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## A Response to *The Durham Statement Two Years Later*

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## A Response to *The Durham Statement Two Years Later*\*

Margaret A. Leary\*\*

*This response to The Durham Statement Two Years Later, published in the Winter 2011 issue of Law Library Journal, addresses that article's call for an end to print publication of law journals and its failure to sufficiently consider the national and international actors and developments that will determine the future of digital libraries.*

¶1 Two weaknesses in *The Durham Statement Two Years Later: Open Access in the Law School Journal Environment*<sup>1</sup> stimulate my response to that article. One is the continuation of the Durham Statement's call for "an end to print publication of law journals."<sup>2</sup> If academic law journals are worth preserving for future readers, they must be kept in paper regardless of the existence of electronic availability. The second is that the three steps called for at the end of the article do not sufficiently consider the national and international actors and developments that will determine the future of digital libraries. Law librarians should enter the mainstream rather than attempt to set up separate processes in this area in which we have no special expertise.

### The Call for an End to Print Publication

¶2 A cartoon on the cover of a 2009 issue of *The New Yorker* shows a wrecked urban landscape, with a few flowers, a background of Manhattan-like skyscrapers across a river, and no people. In the foreground, a green-skinned spaceman—whether a returned astronaut or an extraterrestrial visitor is unclear—rests with his back to the remains of a brick wall.<sup>3</sup> He sits amid shards of CDs, DVDs, perhaps some money, and other fragments. He looks both puzzled and pleased. From the spaceship hovering overhead, there is no sign of technology: no light, no power lines, and no communication devices. The man from outer space is reading, or at least examining, a book—the only usable object in sight. This cartoon inspired me to suggest, in a talk on the Durham Statement that I gave at the 2010 AALL Annual

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1. Richard A. Danner, Kelly Leong & Wayne V. Miller, *The Durham Statement Two Years Later: Open Access in the Law School Journal Environment*, 103 LAW LIBR. J. 39, 2011 LAW LIBR. J. 2.

2. Durham Statement on Open Access to Legal Scholarship (Feb. 9, 2009), available at <http://cyber.law.harvard.edu/publications/durhamstatement>.

3. NEW YORKER, June 8 & 15, 2009 (cover).

Meeting,<sup>4</sup> that the statement should be reviewed and revised with respect to its call for an end to print publication of law reviews.

¶3 *The Durham Statement Two Years Later* does not fully address this request, so I repeat it here.<sup>5</sup> A reexamination of the recommendation to cease print publication (of law reviews, or any truly important category of information) should take a long view, both backward into history and forward into future possibilities. If we believe that legal scholarship is worthy of permanent retention, we should encourage the existence and retention of paper, in addition to digital, copies. Certainly the number of paper copies produced, purchased, and preserved by libraries will go down, but to eliminate print production would be foolhardy. For the foreseeable future, print will be the best format to ensure present and future access to any given literature. Simply put, we know how to preserve paper, and we don't know how to preserve fragile digital documents for the long term. We have acid-free paper, the means to neutralize acid paper, reliable binding methods, and libraries and archives designed to hold paper. Electronic access is far superior to paper in almost every way: e-versions are more searchable, portable, and transferable than paper. But paper is superior as a permanent storage medium.

¶4 Here are the elements we should take into account:

- Research libraries, especially those that are public and have superb collections, exist to provide information and knowledge to support current and future research. This duty includes permanent retention of the most important sources of information about our history and culture.
- These libraries function as repositories of knowledge for the indefinite future, and the format of that knowledge should be able to survive the political, economic, and physical upheavals that we know have occurred in the past and are likely to occur in the future.
- Only analog formats (print or microform) can now fill that need.

¶5 Harvard's Robert Darnton has said, "Nothing preserves texts better than ink imbedded in paper . . . except texts written in parchment or carved in stone."<sup>6</sup> Print on paper is surely sturdier than the electronic on-and-off blips of ever-changing digital media.

¶6 In contrast to paper, digital repositories require

- a digital format that is consistently accessible over time;

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4. "The Durham Statement on Open Access One Year Later: Preservation and Authentication of Legal Scholarship," presentation at the 103rd Annual Meeting of the American Association of Law Libraries, Denver, Colorado, July 13, 2010.

5. The article argues that print is perishable and expensive to buy and house, and that digital access is the preferred access method. Danner, Leong & Miller, *supra* note 1, at 46, 47, ¶¶ 24, 28. After discussing options for digital formatting (*id.* at 47–49, ¶¶ 29–33), issues of preserving digital information are covered (*id.* at 50–52, ¶¶ 37–42). The issues I outline above are not addressed.

6. ROBERT DARNTON, *THE CASE FOR BOOKS* 37–38 (2009). *The Durham Statement Two Years Later* quotes Darnton's statement "Information has never been stable." Danner, Leong & Miller, *supra* note 1, at 46, ¶ 23 (quoting DARNTON, *supra*, at 29). But Darnton's point in the first chapter, which contains both quotes, is the relative instability, unreliability, and unpredictable future of the Google digitization project.

- software to use the digital format;
- hardware on which to load the digital information and use the software;
- a stable Internet environment to transport the digital information;
- a steady source of electrical power, which in turn requires a stable natural environment; and
- a stable, open political environment, which values and sustains public access to information, including an infrastructure to make that possible.

¶7 *The Durham Statement Two Years Later* acknowledges the existence of rapid change in digital formats, software, and hardware; admits that such instability will continue; and assumes the situation can be accommodated over time, and will remain sustainable. Yet the article does not mention the requirements of a steady source of electrical power, an infrastructure to distribute both power and digital information, and the absence of natural disasters such as floods, hurricanes, earthquakes, blizzards, lightning, and other forces. Acknowledging that digital preservation is an unsolved problem, as *The Durham Statement Two Years Later* does, without reconsidering the wisdom of ceasing print publication, incompletely addresses my concern.

¶8 Nor does *The Durham Statement Two Years Later* acknowledge the ways in which both electrical power and a usable Internet—*sine qua non* for access to digital information—can be affected by deliberate sabotage, aging infrastructures, political instability, or outright interference with all kinds of communication, including the Internet. History is filled with examples of censorship, imprisonment, and even execution of dissenters. This approach extended to the Internet recently in Egypt, where the government shut down the network and limited cell phone access in order to disable protestors' communication with each other.<sup>7</sup>

¶9 The difficulties that may arise in gaining access to digital information also diminish the reliability of the documents themselves. Digital repositories should ensure the intertwined features of security and authenticity. The U.S. government has only recently found a method to authenticate enacted legislation; states are still working on it.<sup>8</sup> We must be concerned about the threats to authenticity of digitally preserved documents, not only at the production point but throughout the life of the document, whether accidental or deliberate. Think of the missed, folded, or partially obliterated pages in digitized books; think of the effect of power surges on documents in production, or in digital storage. Yes, there can be forged and altered versions of archival documents, paintings, and artwork, and Darnton summarizes famous arguments over the most authentic text for the works of Shakespeare and others.<sup>9</sup> Contemporary instances of actual forged or altered print publications are rare, though, and have not to my knowledge occurred in the law review literature.

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7. See James Glanz & John Markoff, *Egypt's Autocracy Found Internet's "Off" Switch*, N.Y. TIMES, Feb. 16, 2011, at A1; Matt Richtel, *Egypt Halts Most Internet and Cell Service, and Scale of Shutdown Surprises Experts*, N.Y. TIMES, Jan. 29, 2011, at A13.

8. See *Authentication*, GOV'T PRINTING OFFICE, <http://www.gpo.gov/authentication/index.htm> (last visited Feb. 16, 2011); RICHARD J. MATTHEWS & MARY ALICE BAISH, AM. ASS'N OF LAW LIBRARIES, STATE-BY-STATE REPORT ON AUTHENTICATION OF ONLINE LEGAL RESOURCES (2007), available at [http://www.aallnet.org/aallwash/authen\\_rprt/AuthenFinalReport.pdf](http://www.aallnet.org/aallwash/authen_rprt/AuthenFinalReport.pdf).

9. DARNTON, *supra* note 6, at 27–32.

¶10 Claims that digital-only publishing reduces costs and lessens the use of paper (hinting that digital-only is more environmentally sustainable) should be based on careful study of all variables. I am not aware that we (publishers and consumers of academic law reviews) have worked through the economic consequences of all-digital, all-open-access publishing. Before we make a drastic change, such as ending print publication, we need to develop a realistic business model for the alternative. We will still need the work done by students, typesetters, proofreaders, and designers. We will still need space, new kinds of equipment, and more. Will the royalties from aggregators such as LexisNexis, Westlaw, and HeinOnline replace the income from subscriptions? If they do not, will law schools remain willing to subsidize the publications?

¶11 Most seriously, I am not assured that we have an accurate and complete understanding of long-term storage costs (including complete replication in alternate locations) of the requisite storage medium, shifting form as it will along the way. As Francine Berman, director of the San Diego Supercomputer Center at the University of California, a national center for high-performance computing resources, says, not only is digital data enormously fragile, degrading as it is stored, copied, and transferred across data networks, “economic sustainability [of long term storage] is the gorilla in the room.”<sup>10</sup> *The Durham Statement Two Years Later* does not address these concerns about selecting what will be preserved, and the cost of preserving digital information.

¶12 Nor am I sure we understand the true environmental costs of an all-digital environment. We know that paper requires trees or other plant material; we also know that computers use large amounts of scarce minerals. “One e-reader requires the extraction of 33 pounds of minerals.”<sup>11</sup> Will there be pushback from environmental activists, whether among law school denizens or the broader public? Are we going down an environmentally unsustainable road?

¶13 I raise all of these questions not to argue that we should alter our course toward providing more information in digital form, but only to argue that it is much too soon to cease publishing in paper that which is most critical to an understanding of our legal system and other critical parts of our civilization.

### **Law Librarians Should Enter the Mainstream of Digital Preservation Efforts**

¶14 *The Durham Statement Two Years Later* advocates three next steps for law librarians: explore alternatives for preserving legal scholarship by working in concert with other stakeholders; promote the use of common standards for formatting the files of the documents; and take the initiative to create opportunities for dialogue with law school deans, law review editors, interested faculty, and legal infor-

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10. John Schwartz, *In Storing 1's and 0's, the Question is \$*, N.Y. TIMES, Apr. 9, 2008, at SPG1 (quoting Francine Berman).

11. Daniel Goleman & Gregory Norris, *How Green Is My iPad?*, N.Y. TIMES, Apr. 4, 2010, at WK11. See also DANIEL GOLEMAN, ECOLOGICAL INTELLIGENCE: HOW KNOWING THE HIDDEN IMPACTS OF WHAT WE BUY CAN CHANGE EVERYTHING (2009).

mation vendors on the need for concerted action regarding access to and preservation of electronically published law reviews.<sup>12</sup>

¶15 While these three steps are laudable, law librarians might also take two other steps. One is to recognize the limits of our ability, as individuals or as a profession, to affect much of what will happen in a publishing arena driven primarily by the needs of large international corporations such as Google, Thomson Reuters, Microsoft, and Wolters Kluwer. Those efforts would have high opportunity costs. Why not spend the time more directly performing our work as librarians, as authenticators of knowledge sources as we build print collections and web sites, and as the critical link between researchers and knowledge as knowledge expands exponentially?

¶16 The second, more useful, additional step that law librarians might take is to selectively participate, by means of a few representatives, in the much larger national projects that are identifying the current problems, solutions, and costs of preserving digital information. Two such organizations are the Blue Ribbon Task Force on Sustainable Digital Preservation and Access,<sup>13</sup> and the Digital Public Library long under discussion and recently announced by Harvard's Berkman Center.<sup>14</sup> The proposed Digital Public Library is nascent:

Planning activities will be guided by a Steering Committee of library and foundation leaders, which promises to announce a full slate of activities in early 2011. The Committee plans to bring together representatives from the educational community, public and research libraries, cultural organizations, state and local government, publishers, authors, and private industry in a series of meetings and workshops to examine strategies for improving public access to comprehensive online resources.

One meeting is already in the works: David Ferriero, Archivist of the United States of America, has offered to host a plenary meeting that will assemble stakeholders in early summer 2011. Ferriero said, "It is exciting to contemplate a future where the cultural heritage of our country is available at your fingertips. It is, therefore, important to bring together all interested parties to create a vision of that future." Three major federal cultural institutions—Library of Congress, the National Archives, and the Smithsonian Institution—are already discussing a collaborative effort to build and make accessible a digital collection of materials from their collections.<sup>15</sup>

¶17 The Blue Ribbon Task Force's final report identifies even more quandaries of digital preservation than those listed in *The Durham Statement Two Years Later*, including the fact that digital information is growing much faster than our ability to store it, and that we don't know what digital information we should preserve, or who should preserve it, or who should pay for it.<sup>16</sup> The report also provides the five

12. Danner, Leong & Miller, *supra* note 1, at 53–54, ¶ 45.

13. The Task Force's final report was issued in February 2010. BLUE RIBBON TASK FORCE ON SUSTAINABLE DIGITAL PRES. & ACCESS, SUSTAINABLE ECONOMICS FOR A DIGITAL PLANET: ENSURING LONG-TERM ACCESS TO DIGITAL INFORMATION (Feb. 2010), *available at* [http://brtf.sdsc.edu/biblio/BRTF\\_Final\\_Report.pdf](http://brtf.sdsc.edu/biblio/BRTF_Final_Report.pdf) [hereinafter SUSTAINABLE ECONOMICS FOR A DIGITAL PLANET].

14. Berkman Ctr. for Internet & Soc'y, Press Release, *Berkman Center Announces Digital Public Library Planning Initiative* (Dec. 13, 2010), [http://cyber.law.harvard.edu/newsroom/digital\\_public\\_library](http://cyber.law.harvard.edu/newsroom/digital_public_library).

15. *Id.*

16. SUSTAINABLE ECONOMICS FOR A DIGITAL PLANET, *supra* note 13, at 10.

conditions required for sustainable digital preservation<sup>17</sup> and the three key actions necessary for sustainability.<sup>18</sup> Rather than struggling to figure this out alone, we law librarians should find ways to selectively participate in, and benefit from, this national effort. If we don't, we will continue to spend time and effort creating an infrastructure to replicate what others in the profession are already doing, and we will always be at least one step behind.

¶18 Law librarians will best serve both current and future users of law review literature both by preserving print and by encouraging expanded digital publication and preservation of the most important legal literature.

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17. *Id.* at 12 box1.1.

18. *Id.* at 14 box1.2.