumed reliability and longevity of the United Nations' own Web site where this material may readily be found. 'Cold collation' loose leaf services that collect conventions, or legislation on a certain topic and were a very convenient resource pre-Internet, are rapidly going the way of the dinosaur. There are dozens of such examples, and many of these straightforward cancellation decisions have been taken over the past few years by academic law libraries in Canada and elsewhere.

Academic law libraries also no longer collect many government publications – press releases, annual reports and the like, relying on the government to continue to make this material available online, although they are not obliged to by legislation and there is always the danger that material may simply vanish. In this respect, that of maintaining access to online materials posted by government agencies, we are still somewhat in the 'wild

¹³ *Supra*, n 4.

west' days of the digital revolution. There is little policing, few guarantees that resources will exist from one day to the next, and materials are apt to vanish. Ontarians experienced a frightening wake-up call in this regard recently. In November 2005, it was discovered that gazettes from 2000-2002 had been removed from the Web, the relevant government department apparently had never intended to maintain more than a 'few years' online. It is pleasing to report that an email campaign by the local law librarians group led to the reinstatement of the missing gazettes, a fact which demonstrates something of the willingness of government to listen to law librarians.¹⁴ While there is no certainty that such outrages will not be repeated, such problems are well recognized, solutions are being proposed and it is evident that law and order is coming to the frontier.¹⁵

The 'hard' cancellation decisions are just as hard as they were five years ago when I discussed this issue, and for much the same reasons. Take two examples: the Harvard Law Review and the Ontario Statutes. I am on fairly sure ground in presuming that no academic law library in Ontario or Canada has cancelled these series (with respect to the Harvard Law Review, likely no academic law library in the major common law jurisdictions has seriously contemplated such a step). Yet both are available online from several sources. The Harvard Law Review is available on Lexis and Westlaw, HeinOnline (although behind by three years) and issues from 2004 on are available for free from the Review's own website, full text and in pdf. In the case of the Ontario Statutes, these are readily available via Ontario E-Laws, described on that Web site as a 'joint project of the Ministry of Government Services and the Ministry of the Attorney General'.¹⁶ The site provides both original Acts as passed plus continually updated versions. It does however provide a disclaimer indicating that the online version is not the official version, referring the reader to the print volumes.

No academic law library in Canada, or anywhere else for that matter, has more funds for acquisitions than it knows what to do with. None can afford to buy all that they would like. All must make choices, sometimes very

¹⁴ The Slaw Web site has the history of the saga (search on 'Ontario gazette'), online:< <http://www.slaw.ca/>>

¹⁵ See J. McDonald and K. Shearer, 'Towards a Canadian Digital Information Strategy' (2006), online: Library and Archives Canada, <<http://www.collectionscanada.ca/scin/index-e.html>>, and J. McDonald, 'Towards a Canadian Digital Information Strategy: A Review of Relevant International Initiatives, Library and Archives Canada' (2006), online: Library and Archives Canada <http://www.collectionscanada.ca/scin/index-e.html>.

¹⁶ Ontario E-Laws, online:< <http://www.e-laws.gov.on.ca/>>

hard choices, between what to retain and what to cancel. Yet all continue to subscribe to titles, in print, to which they also have online access, often, as in the case of my two examples, where that access is for free. There can be very little justification for maintaining the print subscriptions to these titles, when that money could be used to purchase something which is not held or accessed at all. Yet academic law libraries continue to maintain certain print subscriptions for a number of reasons which are more to do with their historical role and the difficulty which we, as librarians, have with unshackling ourselves from aspects of that role. This is in part because of the views of certain of our users, but also because of the perceptions that we as librarians have of ourselves as guardians and preservers of knowledge. The reality is that by not letting go of this role, accepting that its time has largely passed, we risk assuming the guise of museum curators, or, less attractive but no less true, warehousemen. We are trapped by the weight of the hundreds of years of our own successful past.

As was said in the recent survey in *The Economist*, we are in the midst of a media revolution akin to that achieved by the advent of the printing press over five hundred years ago.¹⁷ As with that revolution it will likely take decades if not centuries for the full effects to be realized. It is trite to say that, because of the as yet unrealized and unknown full extent of this revolution, we are in a time of transition. But we should also recognize that a number of way stations on this transit line have been reached and that they provide attractive possibilities. We need to take full advantage of them.

The reality is that law libraries and librarians are trying to straddle the print and digital eras and “have it both ways,” taking advantage of the online access, but maintaining the print “just in case,” or because some users still prefer it, or because no law library worth its salt would be without the *Harvard Law Review*. But our limited financial resources simply do not permit this kind of luxury. The gap is getting wider and the continued contortions involved in maintaining the straddle are doing harm to our users who, while gaining the benefits of the greatly increased access to online resources, are missing out on so much more that could be had if the straddle was converted to a whole-hearted leap, and dollars tied up in maintaining access to both print and digital variants of the same resource were freed to purchase unique materials, or to enhance the physical environment, or employ more librarians.

¹⁷ *Supra*, n 4.

The continuing attempts to straddle the print-digital divide are a product of the baggage which we all carry as members of the pre-computer, pre-Internet generation. We strove to build large libraries of print; it is all that there was, or had been, since the last media revolution, when monks scribed and Gutenberg printed. We were indoctrinated with the importance of maintaining certain print resources and frankly most of us still cannot imagine life without them, although many of our users do not share our concerns about the preservation of knowledge, especially when, as far as they can see, everything is on the way to being made available on the Web. Future generations of librarians will not carry our baggage, or rather, will discard it.

Consider my two examples further. Why do we maintain the Harvard Law Review on the shelves given its ready online access? It is because we feel, innately, that we would be doing harm to the reputation of our library by not having it. Arguably it is the most prestigious law journal in the world (or one of the top five at any rate). If we do not have it in print then there is a feeling that our library is somehow diminished. There is also the argument which runs to the effect that, if the Internet ceases to exist, or publishers hugely increase the cost of the online version, which is therefore cancelled, then the library is left with nothing (there are many variations on these arguments: few openly admit to fear that the Internet will disappear, yet that must be the unspoken dread). The argument holds that if we maintain a print subscription then the nicely-bound volumes will always be on the shelves; they are not discarded once a subscription is cancelled. It must be said of course, that in the case of a subscription to legislation, a loose-leaf service or a legal encyclopedia or digest, the "half-life" of the volumes on the shelf rapidly diminishes. Journal articles mostly have a much longer life-span. Should such dire scenarios come to pass; however, would the proprietors of the Harvard Law Review not be happy to sell more print sets? Would eBay not be awash with sellers of back-sets? Second-hand law book dealers would be grateful for the renewal of business that is in rapid decline.

That no academic law library has yet taken this leap is not just from an individual failure of nerve on the part of law library directors. It is also due in part to the reaction that we anticipate would materialize from influential library patrons of the pre-Internet generation, not our students who would likely not notice or care, but senior faculty members, professors emeriti and the like who, as any academic law library director knows, are more than capable of making the life of a dean miserable until he or she orders the reinstatement of a subscription (we also know that such people tend to be very long-lived and are not likely to be replaced by the 'Internet generation' for decades).

As to the Ontario Statutes, this series presents the same kind of difficulty as the Harvard Law Review, although now, as an Ontario law library director, my example is that of a core product of the “home” jurisdiction. An Ontario, or even another Canadian law library, would have to be very courageous indeed to make the leap and stop subscribing to the print version (fans of Yes, Prime Minister will recall that Sir Humphrey Appleby only had to mutter that a decision was “courageous” to make PM Jim Hacker blanche and change tack).

The reasons why canceling the print version of this series are difficult are basically the same as with the Harvard Law Review, although they are compounded by the disclaimer on the E-Laws Web site which states that the print version is still the official source. A bill was introduced into the Ontario Legislative Assembly in late 2005 which will see this disclaimer disappear, however, and confer authority on the E-Laws version.¹⁸ Similar moves have already taken place or are afoot in other jurisdictions.¹⁹ For cost reasons alone it is likely that governments will cease eventually to print legislation at all. Such action will of course remove the necessity for librarians to take the leap themselves, and most would prefer not to. But, if we accept that such a development is inevitable, why not anticipate and cancel the print now and put the money saved to other use?

If librarians make these leaps, then of course my two examples will be multiplied many hundred fold in the larger academic law libraries. If, say, the Harvard Law Review were to go, then the floodgates would open and it would mean that fewer less-renowned journal titles will be maintained in print. Few if any government publications (legislation, debates, gazettes) will be subscribed. If an Ontario law library were to cancel the Ontario Statutes, it seems less likely that it would continue to subscribe to any legislation in print.

What of law reports? Decisions in that respect will be somewhat more problematic and individual. This is because of the value-added features provided by the publishers, but given the continually increasing access to judgments via CanLII and court Web sites, the number of series subscribed in print could be radically reduced (very few law libraries now maintain duplicate subscriptions to any series). It is not really necessary for an Ontario

¹⁸ *Access to Justice Act*, Bill 14, 2005

¹⁹ The author is aware, for example, that the Australian Capital Territory has provided authorized status to its online legislation and that the Australian Federal Government is also moving in this direction.

academic library which has access to Lexis and Westlaw, other fee-based online services, as well as the combined resources of the Web, to keep subscribing to the print versions of all the various law report series from other Canadian jurisdictions (almost all foreign series have now been cancelled). Again, without wishing to offend anyone, how vital is it for an Ontario law library to maintain subscriptions to law report series from Newfoundland, Nova Scotia, or several of the other provinces? Or why even retain reporters from Quebec, as so few Ontario law library users (other than Ottawa University which has a civil law program) seem to have an interest in that jurisdiction with its different code-based legal system (or, indeed, read French, official encouragement notwithstanding). Why not rely on online sources and expand the capacity of our Interlibrary Loan/Document Delivery services to deal with requests for the “original” versions where these are not online, but are required? And why maintain the multiple topic-specific law report series that often only serve to provide alternative versions of a case that are extant in one of the “principle” series? If the concern is with providing access for non-law school patrons, then the answer is simple: obtain commercial passwords to the various databases. The cost, compared with maintaining the print subscriptions, will be minimal.

Now, take the leap further and consider our vast physical collections. If we make the leap to online access over print, because we are content to rely on such access for most legislation, government material, treaties, journals and for many law reports, then what about the back-sets that occupy many valuable acres and gather dust? A leap further will allow us to save enormous space in our libraries. If this material, which occupies the bulk of it, can be removed to storage, whether that be the institution’s own, or a joint municipal or regional facility, or even just put into compact shelving, then the library and the parent institution will realize a huge space dividend (note that I do not say landfill, although doubtless some will suggest this). This will be done in law libraries everywhere; it is simply a matter of time. How much longer we will defer these decisions which could be made today?

6. Conclusion

If we do these things, make this leap into the digital world, what then will our law libraries be like? What will they look like? Here I see little need to change the opinions I expressed in 2001. Our future law libraries will still have books, although a much smaller number of them. They will likely contain some major law report series and many monograph, historical collections (including rare-book rooms and the like), with facilities for

preserving, storing and reading special collections for those institutions which have such collections.

Our law libraries will have large areas devoted to study space. This will comprise a mix of seating: large reading-room tables, individual carrels, and comfortable lounge-style seating. There will be “mixing-spaces” where faculty and students can encounter each other.²⁰ There will also be many more small discussion rooms for group work than are normally found today. There will be library-provided computers still, but these will be convenience machines, small in number; ultimately they will transmute into multi-use information kiosks, guiding the visitor around the library, answering a variety of questions, linking to the Internet and more. There will be a combined copy/print/scanner facility, located at the central information facility which will provide on-demand rapid print, and binding where required, of not just law-related resources, but resources from much of the collected knowledge of humanity.

This law library across the digital chasm will be spacious, comfortable and well-served by professional librarians who will aid students and faculty in locating the best resources for a given task. Nearly all of these resources will be online. There will be more librarians than in the past, a second dividend from making the leap. Radically reduced print subscriptions and physical collections will mean that we require far fewer support staff, such as library technicians and others who currently order and process books, who re-shelve books, lend books, and those maintain copiers and printers. Staffing in these areas has been cut back for more than a decade now, but I foresee further major reductions occurring post-leap. Professional-type services of the type routinely offered in US law school libraries with bigger budgets will become more common in Canadian law libraries, too, as professional staff numbers increase. Services will include compilation of bibliographies, assistance with research, dedicated monitoring of Faculty-member interests, and subject-specific classroom research instruction. Typically little of this is currently offered in Canadian law schools.

I could, of course, make the next logical leap and posit the end of the academic law library itself. Why not, particularly if most of its traditional content is no longer in the physical space of a law library, but it is available online? In this respect, I also adhere to what I said five years ago: I continue

²⁰ It seems sometimes that faculty in the main do not want such space, preferring to avoid students outside of the classroom. But, students demand such interaction, and after all, it is they who pay the ever-increasing fees to attend law school.

to believe that this would be a leap too far. I do not believe that we are anywhere near the point, where, like StarTrek's Mr. Spock, we can simply say, "Computer, tell me..." Everything may be online, if not now then in ten years time, however that is a long way from saying that our students will be able to locate relevant information, however sophisticated the search engines. Nor does it mean they will be better equipped to sort the wheat from the chaff – or have the time to do so. What was illustrated so well in the classic film *Deskset* is still the case today. There may be fifty years between Katherine Hepburn's librarian defeating Spencer Tracy's computer, demonstrating the superiority of the experienced human mind, capable of illogical leaps, but nothing has changed in that respect.

The ability to find, assess and retrieve relevant information is only one aspect that augurs well for the continued need for libraries and librarians. Another is the continued need which humans have to come together in a pleasant environment, to work, study and socialize. Law students are social creatures and use the law library not just because it has books. As I previously said, increasingly they do not refer to books anyway. They use law libraries because they like to encounter each other, observe each other (yes, check out the talent), and work in a space that is comfortable and convenient for their other activities. Many of them live in situations which make it difficult to study. They may be parents, or live in shared accommodation. The library is a haven and refuge, and often the only place available; it must be a place to linger in, not rush through on the way to somewhere more comfortable.