From the Bramble Bush to the Web: How the Internet is Changing the Practice of Law

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From the Bramble Bush to the Web: How the Internet is Changing the Practice of Law

By James Milles

The legal profession is traditionally slow to adopt new technology. There is an often-repeated story — it may even be true — about the New York lawyers at the turn of the century who proudly displayed their new telephone in the reception area so clients could see how progressive they were. Today, many lawyers feel about their cellular phones the same way NRA members feel about their guns. Like the telephone, the Internet is well on its way to becoming a permanent feature of legal practice.

I. Legal Publishing: Some History

One way to understand the significance of the Internet is by comparing it with developments in an earlier period of media-based change in the law: the last quarter of the 19th century. The legal information publishing system that we know today grew out of a number of developments from that era: the invention of the printing presses that we know today grew out of a number of developments from that era: the invention of the printing presses that have prevailed ever since. The new availability of cheap paper and high-speed printing presses helped make possible a tremendous growth in publishing in America. This expansion presented a favorable climate for a Minnesota stationery salesman named John B. West, the founder of West Publishing Company.

West’s innovation was in combining two elements: collecting all the cases issued by the courts, and organizing them according to a uniform scheme. West bought the rights to the American Digest System, the best available legal indexing scheme at the time, and employed experts to develop it. By combining comprehensive printing of cases with an overarching scheme of legal categories, West Publishing Company did more than any other force to foster the ideal that comprehensive access to cases and the search for the case “on all fours” with yours was the way to do legal research.

Moreover, the overall outline of the digest system — the seven major categories — closely matched the first-year curriculum developed by Langdell.

Delgado and Stefancic, among others, have argued that the categories of the West Digest System have fundamentally shaped the way lawyers think about and analyze law.

C. Law school journals

The late 19th century also saw a tremendous growth in the number of print periodicals as the development of processes that made paper less expensive and put publishing within the reach of more people.

One of these new periodicals was the first academic law journal, the Harvard Law Review, first published in 1887. This was an era when law schools were fairly marginal entities; most lawyers still received their training by apprenticeship. One of the purposes of the new law school journals was to promote the

B. The influence of West Publishing

The persistence of this model is not due simply to its inherent rightness or to the genius of one man. A number of other concurrent forces tended to cement not only law school curricula but legal doctrine into the forms that have prevailed ever since. The new availability of cheap paper and high-speed printing presses helped make possible a tremendous growth in publishing in America. This expansion presented a favorable climate for a Minnesota stationery salesman named John B. West, the founder of West Publishing Company.

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visibility and reputation of the law schools — much as law school web sites do now. The universal establishment of law school journals contributed to the growing influence of academia in the development of legal doctrine.

II. Subsequent Changes

During the twentieth century, three notable developments have broken down the dominance of the traditional legal information structure and prepared the way for the acceptance, if not the inevitability, of the Internet in the legal profession: the growth of statutory and regulatory law, the increasing use of non-legal information sources, and the development of full-text online searching.

A. Growth of statutory and regulatory law

Authors of legal research textbooks often note the increasing importance of statutory and regulatory law in our nominally common law system. "[U]ntil this century, statutory law assumed a role of secondary importance in American law, inspiring one scholar to characterize [statutes] as 'warts on the body of the common law.' However, state and federal legislation has so proliferated in recent decades of new legal specializations like health and environmental law requiring specialized technical expertise has further reinforced the demand for non-legal information.

Beyond this, the scope of "legal" authority has grown to encompass non-precedential documents like general counsel memoranda and SEC "no-action" letters — documents generated by regulatory agencies carrying no precedential weight, but heavily used by lawyers nonetheless.

C. Full-text searching

In the 1970's, the availability of powerful mainframe computers and communications via modem made LEXIS and WESTLAW possible. For the first few years, LEXIS was at best a supplement to printed legal materials. However, as more material became available online, these services became viable replacements for printed law books. Some observers thought that online research services provided by these two major commercial publishers would eventually replace print research altogether.

The picture became more complicated when law books on CD-ROM began to appear in the 1990's. Whether online or on CD-ROM, all of these information tools depend on full-text searching and information retrieval. It is unfortunate that many law students rely on full-text searching and ignore the valuable analytical tools provided by the pre-edited categories of the West Digests; the limitations of full-text searching have been well documented.

III. Impact of the Internet

Today the legal publishing system is changing on many fronts. Where once there were dozens of competing publishers, mergers and purchases in the past few years have left all the major publishers in the hands of two or three multinational corporations. At the same time, digital technology has given rise to many new, smaller CD-ROM and Internet publishers. None of these new publishers can match the comprehensive scope of WESTLAW or LEXIS/NEXIS, but their products are much more affordable.

The result of these changes is a startling growth in the variety of legal information sources available to the attorney. All the federal appellate courts and almost every federal agency use the Internet to provide legal information to the public. But the Internet is one of many elements in the increasing availability of legal information in digital form. Among all the electronic information sources available, three essential elements distinguish the Internet: easy electronic publishing and distribution, computer-mediated communication, and the possibilities of interactive multimedia.

A. The growth of electronic publishing

In discussions of electronic publishing on the Internet, it customary to quote A.J. Liebling: "Freedom of the press is guaranteed only to those who own one." It is just as customary to note that, with the Internet, everybody can be a publisher.

CD-ROM publishers are now starting to offer their materials through the Internet. LOIS offers an Internet-based service at http://www.pita.com, providing subscribers legal information from Missouri and a dozen other states. The states, too, are beginning to publish via the Internet. The Missouri Supreme Court publishes recent decisions on their web page, as well as decisions from the Eastern District of the Missouri Court of Appeals.

Traditional publishers like WESTLAW and LEXIS/NEXIS are also moving to the Internet as a medium of delivery. Most law schools have

5. Charles R. Calleros, Legal Method and Writing 17 (2d ed. 1994).
6. "The written presentation of public policy arguments supported by non-legal authorities, generally, is considered a Brandeis brief, named for United States Supreme Court Justice Louis D. Brandeis." David W. Heppelwhite, A Traditional Legal Analysis of the Roles and Duties of Pharmacists, 44 Drake L. Rev. 519, 553 n. 7 (1996).
replaced modem connections to these services with direct Internet access through campus networks. As high-speed communications technologies like ISDN (integrated services digital network)11 become more widely available, law firms are likely to do the same.

The legal researcher is thus faced with more choices than ever before. The increasing availability of legal information on the Internet and on CD-ROMs is pressuring LEXIS/NEXIS and WESTLAW to lower their prices. Both now offer a variety of pricing schemes, including flat-rate and per-document purchases via fax. Lawyers will have to become familiar with the range of information options now available. It may be more cost-effective to get a recent decision from the Internet than to pay $40 or $50 for the same document from WESTLAW or LEXIS/NEXIS. Certainly as clients become aware of these low-cost alternatives, they will be increasingly reluctant to pay high online legal research fees. CD-ROMs too, despite their current popularity, will likely decrease in significance as more publishers make the same material available on the Internet, where the burden of updating is maintained by the publisher rather than the user.

In the future, legal publishing could change in more radical ways. The key to West’s long dominance of legal publishing has been its ability to combine information acquisition, analysis, and distribution into a single package. The National Reporter System and the Supreme Court and Federal Reporters would not have been successful without the West Digest System and the army of editors who analyze, summarize, and categorize every case handed down. At the same time, it was the comprehensiveness of the collection effort that made the Digest System persuasive; lawyers could feel that the West Reporters gave them access to every relevant case they needed.

With the advent of Internet publishing, however, this process has opened up. Many legal scholars envision new kinds of legal scholarships as law professors and lawyers develop original materials with hypertext links to the primary legal resources provided by others. A number of experiments along these lines are already taking place in the law schools. Patrick Wiseman at Georgia State University College of Law has taught a seminar on “Law and the Internet”12 for the last two summers where the text is the web. Students research legal issues relating to the Internet by using the Internet itself, and write their seminar papers in HTML (hypertext markup language) with direct hypertext links to cases and web sites rather than traditional footnotes.

Law journals are also changing. One disadvantage of traditional law journals is that they are static; once an article appears in print, it immediately begins to be superseded by new law. One response to this is Bernard Hibbitts’ article, “Last Writes? Re-Assessing the Law Review in the Age of Cyberspace.” This article appeared in print in 71 New York University Law Review 615 (1996), but the version on the web13 not only includes live, hypertext links to sources, but also comments by readers, and updates by the author. There is even an example of a complete legal treatise authored and maintained on the Internet, with expert commentary and live links to primary sources.14

Work is being done on developing payment mechanisms for the Internet.15 Soon it may be possible to search an Internet web site for legal forms and pay $20 for a sample motion or $1.00 for a single contract clause.

B. Computer-mediated communication

Traditional publishing is a “one to many” communication medium. The electronic medium of the Internet makes “many to many” communications available to almost everyone. The result of this is the growth of a number of “virtual communities”16 based on shared interests rather than on geography.

Already, thousands of lawyers use email (and its group forms, discussion lists and Usenet newsgroups) for formal or informal CLE. Scores of active discussion forums for different areas of practice allow any lawyer to draw on the expertise of colleagues around the world.

Electronic communication via the Internet is also having an impact on lawyers’ relationships with their clients. For one thing, the pace of interaction has increased once again. Once, waiting a couple of days for a letter to be delivered was acceptable. When overnight delivery became possible, it soon became the norm. With the fax machine, expected response time shrank to hours. Email makes communication even faster; anyone can send a brief message in seconds. If you don’t already use email, chances are that very soon your clients will force you to; they use email, and they will expect to be able to reach you by their preferred method of routine business communication.

These virtual communities are not limited to lawyers and their clients. The discussion list healthlaw-l@lawlib.wuacc.edu consists of lawyers, health care providers, and other professionals. Lawyers have much to gain from the enrichment of discussion by opening up legal debate to non-lawyers.

C. Multimedia and the senses

For many users, the greatest appeal of the Internet lies in its interactive multimedia (graphic, audio,
and video) capabilities. For lawyers accustomed to finding the law in the black and white of case reporters and statutes, the possible impact that multimedia may eventually have is difficult to grasp. Most lawyers’ use of graphics is limited to their law school use of colored-coded highlighters in their casebooks. The Internet, however, opens up the possibility of using a wide variety of media in publishing and researching the law.

Several scholars have discussed the limitations imposed on our thinking about the law by its traditionally text-bound nature. Peter W. Martin has noted the paradox that, even in printed reports of trademark cases where visual symbols are under litigation, color graphics are non-existent. The multimedia capabilities that are a standard feature of modern computers encourage the full exploitation of graphics, sound, and video in the publication of legal sources on the Internet.

The available examples are modest, but the future possibilities are intriguing. Northwestern University’s Department of Political Science is developing an archive of audio recordings of Supreme Court oral arguments. In the future, VRML (virtual reality modeling language) may be used to present three-dimensional spatial models for navigating through research sites, or even for electronic court filings, just as it is now used to navigate through online “electronic malls.”

IV. Conclusion

The legal Internet is still in its infancy. Some lawyers remain reluctant to use it because they have not found one sufficiently compelling reason. For many lawyers, however, the cumulative effect of many reasons to join is decisive. Large firms find substantial cost savings in access to documents, and productivity gains through the routine use of email. Small firms and solo practitioners find that the resources and expertise available through the Internet enable them to compete with larger firms. For most lawyers, the question of using the Internet is not a matter of if, but of when.


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