

# LOSING THE LAW

## A CALL TO ARMS

## Robert C. Berring

S ONE WHO HAS LABORED LONG in the vineyard of teaching and writing about legal research, I am well aware of the fog of boredom that descends upon most lawyers when the subject of legal information is discussed. Legal information is the bottle that contains the fine wine of legal meaning. Talking about it is like discussing heating and ventilation (HVAC) systems; we all appreciate them, but we prefer that they just go about their business.

But there is trouble in River City my friends, big trouble. I can see the snowball poised at the top of the mountain and it is beginning to roll down the slope. As it descends and gets larger, stopping it will be expensive and messy and will involve no small amount of tooth-gnashing. So we must stop it now. If you have read this far, please read on. It is time to save the legal information system.

The identification of the snowball is contained in the recently released "State by State Report on Authentication of Online Legal Resources" produced by the Access to Electronic Legal Information Committee and Washington Affairs Office of the American Association of Law Libraries (March 2007).<sup>1</sup> The American Association of

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<sup>&</sup>lt;sup>1</sup> The report is at www.aallnet.org/aallwash/authen\_rprt/AuthenFinalReport.pdf.

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Law Libraries (AALL) knew something was amiss with legal information. States are making the transition from paper to digital publication of primary legal authority without thinking through what they are doing. The various state agencies know that the move from paper to digital information saves money. They also know that moving to web-based production of primary source materials caters to the desires of citizens who want search engine driven access to the law. Besides, paper is a drag.

What could be wrong with this picture? The problem is that not one state has thought through the implications of abandoning paper copies. Not one state has put in place a system that authenticates and preserves the new digital information. Some states have even completely stopped printing administrative regulations and deemed the online version to be the official publication of the state's information without providing for authentication or preservation of it. This means that no one is checking the online version to be sure that it accurately reflects the law as passed. This problem is obvious enough. Short of the Dr. Evil scenario of someone hacking in and altering the information for fun or profit, simple errors could be introduced and compounded. Material could be lost. And then there is Dr. Evil.

Further, no one is guaranteeing that a safely encrypted copy of the digital information is preserved in a secure environment. To be concrete, no one is making sure that if, in the year 2010, someone wants to know what the administrative regulations on a particular topic in your state were in 2007, there will be some certain way of doing so. Only the current version will be available. No one is securely archiving the information. The current rules may be available for free with easy access, but who will be doing the work of preserving them?

For centuries our culture has benefited from the features of information recorded on paper.<sup>2</sup> True paper copies, while subject to

<sup>&</sup>lt;sup>2</sup> There is a lot of great literature on this topic. The classic is Elizabeth Eisenstein, *The Printing Press as an Agent of Change*, Cambridge University Press (2005). This latest paperback republication of Eisenstein's ground-breaking work explains the way in which paper and the printing press came to undergird our culture. A more

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deterioration, gave us a method of preserving authentic forms of important information. Paper information is so much a part of the warp and woof of our lives that we do not have to think about it. At the same time paper has come to represent a fading life-style and it has been identified with inaccessible or proprietary information. The battles in the late 20th century over West's "ownership" of the law and the current concern about WESTLAW and LEXIS are familiar to anyone who has been watching. Counting on digital information not only represents the modern view, it is seen as liberating and free.

But if we leap to digital information without providing a reliable infrastructure that authenticates and preserves it, we will be making a huge mistake. It will have to be corrected in the future, further down the mountain, when the snowball has become so big that it begins to cause serious problems. (Never say that I cannot stick to a metaphor.) Intelligent action now is needed. The AALL is trying to get states to do the right thing.

This problem lives mostly in administrative codes and registers right now, but legislative materials and judicial opinions cannot be far behind. The AALL Report has performed a signal service. Its editors found a law librarian in each of the 50 states who could check on the current status of state publications. What is deemed official? What authentication methods are in place? Has anyone even thought about these issues? The volunteers who compiled the state information are people who care about legal publication and who watch what is going on. The editors gathered all of this material together, summarized it and published it. It is an achievement of detailed research of the sort that I admire but could never perform. This kind of careful, diligent work is hard to do and holds little reward for the doer.<sup>3</sup> But it is done. And this careful, incremental

varied and readable background can be found in *Daedulus, The Journal of the Ameri*can Academy of Arts and Sciences, Fall 1996 issue, "Books, Bricks, and Bytes."

<sup>&</sup>lt;sup>3</sup> Mary Alice Baish and Richard Matthews are the editors of the Report. These two deserve credit, which they would doubtless pass along to the state volunteers. This is why I love librarians. Claire Germain, past president of the AALL, and

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process produces some mind-boggling conclusions. No one is paying attention. Check out your state, they are all in there.

On April 20-21, 2007, the AALL convened a "National Summit on the Authentication of Digital Legal Information" in Schaumburg, Illinois<sup>4</sup> that brought together librarians, judges, legislative analysts, digital security experts, law professors and others to discuss this document. One salient point that emerged from the discussions was that the technology exists to handle these problems. The response to terrorism has caused a spike in the development of security and authentication software funded by the federal government, but it takes effort and costs money to implement it. The challenge will lie in mustering the political will and the (no surprise) money to adopt a workable system. There is very little sizzle involved in talking about authentication and preservation of legal materials. For centuries we have been able to rely on a true copy in paper form to handle that for us. But no more. If we want to preserve legal information in an authenticated, reliable way in digital form we will have to pay some attention to the problem and pay some money towards remedying it. We have to start now.

It has been suggested that the market will handle this problem. Won't WESTLAW, LEXIS or something else address these problems? No. There is no money in this activity. We are talking HVAC here. But I have faith in the readers of the *Bag*. Who better than all of you to become aware of this problem? Pick up your shields and head to battle. Making sure that the states handle this correctly will be a difficult job that will lack any patina of glamour but will be an act of honor. Do I have *Bag* readers pegged or what?



Sally Holterhoff, current president, deserve a tip of the hat as well for pushing hard on this issue.

History will record the conference as taking place in Chicago but I was there and it was held in Schaumburg. Let it be noted that Schaumburg is not Chicago.