SSRN AND THE (ARBITRARY) DETERMINATION OF “SCHOLARLY” MERIT

Bridget J. Crawford

On May 20, 2019, Brian Frye tweeted: “I am sad. @SSRN has decided that my article about Gremlins (1984), In re Patentability of the Peltzer Inventions, does not qualify for ‘public’ status because it is ‘opinion, advocacy, or satire.’ Why judge? Oh well. You can still download it here.”

I followed Brian’s direct link to the piece. The abstract refers to the many inventions of the movie’s Randall Peltzer character, and explains,

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1 Brian L. Frye (@brianlfrye), TWITTER (May 20, 2019), www.twitter.com/brianlfrye (font style added). Brian Frye is the Spears-Gilbert Associate Professor of Law at the University of Kentucky College of Law. See, e.g., Brian L. Frye, UNIVERSITY OF KENTUCKY COLLEGE OF LAW, law.uky.edu/directory/brian-l-frye.


“This essay takes the form of an opinion letter evaluating the patentability of Peltzer’s inventions.” I do not teach IP, but I like Brian’s work and so I downloaded the essay. It struck me as funny and as an excellent teaching tool. But if you had gone to Brian’s author page on SSRN, you wouldn’t have been able to access the paper. You would not even have seen it.

I myself have posted material that apparently doesn’t meet SSRN’s criteria for a “scholarly paper,” including an interview with the principal drafter of some important state trust legislation (and the interview itself has been cited in subsequent scholarship) and columns for Tax Notes reviewing

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4 See, e.g., Bridget J. Crawford, Pace University School of Law, law.pace.edu/faculty/bridget-j-crawford (listing “courses taught” including taxation, wills, and feminist legal theory).

5 See Author Page for Brian L. Frye, SSRN.COM, papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=646621 (listing and linking to 52 “Scholarly Papers” and 3 “Other Papers” by Professor Frye).

6 Upon further investigation, I determined that this statement was false at the time I wrote it on May 21, 2019. The paper was then listed under “Other Papers.” See id. And, mirabile dictu, on May 29, 2019, without any action taken by Professor Frye (or me), the SSRN editors moved this paper to his “Scholarly Papers.” See Brian L. Frye (@brianlfrye), Twitter (May 29, 2019), www.twitter.com/brianlfrye (font style added) (Professor Fry’s reporting that SSRN had sent him notification that In re Patentability of the Peltzer Inventions would appear in the “Scholarly” section of his papers, and commenting, “Holy crap! @ProfBCrawford @grimmelm & @FacLoungeBlog get results.”). On my own SSRN Author Page, papers other than “Scholarly Papers” are not publicly available under “Other Papers” even though I have requested that they be included on my Author Page. See Author Page for Bridget J. Crawford, SSRN.COM, papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=344493.


estate and gift tax law review articles published in 2016\(^9\) (even though SSRN published my similar pieces reviewing scholarship for the years 2015 and 2014 (combined),\(^{10, 11, 12, 13, 14, 15}\)).

When I posted my Information for Submitting to Online Law Review Companions\(^{16}\) (a submission guide modeled after Nancy Levit and Allen Ros-
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tron’s useful *Law Review Submission Guide*), SSRN reviewer “Ty D.” responded:

We have accepted your paper to appear in the “Other Papers” section of your Author Page, which is where opinion, advocacy and satirical papers are displayed as per SSRN policy. It will not be searchable by the SSRN eLibrary search engine but will be searchable by public search engines, and you may share the URL.

I asked SSRN for reconsideration, and got this from SSRN reviewer “Katie M.”:

We have recently reviewed your submission to SSRN. Our classifiers have determined that this submission is very useful information, however would still be considered non-scholarly. Because of our acceptance of your previous paper 1019029, we have made the decision to allow the public viewing of this paper. In the future, similar submissions will be processed to appear in the “Other Papers” section of your Author Page, which is where submissions that are not full scholarly research papers (including submissions such as data tables, summary book reviews, opinion, advocacy and satirical papers) are displayed as per SSRN policy.

I do not even bother thinking that my *Information for Submitting to Specialty Law Reviews and Journals in Gender, Women & Sexuality* will be a searchable public paper.

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18 Comment of “Ty D.” in Abstract Comments History: Author Comments to *Information for Submitting to Online Law Review Companions*, supra note 16.

19 Comment of “Katie M.” in Abstract Comments History: Author Comments to *Information for Submitting to Online Law Review Companions*, supra note 16. Note that “previous paper 1019029” is not “my” paper, but rather the Rostron/Levit guide, supra note 17.

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So what exactly are SSRN’s rules for what is “publicly available” and what is not? What I could find is this: On SSRN’s “Support Page,” one reads the question, “Is my paper eligible for inclusion and public display in SSRN’s eLibrary?” and a response.

A paper must be part of the worldwide scholarly discourse covered by one or more of SSRN’s subject area networks to be eligible for inclusion and public display in SSRN’s eLibrary. Every submitted paper is reviewed by SSRN staff to ensure that the paper is a part of the scholarly discourse in its subject area. SSRN does not provide peer review for papers in the eLibrary.

An author may submit a paper that is not scholarly – for example, an editorial or opinion paper. The author must have a scholarly work accepted to SSRN before a non-scholarly work will be accepted. These non-scholarly works will be given an “Approved-Private” status (rather than “Approved”). The author can choose (on their My Papers page) to have the private papers appear on their Author page in the “Other Papers” section. These private works will not be searchable from SSRN’s Search page and will not appear within any network on the Browse page. The private papers are, however, searchable by external search engines (e.g. Google) if the author included them on their author page. The author may also post the URL elsewhere for download or send the URL of their private paper to readers.²¹

SSRN’s Terms of Use include this prohibition: “Content may not be illegal, obscene, defamatory, threatening, infringing of intellectual property rights, invasive of privacy or otherwise injurious or objectionable.”²² Then there is the information I can see under the “Privately Available Papers” heading on my own Author Page:

This section contains papers that are not displayed on your Author Page unless the “Include on Author Page” checkbox is checked. They are not available in the public SSRN eLibrary or to the SSRN search engine due to an author request, submission restriction (e.g. restricted conference), or SSRN policy (e.g. paper is an opinion/


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advocacy paper or is not a scholarly research paper covered by one of SSRN’s networks). If you want a private paper to display in the “Other Papers” section on your SSRN Author Page and as a result be searchable by external search engines (such as Google), click the paper’s “Include on Author Page” checkbox below (if available). Downloads of these papers are not included in computing the total downloads shown on your author page.23

So it looks like SSRN divides submissions into “non-scholarly” and “scholarly” work. Fair enough.

What can we deduce about the definition of each category? As for non-scholarly work, we know from the FAQs that “non-scholarly” work includes “an editorial or opinion paper.”24 We know from Brian Frye’s submission that a non-scholarly work is “opinion, advocacy, or satire.”25 We know from the comment on my law review submission guide that non-scholarly work includes “data tables, summary book reviews, opinion, advocacy and satirical papers.”26 But wait, if SSRN does not publish “advocacy,” why is an amicus brief by Orin Kerr, for example, publicly available?27 The easy answer would be because amicus briefs are scholarly,28 but so are . . . oh,

23 Privately Available Papers, Author Page for Bridget J. Crawford, SSRN.COM, hq.ssrn.com/submissions/MyPapers.cfm?partid=344493. I do not believe that the reader will be able to access this information, as it is listed under “Privately Available Papers” and therefore is likely, itself, to be privately available.

24 See supra note 21.

25 See supra note 1.

26 See supra note 19.


28 Others disagree. See e.g., ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE 104-05 (2008) (“An increasingly popular category of amicus brief is the academic brief – ‘Brief on Behalf of Legal Historians,’ or ‘Brief on Behalf of Professors of Securities Law.’ These are usually drafted by a few professors and then circulated from law faculty to law faculty, seeking professorial sign-ups. Advocacy and scholarship do not go well together, which is why many academics never lend their names to professorial amicus briefs.”). In fifteen years of full-time law teaching, I have signed on as amica to five briefs filed with the Supreme Court of the United States (and some others). See, e.g., Brief of Amici Curiae of Trust Law and ERISA Law Professors in Support of Respondent in First American Financial Corporation v. Edwards, No. 10-708, 2011 WL 4998361 (listing me as one of the amici); Brief of Amici Curiae Law Professors & Economists in Support of Petitioner
let us not get started.  


I am not picking on Orin’s brief. It’s just the first one that came up in my search. Go Orin!


See, e.g., Ross E. Davies, Arthur Conan Doyle’s Pig, and Yours: A Challenge, 2016 Green Bag Almanac & Reader 537 (inviting contributors to draw a pig with their eyes closed and submit the contributions to the Green Bag). Example provided by way of illustration, not by way of conveying disapproval of any kind. No hate. But see James Grimmelmann, Renvoi and the Barber, 22 Green Bag 2d 109 (2019) (discussing, in essay published in the Green Bag, the revoi paradox in choice of law by reference to the musical Sweeney Todd). Professor Grimmelmann’s essay is apparently not “scholarly” according to SSRN, as it appears on his SSRN page as an “Other Paper.” See Author Page for James Grimmelmann, SSRN.com, papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=413551. In response to my original post at the Faculty Lounge, James Grimmelmann commented that, apparently, SSRN doesn’t consider every paper published in the Green Bag to be a “full scholarly research paper[.]” I received a similar email about my essay Renvoi and the Barber. It may not be a long paper (16 pages), but I certainly sweated every word and it makes, in my opinion at least, an original contribution to legal theory. I opened a support ticket a week ago to inquire on what basis SSRN thinks that it is not scholarship, but I have received no reply.
Bag folks will be publishing in the future.  

Hate not the Green Bag. I love it; but I seek clarity. And there seems to be a selective “grandfathering” rule, so that my online law review companion submission guide could be “publicly available” because the one by Nancy Levit and Allen Rostron is, but my review of estate and gift tax articles from 2016 could not be “publicly available,” even though my own reviews of a similar nature published in each of five prior years were.

How do these definitions of “non-scholarly” and “scholarly” work map on legal scholarship? (I guess there is “advocacy” and then there’s “normative” scholarship, and the two are not the same, but can be.) How many of the inconsistencies (as I see them) are related to (or a consequence of or arise from) Elsevier’s 2016 acquisition of SSRN? If I were interpreting SSRN’s self-stated rules, I would be a little more relaxed and look favorably on “appeals” or requests to reclassify, upon a showing of the scholarly or pedagogical value of material.

SSRN self-describes its mission as follows:


See, e.g., Ross E. Davies, Laws of Demand and Supply, 2019 BAKER STREET ALMANAC 1 (2019) (describing in approximately 300 words the motivation for a new publication as moving “away from putting a little bit of Sherlock Holmes into many of our legal publications and toward putting a little bit of law into an annual Holmes publication.”). Perhaps it is more accurate to say that SSRN considers as scholarly anything written by Ross Davies, not “anything published in the Green Bag.” See supra note 31 and accompanying text. But see Author Page for Ross E. Davies, SSRN.com, papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=266098 (listing 118 “Scholarly Papers” and 9 “Other Papers”).

See supra notes 9-15 and accompanying text.

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SSRN’s objective is to provide rapid worldwide distribution of research to authors and their readers and to facilitate communication among them at the lowest possible cost. In pursuit of this objective, we allow authors to upload papers without charge. And any paper an author uploads to SSRN is downloadable for free, worldwide.¹⁷

Does the classification of publicly-available “scholarly” papers and privately-available “non-scholarly” papers as applied serve SSRN’s mission? To me, the answer is no. That is, my opinion is no.³⁸ Brian Frye’s patentability piece,³⁹ which strikes me as a great teaching and learning tool, has an easy home in the “Law Educator: Courses, Materials & Teaching eJournal,”⁴⁰ if not the substantive IP eJournals (not my field).⁴¹ Oh, but wait, are “Courses” scholarship? They must be. So must be “Materials,” because they are publicly available and only “scholarly” works are publicly available. But Brian’s piece is not “teaching material” in SSRN’s universe? That does not make any sense to me.

Like others, I have been (and remain) skeptical of Elsevier’s acquisition of SSRN.⁴² Since then, I have noticed that papers tend to take longer to get “approved.” (The longest wait I have had is six weeks, and even then, I had to contact customer service to point out that it had been six weeks since submission, and could SSRN pretty please post the piece.)³ I find useless the JEL Classification Codes (not an Elsevier invention), at least in the

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³⁸ SSRN does not publish opinions. See supra note 1 and accompanying text (SSRN’s explaining policy against making publicly available papers that are “opinions”). One must wonder how it is that SSRN publishes any normative legal scholarship at all, then. See id.
⁴² See supra note 37 and accompanying text.
⁴³ See, e.g., Classification and Distribution Information for Bridget J. Crawford and Michelle S. Simon, The Supreme Court, Due Process and State Income Taxation of Trusts, SSRN.COM, papers.ssrn.com/abstract=3358502 (showing creation date of March 22, 2019 and “last updated” date of May 9, 2016).
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case of the “Law & Economics” (or “K”) codes applied to most law review scholarship.44 These sort codes are so blunt as to be useless for my research, at least. Maybe the codes work better in Economics (after all, the classification system was developed by the *Journal of Economic Literature*).45

Like others, I am waiting to see if an alternative to SSRN develops.46 Until then, the SSRN downloads remain the coin of the realm in many subsdisciplines in law.47 For now, I think the answer to Brian Frye’s, “Why judge” question48 is: “SSRN does because it can.”

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44 See, e.g., Browse JEL Classification Codes, K: Law and Economics, SSRN.com, papers.ssrn.com/sol3/displayjel.cfm (listing 29 classification codes applicable to “Law and Economics,” including K00 [“General”], K1 [“Basic Areas of Law”], K10 [“Basic Areas of Law-Other”], K2 [“Regulation and Business Law”], “K29 [“Regulation and Business Law-Other”], K3 [“Other Substantive Areas of Law”, K39 [“Other Substantive Areas of Law-Other”], K4 [“Legal Procedure, the Legal System, and Illegal Behavior”], and K49 [“Legal Procedure, the Legal System, and Illegal Behavior-Other”]. There is no category for “Other-Other.” See id.

45 JEL Classification System/EconLit Subject Descriptors, American Economic Association, www.aeaweb.org/econlit/jelCodes.php (“The *JEL* classification system was developed for use in the *Journal of Economic Literature (JEL)*, and is a standard method of classifying scholarly literature in the field of economics. The system is used to classify articles, dissertations, books, book reviews, and working papers in EconLit, and in many other applications.”).

46 James Grimmelmann’s comment to the original blog post, for example, reminds readers of the value of “self-archiving, law-school hosting of faculty publications, and open alternatives like LawArXiv.” See Comment of James Grimmelmann, supra note 31.


48 See Frye, (@brianlfrye), TWITTER (May 20, 2019), supra note 1.