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Review of Hibbitts' Last Writes?

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REVIEW OF HIBBITTS'S *LAST WRITES?*

by

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INTRODUCTION

Professor Hibbitts's review of the history of law reviews was interesting. For me, the most notable part of that history was his placing the law review in context, not only of the times and the desire of law faculty to be recognized as part of the academic world, but of technology. He points out that declining costs in the print publishing world helped fuel the growth of law reviews. I do not know the history of publishing well enough to know whether the 1890s (the beginning period of law review formation) was a watershed time, but surely publishing costs do indeed have something to do with the eagerness of institutions to engage in regular publication.

Of course, his reliance on technological developments is not just happenstance, because Professor Hibbitts wants to demonstrate that today's technology can or should bring about a similar revolution in legal scholarship — this time toward the self-publication on the World Wide Web that he favors.

I am inclined to be sympathetic toward this view. Every law faculty member questions, at one time or another, just how much sense it makes for students to have so large a role in the careers of legal academics. On the other hand, when a tradition has survived as long as that of the student-edited review, one suspects that something more than happenstance or even publishing technology must be at work. In any event, it is useful to think more carefully about his proposal and to examine critically some of Professor Hibbitts's justifications for moving to faculty self-publication on the World Wide Web.

SAVING TIME?

One interesting and appealing justification is that our current publication system takes a lot of time and effort. After writing, one must ensure that copies are made, submitted to scores of reviews, negotiations conducted over phone, fax, and mail; and then months may go by before publication. Much of this time can be saved by posting one's article on a Web site.

But Professor Hibbitts's response to this problem is itself contradictory. After bemoaning all the time and expense of conventional publication — which is confined almost entirely to text and footnotes in a continuous stream

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— Hibbitts suggests that authors take advantage of the new Internet medium by adding hypertext links, audio clips, video clips, multimedia generally, and whatnot. These things are potentially wonderful, and I do not discourage their use. But they take considerable energy — energy not devoted to substantive legal thinking. Hypertext jumps in particular require a more complex organizing principle than linearity. I don't know about Professor Hibbitts's experience, but in my experience many authors do not do a wonderful job of organizing their material in linear, old-fashioned text as it is. One shudders to think what these authors would make of the multi-dimensional organization schemes facilitated — indeed, required — by hypertext!

I do think that hypertext and multimedia are "new ways of thinking," and that younger generations of legal scholars will be more and more accustomed to them. In that sense, I think they are largely inevitable. But an extra dimension in one's scholarship does require, however facile one may be at accomplishing it, extra time. And with that extra time, some of the benefits of Web publishing will be lost.

Of course, Web publishing does not *require* these additions. In fact, articles in my own *Journal of Online Law* have some hypertext URL links, but are otherwise relatively linear. We have no policy about this, and it reflects more of the authors' current habits of working than anything else. But it does show that Web publishing can be done with an essentially linear text approach. Professor Hibbitts criticizes that approach, however, noting that "[t]he purely electronic law reviews that do exist are not taking full advantage of their medium. A comprehensive check of the current and back issues of the relevant legal journals reveals that they have not as yet made any use of multimedia, nor have they taken more than marginal advantage of hypertext." I'll say. I am one — in his words — "busy and individually-impoverished law faculty" member who is relieved that so far, publication of a journal has *not* required the addition of time entailed by hypertext and multimedia.

CONTINUOUSLY UPDATING?

Professor Hibbitts identifies one major advantage of Web publishing as the ability to continuously revise and update material. Truly, this is an extraordinary new ability, utterly available with e-publishing, and utterly unavailable with paper publishing.

Every new power brings with it a new responsibility, of course. With continually updated documents, there will inevitably arise problems in referencing and citation: which version is being referenced? When exactly was that change made? Perhaps this is no greater a problem than simply citing the date of publication of a paper document; with the Web, a given article might be

revised over time, but a reader could always cite "Hibbitts, Last Writes, March 15, 1996 version." Other readers might cite different versions, e.g., "Hibbitts, Last Writes, April 3, 1996 version."

But, if yet another reader wants to verify or just look at the earlier citation, the one based on the March 15 version, will it be available? What if a reader of one of the above citations checks the Hibbitts Web page and discovers that it now carries a date of April 25, 1996?

In that case, readers will want to know whether the particular part of the article they are interested in from the March 15 version is the same or has been changed in the current version. If changed, the original reference is no longer valid, so obviously this information is significant.

Does this mean that authors of continuously updated Web documents must keep all versions on-line? Perhaps. And perhaps that is not a terrible burden. Or perhaps Web browsers will need some form of red-lining, or built-in method of displaying the version that a researcher seeks. Software to do this sort of thing is widely used in commercial software development firms; it is known as "version control" software, and it tracks and records changes, allowing any chosen earlier version to be reconstructed and examined. No doubt the same type of version control software could be adapted to online law review articles. But that, too, lends another layer of complexity to what Professor Hibbitts puts forward as a simpler and more straightforward process.

For that matter, the notion of continuously updating an article is, at best, a mixed blessing for authors. One of the greatest sources of relief for some scholars (myself included) is the knowledge that when a piece of scholarship finally hits print, one is *finished with it.* Of course, one may not be finished with all the ideas, and of course one may want to write follow-on pieces. But it is nice to know that for an article that one is thoroughly sick of, no one expects continuous revisions because everyone knows revisions are not possible. I, for one, confess: I like it like that!

AVOIDING NEEDLESS STUDENT QUALITY CONTROL?

Professor Hibbitts argues that students do not now provide much in the way of quality control over the publication of articles. Doubtless there is much truth to this observation. Students are often not qualified to assess an article's merits or contribution to the field.

On the other hand, however bad the job students do, the academic profession, the practicing bar, and judges, all tend to treat articles in certain reviews with more respect than others. Generally, the leading law schools have the leading law reviews.

Whether students at these schools in fact exercise wiser or more percep-

tive quality control over their publications than students at other institutions, it remains true that readers of reviews act as though they did. There will clearly be some loss of this "de facto" quality control if student-edited reviews decline.

Perhaps the decline is not to be mourned, as I suspect Professor Hibbitts would argue. But it is not enough to observe that students do not really do a goodjob of quality control, when in fact the legal community acts to the contrary. What will that community do in the absence of that control?

COUNTERING THE EXPLOSION OF LAW REVIEWS?

Professor Hibbitts notes the accelerating growth in the number of law reviews. I was actually surprised by the numbers. They do cause one to wonder "why?" He argues that the growth is partly attributable to the "democratization" of higher education: if law review experience is a good thing, then why not make it available to more students by creating more journals? There is much to this argument. Certainly when the last couple of reviews were newly proposed to my own faculty, a frequent and powerful argument was precisely what Hibbitts suggests: that more students would get the benefit of the review experience.

On this point, I am inclined to agree with Hibbitts's thought that maybe the "review experience" is less than it's cracked up to be. By taking a large amount of time, it may even be an impediment to classroom learning.

He also argues that there has been an increasing pressure for law faculty to publish or perish. It is not completely clear whether that pressure can be correlated with the number of law reviews, though I certainly think it's true that the "dawn" of reviews in the late 19th century was indeed related to the desire of law faculty to be seen as an integral part of the university's academic mission, and not "just" a trade school off to the side.

But there is at least one other reason for the rapid growth in law review ranks: it is the rapid growth in laws. We are no longer a legal community of common law courts, gradually evolving, in piecemeal fashion, over the course of decades. We are a world of statutes and regulations, coming out with startling speed. Regulations in particular are famously numerous: I do not have the statistics before me, but I recall seeing that every day, literally pounds and pounds of the Federal Register are issued. (Perhaps it is now in electronic form).[1]

To the extent that law reviews actually perform a useful service —

1. Indeed it is. *See Federal Register Online* (visited Aug. 26, 1996), <http://www.gpo.gov/su_docs/aces/aces140.html -Eds.

analyzing current law — they must necessarily increase their pages in proportion to the increased pages of legislation and regulation. Whether they have in fact increased "in proportion" is an empirical question, but surely some of the rate of growth in our laws today, not just a "publish or perish" mentality, accounts for some portion of the increase in the number of law reviews.

GETTING RID OF THE *BLUEBOOK?*

Professor Hibbitts notes that the elaborate "Bluebooking" that students do to ensure that references are in standard format may be needless in an online world. Many references need no longer spell out complexities of page numbers, years, exact titles, etc., because there can be a hypertext link to the original source. Thus, an "e-author" can omit footnotes like: M. Ethan Katsh, *Rights, Camera, Action: Cyberspatial Settings and the First Amendment*, 104 YALE L.J. 1681 (1995) and replace them with a simple link, presumably something like this: "Katsh: Rights, Camera, Action," which can contain the (thankfully) hidden URL link: <http://www-unix.oit.umass.edu/~eleclaw/ylj.html>.

Of course, this will not eliminate the need for a *Bluebook* or something else like it. There will inevitably be conventions for links. Should the link be written out as I have shown? Or should it be: "M. Ethan Katsh, *Rights, Camera, Action: Cyberspatial Settings and the First Amendment?"* Or should it be more, perhaps even including the URL itself? If you think *Bluebook* cites are ugly, wait until you see an article full of URLs!

I think his argument about the *Bluebook* is strongest when he refers to especially important and well-known documents. I much approve, for example, his observation that hypertext references to "[t]he Magna Carta might provide readers not only with the *text* of the famous thirteenth-century English charter but also with a full color (and, in this instance, magnifiable) *image* of the manuscript in the British Library." In the online version of Professor Hibbitts's article, a click on the word "text" in his document does indeed bring up the text of the Magna Carta, and sure enough, a click on the word "image" brings up the British Museum's Web site with a photograph of the actual document right on one's screen. Impressive stuff![2]

On the other hand, URLs are notoriously unreliable. Web sites come and go with far greater frequency than libraries. Perhaps this will not be true for

2. I wanted to compare the elegance of Hibbitts's Magna Carta cite to what I imagined would be a cumbersome and silly *Bluebook*-dictated cite for the same document, but I could not find a reference to that document in the index to the *Bluebook* I have on hand. I looked under "Magna Carta," of course — not there. And, knowing law review editors and *Bluebook* aficionados to have a reputation for "trees, can't see the forest for," I also looked under "Carta, Magna." No luck. No doubt it's there somewhere, though.

the British Museum. But Professor Hibbitts's cite to my own electronic journal, *The Journal of Online Law*, for example, gives a now-incorrect URL. The journal was originally hosted at Cornell University's law school, but is now hosted (at a completely different URL) at my own institution, William and Mary. Of course, I am the one who moved it, not Professor Hibbitts. But "moving" is a common occurrence in cyberspace, and URLs are unstable because of it.

In short, one of the great benefits of e-publishing on the Web — its ease and flexibility — is also the thing that makes locating documents unreliable. Proposals to ameliorate this situation are afoot, as are active projects to implement new schemes for labeling and locating information on the Web.[3] But at the moment, these efforts are not publicly functional, and we are forced to rely on the unstable URLs that Professor Hibbitts favors.

CONCLUSION

Professor Hibbitts offers a brave new world, with lots of URLs in it. In some ways it is a very appealing world: no delays, no *Bluebook*, no stale articles. But these advantages come at a price: more time on non-legal issues like hypertext linking and multimedia; more concern about the formatting of Web references and their stability; and substantial effort keeping materials up to date and enabling readers to track article versions as they mutate over time.

Overall, I confess that I think that Web publication *will* become the publication of the future, so my heart is with him. But the case he makes for immediate change to self-publication is weaker than he allows. Nor does his proposal clearly separate the advantages of *Web publication* from the advantages of *self-publication*: many of the tedious steps of Web publication (hypertext link checking, for example) would be at least as well done by motivated students as by faculty. Basic editing for style and clarity are also often well done by students. And finally, the legal profession tends to accord student-edited journals a measure of respect for their quality control function, whether deservedly or not. On balance, I suspect that a large student role in legal scholarship will be with us for some time to come.

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3. *See, e.g.*, (oh, the irony of a URL citation) Robert Kahn & Robert Wilensky, *A Framework for Distributed Digital Object Services*, available at <http://WWW.CNRI.Reston.VA.US/home/cstr/arch/k-w.html>.