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Permanent Digital Legal Information: Disappearing Urls and Preservation of Digital Objects Cited in Court Decisions*

SASHA SKENDERIJA**

Abstract

The recent transformation of legal information has led to more drastic consequences in law than in some other fields. As electronic resources become more prevalent and available, courts begin citing to them. The emerging digital-born information and the new network models of communication such as Law Blogs and Wikipedia have already acquired a certain status, being cited by court decisions. For example, the U.S. Supreme Court recently cited a videotape in its decision of *Scott v. Harris* (2007), saying "it speaks for itself," and included it in the opinion as an attachment.

Unfortunately, like many other government entities, the courts have not taken precautions to make sure that the materials they cite remain stable and available to the public for long term access. This is so, even though "no one is supposed to ignore the law." What happens when the materials one relies on disappear?

This paper examines the serious implications that could arise from this situation. It will also examine the challenges, new roles and possible course of action for law libraries and librarians in ensuring the availability of digital objects in the legal field far in the future.

While U.S. states' government, judicial and legislative entities today make available enormous amounts of primary source information to the

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public through the Internet, most fail to recognize the need to manage the entire lifecycle of official government legal information, from its creation to its long-term preservation. These two needs include ensuring that the official electronic legal information is

- a.) easily located and accessed by the public;
- b.) that an electronic publication is deemed “authentic” and “official,” and
- c.) that electronic government information of long-term value will be preserved for permanent public access.

The new network sources and multimedia formats, such as law blogs,¹ Wikipedia,² and multimedia files, have already acquired a certain status, being cited in court opinions. The U.S. Supreme Court recently cited to a video file in *Scott v. Harris*, saying “it speaks for itself,” and included the link to the URL in the opinion as an attachment.³ We might expect that many courts nationwide will soon follow the example of the Supreme Court, even though it does not appear that precautions have been made to ensure that the materials cited will remain stable and available to the public for long-term access.

Courts and other governmental entities are presumed to be responsible for access to primary sources, multimedia attachments and other legal materials cited in the official documents, as well as to make these available to the public for the long-term. However, at present there are no legal requirements for this. The result is that the law is disappearing, and each day more and more digital born legal materials are vanishing at an accelerating rate.

As we can see from a recent report, “State by State Report on Authentication of Online Legal Resources,” by the American Association of Law Libraries (AALL), none of the states has yet put into place a system that authenticates and preserves electronic documents.⁴ Moreover, no one is taking care of light and dark archiving of digital born legal materials. No one is providing a reliable infrastructure for authentication and preservation.

¹ 1 Cases Citing Legal Blogs - Updated List at: http://3lepiphany.typepad.com/31_epiphany/2006/08/cases_citing_le.html. Last visited on March 11, 2010.

² Cohen, Noam (January 29, 2007, Section C). “Courts Turn to Wikipedia, but Selectively,” *New York Times*. 3. Online at: <http://www.nytimes.com/2007/01/29/technology/29wikipedia.html>. Last visited on March 11, 2010.

³ U.S. – 127 S. Ct. 1769. 1775, n. 5 (2007).

⁴ For the full report, see, http://www.aallnet.org/aallwash/authen_rprrt/AuthenticationReport.pdf (last visited on March 11, 2010).

As Robert C. Berring notes, “this problem lives mostly in administrative codes and registers right now, but legislative materials and judicial opinions cannot be far behind.”⁵ However, out of AALL and Berring’s scope stayed the court opinion citations to external electronic sources such as law blogs. Recently, Kathy Carlson referred to the precedent of citing video files in a Supreme Court opinion referring to a URL. She pointed out that “there needs to be some thought as to how these materials will be preserved and permanent access will be provided, especially now as the practice of attaching them to opinions is in its infancy.”⁶

Law librarians find themselves to be key stakeholders in this emergency situation. In April 2007, the AALL organized a “National Summit on the Authentication of Digital Legal Information” to address this dire situation, gathering together other critical stakeholders, including judges, legislative analysts, digital security experts, law professors and others. They recognized the severity of the problem, acknowledging that they must apply political pressure to lawmakers in order to create regulations for authenticating and preserving digital born legal materials. Because of the severity of the problem, measures must be taken immediately in order to stop the tide of disappearing, official, digital-born, legal information. There is strong awareness among the stakeholders that there is technology for handling these problems, even though these issues do not seem to be attractive enough for the market.

What are the Alternatives? The federal government has taken some steps to address these issues, but none of them in their recent state of development encompasses all aspects of the challenge. For example, in response to terrorism fears after 9-11, the federal government has funded the development of security and authentication software tools, but they are generally costly and difficult to implement on the smaller scale.

The GPO Access Act of 1993 included a provision that the GPO “operate a storage facility for Federal electronic information,” but it is not adequately meet the demands of electronic-born primary source materials and

⁵ Berring, Robert C. (Spring 2007). “Losing the Law.” *Green Bag*. Vol. 10, 2D. 279. Online at: <http://www.greenbag.org/contents/toc.php#Spring2007>. Last visited on March 11, 2010.

⁶ Carlson, Kathy (September-October 2007). “Digital Attachments Are Here...or Are They?” *LawLibrarians in the New Millennium*. Vol. 10, No. 4.

attachments.⁷ AALL and legislators created the E-Government Act of 2002.⁸ Provisions in Sec. 207 of the Act call for more Federal agency responsibility for ensuring preservation and access to publications made available on agency Web sites.

NARA's Access to Archival Databases (AAD) System gives access to millions of historical electronic records created by over twenty federal agencies and is the first publicly accessible application developed by the ERA. AAD does not, however, address the needs of states, whose digital born electronic materials are not included in the database and are not expected to be in the near future. AAD also does not appear to be able to handle multimedia formats and other sources of non-governmental origin, such as blawgs, wikis, and the like. This means we must look beyond federal solutions in order to stop the loss of electronic born legal materials.

Since states are unlikely to fund solutions on their own and currently lack legislative requirements for doing so, it is possible that the legal community might be able to leverage existing authentication and preservation technologies provided by non-profit journal and archival solution providers such as JSTOR,⁹ Portico¹⁰ or LOCKKS,¹¹ at reasonable cost and without high implementation hurdles. Moreover, these systems for working with digital objects have been developed for the academic community in close collaboration with research librarians and have a robust grasp of the complexity of publishing lifecycles as well as of archival technologies and standards. Additionally, a research institution like Cornell's Legal Information Institute (LII),¹² which is a non-profit web publisher of federal legal documents, also provides valuable potential contributions in meeting the immediate need of the legal community, government, and the general public.

JSTOR's dual mission is to provide access to journal articles and to archive them for the long-term. As a "light" archive, JSTOR has expertise in organizing serving up data to authorized users. Its new technological platform does allow for the preservation and display of non-journal materials,

⁷ Government Relations Committee and Washington Affairs Office, American Association of Law Libraries (June 2003). State-by-State Report on Permanent Public Access to Electronic Government Information. 11, <http://www.aallnet.org/aallwash/PPAreport.html>. Last visited March 11, 2010.

⁸ Pub. L. No. 107-347, 116 Stat. 2899

⁹ <http://www.jstor.org>.

¹⁰ <http://www.portico.org>.

¹¹ <http://www.lockss.org>.

¹² <http://www.law.cornell.edu/>.

but it has not yet worked with multimedia formats (video), nor does it display objects that did not have a print counterpart. It also does not yet provide open access to the content it archives.

Portico, created to archive electronic-born information (as a “dark” archive) and to provide electronic-born content to JSTOR, might perhaps have the appropriate infrastructure for ingesting, authorizing and preserving large amounts of electronic born legal materials, but it also does not have an “open access” philosophy. Moreover, it does not yet work with multimedia formats (although it technically could do so) nor does it preserve non-“official” sources, such as blogs.

Stanford University’s LOCKSS (Lots of Copies Keep Stuff Safe) is similar to Portico in that it was also created to preserve journal materials for the long-term. Unlike Portico, it maintains the original state of the content, including branding, and it requires local technological implementation. While none of these solutions is a perfect fit for the immediate means for stopping the disappearance of official digital-born legal information, it is appropriate to consider them as potential solution providers – either alone or in conjunction with one another. They could relatively easily adopt their technologies for the ingest of electronic born legal materials, and could be more easily customized to the specific needs of research librarians than the technologies provided by large governmental agencies or large forprofit vendors.