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The AALL National Conference on Legal Information Issues: Charting the Course of the Legal Information Revolution

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The AALL National Conference on Legal Information Issues: Charting the Course of the Legal Information Revolution

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James Heller reports on the AALL Conference on legal information issues and adds his own reflections on the Conference which he helped to design.

During the past decade, developments in information technology have revolutionised the way law and law-related information is disseminated to and used by the legal community and the public. In July 1995, the American Association of Law Libraries, a non-profit organisation with more than 5,000 members, convened the first "National Conference on Legal Information Issues" in conjunction with its 88th annual meeting. The National Conference served as forum for members of the legal and information communities to discuss the challenging problems and issues arising from the dynamic technological changes that have affected the creation, dissemination and use of legal information.

Law librarians understand well the issues surrounding access to legal information, and intend to help design solutions that ensure fair access to law and law-related information. We serve to help a diverse group of individuals, including law school and university professors and students, judges, legislators and other public officials, corporations and small businesses, attorneys and, of course, the general public. We work closely with both government and commercial information providers. We have participated in negotiations with publishers and other information providers on the fair use of copyrighted works, testified before Congress too many times to count and submitted amici briefs to appellate courts on issues that concern our members and those who we serve.

I served as programme chair for the 1995 AALL Annual Meeting, at which we offered more than 70 educational programmes. The annual meeting and National Conference were not, of course, the work of one person. The AALL Education Committee, the National Conference Task Force and approximately 300 programme coordinators and speakers helped make it a success.

Planning the 1995 meeting began in the Spring of 1993 when Carol Billings, law librarian for the State of Louisiana, was elected vice president/president-elect of AALL. Carol would serve as AALL president during 1994-95; her term would culminate in the 1995 annual meeting. Carol conceived the idea of holding a National Conference on Legal Information Issues in conjunction with this meeting, and she appointed me as programme chair. We both felt strongly that AALL should provide a forum to address the ethical, economic and legal questions raised by the new electronic environment.

In 1932 Aldous Huxley wrote about a nightmarish brave new world where people lived daily in anxiety and fear. The brave new information world may seem shocking, and has certainly created no small amount of anxiety. But thankfully it does not appear as frightening as the world Huxley envisioned.

I put this new information world in context in my own idiosyncratic way not too long before the National Conference took place. I was reading my two young sons the illustrated autobiography of Bill Peet, the author of dozens of childrens books that revolve around animals. Through those animals, Bill Peet taught children about the challenges of living in a rapidly changing, and often unfriendly, world. Of course his stories always ended happily; the little creatures always figured out - sometimes by themselves, but usually with the help of others - how to survive, and thrive. Although this might seem far-fetched, it occurred to me that these same themes are being played out today. Technological changes have affected fundamentally the way legal information is produced and accessed. The choices are so dizzying that sometimes we wish that the information revolution would just go away. But it will not. Indeed, it promises to get even more complex.

The 1995 Annual Meeting and National Conference brought together more than 2,500 librarians, law faculty and deans, judges and court administrators, practising attorneys and firm administrators, government officials, legal information producers, and leaders of information associations to help chart the course of the
information revolution. Because of the National Conference, the Pittsburgh meeting was particularly heavy on policy.

The Legal Information Revolution in Context

The National Conference was not, however, the first time AALL members addressed information policy issues at our annual meeting. Rummaging through old association materials I happened upon the programme for our 1981 meeting in Washington, DC. We then discussed some of these very same issues, and offered programmes on such topics as how to apply copyright law to new technologies, to how to facilitate access to electronic materials and the law librarian's role in the information age. American philosopher George Santayana cautioned that "those who cannot remember the past are condemned to repeat it," but AALL had not forgotten the past. Rather, our long-standing interest in information policy issues culminated in the National Conference.

Remembering Santayana's message, the topic I selected for the Plenary Session for the National Conference was the History of Legal Publishing. Robert Berrin, law librarian at the University of California at Berkeley, Toni Carbo-Bearman, Dean of the University of Pittsburgh's library school, and Kathryn Downing, President of the Lawyer's Cooperative Publishing Company, took us on a journey back to the earlier days of American legal publishing, brought us up to the present and then discussed the future of legal publishing and the use of legal materials.

American legal publishing changed little until the 20th century. Until fairly recently, case law formed its basis, and scholarly works invariably compiled, or commented on, judicial decision. Neither have the players changed much over time. Since the early days of the republic, both the public and private sectors have played significant roles in publishing legal information.

In 1789, the first year elections were held under the new American Constitution, Ephraim Kirby published the first volumes of American law reports (Reports of Cases Adjudged in the Superior Court from the year 1775, to May 1788). Kirby was followed by other entrepreneurs and some judicially appointed court reporters who published reports for different jurisdictions. It was not until 1876 that the reports of the United States Supreme Court were issued under government authority (though they remained privately published), and not until 1922 that the federal government itself began publishing the reports. In the earliest days of American legal publishing the private sector led the way - a pattern that continues to this day.

Court reporting, and scholarly works based on judicial decision, remained the predominant form of legal literature through to the end of the 19th century. The 20th century saw the ascension of legislative and administrative law - and tremendous growth in legal publishing.

Still, the publication of legal materials changed little during most of the 20th century. Placing slots in the back covers of books to insert pocket parts, and using looseleaves and post binders to interfile new material, certainly facilitated research. But the real revolution came in the early 1970s when Mead Data Central released its Lexis on-line legal database. Not long after, West Publishing Company unleashed Westlaw. The 1980s saw the birth of CD-ROM publishing, and the Internet blossomed in the 1990s.

Although we can pinpoint when and how the legal information revolution began, no one knows for certain where it is going. We have seen tremendous consolidation of the legal publishing industry, but also the blooming of a thousand flowers. American and multinational publishers that have acquired both small and large legal publishing houses and on-line information vendors must think they will find strength, if not survival, in numbers. Although in August 1995, American legal publishing giant West Publishing Company announced it would explore the sale or restructuring of its company. The digital world has created many opportunities for smaller legal publishers; dozens of companies have begun acquiring government information and re-packaging it in CD-ROM format.

Copyright and the Revolution

The National Conference featured many items on copyright law. We asked Bruce Lehman, Commissioner of Patents and Trademarks and Assistant Secretary of Commerce, to speak about the controversial draft report of the Working Group on Intellectual Property Rights (known as the "Green Paper") that examined the intellectual property implications of the National Information Infrastructure. The NII (often called the "information superhighway") will use communication and computing technologies to deliver information to homes, businesses and public and private institutions. Mary Beth Peters from the Register of Copyrights discussed the challenge of protecting the rights of copyright owners in the electronic age, but at the same time ensuring that users have fair access to intellectual property.

Both publishers and users of legal information perceive technology as a double-edged sword. Users understand that technology has the potential to make legal information more widely available, and at lower prices. But they also appreciate the risks: encryption devices, restrictive licences and uncertain copyright laws threaten to limit access to legal information. Publishers feel equally ambivalent. Although the digital revolution creates abundant new opportunities for the information industry, many publishers fear they have little or no control over re-distribution of their products. To address this concern they are aggressively pursuing their agenda in Congress, in
the Executive Branch, and in the courts.

How far will the publishing industry push? Carol Risher, an officer of the Association of American Publishers (AAP), told an audience at the National Conference that publishers can legally prohibit customers from looking at magazines and books by placing them in plastic bags. Ms. Risher maintains that publishers can do the same with electronic information. According to the AAP, fair use disappears in the digital world, and users must pay to browse on-line information. The library community believes this practice contravenes the fair use provisions, such as libraries, which has since 1862 been the principle source of public information. The legislation attempts to prohibit agencies from:

- establishing discriminatory monopolistic distribution arrangements for public information
- restricting the use, resale or redissemination of public information
- charging fees for resale or redistribution of that information
- charging user fees that exceed the agencies cost of dissemination.

In enacting the Paperwork Reduction Act of 1995, Congress expressed its belief that the public and private sectors can, in tandem, foster information democracy. The Act attempts to ensure timely and equitable access to government information in both print and electronic format by encouraging a diversity of public and private sources for information based on public information. The legislation attempts to prohibit agencies from:

Access to Information

But a coin has two sides. Most publishers believe they are entitled to free, unfettered access to government information, which they can enhance and re-package, then market for sale or lease. User groups, such as librarians and educators, also believe in broad access to information created at the taxpayer’s expense. How we achieve that goal, whether through the private or public sector, or some combination thereof, is a matter of some debate. Librarians are greatly concerned about the future of the United States Government Printing Office (GPO), which has since 1862 been the principle source of inexpensive or free federal government information.

Untold numbers of United States government publications are available to American libraries at no charge through the federal Depository Library Program, which is administered by the GPO. Librarians are concerned that an increasingly conservative Congress will take measures that weaken, if not kill, the depository program. Congress could accomplish this through the budget process. For example, it could mandate that federal agencies pay the Government Printing Office for printing and/or disseminating agency publications. Many GPO watchers fear that such action would result in fewer governmental publications, as federal agencies would be likely to cease publishing certain materials.

Librarians are well aware of the inadequacies of the GPO and the depository program, which cannot be blamed entirely on limited finances. In August Betty Turock, President of the American Library Association, proposed to a Congressional Committee a new model that would facilitate the dissemination of government information. Speaking on behalf of several national library associations, including AALL, she suggested that responsibility for disseminating federal government information rest with a Chief Federal Information Dissemination Officer and a Steering Committee including representatives from the executive, legislative and judicial branches. She also recommended that the government reinvent the depository program as a flexible federal, state and local partnership.

The government believes that the solution lies in partnerships between the public and private sectors. At the National Conference, Bruce McConnell from the Information and Regulatory Affairs division of the Office of Management and Budget suggested separating GPO’s publishing and printing activities and relying more on private sector printing. Mr. McConnell considers the private sector, and the telecommunications industry in particular, to be the critical player in creating a real national information infrastructure. He believes that opening other markets to America’s telecommunications industry, and vice versa, will create more competition and result in cheaper prices and greater consumer choice.

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But this is not solely an American problem. Business persons, lawyers, judges, and others need access to legal information from around the world. Chris Mellor acquires global information for CCH, a Chicago-based legal and business publisher. At the AALL National Conference, he pointed out the difficulty publishers have accessing information produced by foreign governments. Although some countries claim no copyright in governmental publications, others do. English Crown copyright, he pointed out, presents obstacles to private sector republication of official documents. A firm believer in the market, Chris Mellor felt confident that increased competition among information providers would result in increased access to worldwide governmental
information for both publishers and users, and at a lower cost.

The Justice Department’s View

Paul Friedman, Deputy Associate Attorney General for the United States Department of Justice, presented the Conference’s keynote address. Mr. Friedman, who has become a key person on information policy issues for the Justice Department, offered insight on how DOJ will address some of the challenges and opportunities posed by the electronic revolution, including computer crime, privacy, and equal access to government information.

Mr. Friedman pointed out some notorious examples of crime in cyberspace, including a hacker who had been paid by the KGB to ferret out United States military secrets by penetrating government computers. He spoke of an American college student who developed a program that consumed the memory of computers through the Internet, causing nearly $100 million damage. Mr. Freidman also recounted the activities of the Legion of Doom, a group of hackers who penetrated the computers of Bell South, a regional telecommunications company. The OMB’s Bruce McConnell, who targetted the telecommunications industry as the key player in the success of the information superhighway, must have blanched.

Mr. Friedman concluded his address by tackling the issues of access to government information in the digital world, including probably the most controversial issue among law librarians during the last two years - the debate over adoption of a vendor and format neutral case citation system.

The Citation Debate

I had the honour of moderating a debate on the citation controversy, which actually began more than 150 years ago in the case of Wheaton v Peters 33 US (8 Pet) 591 (1834). Wheaton, an early reporter of United States Supreme Court opinions, attempted to enjoin Peters, who had succeeded him as court reporter, from publishing a series of "Condensed Reports" of early Supreme Court decisions that included cases reported in Wheaton’s Reports. Not only was Daniel Webster, Wheaton’s attorney, unable to persuade the Court that his client’s reports were protected under common law copyright, but the Court held that no reporter could claim copyright in the opinions of the Court.

The modern-day controversy began a decade ago when West Publishing Company sued Mead Data Central, the creator of the Lexis on-line legal database. West sought to enjoin Mead from adding references to pages in West reports to cases in Lexis. In 1986 the United States Court of Appeals for the Eighth Circuit held that West held copyright in its arrangement of the opinions in its reports, that the pagination in West reporter volumes reflected and expressed West’s arrangement, and that Mead’s use was infringing (West Publishing Co v Mead Data Central, Inc 799 F.2d 1219). Eventually West licensed Mead - for an undisclosed but reportedly very large fee - to cite to the internal pages of West reports in Lexis.

West and AALL do not see eye-to-eye on this issue. Many law librarians contend that, because West publishes the decision of most federal courts and many state courts, reliance on West citations and pagination limits competition, results in higher prices for accessing that information, and effectively restricts access to public information. West counters that the existence of nearly 200 publishers of court decisions demonstrates that the market is wide open.

In 1991 AALL testified in support of a bill that attempted to overrule the West v Mead decision. The proposed legislation would have eliminated copyright in volumes and pagination of court reporters, and titles and sections of statutes and regulations. Although the bill never made it out of Congressional committee, this was the beginning of an increasingly strained relationship between AALL and West.

Tension heightened in 1993 when the then AALL president Kay Todd appointed a task force to consider and develop vendor and medium neutral citation forms. It peaked in 1994 when AALL, by now under the leadership of Carol Billings - a staunch advocate of non-proprietary citations who spurred the state of Louisiana to adopt an alternate citation system - released a resolution supporting non-proprietary citations as well as free or low-cost databases of legal information. Earlier this year the citation task force submitted a report supporting adoption of a vendor and medium neutral system. The AALL Executive Board adopted most of the task force’s recommendations at its annual meeting in July 1995.

To the surprise of many, the United States government has taken a position on the citation issue. During his keynote address, Paul Friedman told us that the Justice Department supports wider access to a judicial opinion. Although DOJ will not develop its own database of federal court decisions, it encourages federal courts to make their opinions available electronically, and to consider uploading those decisions to a central repository. Mr. Friedman stated that the Justice Department supported the concept of a non-proprietary citation system, and that such a development will increase competition and improve public access to judicial opinion.

Paul Friedman characterised cyberspace as somewhat like the Wild West: replete with creativity, freedom and adventure, but also brimming with snake-oil salesman, red light districts and bad guys. The West was tamed (sort of) when the rule of law took hold. Mr. Friedman concluded that our challenge is to provide some minimal law and order in cyberspace without destroying or chilling
governed? Many observers believe that government regulation will stifle the exuberant, if somewhat anarchic, development of the Internet that we have seen over the last few years. They are convinced that the government should keep its hands off it.

The National Information Infrastructure Advisory Council, a 37-member panel appointed by the President in 1994, emphasises that the private sector must have primary responsibility for the design, deployment, and operation of the NII. But the council points out that the government does have a role: it should encourage interoperability of the NII, encourage women and minority-owned businesses and not-for-profit organisations to participate in the NII and ensure basic levels of service and fair access regardless of geography.

The Advisory Council cautions that we must take steps to ensure information democracy. It used the phrase “information haves and have nots” in its report, and we heard those words again and again during the National Conference. Many think that technology, particularly the Internet, will help promote equitable access to information. Others fear that technology will create even more barriers for the poor. The technological revolution has certainly raised hopes of broader access to legal information. The call for “information democracy” was not unheard of a decade ago, but neither was there a clamour for it. Everyone seems to be aware of the potential of the Internet to broaden access to legal information, but we are increasingly aware that it may have the opposite effect.

The National Conference’s Plenary Session on the history of legal publishing attempted to connect the past with the future. Indeed, we cannot chart a proper course for the use of new technologies without looking to the future through our past. To be certain, we must focus on the future. But we cannot be blind to the past. We cannot, for example, determine how to apply copyright law in the electronic age without remembering that the drafters of the Constitution proclaimed that the fundamental purpose of copyright is to promote the progress of science and the useful arts. Encryption devices serve a useful purpose in authenticating electronic documents. But they also can jeopardise first and fourth amendment rights if we forget the capacity of government and law enforcement agencies to abuse their power. We herald the role of the private sector in maximising the capabilities of the Internet and other developing technologies. But we must remember that the private sector is market driven. If Lexis and Westlaw will not include in their databases decisions of the Virginia Supreme Court prior to 1924, can we count on the private sector to make available and preserve historical and current legal writings?

The National Conference was an opportunity to
bring all the important constituencies together - government officials, lawyers, judges, publishers, and government policy makers - to help address challenging information policy issues. Earlier in this paper I wrote that the National Conference culminated AALL's longstanding interest in legal information policy issues. But that clearly is not the case. The National Conference was, in fact, a new beginning that will ensure that law librarians help chart the course of the legal information revolution.

Endnotes


2. 17 US Code § 107 (1992). The fair use of a copyrighted work, including for research, scholarship, or ... is not an infringement of copyright.
