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Don't Dilute My Coffee! Federal Trademark Dilution and Likely Legislative Changes

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Is There a New Digital Collection in Your Future?

by Iva M. Futrell and Roger V. Skalbeck

*Which new service should I get?
LLMC or Serial Set?
And there's this real big set I saw,
Called the Making of Modern Law.
Those academics get even more,
Like that nifty thing JSTOR.
There's Hein Online and CRDC,
Do you think one's right for me?*

UNIVERSITY OF RICHMOND

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LAW LIBRARY

Google Book Search is getting lots of press for its digitization efforts, but we all know this is not the first game in town. In fact, when it comes to providing relevant digital collections, Google is not (yet) all that useful. It is a good service for finding books, but it is not suited for actually reading them. For legal materials relevant to lawyers, professors, students, and librarians alike, there are many more exciting alternatives.

In this article, we take a look at a handful of the bigger law-related digital collections available today. We present the core elements of each collection to give readers an idea of what is out there. In addition, we look at some broad-based questions presented by acquiring access to digital collections. Finally, briefly, we look at issues of access, ownership, copyright, interlibrary lending, catalog records, and cost.

Highlights of Selected Digital Collections

Here we look at the following products: Hein Online, JSTOR, LLMC-Digital, Making of Modern Law, LexisNexis Congressional Research Digital Collection,

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Digital Collection

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and the LexisNexis Serial Set. These products are unlikely to compete much based on content, but they are likely to compete for a place in the library budget. As many libraries probably already subscribe to one or more of these services, we highlight only selective features of each of them.

Hein Online

Hein Online (www.heinonline.org) is a collection of scanned law reviews and primary federal materials such as the Federal Register and the Statutes at Large. It also has an expanding collection of materials in the area of legislation, as well as 19th and early 20th century treatises. Hein works closely with Cornell University libraries in digitizing their materials. This service is priced as an annual subscription, and librarians can elect to get subsets of the materials, e.g., only the Federal Register.

LLMC-Digital

The Law Library Microform Consortium (LLMC) (www.llmc.com/digital_toc.htm) was chartered in 1976 as a non-profit library cooperative at the University of Hawaii. Its goal is to preserve legal titles and government documents on microform, while making copies inexpensively available either in microfiche format or digitally through its online service LLMC-Digital. LLMC has filmed over 7,700 titles, some 103,000 volumes. One library participating in that project is George Washington University Jacob Burns Law Library ("GWU"). In June 2005, LLMC placed a digital scanner at GWU. Many of the LLMC's existing microforms are not clear enough to digitize. GWU is digitizing these titles first, and then they'll scan titles in their collection that are not in LLMC microform. Jennie C. Meade, librarian of Rare Books, is coordinating this project. We visited her recently and saw the scanner in operation, digitizing a beautiful large French book. Five thousand of the 10,000 titles in the GWU Special Collection are French legal volumes from the 15th through the 19th centuries. After this collection is finished, they will begin on the Canon Law Collection.

LexisNexis Congressional Research Digital Collection

Congressional Research Digital Collection (CDRC) is part of an ongoing project by LexisNexis to build a digitized collection of congressional information. This collection includes 175 years of Congressional Committee Prints and Congressional Research

Service (CRS) reports. It supplements already completed fulltext access to the Serial Set from 1789 to the present. The whole database has a redesigned LexisNexis Congressional interface that was launched on December 10, 2005. The annual subscription to CRS Reports from 2005 onward will be a set price per year with ownership coming to the subscriber after five years.

JSTOR

The JSTOR name is an acronym for journal storage (www.jstor.org). Conceived by William G. Bowen of the Mellon Foundation and begun in 1995, it contains reproductions (full backruns) of core scholarly journals in Anthropology, Asian Studies, Ecology, Economics, Education, Finance, History, Mathematics, Philosophy, Political Science, Population Studies, and Sociology. Typically, the most recent few years of each journal are delayed based on agreements with the publishers. A few publishers only allow JSTOR to provide access up through a fixed and permanent date. Presently, JSTOR does not allow corporations or law firms to subscribe to its services.

Making of Modern Law

The Making of Modern Law (www.galeuk.com/trials/moml/) is a reference resource for historical legal studies. There are 22,000 British and American legal treatises from 1800 to 1926. The searchable fulltext database, like so many of the other digitized collections, is based on the microfiche collection from Primary Sources Microfilm, which is now owned by Thomson/Gale.

ISSUES IN ACQUIRING A DIGITAL COLLECTION Access or Ownership?

When considering a new digital collection, what is it that you actually get by "buying" it? Do you merely have the right to access it during the period of an annual subscription, or do you actually own something you won't relinquish if you don't renew your contract?

With a collection, such as the Making of Modern Law or the Serial Set, libraries can own the title, though not in the form of physical possession. There are large upfront costs that represent the purchase of the product itself. It is important to recognize though that most publishers who use an "ownership" model still require annual maintenance fees to support hosting the content. Of course, this also helps the publishers generate long-term revenue as well.

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Digital Collection

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Cost Concerns: Overhead and Efficiency

One crucial factor with a large digital collection is, of course, its cost. It doesn't matter what kind of organization you are in – everybody cares about money. With prices that can be well above \$100,000, even well-funded institutions will scrutinize costs for a new collection.

For large research institutions, there are many ways to justify a massive collection of 19th century materials such as found with the Making of Modern Law. Many researchers probably never had the chance to access, let alone search, these sources easily. However, if you try this argument in a law firm, the managers will probably look at you as if you belonged

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in the 19th century. The danger with acquiring any new service is that probably it is seen as an overhead expense, especially at law firms. Concerns of adding overhead to the budget might be overcome by finding ways that people can replace existing activities with better efficiency. Beyond that, acquiring a large digital collection might be a way to help pare down a library's physical collection. Presumably retention decisions have been made based on the availability of law reviews on Hein Online.

Most subscribers to LLMC-Digital are academic law libraries, though there are a few law firms. When asked why they subscribe, one law firm librarian says: "It's important to support digitization projects, and LLMC-Digital is not that much money from our annual budget."

Hazel L. Johnson at McGuire Woods in Richmond said, "While it's not one of our most utilized resources, it has been a lifesaver a couple of times already. We've used the federal crime statistics and really old federal legislative materials. I think as the collection continues to grow we will find additional opportunities to utilize the resources."

Copyright and Contract Law

The reason Google Book Search is getting so many headlines is because of the novel copyright implications. Is its approach an allowable fair use? Is showing a book cover or excerpt a form of reproduction, distribution, or even display of the copyrighted

work? As it turns out, these kinds of questions are thus far irrelevant to the digital collections we've highlighted. With services such as JSTOR and Hein Online, specific agreements with each publisher are included. The other services cover materials outside of copyright protection.

Of course, it is not certain that there are no copyright issues for the Hein or JSTOR digitization efforts. On one hand, in 2001, the Supreme Court ruled in favor of freelance writers in a suit against the

When considering a new digital collection, what is it that you actually get by "buying" it?

New York Times, LexisNexis, and others. Here the court held that the publishers could not relicense individual articles in a database where an initial copyright grant was only for use in a collective work (*New York Times v. Tasini*, 533 U.S. 483 (2001)). However, last year the Second Circuit Court of Appeals found in favor of National Geographic. The magazine had reproduced the entire contents of each issue, which the court held to be privileged revisions and not new works under the relevant statute (*Faulkner v. National Geographic Enterprises Inc.*, 409 F.3d 26 (2d Cir. 2005)). Recognizing the importance of this case for researchers and indeed their own viability, JSTOR submitted an amicus brief in the National Geographic Case, which you can find on its web site (www.jstor.org/about/publishers/).

Producers of the bigger digitized collections avoid copyright problems altogether, by focusing on materials that are outside protection. Materials from the 18th and 19th centuries have entered the public domain, and works of the U.S. government can have no copyright protection. When materials are not protected by copyright, this may bring about two results – competition and protection through contracts.

To illustrate the competition aspect, there are already competing versions of the Serial Set from LexisNexis and Readex. Both providers have digitized these public domain materials, and they compete based on search features and other value-added enhancements. Any other publisher, school, or foundation who wants to digitize the same materials can do just that.

When materials cannot be protected by copyright, companies may try to protect their investments through contractual provisions. For this reason, it is utterly important that you review each new contract to see what you are allowed to do with the content you acquire. It is conceivable that a future enterprising publisher might try to restrict you from

sending its materials to other libraries or law firms. An overzealous provider might even try to retain property rights to new works you might create using their collection.

Thankfully we've found no egregious practices yet, and it is unlikely that the market would respond favorably to this type of overreaching. Typically outside users are allowed to access digitized materials in your physical library, and some publishers allow for interlibrary lending. By way of illustration, following is a sample provision that might appear in one of your contracts:

"To the extent permitted by copyright law, Subscriber may make copies (including digital copies) of Materials retrieved from the Service and distribute the Materials and copies as part of a formal inter-library loan (ILL) program, where this program is administered directly by the Subscriber, restricted to official ILL partner libraries, and operated in accordance with generally accepted practices for such programs."

Catalog Records

Once you buy a digital collection, how will people find out about it? One logical way to integrate it is to add records to your catalog. Since library catalogs support remote access links, users can look for an

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item and go to it directly. Before dumping thousands of records into your catalog, you need to think about how people use your catalog. Assuming you can link to materials remotely, do you have any electronic records of this nature already? Also, is there a way to restrict a catalog search to include or exclude materials from one of these providers? If you route links through a proxy server, can you change this URL later if you have to?

As one example to consider, think of the Serial Set, which could be 325,000 records with the inclusion of the American State Papers. Polly Todd, director of Editorial Services and Innovation at LexisNexis (Polly.Todd@lexisnexis.com), is working on this catalog project. She hopes to produce some records in the third quarter of this year and be finished in 24 months. Todd says, "The serials records we will keep separate as a single deliverable batch; we will batch records for monographs by Congress (minus any

serial records, of course)... By delivering the records in this fashion, we will be able to release records incrementally over time while we are completing the project; my hope is that the batches will be reasonably manageable, while libraries can choose when and how many records to download, based on their available resources." She also says that any thoughts a librarian would like to share would be appreciated.

For those wanting help to manually load catalog records, Washburn University provides some useful tips, linked from the Hein Online web site (<http://washburnlaw.edu/heinonline/>). This is particularly useful, as it shows how to include some form of proxy server address in a record's 856 field.

Acquiring access to a digital collection requires planning, promotion, and a holistic view of your collection.

As an alternative to loading records into your catalog, you might prefer to post a searchable list of titles on your intranet. For a fee, a company, such as SerialsSolutions (www.serialssolutions.com), aggregates electronic journal holdings based on the databases to which you subscribe. As a simpler and cheaper alternative, both Hein Online and JSTOR provide spreadsheets containing all their title holdings with associated URL links. With a few modest enhancements, you could have this on your intranet in an afternoon.

Conclusion

Acquiring access to a digital collection requires planning, promotion, and a holistic view of your collection. Decisions need to be made about what is or will become available at a public domain location. Over time, resources such as the Government Printing Office's registry of U.S. government digitization projects (www.gpoaccess.gov/legacy/registry/) will help inform these decisions. You will need to compare the short-term use to the long-term demands. This is especially important when you are purchasing the product and not merely licensing it from year to year. Also, you must consider the long-term reliability of the vendor.

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