

EDITOR'S NOTE — OPEN ACCESS TO LEGAL SCHOLARSHIP

Josh Wilner*

Open access could be the next step in a tradition that includes the printing press and penny post, public libraries and public schools. It is a tradition bent on increasing the democratic circulation of knowledge ...¹

What began four years ago as an ambitious, student-initiated pilot project called the *McGill Health Law Publication* is today reborn as a full-fledged academic journal. It is with great pleasure that I present on behalf of our team of volunteer student editors the inaugural issue of the *McGill Journal of Law and Health* (“*MJLH*”) / *Revue de droit et santé de McGill* (“*RDSM*”). With the drafting of our constitution we have planted the seed of our very own living tree—an embodiment of what is sure to be a lasting institution at McGill’s Faculty of Law. We are a new voice in legal publishing, a field that is in need, in particular, of more specialist journals.²

À tous ceux qui ont donné leur support à cette initiative croissante dès son instauration il y a à peu près quatre ans — et particulièrement au doyen Nicholas Kasirer, aux professeures Angela Campbell et Lara Khoury, et à l’ensemble de notre comité consultatif — j’aimerais exprimer mes remerciements les plus sincères. J’aimerais aussi remercier ma collègue et amie Virginie Marier, qui me succèdera comme rédactrice en chef pour le prochain volume de la revue, pour sa vision et son leadership dans notre renaissance comme le *RDSM*.

In making its peer-reviewed content available free of charge on the internet (see www.mjlh.mcgill.ca), the *MJLH* is unique among Canadian law journals. The advent of so-called “open access” publishing offers a new model for the operation of scholarly journals, and its promise is reflected in the expanding literature—both general³ and specifically legal⁴—devoted to this pioneering concept. An oft-quoted definition of “open access” stems from a meeting convened in Budapest by the Open Society Institute in 2001, the purpose of which was to “accelerate progress in the international effort to make research articles in all academic fields freely available on the internet”:

* Editor-in-Chief, *McGill Journal of Law and Health*, Vol. 2.

¹ John Willinksy, *The Access Principle: The Case for Open Access to Research and Scholarship* (Cambridge, Massachusetts: MIT Press, 2006) at 30.

² Bruce Ryder, “The Past and Future of Canadian Generalist Law Journals” (2001) 39 *Alta. L. Rev.* 625.

³ See e.g. Leslie Chan, “Supporting and Enhancing Scholarship in the Digital Age: The Role of Open-Access Institutional Repositories” (2004) 29 *Canadian Journal of Communication* 277; Dominique Foray, *The Economics of Knowledge* (Cambridge, Massachusetts: MIT Press, 2004); R. Kling & E. Callahan, “Electronic Journals, the Internet and Scholarly Communication” (2003) 37 *Annual Review of Information Science and Technology* 127; R.P. Peek & G.B. Newby, eds., *Scholarly Publishing: The Electronic Frontier* (Cambridge, Massachusetts: MIT Press, 1996).

⁴ See e.g. *Declaration on Public Access to Law*, online: World Legal Information Institute <<http://www.worldlii.org/worldlii/declaration/>>; Science Commons Open Access Law Program, online: Open Access Law Program <<http://sciencecommons.org/projects/publishing/oalaw/>>; Open Access Law Canada, online: OALC <<http://www.openaccesslawcanada.ca/>>; Caroline Christiansen, “Electronic Law Journals” (2002) 30 *Int’l J. Legal Info.* 337; Dan Hunter, “Walled Gardens” (2005) 62 *Wash. & Lee L. Rev.* 607; Richard A. Danner, “Applying the Access Principle in Law: The Responsibilities of the Legal Scholar” (2007) 35 *Int’l J. Legal Info.* 355; and the numerous articles resulting from a recent symposium on open access in law, including Lawrence B. Solum, “Download It While It’s Hot: Open Access and Legal Scholarship” (2006) 10 *Lewis & Clark Law Review* 841; Michael J. Madison, “The Idea of the Law Review: Scholarship, Prestige and Open Access” (2006) 10 *Lewis & Clark Law Review* 901; Michael W. Carroll, “The Movement for Open Access Law” (2006) 10 *Lewis & Clark Law Review* 741; Ann Bartow, “Open Access, Law, Knowledge, Copyrights, Dominance and Subordination” (2006) 10 *Lewis & Clark Law Review* 869.

By “open access” to this literature, we mean its free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.⁵

This touchstone definition of “open access” defines a model that is susceptible of many forms and degrees of application. “Open access” is, in reality, an umbrella concept that comprises numerous variations in practice: for John Willinsky, Professor of Education in the Department of Language and Literacy at the University of British Columbia, there are ten “flavours” of open access.⁶ In what might be considered a recognition of the merits of open access, the Supreme Court of Canada is presently considering posting court files online.⁷

L’application de ce principe multiforme mais aussi unifiant dans le domaine juridique ne peut pas procéder sans considération de la nature même de la doctrine juridique. Comme l’a dit Madison, «Open access for law reviews really invites a hard look at law reviews and legal scholarship in general»⁸. Le modèle libre accès se prête particulièrement bien au domaine juridique, comme le reconnaît la professeure américaine Jessica Litman, réputée dans le domaine des droits d’auteurs: «Law journal publishing is one of the easiest cases for open access publishing»⁹. L’application d’un principe de libre accès au Québec invite à réfléchir sur le caractère privilégié—auprès des juridictions de «common law»—de la doctrine comme source formelle de droit dans les juridictions de droit civil.

Implementing open access in legal publishing also invites reflection on the placement and role of law journals within law faculties. According to one commentator,

When law reviews are based in law schools, they serve a larger purpose — they proclaim that law schools are not trade schools, but are citizens of the scholarly community and the broader public community, participating in contemporary debates. By their existence, law reviews remind us that law is not only a practice, but also an intellectual discipline and pursuit.¹⁰

In terms less political, working on a legal journal can be considered part of, not an addition to, a legal education; the work of editors is curricular, not extra-curricular. In terms more political, law faculties and law students are citizens of the greater communities within which they exist and live, contributing to debate and dialogue by engaging in public fora.¹¹

The open access format of the *MJLH* reflects the journal’s institutional commitment that high-quality, peer-reviewed research is a public good that should be available to all. The journal’s mandate is informed by the *access principle*, which articulates an ethical obligation

⁵ See online: Budapest Open Access Initiative <<http://www.soros.org/openaccess/>>. To date, the Initiative has 5,225 signatories, including Université de Montréal, Université Laval, the Conférence des recteurs et des principaux des universités du Québec, the Canadian Library Association, the Fonds québécois de la recherche sur la nature et les technologies Québec, the United Nations Food and Agriculture Organization, and Massachusetts Institute of Technology Libraries.

⁶ See Willinsky, *supra* note 1 at 212-217, appendix A. The ten flavours of open access are homepage, e-print archive, author fee, subsidized, dual-mode, delayed, partial, *per capita*, indexing, and cooperative.

⁷ Janice Tibbetts, “High court weighs putting files online: Decision expected this fall on electronic access” *Ottawa Citizen* (28 July 2008) A2. Mick Ryan, chair of the Canadian Bar Association committee that has been working with the Supreme Court on this issue, is quoted in the article as saying, “I think it’s inevitable that it will happen because the courts are really concerned about having an open access policy and being transparent.”

⁸ Madison, *supra* note 4 à la p. 902.

⁹ Jessica Litman, “The Economics of Open Access Law Publishing” (2006) 10 *Lewis & Clark Law Review* 779 à la p. 783.

¹⁰ Donna Grescher, “Law Reviews as Cultural Narrative” (2001) 39 *Alta. L. Rev.* 616 at 623.

¹¹ For a novel argument that Wikipedia should be used as a tool for engaging law students in their education, allowing for collaboration, participation, and debate, see Beth Simone Noveck, “Wikipedia and the Future of Legal Education” (2007) 57 *J. Legal Educ.* 3.

for journals and other institutions of learning to disseminate the work they publish as widely as possible:

“The access principle”: A commitment to the value and quality of research carries with it a responsibility to extend the circulation of such work as far as possible and ideally to all who are interested in it and all who might profit by it. What follows on this principle, given the current transformation of journals from print to online formats, is that researchers, scholarly societies, publishers, and research libraries have now to ask themselves whether or not they are using this new technology to do as much as can be done to advance and improve access to research and scholarship.¹²

The access principle is more than a mere theoretical aspiration. It has recently found concrete expression in the granting policy of the Canadian Institutes of Health Research (“CIHR”), the primary federal agency responsible for funding health research in Canada. In unveiling the *Policy on Access to Research Outputs*¹³ in September 2007, former CIHR President Dr. Alan Bernstein stated:

With the development of the internet it is now feasible to disseminate globally and easily the results of research that we fund. As a publicly-funded organization, we have a responsibility to ensure that new advances in health research are available to those who need it and can use it—researchers world-wide, the public and policy makers.¹⁴

The National Institutes of Health, part of the U.S. Department of Health & Human Services, has a similar *Public Access Policy*.¹⁵ In March 2008, notably, the Harvard Law Faculty voted unanimously to make each faculty member’s work available online for free.¹⁶ These significant developments are evidence of an increasing recognition that with the creation of knowledge comes a responsibility for its dissemination. The *MJLH* is proud to be a part of this developing trend.

Le potentiel du libre accès, néanmoins, n’est pas encore complètement réalisé. Le concept d’accès, comme celui de *libre accès*, est une question de degré. La prochaine étape dans le mouvement vers le libre accès sera d’adapter les moteurs de recherche à la doctrine publiée en ligne pour rendre leur découverte aussi facile que celle des autres outils de recherche dans les banques de données.¹⁷

To accomplish this goal, more information is required *about* information. Scholarship published online can be catalogued using descriptive “metadata tags” and thereby made searchable from a centralized database. This is what the Budapest Open Access Initiative means when it refers to “crawling” open access articles for indexing. A prime example of the full potential of open access publishing, albeit in nascent form, is OAIster,¹⁸ which “harvests” metadata and centralizes it in a searchable directory.

As Danner notes, “... information technology is changing the traditional roles and future possibilities for the existing parties in the system of scholarly communications: scholars (as both creators and users of scholarly information), publishers, and libraries.”¹⁹

¹² Willinsky, *supra* note 1 at xi [emphasis omitted].

¹³ See online: CIHR <<http://www.cihr.ca/e/34846.html>>.

¹⁴ CIHR, News Release, 2007-32, “Open access to health research publications: CIHR unveils new policy” (4 September 2007), online: CIHR <<http://www.cihr-irsc.gc.ca/e/34851.html>>.

¹⁵ See online: U.S. Department of Health & Human Services <<http://publicaccess.nih.gov/>>.

¹⁶ Harvard Law School, News Release, “Harvard Law faculty votes for ‘open access’ to scholarly articles” (7 May 2008), online: Harvard Law School <http://www.law.harvard.edu/news/2008/05/07_openaccess.php>.

¹⁷ Madison, *supra* note 4 à la p. 917 note 49.

¹⁸ See online: OAIster <<http://www.oaister.org/>>.

¹⁹ Richard A. Danner, “Electronic Publication of Scholarly Information in Law: A View from the United States” (2000) 28 Int’l J. Legal Info. 465 at 467-8.

Avec toutes ces possibilités de développements excitants à l'horizon, le futur de la plus jeune revue de la Faculté de droit de McGill, la *Revue de droit et santé de McGill*, est des plus prometteurs.

À votre santé!