



P.O. Box 5337, Arlington, VA 22205-5337 • 703-237-9806 • Fax 703-237-9808

February 22, 2011

Michelle Timmons
Chair
Drafting Committee for Authentication and Preservation
of State Electronic Legal Materials Act
700 State Office Building
100 Rev Martin Luther King Blvd
St. Paul, MN 55155

Dear Ms. Timmons:

On behalf of the members of American Court and Commercial Newspapers, Inc. (ACCN), a national organization of newspapers that cover the courts and the law in America, we are writing to express our interest in the work of the APSELM committee, and to provide some thoughts for your committee.

We urge the committee to take the following actions:

1. To set the highest bar for authenticity and verification for state law websites; and
2. To maintain the core printed products required now in state law because reliable archival systems cannot be committed today for readers of tomorrow in an era where public funding is at grave risk, and because the public lacks uniform access to digital products.
3. To ensure that official government publishers perform the functions of providing core data in an open network manner, which the creativity and investment of private publishers may enhance for a robust legal materials marketplace. Government publishers should be restricted from holding copyrights in core legal materials so that the marketplace may fully function and public access by libraries may be preserved.

First, some background on our organization and the reasons for our interest.

ACCN represents about 100 newspapers nationwide. Our mission has long been to cover legal and business news in American cities and states. Many of our newspapers are prize-winning publications, having broken many stories that found their way into mainstream media and led to improvements in legal systems or airing of important public debates. Our readership is primarily within the legal and commercial sectors, though private citizens find our publications of interest as well. Among our strengths is a nationally recognized expertise in public notice, which brings us today into public debate about the use of websites and their relation to reliable printed materials. Along with other newspaper organizations across the country, we founded the Public Notice Resource Center (PNRC) in 2002 to track and inform our members and the public on trends in providing authentic, independent public

notice on actions of government bodies and private entities engaged in exercising powers that impact communities.

In addition, our newspapers are active members of other state and national press organizations that actively advocate for open government and transparency. We believe trust in our state and local governments depends wholly upon the ability of citizens to observe the branches of government in action—through newspapers, the Internet and as direct participants—and we regularly express our views on matters that may obscure these actions to our readers.

Finally, as newspapers with technologically-active staffs and readerships, we are leading the way to a new digital generation. We have active websites and digital applications, as well as respected newspapers in print. With the rest of the information services world, we are feeling our way into digital transitions, and our insights into what works and what does not inform our comments here.

We believe the work of your committee is of the highest importance in today's digital transition. The right product from this committee will illuminate citizens' paths to reliable information; the wrong product will establish benchmarks that will elevate expediency to the detriment of transparency and reliability.

Authenticity and Verification

The importance of the public's ability to make its own determination that the information it receives is authentic is at the core of the trust in our legal system. Trust in the law relies wholly upon the ability of the public to see for itself how the institutions that shape the law function, and to know that the information received from them is reliable and authentic. In today's system, the imprimatur of an official printer provides a citizen researcher the assurance that the words on paper are written as intended by the crafters of law. But in an Internet world, determining that the visual readout of bits and bytes from an invisible server are true and unaltered is tremendously difficult. The public cannot easily see the path from, for example, a judge's chambers to a government website, and pervasive reports of hacking by mischief makers on well-known websites gives rise to doubt.

As Justice Burger once noted, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. Richmond Newspapers v Virginia, 448 U.S. 555, 572 (1980). Though the statement was directed at long-standing openness at common law of criminal proceedings, the statement is much quoted as universally true about any public institution whose mission depends upon public trust.

There is little reason for the public to doubt the authenticity of a court opinion, statute or administrative rule published in an official printed journal. But in a digital world still in its infancy, the public has had multiple occasions to distrust and fear the authenticity of what it sees on the Internet. These are just a few examples of incidents covered by our newspapers and others when the open networks of the Internet have been invaded to snatch veracity and safety from the postings on the Internet.

- People using Mac and Windows clipboards have been diverted by hacker software posing as security applications.
<http://www.networkworld.com/news/2008/081908-mac-windows-clipboards-poisoned-by.html>.
- Phishing invasions remain pervasive, as hackers try to gather banking information with fake Patriot Act notices. <http://www.networkworld.com/news/2011/011311-patriot-act-phishing-e-mails-resurface.html>
- Even while trying to combat H1N1, the Centers for Disease Control were plagued by their own viruses, as users were diverted by a phishing scam to a fake vaccination program.
<http://www.emergencyemail.org/newsemergency/anmviewer.asp?a=436&z=29>
- People have been invited to hand over large sums of money to pay off alleged “fines” for visiting Wikileaks. The Spokane BBB warned of a phone scam threatening consumers with fines and jail time. A local resident reported she received an automated phone call telling her that her computer and IP address had been noted as having visited the *Wikileaks* site, and that there were grave consequences for this, including a \$250,000 or \$25,000 fine, perhaps imprisonment. The consumer was presented with options to pay the fine. The FBI said "Caller ID is essentially meaningless" and reflects a spoofed phone.
<http://www.networkworld.com/community/blog/fbi-warns-trojan-tainted-resumes-other-phishi>
- Military secrets have exposed. The nation’s classified secrets were exposed in 2008 when a key military networks were hacked via a thumb drive inserted into a laptop computer. <http://www.technewsworld.com/story/70699.html> and Keith Alexander, head of the National Security Agency warns of international plots to create a virtual 9/11 against US computer systems.
<http://www.networkworld.com/community/blog/cyber-warfare-us-military-hackers-and-spies-p>.
- In fact, US elections may be threatened by exposure to hackers because of electronic voting, Alexander says. <http://www.examiner.com/progressive-in-boston/electronic-voting-machines-u-s-at-risk-from-foreign-hackers-attacking-military-computers>.
- Recent uprisings in the Middle East have reminded the public that governments have the capacity to shut down the Internet entirely if they can gain control over key ISPs.
<http://isoc.org/wp/newsletter/?p=3100>.
- Local governments are not immune from malfeasance on the Internet. In Tennessee, a critic of the county’s speed cameras grabbed up a lapsed domain name from the city police department and used the website to vent his irritation at the camera policy. The police chief said: “If you open up a website and let it go down, somebody

can buy it – I did not know that.” [Anti-speed camera activist nabs Bluff City PD’s expiring web domain.](#)

- Our newspapers regularly chart incidents of local and state government websites that have broken links, are down for maintenance, contain yet-unbuilt pages or are subjected to denial-of-service attacks.

The Internet undoubtedly is working its way to providing newly-searchable and cost-effective media for providing information. Internet advocates will say that such outages and abuses are to be expected in a system designed for open networking, and that perfection was never a goal of the early Internet visionaries. While each incident may reflect exposures and weaknesses of only one type or in only one system, the regularity of these news stories and of citizens’ personal experiences with inoperable or compromised websites add to a mass of public skepticism of the Internet’s reliability. It would take only a handful of incidents of a new state law domain’s being corrupted, phished or brought down by malfeasants to call an entire system of publications into question.

Section 4 of the Committee’s November draft addresses the anticipation of the internet’s vulnerabilities. Requiring an official publisher to certify that an electronic record is a true and correct copy is an essential first step. Providing transparency into the certification process is the essential second step. The public must see the system in operation to trust it. It must be able to understand such validation systems as public keys, or to be able to determine that trusted Internet experts have put an imprimatur on such systems.

We believe, however, that the draft does not go far enough. As written, it permits an official publisher to avoid the authentication step if the publisher also maintains a print version of its material. The Committee should require all electronic versions offered by an official publisher to follow the requirements of Section 4. It is unreasonable to expect Internet readers to seek out a printed official version of legal materials simply to satisfy themselves that the Internet copy they are reading is authentic. As legal materials migrate to online versions, the highest standards must prevail, even when print editions remain available. And we believe the print editions must remain available for the foreseeable future.

Archivability

A principal reason for our belief that print editions remain essential is the ease of archiving print.

We can all imagine ourselves attempting to read an electronic document created from the 8 inch floppy disks created by IBM in the 70s. Or the 5-inch plastic disks in the 80s. Many of us still have newspaper editions on “zip drives” created by Iomega in the 90s, and virtually everyone has kept a version of a document on today’s thumb drives.

Even as the committee works, we would venture that a number of observers are struggling with the transition from Microsoft Word 2003 to Word 2007—which cannot be

read by the 2003 user unless he is sophisticated enough to use a downloaded transformer. The 2003 user cannot edit the 2007 user's version. Internet browsers regularly require updating, and those without the ability to use new versions are left in the ditch on the information highway.

At our newspapers, we maintain printed archives in bound editions. Our staffs, our readers and our advertisers rely on access to those archived copies to find items that ran in the newspapers as recently as five years ago. Genealogists and historians probe microfilmed facsimiles of printed newspapers for historical records of adoptions, divorces, land transfers and bankruptcies that have been printed in our newspapers. Though today's digital versions may reach many of our constituencies, none of us can promise that those versions will remain ubiquitous in decades to come. We may not even be able to read our own digital versions in 20 years. That is why we maintain print copies in archives.

We understand that the Library of Congress has advised its partner libraries that no digital version of a record is of reliable archival quality, precisely because the technology moves and morphs into new versions so often.

Thus, we have doubts of the efficacy of the Committee's Draft Section 6. In particular, we question the section that requires the official publisher to:

"ensure the continuing usability of the legal material, which may include periodic updating into new electronic formats as necessary."

But the price of such insurance is beyond any present publisher's ability to foretell. With state funding cuts striking deeply into the budgets of libraries, historical societies and archives, even the price of today's updates will be beyond the capacity of many agencies. Who is to foretell the price of tomorrow's updates?

The chilling aspect of neglected maintenance of these materials is that some damage may be permanent. Lost archives can become a cumulative risk. An agency that is unable to update from version 1.0 to version 2.0 may discover on the day that version 5.0 is available that no currently available application can read 1.0. Those materials, if not also in print, could be lost to history.

Martha Anderson, director of program management of the National Digital Information Infrastructure and Preservation at the Library of Congress, cautions about the ephemeral digital world. She estimates that only 1 percent of the Library's holdings are digitized. She has spoken to newspaper experts frequently about the challenges of preservation, and warns that keeping trilobytes worth of electronic files is not the same as preservation. To guarantee preservation, continuous public funding and careful management must be in place for all digital materials carrying historic importance. But no legislature, and certainly no court or executive agency, can bind future lawmakers' decisions on funding. Entire strings of preserved materials may be abruptly lost—and are doubtless in the process of being lost in 2011 because of funding cuts—when the money runs out.

Thus, The Public Notice Resource Center's conclusion about the state of digital development is that that electronic records—even when properly authenticated—cannot yet

fulfill preservation requirements, unless massive public investment is made on a continuous basis to update them—a commitment that cannot be guaranteed by any stakeholder today.. Publicly-available printed materials must be preserved, now and in the foreseeable future.

Accessibility

Internet users without access to broadband technology are users without meaningful access in today's heavily-loaded download world. While a printed law book may be available in a local public or law library, or for purchase from a public printer, the digital version may not be as easily accessible.

The most recent maps from the United States Department of Commerce show wide gaps remaining in broadband coverage across America. <http://www.broadbandmap.gov/technology>. But the Commerce data do not reflect practical access, which is limited not only by lit fiber but by price of service. With broadband packages ranging upward of \$75 in most cities, economic constraints limit practical access. The Pew internet and American Life Project reported last year that only two-thirds of American households have broadband service at home.

Even for those with broadband service, clear patterns of usage have developed. Defeating the high hopes of many municipalities and states who have wanted to use their websites to get their message out., poor readership of government websites has shown up consistently in independent research. In Pew's most recent survey, only 44 percent of Americans had used a government website at all in the previous year, and most of those went to these sites for purely transaction reasons—such as to update a driver's license. Most say they still prefer to interact with their governments by phone. <http://www.pewinternet.org/Reports/2010/Government-Online/Part-One/How-Americans-use-government-websites.aspx>.

Online access is a more difficult matter for identifiable age groups: older Americans, minorities and rural citizens. In 2010, access by citizens 65 or older had not yet reached 50 percent of that population, and access by citizens 50-64 had barely cleared 75 percent. With an aging population greatly affected by changes in the laws of health care, benefits and taxation, limited digital usage is a matter of concern.

In 2010, only 46 percent of black men and 44 percent of black women had visited a government website, according to Pew. For Hispanic populations, government sites were visited by 44 percent of men and 42 percent of women. <http://www.pewinternet.org/Infographics/Interaction-with-the-Web-by-Race-and-Gender-2001.aspx>.

In rural America, only 31 percent of residents have access to digital information through broadband service.<http://www.dailyonder.com/broadband-connection-highs-and-lows-across-rural-america/2009/02/11/1921>.

These digital divides remain a challenge for all of us wishing for an informed, well-read electorate. It may be true that some legal materials available today in print are barely more accessible. Some will say that the availability of computers at public libraries helps to close the gap. But the library computers provide the illusion of a solution. Computer time is often scarce and usage data would suggest they are being used primarily for email and entertainment, not for research or access to government information. ACCN believes that printed books, digests and official publications even if available only in county or law school libraries, will be necessary to meet the needs of many for the foreseeable future. When the access challenges are added to the archiving needs, the case for print is strong indeed.

The Value of the Marketplace

ACCN's member companies do not operate primarily in the legal books marketplace, nor do we operate massive online databases for court decisions, as do our brothers and sisters in the world of law book publishing. PNRC's stakeholders are primarily newspapers, not legal book publishers.

Tim

But we do cover lawyers, courts and public bodies in our newspapers.

We appreciate the value-added products that our brothers and sisters in the law-book-publishing world, have provided. The searchability and complex linking of resources in such systems as WestLaw or Lexis online databases have made the world of legal research less expensive and more effective. Our court systems would be less vibrant if the principles of legal information through official state publishers began in any way to restrict or compete with the abilities of the marketplace to meet the demands of information users. On the contrary, the economic rigors of competition will take the pure data of government digital products into new and less-expensive products as the internet and digital applications evolve. The public-spirited missions of our nonprofit libraries and digital pioneers will make digital products available to those who need free access.

Thus, we recommend to your drafting committee one additional provision. To Section 7,, we would enumerate the existing proposal as subsection 1), and add a subsection 2):

“[notwithstanding any other section in this code], the official publisher of legal material is prohibited from holding a copyright or any other property right in information produced with public funds.”

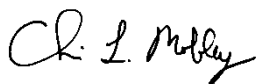
The federal government is prohibited under Title 17 from holding a copyright interest in most materials produced with taxpayer funding. The omissions of such restrictions in many states laws are a creeping menace to transparency, causing legal matters to become available only to those able to pay, despite the fact that their creations were supported originally by public funds. This draft presents your committee with an opportunity to correct those wrongs in a substantially-important area of information practice.

Conclusion

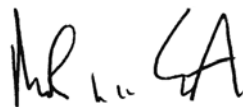
At ACCN and PNRC, we believe your work in this proposed law is critical and timely. The November draft that we reviewed takes important steps to creating a reliable and trusted core base of digital law information. The product will be stronger if it mandates highest standards of authenticity and verification, recognizes the need for continued printed materials for accessibility and archiving, and promotes the best values in free access to the public and the vigorous creativity of the marketplace by making official materials available to all, without restrictions of copyright or usage.

We will be following the progress of your work through the debate of Commissioners in July, and ACCN intends to be actively involved as state legislatures consider your final recommendations. We appreciate the opportunity to share our views.

Sincerely,



Chris Mobley
President, American Court and Commercial
Newspapers, Inc. and
Publisher of Miami Daily Business Review



Mark W. C. Stodder
President, Public Notice Resource Center and
Executive Vice President, The Dolan Company,
Minneapolis, MN



Bradley L. Thompson II,
Legislative Chairman, American Court and
Commercial Newspapers, Inc. and
President, Detroit Legal News

