

## THE FUTURE OF BOOKS RELATED TO THE LAW?

*Eugene Volokh\**

People have been reading books for over 500 years, in more or less the same format. Book technology has changed in some measure during that time. Fonts have become more readable. Books have become more affordable. Still, the general form of the book has remained much the same.

But the arrival of e-readers, such as the Kindle 2 and the Sony eBook, offers the possibility of a major change.<sup>1</sup> First, people may shift to reading existing books on those e-readers.<sup>2</sup> Second, the shift may lead them to change the way they use books, for instance by letting people have many reference works at their fingertips.<sup>3</sup> Third, the shift may change the content of books.<sup>4</sup> And, fourth, the shift may change who publishes books, and sometimes which books are published.<sup>5</sup>

Home computers and laptop computers have caused all these effects, to a considerable degree, with other media. We see this, for instance, with newspapers, magazines, and new publications—such as blogs—that are in some ways the electronic descendants of magazines and newspapers.<sup>6</sup> But e-readers, with their greater portability and readability, may yield similar results for books and not just shorter-text media.

In this Foreword, I'll try to briefly sketch how these changes might play out as to books related to the law: textbooks, scholarly books, legal books aimed at laypeople, treatises, other practitioner reference books, and law student study tools. I'll also talk about what changes to the technology, and to the structure of the legal-book market, may be needed to capture the technology's possible benefits.<sup>7</sup>

The effects of the technological change will likely be varied. The shift from horses to cars, for instance, both allowed long-distance commuting and

---

\* Gary T. Schwartz Professor of Law, UCLA School of Law (volokh@law.ucla.edu). Thanks to Stuart Biegel, Jason Dreibelbis, Cheryl Kelly Fisher, Kevin Gerson, June Kim, Mark Lemley, Jenny Lentz, Robin Shofner, Vicki Steiner, Vladimir Volokh, and John Wilson for their help.

1. I'm not wild about the label "e-reader," since it makes it awkward to talk about readers (people) in the same sentence as "e-readers" (reading devices). But that seems to have become the generic term, with "e-books" being used to mean the electronic text that's downloaded to an e-reader.

2. *See infra* Part I.

3. *See infra* Part I.

4. *See infra* Part III.

5. *See infra* Part IV.

6. *See generally* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 *YALE L.J.* 1805 (1995) (discussing how electronic distribution can broadly change the media).

7. *See infra* Part II.

reduced the amount of manure on the streets,<sup>8</sup> yet the two are hard to link through a grand theory. But many of the effects will point in the direction in which electronic distribution tends to change the media generally: towards reducing cost, increasing choice, and increasing convenience.<sup>9</sup> And in the process electronic distribution will not only facilitate access to existing material, but will also promote production of more material.

Naturally, this is speculation—wide acceptance of e-readers is only beginning, though the broader cyberspace media revolution is about fifteen years old. And I'll make it still more speculative by considering not just the current e-reader technology, but also foreseeable developments in that technology.<sup>10</sup> But I hope the speculation will still be helpful, both to curious observers and to those who are thinking of participating as authors in the evolution of the legal book.

### I. WHY LEGAL BOOKS ARE LIKELY TO GO ELECTRONIC

The paper book is a familiar and well-loved technology. It also has some advantages over e-readers, advantages that might endure for many years. The main advantages have to do with how much material one can see at once, without flipping a page or clicking a button. Paper books still let people see more text, on two open, largish pages, than can be seen on a modern e-reader screen.<sup>11</sup> And people can cheaply have several books or printouts in front of them at once. Few people are likely to buy several e-readers to duplicate that experience, until e-readers get as cheap as CD players have become over time.<sup>12</sup>

---

8. Joel A. Tarr, *Urban Pollution—Many Long Years Ago*, AM. HERITAGE, Oct. 1971, at 65; Current Reading, *The Urban Dung Problem in Historical Perspective*, 25 PUB. INT. 126, 126 (1971) (“In 1900 New York City’s approximately 120,000 horses produced over 2,500,000 pounds of ‘solid waste’ a day, as well as about 60,000 gallons of urine!” (quoting Prof. Joel A. Tarr)).

9. Volokh, *supra* note 6, at 1808–09; see also Eugene Volokh, *Paper Books? They’re So 20th Century*, WALL ST. J., May 30, 2000, at A26.

10. I’ll therefore set aside some criticisms of e-readers, such as the Kindle DX, that are focused on particular unfortunate design choices in the early-generation models, so long as it seems likely that those problems could easily be avoided in future versions of the product. See, e.g., Walter S. Mossberg, *The Latest Kindle: Bigger, Not Better, Than Its Sibling*, WALL ST. J., June 11, 2009, at D1 (criticizing Kindle DX on these grounds); Suzanne Choney, *Kindle DX: A Little Ungainly, But Not So Little*, MSNBC.COM, July 2, 2009, [http://www.msnbc.msn.com/id/31569340/ns/technology\\_and\\_science-tech\\_and\\_gadgets/](http://www.msnbc.msn.com/id/31569340/ns/technology_and_science-tech_and_gadgets/) (likewise).

11. This stems from three reasons: (1) e-readers’ lesser legibility requires them to use a larger font; (2) e-readers’ screen size tends to be smaller, presumably for cost and portability reasons, than the text size of a typical book (though screen size for the Kindle DX, which is designed specifically for textbooks, is roughly the same as the text size of a typical textbook); and (3) a hard-cover or loose-leaf book can be opened to show two pages at once.

I don’t speak here of the supposed aesthetic benefits of holding a paper book in your hand. I’m not sure that such benefits are on balance likely to be seen as determinative even with books that are read for pleasure, and they seem especially low as to books related to law. But in any event, students, professors, and lawyers are likely to take much more functional approaches toward the textbooks, treatises, study aids, and scholarly books that they read.

12. Of course, one can have many books available on the e-reader, and can switch between them at the click of a few buttons. But that’s not quite as easy as having several items that you can read side by side.

But e-readers also offer material advantages over paper books, and are likely to offer still more within just a few years. This will be enough, I think, to lead most users of law books to eventually shift to e-readers, and especially to influence law students and young lawyers who are already used to reading many things on computers.

First, e-readers are *more portable* than books. Hundreds of books' worth of data can fit on an e-reader that is the size of a hardcover book, and the weight of a paperback.<sup>13</sup> This is especially useful for law students who have to carry several books for their classes—a typical textbook weighs four pounds,<sup>14</sup> so a semester's worth of books can be a back-straining load<sup>15</sup>—and for lawyers who have to carry many books and other documents to court or on a trip. (The Kindle 2 lets you upload your own documents onto it for free, if you connect the Kindle to a computer and run a conversion program; and for fifteen cents you can e-mail a document to a special kindle.com address, where it will be automatically converted and sent wirelessly to your Kindle.)

But e-readers don't just help people carry those books and documents that they're already carrying. Rather, e-readers also make books *more immediately available*. Lawyers could have all their favorite treatises and important statutory and regulatory sources constantly at hand. Students could always have their hornbooks or outlines, together with their textbooks.

E-readers can make it *easier to find the books you already have*. All the books, and other materials such as downloaded articles or cases, are right there on the e-reader, available through its alphabetizable table of contents; you needn't spend time searching for that misplaced book. Of course, this assumes that you haven't misplaced the e-reader itself, but it's easier to keep track of one e-reader than of many items.

E-readers make it *easier to buy books*, which can be selected in seconds and then downloaded in a few minutes. Of course, impulse buys are uncommon for law books. But this ties in to one more reason that many readers of law books might want to buy e-readers: e-readers are also useful for reading *other books, newspapers, and the like*, for which impulse buying

---

Losing or damaging an e-reader is much more expensive than losing or damaging a book. This may lead people to be highly reluctant to take e-readers certain places, such as beaches or bathtubs, and to give e-readers to their small children; but that's a matter more relevant to pleasure reading and to children's books than to legal books.

13. The Kindle 2 weighs "10.2 ounces, lighter than a typical paperback." Amazon.com, Kindle Wireless Reading Device, <http://www.amazon.com/kindle> (last visited Nov. 15, 2009).

14. By way of comparison, the textbooks I use for the three large classes I teach—JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* (4th ed. 2007) (1037 pages plus front and back matter), WARD FARNSWORTH & MARK F. GRADY, *TORTS: CASES AND QUESTIONS* (2d ed. 2009) (791 pages plus front and back matter), and EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* (3d ed. 2008) (1074 pages plus front and back matter)—weigh 4½, 3¼, and 4½ pounds, respectively.

15. Cf. CAL. STATE BD. OF EDUC., CAL. DEP'T OF EDUC., *TEXTBOOK WEIGHT IN CALIFORNIA: DATA AND ANALYSIS* (2004), <http://www2.cde.ca.gov/be/ag/ag/may04item21.pdf> (reporting on possible health problems caused by excessive textbook weight, even in the higher grade levels, and urging—among other things—lighter-weight options for any ninth-to-twelfth-grade textbooks that weigh over five pounds).

and instant delivery can be important. As lawyers and law students buy e-readers for pleasure reading, they're likely to use them for legal reading as well.

E-readers can also make each book more usable. First, they can make *source material more available*. Case or statute references in a treatise, for instance, could link directly to the text of the case or statute. This text could be distributed as part of the work, for especially important sources. Or the software could be designed to allow links to a Web database, such as Google Scholar's new legal opinions database, which could be reached through the e-reader's built-in cellular modem. Such a link would be slower than a link to an already-included appendix, or than a normal internet broadband connection. But it would be faster than going to the library or even to one's main computer to track down the source.

E-readers also make books *more searchable*. This is especially helpful for reference works, but it's also useful for textbooks, and to some extent for scholarly works. If you're looking for a passage you remember, you can find it by just recalling a key word. Traditional indexes provide some such flexibility, but full-text search is quicker and generally more comprehensive.

E-readers can help *preserve the users' own marginal annotations* from edition to edition, at least if the software is designed to allow this. For instance, if you write notes in your copy of an important statute or volume of regulations, you would lose those notes when you shift to a new edition, unless you're willing to hand copy them. But properly designed e-reader software could easily retain the annotations, while still providing access to the latest updates.<sup>16</sup>

And e-readers can provide *instant translation* through built-in dictionaries, whether for English words, legal jargon, or foreign words. This is especially useful for foreign-language speakers who are studying or researching American law, for English speakers who are studying or researching foreign-language law, or for law students who need quick lookup of legal phrases. (The Kindle 2, for instance, lets you set any dictionary you buy as the primary dictionary, though it comes with a free *New Oxford American Dictionary*.)

On top of this, e-readers have the potential to substantially *reduce the cost* of books. Going electronic will cut down on printing costs, shipping costs, and storage and distribution costs on the publisher side, plus the costs of shelving and operations at the bookstore. This should quickly offset the cost of the hardware. Law students, for instance, generally have to buy \$400 or more worth of books each semester; if that bill is reduced by just 20% the savings will quickly exceed the \$260 price tag—and there's every reason to think that e-reader prices will fall, just as prices for other hardware, from computers to CD players, have fallen, and just as today's Kindle 2 costs less than the original \$400 Kindle did two years ago.<sup>17</sup> There's more on the cost issue, though, below.

---

16. Thanks to Volokh Conspiracy commenter Alan Tysinger for raising this point.

17. David Pogue, *Books Pop Up, Wirelessly*, N.Y. TIMES, Nov. 22, 2007, at C1.

## II. WHAT MANUFACTURERS AND PUBLISHERS NEED TO DO TO FACILITATE A SHIFT TO ELECTRONIC READING

Yet to make e-readers most effective, manufacturers and publishers have to improve their technology and their business models.

### A. Technological Barriers

Let me begin with readability, probably the main (though not vast) disadvantage of current e-readers. E-readers are still not quite as *legible* as paper. The Kindle 2 is much better than earlier readers, such as the Rocket eBook from about ten years ago. Still, its dark-grey-on-light-grey contrast is not quite as clear as the contrast on paper. Books on the Kindle 2 are readable, but at least slightly less so than paper.

Current e-readers also tend to *reduce the size of illustrations*, because of the smaller page size.<sup>18</sup> You can zoom in on part of an illustration, but that lets you see that part more clearly only at the expense of temporarily making other parts invisible. Either the screen needs to get clearer, or the electronic versions of books need to break up the illustrations in ways that maintain the illustrations' readability.

Second, *annotating and highlighting* is still harder on e-readers than on ordinary books. On the Kindle 2, for instance, you have to hit a button several times to move the cursor to the words you want to highlight. To write notes in the margin, you have to type your annotations on a small and fairly clunky keyboard.<sup>19</sup>

Fortunately, a solution will probably not be long coming: a stylus-based interface, with which people can just touch what they want to highlight, and can handwrite whatever brief notes they want to jot down.<sup>20</sup> Such interfaces are already available on other computers, so they will likely make their way to e-readers soon.

Third, e-readers will probably become considerably more useful if they can let users see *two or more passages at once*, through some sort of windowing. Of course, less of each passage would be visible; but it would still be helpful to see two items side by side, much as people can now see two paper books or printouts side by side. And this would also let readers simultaneously see two different passages from the same book side by side,

---

18. The Kindle DX, with its fairly large screen, doesn't seem to have this problem. See David Carnoy, *Amazon Kindle DX E-Book Reader Reviews*, CNET REVIEWS, June 10, 2009, <http://reviews.cnet.com/e-book-readers> (follow "Amazon Kindle DX" hyperlink).

Current e-readers also don't display color, and this constraint might remain for a while, given the nature of the technology. But that's less of a problem for books related to law than it would be for, say, children's books or art books, or even for textbooks in other fields where multicolor charts are more common.

19. Cf. Jeffrey R. Young, *How Kindle Could Change the Textbook Market*, CHRON. OF HIGHER EDUC., May 15, 2009, at A4 (reporting that the difficulty with taking notes on a Sony e-book reader persuaded a university to abandon its experiment with switching to e-reader textbooks).

20. See, e.g., *The Dual-Screen E-Reader by Entourage Edge*, TOUCH USER INTERFACE, NOV. 5, 2009, <http://www.touchuserinterface.com/2009/11/dual-screen-e-reader-by-entourage-edge.html>.

something paper books can't provide (unless one owns two copies of the same book).

Fourth, current e-readers, and the e-books sold for them, generally *don't include the same page numbers* as the paper books. This may discourage students from switching to e-reader textbooks while their classmates and teachers are still using paper books: When the teacher asks people to turn to p. 123, the e-reader users won't know where to go.

Fortunately, this too should be easy to fix. The e-reader software just has to be able to display the current original page number on each screen, and to let people enter the page number they want. And publishers will have to insert the proper codes in the files that would indicate to the e-reader where each new paper page starts.

Fifth, *e-reader search features are primitive*—all you can do on the Kindle 2, for instance, is search for a particular string.<sup>21</sup> If e-readers are to become useful for large treatises, it would be helpful to allow Lexis/Westlaw-like search operators: AND, OR, NOT, NEAR, and the like. Again, though, the software to do this is readily available.

Sixth, students who use (and mark up) e-textbooks will want to *bring them into open-book exams*. Many law schools might be reluctant to allow exam-taking students to use devices that have wireless access, and that can in some measure be used to send messages as well as receive them.<sup>22</sup> E-readers will need to have a switch (in software or hardware) that would block the e-reader from communicating, in a way that a proctor can periodically check. This would be similar to the software, already required by many law schools, that turns off many of a student laptop's functions during an exam.<sup>23</sup>

### B. Cost

Electronic distribution has long been touted as making content cheaper for consumers. This has largely been true: Newspaper articles, including articles from out-of-town or foreign newspapers, are now largely available for free. So are many magazine articles.

Many old books are available for free on Google Books and Project Gutenberg;<sup>24</sup> the latter books can be easily downloaded onto the Kindle 2. And many Kindle versions of legal books already tend to sell for about 20% below their list price. (This, though, varies from book to book, and some

---

21. See AMAZON.COM, KINDLE USER'S GUIDE 68 (3d ed. 2009), [http://s3.amazonaws.com/kindle/Kindle2\\_Users\\_Guide.pdf](http://s3.amazonaws.com/kindle/Kindle2_Users_Guide.pdf).

22. Thanks to Volokh Conspiracy commenter Leeor Baskin for raising this point.

23. See, e.g., Danny Jacobs, *One More Fear Factor: After Finishing Their Bar Exam Essays, Nearly Half Must Go Elsewhere to File Their Answers*, DAILY RECORD (Baltimore), July 29, 2008, at 1A (describing ExamSoft's SofTest software).

24. Project Gutenberg, <http://www.gutenberg.org>, is a large and free online collection of public domain books; the books are uploaded and edited by volunteers. See MARIE LIEBERT, PROJECT GUTENBERG (1971–2008) (2008), <http://www.gutenberg.org/etext/27045>.

remaindered copies of slightly older paper books are so deeply discounted that they cost less than the Kindle versions.<sup>25</sup>)

But current e-book discounts likely won't suffice to allow a broad conversion to e-books, for two reasons: the used-book market, and libraries.

### 1. *Copyright Law, Books, and e-Books*

Used-book sales and library borrowing are both enabled by the "First Sale Doctrine" of U.S. copyright law: Once a book is sold, buyers are free to resell it or lend it, and don't need the author's permission for that.<sup>26</sup>

People routinely take advantage of this. Law students often buy used textbooks, and then sell them back to the bookstore when they're done. Legal academics can get pretty much any book delivered to their faculty mailboxes by their university libraries. Likewise, lawyers routinely borrow books from the firm library; even sole practitioners may pool their book collections with other lawyers in the same suite of offices. We've gotten

---

25. See Jeffrey A. Trachtenberg, *Amazon's Kindle to Sell Law Books*, WALL ST. J., July 10, 2009, at B6 (reporting a deal with the Practising Law Institute through which various treatises and practice guides were made available for the Kindle at 20% below the print list price). Consider also the following price list compiled by my research assistant, Robin Shofner, in early August 2009; the first three items are textbooks, the next three are practitioner books, and the last three are scholarly books. P stands for paperback, H for hardcover, and RB for ring binding.

Author	Title	Publisher	Kindle Price	Amazon Price
Michael D. Murray	Media Law and Ethics	LEA	\$55.16	\$85 (P)
Tyll van Geel	Education Law	LEA	\$76	\$95 (H), \$89.95 (P)
Mohamed Ramjohn	Text, Cases and Materials on Equity and Trusts	T & F Books UK	\$51.96	\$180 (H), \$64.95 (P)
Henry H. Perritt, Jr.	Trade Secrets: A Practitioner's Guide	Practising Law Institute	\$200	\$275 (RB)
Ronald B. Hildreth	Patent Law: A Practitioner's Guide	Practising Law Institute	\$220	\$275 (H)
Bruce P. Keller & Jeffrey P. Cunard	Copyright Law: A Practitioner's Guide	Practising Law Institute	\$236	\$295 (RB)
William Eskridge	Dishonorable Passions: Sodomy Laws in America	Viking Adult	\$14.83	\$13.18 (H)
Paul Collier	Wars, Guns, and Votes	HarperCollins	\$14.84	\$17.81 (H), \$10.19 (P)
Jamie MacGregor Burns	Packing the Court	Penguin Press	\$9.99	\$18.45 (H)

The Eskridge book is marked down from an original \$32.95 list price, and the Collier hardcover is marked down from an original \$26.99 price. It's a mystery to me why the Kindle version of the Collier book sells for \$14.84, while the paperback list price is \$14.99 (which unsurprisingly leads to a discounted price of \$10.19).

26. 17 U.S.C. § 109 (2006).

used to borrowing books for free, once someone at our institution—such as a university or a law firm—has bought a copy.

Yet the same transactions would likely be infringing when done for e-books (and are often technically stymied by copy protection). The First Sale Doctrine applies only to “distribution” of books, meaning the transfer of tangible items. It does not apply to copying of materials. And “reselling” or “lending” an e-book from an e-reader’s disk drive necessarily involves copying.

Even if you copy the book to someone else’s e-reader and then delete it from the original, thus trying to mirror a traditional resale or lending arrangement, you’ll still have made a copy, and thus infringed the copyright in the work.<sup>27</sup> So you can buy e-books only “new.” You can’t lend or borrow them, or buy or sell them used.

## 2. Used Books, Especially Textbooks

This is both a barrier to the wide acceptance of e-book textbooks, and an opportunity for publishers. First, the barrier: One can often buy used books through Amazon for much less than the cost of a Kindle e-book.<sup>28</sup> Likewise, many college bookstores offer used textbooks at about 75% of the price of new textbooks, and then buy them back at 50% or so of the sale price, if the store expects the same edition to be used again the next semester.

Let’s consider, then, the economic lifecycle of a textbook. Assume an edition comes out in 2010, the textbook is used in one class per year, and the next edition comes out in 2014. Assume the bookstore knows of the coming edition, so it doesn’t buy the book back after 2013. Assume a national aver-

---

27. Courts might conceivably conclude that the use is fair because it is aimed at mirroring what is allowed for paper books. But that’s far from clear. First, such copying and deleting does affect the copyright owner’s opportunity to sell the original work for full price. If a court comes at the question from the assumption that a copyright owner is entitled to fully profit from all copying of the book, except the copying that has no effect on sales, then the court will likely see the copying involved in “buyback” or “lending” as unfair.

But, second, even if a court is willing to say that copying that mirrors the economic effects of traditional reselling is *per se* fair—perhaps on the theory that the copyright owner shouldn’t get a windfall from the shift to electronic distribution, and shouldn’t be able to claim a monopoly over economic equivalents of traditionally noninfringing activity—electronic copying and deleting does not mirror the economic effects of traditional reselling. Precisely because electronic distribution is more efficient, in that it can easily be done over long distances (with no searching for used copies and no shipping costs) and with no degradation of the quality of the work (no highlighted passages and no torn pages), it is also more likely to displace the copyright owner’s own sales. For instance, for a book to be instantly available to library users throughout the nation, tens of thousands of copies would likely have to be sold to libraries. But if the book could be “lent” for free by a centralized electronic library, the electronic library might be able to satisfy user demand by buying only several hundred (or fewer) copies, one for each person who is likely to be reading the book simultaneously.

28. For instance, one leading torts textbook, RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* (9th ed. 2008), is available used on Amazon starting at \$55; the list price is \$154, the Amazon new price is \$119.96, and the price at what seems to be the roughly normal 20% Kindle textbook discount would be \$123. Amazon.com, *Cases and Materials on Torts*, [http://www.amazon.com/Cases-Materials-Casebook-Richard-Epstein/dp/0735569231/ref=sr\\_1\\_3?ie=UTF8&s=books&qid=1258321159&sr=8-3](http://www.amazon.com/Cases-Materials-Casebook-Richard-Epstein/dp/0735569231/ref=sr_1_3?ie=UTF8&s=books&qid=1258321159&sr=8-3) (last visited Nov. 15, 2009). (The textbook is not yet available on Kindle.)

age sales tax (6%), which is charged when one buys the book, new or used, but which isn't charged when one sells it back to the distributor. Here's how the transactions might look:

Semester	Transactions	Net cost to student
Fall 2010	Buy new, sell back at 50% of the sale price	56% of list price
Fall 2011	Buy used at 75%, sell back at 50% of the sale price	42% of list price
Fall 2012	Buy used at 75%, sell back at 50% of the sale price	42% of list price
Fall 2013	Buy used at 75%, no sell back	79.5% of list price

Of course, this pattern won't be perfectly followed: Many students keep their textbooks for future reference. Some students delay selling back their textbooks, and when they're ready to sell them back they might find that they no longer can. Some students prefer to buy clean books, without someone else's possibly misguided highlighting and notes distracting them from the text.<sup>29</sup> And some bookstores might refuse to buy back books with too much writing in them. Nonetheless, this table suggests that, for many students, a 20% discount from list price might not be enough to get them to buy an e-book version of the textbook.

Now the opportunity: Textbook publishers are already unhappy with the used paper textbook market. One reason they urge authors to come out with new editions is to dry up the used-book market, at least for a while.

Textbook publishers, then, have a substantial incentive to charge much less for e-books, precisely because e-books can't be resold (as well as because they're cheaper to produce and distribute). In the example above, for instance, a publisher could charge 35% of the paper list price for an e-book (amounting to roughly 37% with tax included) and still make more money as well as saving students money.<sup>30</sup> The savings will come out of the money that the bookstore would otherwise pocket; the bookstore's costs and profits would no longer have to be paid for.

The students would also get clean copies of the books rather than having to deal with others' highlighting and notes and students would get to keep the books for future reference. All these would be further incentives—in addition to portability and, with the revised pricing plan, cost—for students to embrace e-books. And this would happen naturally, if textbooks coexist in

---

29. See Vicki L. Silvers & David S. Kreiner, *The Effects of Pre-Existing Inappropriate Highlighting on Reading Comprehension*, 36 *READING RES. & INSTRUCTION* 217, 219 (1997) (reporting that "inappropriate highlighting" in reading materials—including highlighting that buyers of used textbooks may inherit from previous owners—"reduce[s] reading comprehension").

30. The author would also make more in royalties, assuming the rate remains what it has been, since both the author and the publisher now get nothing from used textbook sales.

the e-book and paper editions: the competition from the used-book market would pressure publishers into reducing the e-book costs.

Of course, if publishers can persuade instructors to adopt textbooks that are distributed only in e-book format, then the competition will be absent. Publishers could continue charging high prices for the e-books, because the used paper books won't be an alternative. And of course law professors make the selection decision, while law students must pay the cost. Still, I think many professors will be at least mildly interested in saving their students money. And I suspect many professors will try to avoid the student annoyance that would likely be created if the professor's decision makes students pay more for e-textbooks than students have historically had to pay for used paper textbooks.

### 3. Libraries

So e-textbooks have to compete with substantially discounted used textbooks. And scholarly books aimed largely at law professors and law students have to compete with something even cheaper: library borrowing.

Law professors can generally get nearly any legal book for free, with minimal hassle and modest delay, just by asking their librarians. Law students can often do much the same, though with a bit more work. As a result, for instance, I never buy law-related e-books for my Kindle, though I do download free public-domain items (such as Blackstone's *Commentaries*), as well as draft articles and the like. Instead of buying law-related e-books, I just borrow the paper books from the library.

Now of course borrowing these books isn't really free for my employer. The library spends money on buying the books, on maintenance, shelving and reshelving, and on processing faculty delivery requests.<sup>31</sup> Space used for book stacks is also space that can't be used for faculty and staff offices, classrooms, and the like. So libraries, library users, and publishers can all profit from making it possible to lend all the e-books on much the same terms as libraries can now lend books.

And fortunately, there's ample precedent for this in the site licenses that many libraries already get for various online collections: HeinOnline's collections of law journal articles, public-domain legal classics, government documents, and some more recent treatises; Chadwyck's Early English Books Online, Gale's Eighteenth Century Collections Online, Making of Modern Law, and other databases; the Oxford English Dictionary; and the like. University libraries routinely have such subscriptions for all their users, but some public libraries do, too.<sup>32</sup> Libraries and publishers would likewise

---

31. The UCLA Law Library reports, for instance, that in Fiscal Year 2008–09 it spent about \$60,000 on book shelving and reshelving, plus \$45,000 on freight for buying new books (not including the costs of the books themselves). E-mails from Kevin Gerson, Director, UCLA Law Library, to author (Sept. 10, 2009, 09:30 & 09:41 PST) (on file with author).

32. See, e.g., Mobile Alabama Public Library Databases, <http://www.mplonline.org/databases.htm#av1> (last visited Nov. 15 2009) (noting the State of Alabama's provision of online Oxford English Dictionary access to all public-library users, including from their homes via <http://>

be able to negotiate for library licenses to lend all new e-books coming from the publisher.<sup>33</sup>

Libraries pay flat rates for each database, and the rates are often substantial.<sup>34</sup> Blanket licenses to electronically lend all new Harvard University Press books would likely be expensive, too. But the costs of buying books can be high as well, especially when coupled with the other costs I mentioned above. Eliminating those other costs means that there will generally be some price point at which authorizing the library-wide license will both increase profits for publishers and decrease costs for libraries.

Determining that price point might not be easy. Different libraries have different costs. Publishers may be reluctant to negotiate in detail with each library. And there's always difficulty with any change to the way people have long done business. But on balance, and especially given the precedent of the other online databases, libraries and publishers should be able to create an e-book lending model that would replace the old paper-book lending model that was driven by the First Sale Doctrine.

### III. HOW E-READERS CAN CHANGE THE CONTENT OF LEGAL BOOKS

So we've spoken about why lawyers, law students, and law professors might shift to e-readers, and how this shift may change their reading habits (especially by letting them have their main reference works constantly available). But the shift should also lead to a change in the content of legal books.

#### A. Size

The most obvious such effect will be to *remove the influence of page limits*. My First Amendment casebook is now at 1074 pages, including front matter, and my publisher tells me that the next edition can't get any bigger. And there are good reasons for that, both related to cost and to bulk. But it means that if I add some new cases, I have to remove or trim down some old cases. That's work for me, and inconvenience for teachers who use my

---

[www.avl.lib.al.us/authcheck.phtml](http://www.avl.lib.al.us/authcheck.phtml)); New York Public Library, Databases and Indexes Online, <http://www.nypl.org/databases/index.cfm?act=3&id=129> (last visited Nov. 15, 2009) (noting the New York Public Library's provision of access to Early English Books Online); WYOMING LIBRARIES, WYOMING LIBRARIES' GUIDE TO HEINONLINE, <http://www-wsl.state.wy.us/training/documents/HeinOnline.pdf> (noting the Wyoming Public Library's provision of access to HeinOnline, though only inside a library).

33. My own library system, the University of California, has bought access to all Springer Electronic Books published from 2005–09, *see* UCLA Library, SEL What's New Archives, <http://www.library.ucla.edu/libraries/sel/12397.cfm#item60> (last visited Nov. 15, 2009), though what I describe in the text would involve a constant subscription to all forthcoming books from a publisher as well as already published ones.

34. UCLA, for instance, pays \$12,000 just for the main subscription for HeinOnline's basic service (chiefly useful for its comprehensive collection of law review articles, as well as many old legal books). E-mail from Vicki Steiner, Reference Librarian, UCLA Law Library, to author (Aug. 6, 2009, 16:59 PST) (on file with author).

textbook but find that a case they taught from the previous edition is missing from the new edition.

Likewise, if I'm interested in adding a new chapter (for instance, about the First Amendment and ballot-access restrictions, or about Framing-era views on the First Amendment), I either have to cut something else, or forgo the new material. This limits the useful material I can add, and limits the choices I can present to the teachers who adopt my book.

If my textbook moves to e-book format, these constraints will fall away. And though long law journal articles or scholarly books are hard to get through, long (but well-edited) textbooks are good: textbook authors deliberately design books to have more material than each adopter will need, so that adopters can pick and choose what to include. If my textbook grows to the equivalent of 1500 paper pages, but remains easily portable, no student will have to read all 1500 pages. My adopters would still assign the same number of pages that they usually assign, but they would have more topics to choose from, and perhaps more cases in each topic to choose from.

Removing page limits would also let authors include valuable supplementary material—statutes, regulations, datasets, and the like. A copyright treatise could include the full text of the Copyright Act and of all Copyright Office regulations. Likewise, a scholarly book could include a great deal of supporting evidence, so readers who are interested could easily examine it. And even readers who don't want to see all the supporting evidence might feel more confident in a scholarly book's accuracy when the evidence is there.

To be sure, lifting the page limits could lead some textbook authors to underedit the cases. But the current page limits may lead some authors to overedit the cases. And in any event, experienced textbook authors know that they need to edit cases well, so that students don't have to read unnecessary material, and so that textbook adopters don't have to assign too many pages per class session.

### B. Malleability

E-books can also be easily changed, both when they are sold and later. One consequence is that textbooks could be *custom produced* for particular teachers, with little extra work for the authors.<sup>35</sup>

It shouldn't be hard to create a textbook-assembly program that lets an instructor choose which cases from a textbook should go into the custom e-book that he will assign for his class, and which order they'll go in. The program might, for instance let instructors select and reorder cases with a few motions of the mouse. It might automatically fix forward and backward references (with help from metatags embedded in the source file by the textbook author). It might warn the user when one case is being deleted but

---

35. Cf. Randal C. Picker, *The Mediated Book* 12–19 (Univ. Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 463, 2009), available at <http://ssrn.com/abstract=1399613> (discussing this issue as well, in considering whether books could become advertising-supported).

another case that refers to it is being kept. The resulting packet will be easier for students to navigate, especially if the instructor's syllabus would otherwise have skipped around a lot.

Such a program could also make it easy for the instructor to add supplementary materials, or perhaps even merge materials from multiple textbooks. The sales price can be suitably and automatically split between the textbook publishers according to some prearranged fee schedule. And students will have one "book" that they'll read from beginning to end. They wouldn't need a book they'll read only half of, coupled with a separate packet of supplementary materials.

The malleability of e-books also facilitates post-sale changes. E-textbooks, e-treatises, and even scholarly e-books would then be *easier to update*. New cases and other new developments could likewise be added right away, without having to wait for the next supplement.

To be sure, this will lose publishers the profits on supplement sales. Perhaps publishers will then charge for the updating service, to make up for that (though the cost savings of electronic delivery mean that publishers wouldn't need to charge as much as they do for the printed supplement). But in any event, the immediate and seamless supplementation should be so valuable to teachers and to students that some publishers are quite likely to start offering it, and when they do, others will have to follow suit.

Likewise, electronic books are *easier to correct*. When one user of the book reports a typo, a substantive error, a poorly edited case, or the like, the author could promptly fix it. The software could even immediately distribute the correction to all existing buyers, and perhaps notify them of where the correction took place.

Of course, this needs to be done in a way that doesn't make readers feel that their bookshelf is being tampered with against their will.<sup>36</sup> Moreover, a professor or a student who has read a passage the day before class might be surprised and unhappy to find that an unannounced change was made the day of class. But this could easily be dealt with by noting the changes in the text, or giving people the option to accept or reject the change.

---

36. Consider the Amazon/George Orwell controversy. In 2009, Amazon discovered that some editions of George Orwell's *1984* and *Animal Farm* had been uploaded to the Kindle bookstore in violation of copyright; it therefore deleted the books from the Kindles of people who had innocently bought them and refunded the buyers' money. Brad Stone, *Amazon Erases Two Classics From Kindle. (One Is '1984')*, N.Y. TIMES, July 18, 2009, at B1. This led to a great deal of criticism, and to an apology from Amazon. Brad Stone, *Amazon Faces a Fight Over Its E-Books*, N.Y. TIMES, July 27, 2009, at B3. Part of that criticism seemed to stem from a sense that Amazon was intruding on people's personal space with this sort of action—a sense that might be aroused even by much smaller changes. Still, this simply counsels for the updates being done more delicately. Most users should be pleased when an error in a book is corrected, at least if the correction is properly noted, and if the user has the option to block such corrections if they offend his sense of privacy.

### C. Interactivity

E-books could also be made interactive, though that would require some changes to e-reader software, and the development of a protocol through which those changes can be taken advantage of by publishers.

The chief value of this should be for legal study tools. Instead of a book full of written multiple choice practice questions, with answers and explanations at the back, students could use an e-book with interactive questions that immediately explain why some answer was right or wrong. The question sequence could even be paced to a student's performance, for instance so that the e-book would test a student more on matters that he consistently gets wrong and less on matters that he consistently gets right.

There are already such study tools on CD-ROM,<sup>37</sup> but having them available on e-readers should make the tools more readable and portable. And the advent of e-readers will also make it especially convenient for textbook authors to include self-testing questions within the book.<sup>38</sup>

In principle, interactivity could also be helpful for some scholarly works and treatises, for instance to depict changes over time, or to allow custom searches of large sets of data. Various reference sites, such as the Census<sup>39</sup> and the Centers for Disease Control and Prevention's Web-Based Injury Statistics Query and Reporting System,<sup>40</sup> already provide useful databases that way. But I suspect that this sort of feature would likely be most useful for more data-rich projects than the typical legal book.

## IV. BEYOND THE CURRENT PUBLICATION SYSTEM

Part II discussed the first phase of the migration to e-books: whether people will start reading electronically the same content that they've long read on paper. Part III began considering the "second migration," in which people take advantage of features of the new technology—for instance, the malleability of e-books, and the relaxation of size constraints—that don't just emulate the old technology but go beyond it.<sup>41</sup>

---

37. See, e.g., Interactive Legal Tools, <http://www.interactivelegaltools.com> (last visited Nov. 15, 2009).

38. E-books can also easily include *embedded audio* materials. E-readers already have audio output capabilities, and there's no reason why the software can't let files mix text and audio. In principle, the same could be done for grey-scale video, and perhaps eventually for color video as well. Legal books, as opposed to works of entertainment, books about music, or language textbooks, probably don't need audio much. But in some cases, the audio might be helpful, for instance to illustrate music copyright cases, provide pronunciation for legal terms (especially foreign ones), or to make points about appellate advocacy.

39. U.S. Census Bureau, <http://www.factfinder.census.gov> (last visited Nov. 15, 2009).

40. Centers for Disease Control and Prevention, WISQARS (Web-Based Injury Statistics Query and Reporting System), <http://www.cdc.gov/injury/wisqars/index.html> (last visited Nov. 15, 2009).

41. See Eugene Volokh, *Law Reviews, the Internet, and Preventing and Correcting Errors*, YALE L.J. POCKET PART, Sept. 6, 2006, at 9, <http://www.yalelawjournal.org/images/pdfs/57.pdf> (using a term that I borrowed from my friend Steve Cooper).

But there's another aspect of the second migration: it opens the door to publishing structures that don't now exist, making possible both further cost reductions and the distribution of books that can't be distributed cost-effectively today. Let me speculate briefly and tentatively about that here, limiting myself to the two fields I know best—scholarly books and textbooks—and omitting treatises, other legal practitioner references, and student study aids.

### A. *Scholarly Books*

#### 1. *The Authors' Problem*

Say you're a professor who wants to publish an academic legal book. Your primary goal is to get more readers. You'd also like to get some money, but you might well be willing to trade off that money for readers. After all, unlike most authors who don't have academic appointments, you're already being paid for your time.

##### a. *Expense Limits Readership*

The trouble is that the book will often be priced at a level that will alienate many potential readers. Let me give as an example a book about which the author guest-blogged on my blog: Richard Painter's *Getting the Government America Deserves: How Ethics Reform Can Make a Difference*, published by Oxford University Press. As of January 2010, when I last edited this passage, the book had a list price of \$70, and Amazon offered it for that price, though one affiliated store offered a used copy for \$56.52+\$3.99 shipping. From February 2009, when the book was released, to October 2009, the book sold only a bit more than 300 copies.<sup>42</sup> It seems very likely that considerably more copies would have been sold had the price been, say, \$10.

Of course, if the book were distributed for free, the author wouldn't make any money from it. For most law professors, the income from academic books is a small fraction of our salaries: If Prof. Painter makes a 10%–20% royalty, that will amount to \$7 to \$14 per book; and if the book ends up selling 500 copies, the income will be nontrivial but still modest. We routinely spend a lot of time writing articles, which don't directly make us any money. It seems likely that even if we couldn't make money from writing books, but could get readers and citations—and books do seem to be more cited than even the most heavily cited articles by the same authors<sup>43</sup>—we'd keep writing.

But if we could cut out the middleman, at least in large part, we might be able to get both more readers and more money. Say, for instance, that

---

42. See E-mail from Prof. Richard W. Painter, University of Minnesota Law School, to author (Oct. 6, 2009, 19:25 PST) (on file with author).

43. See Eugene Volokh, *How Often Do Scholarly Books on Law Get Cited?* (forthcoming).

authors could find a way of pocketing 80% of the sale price rather than 10%. Then if the book were sold directly by the author for \$7 rather than \$70, and sold only twice as many copies as a result (not unlikely, given the vastly lower cost), the author would make more money as well as having more readers.

b. *Expense Limiting Book Topics*

Because existing books are fairly costly to produce and distribute, publishers have to consider the likely market for a book. They may therefore reject a book or a monograph simply because it will have only a modest number of readers.

Some nonprofit academic presses may be willing to pay less attention to such circumstances, because they see their mission as spreading scholarly knowledge, even when the market is small. And many presses do now publish books that ultimately sell only 2000 copies or fewer.<sup>44</sup> Still, the worry about recouping printing, distribution, and promotion costs necessarily remains a constraint that will keep some valuable but narrow-market books from being published.<sup>45</sup>

2. *Publishers' Diminishing Value Added*

So the bulk of the problem I describe stems from the fact that books cost a great deal, both to buy and to produce; and the great bulk of the money goes to publishers and book stores. I don't begrudge them this money as a matter of principle. They have historically provided a needed service without which the authors' ideas could never have been distributed. But to the extent this markup can be reduced, both academic authors and their readers would generally benefit.

Historically, a publisher has had multiple roles. In roughly chronological order within the book's life cycle, they have been the following:

- (1) selecting good books, so that the publisher's name serves as a signal of quality to readers;
- (2) editing;

---

44. *Id.*

45. Existing books have another, related, drawback: they are not searchable on Lexis and Westlaw (with the exception of treatises that those services choose to include), so researchers might often miss them. It turns out that books are still generally more often cited than articles by the same author, despite their not being on the electronic services. *Id.* But if they could be made available on Lexis and Westlaw, presumably the citations would increase still further.

I won't discuss this further here, because in principle publishers could remove this drawback even without the shift to electronic publishing: They can presumably work out deals to include the books in the Westlaw and Lexis databases, much as those databases include law reviews. Scholarly books on legal topics are about as useful (or not) to paying Westlaw and Lexis subscribers as are articles, so there's little reason for Westlaw and Lexis to balk, if the royalty payments to the publishers are set low enough (or even waived altogether). Still, the law review book-publishing proposal I lay out below might ease the transition to Westlaw and Lexis availability, by piggybacking on existing contractual relationships between journals and the electronic databases.

- (3) typesetting;
- (4) printing;
- (5) physically distributing copies to books and libraries;
- (6) physically distributing free copies to prospective reviewers, and (for textbooks) to prospective adopters;
- (7) persuading people to buy the book.

Modern word processing has already made dispensable the publisher's typesetting function, which was once very significant. I provide my textbook publisher, for instance, with camera-ready copies of my textbook drafts. Other authors might not, but they easily could if they had to, especially with the help of a research assistant. The advent of e-readers will likewise eliminate the need for the publisher's printing and physical-distribution functions.

As to editing, my sense from friends who write scholarly legal books and legal textbooks is that many publishers don't provide much substantive editing. That has also been my personal experience with my textbook publisher.

So authors already have to rely on themselves, on substantive critiques from colleagues (though ones that rarely extend to line edits), on research assistants, and sometimes on freelance editors whom the authors hire for the task. Of course such editing assistants and freelance editors need to be paid. But they can be and often already are paid by the author's academic institution—perhaps with some recoupment from the incoming royalties, or perhaps not—much as the institution already provides funding for research help from research assistants and librarians.<sup>46</sup>

That leaves publishers with two main functions: selecting and signaling (1), and marketing (7).

Publishers' selection of a book is a signal (though a necessarily imperfect one) of the book's passing at least some threshold of quality. First, readers know that academic publishers generally have panels of scholars vet books for publication. Second, readers know that publishers have an incentive to reject bad material, since the publishers' money and reputation is riding on their books' success.

And publishers also help promote the book in various ways. They may (a) buy ads in various publications (such as the *New York Times Review of Books*), (b) place the book in bookstores, where browsing readers may come across it, (c) identify leading experts in the field to whom to send review copies, (d) try to line up reviews in leading publications (such as newspapers and magazines), (e) identify professors to whom to send review copies of textbooks, (f) display the book in the publishers' booths at academic

---

46. Many academic institutions prefer to employ students rather than outsiders for research help; this provides some subsidy for students, trains them, and helps develop their relationships with professors. Nonetheless, in my experience academic institutions also pay for research help from outsiders who have the needed expertise, or are in the right place (for instance, if the help requires looking through physical archives in some other city).

conferences, (g) list it in catalogs from which libraries may make selection decisions,<sup>47</sup> and so on.

### 3. *An Alternate Publishing Scheme: Law Journals Moving into Book Publishing*

#### a. *Selection and Signaling*

One possible consequence of publishers' reduced marginal advantage is that others could begin to compete with book publishers. The logical candidates for this role would be law journals.

Law journals have the sort of branding power that publishers do. If the *Journal of Law & Economics* decided to select books, readers could be assured that some serious scholars in the field have read the book, and found it worth publishing. This is much the same thing that readers of Harvard University Press books can expect.

If the *Michigan Law Review* decided to do the same, readers wouldn't have as much valuable information, because the book will have been screened mostly by students. But readers would still know that the book was selected through a competitive screening process. Between that and other factors, such as the author's name, the cover blurbs, and the book reviews—now more accessible than ever, because of the internet—readers will have a pretty good sense of whether the book is worth reading.

Prominent student-edited journals could also institute some level of peer review for books as well, if they wish. The *Harvard Law Review* and the *Stanford Law Review* already provide some faculty review of their articles, though not as much as university presses tend to provide for books.<sup>48</sup>

Academic authors derive value from the publisher's imprimatur, even independently of the imprimatur's ability to increase book sales. Placing a book with a publisher is important for promotions, and for professional respect. But we already know that the top law journals, both faculty edited and student edited, are also highly valued by authors, because their imprimaturs are also respected by the authors' colleagues.

Most law professors would be delighted to be published in the *Michigan Law Review*, and even more so in the law review at the school sometimes referred to as "the Michigan of Massachusetts." They would likely be similarly happy to have their book "published"—or, more precisely, branded—by a hypothetical Michigan Law Review Books project. Some authors might hesitate if they see electronic-only publication as less prestigious than paper publication. But if the electronic-only publication is done by high-status law

---

47. See E-mail from Jenny Lentz, Reference Librarian and Head of Collection Development, UCLA Law Library, to author (Sept. 15, 2009, 13:39 PST) (on file with author) (reporting that the UCLA Law Library reviews publisher announcements and catalogs to see which books are worth buying, and relies heavily on the publisher's reputation).

48. See Harvard Law Review, Manuscript Submission, <http://www.harvardlawreview.org/manuscript.shtml>; E-mail from Kara Kapp, Editor, Stanford Law Review, to author, (Aug. 15, 2009, 20:32 PST) (on file with author).

reviews, it should quickly become prestigious precisely because of the law reviews' status. And that would be especially likely if the lower cost of electronic distribution means more readers and thus more exposure for the authors' ideas.

The branding by a law journal might at first be less effective with international and interdisciplinary audiences, who aren't as familiar with American law journals. But readers will still see that the book bears the brand of some impartial organization. And the organization will have a name that is visibly affiliated with a prominent university (e.g., the *Michigan Law Review*) or that sounds like a leading journal in a discipline (e.g., the *Journal of Law & Economics*).

And if the book jacket includes blurbs by prominent academics praising the book and the author, that should further ease readers' concern. After all, people who look for works from other countries or disciplines generally don't put that much stock in the precise name of the publisher. Instead, they tend to be more interested in the book's title, the author's name, and the names of endorers.

Nor should there be any major institutional barriers to law journals' publishing books. From an editing and selection perspective, a book is not much different from a very long article. Indeed, screening submitted book drafts, and editing them once they're accepted, would be more time consuming than screening and editing article drafts. But presumably many fewer book drafts would be submitted than articles. And I suspect that many student editors would be pleased to help select and edit books, which are often seen as more meaty and more lasting than an article.

Law journals would have to commit to indefinitely keeping their e-books online, even if the journal stops operating. But it shouldn't be hard or expensive to set up some sort of central repository (or even more than one such repository) that would either do all the electronic distribution and financial collection on behalf of hundreds of journals, or would at least step in for those journals that stop publishing. This repository could be a law review cooperative, a leading university law library, or a for-profit service such as HeinOnline.

Faculty-edited journals might be reluctant to undertake heavy editing obligations for a book. But they might therefore just choose to select the books and provide big-picture editing suggestions, and leave line editing to the author, to any student workers on the journal, or to research assistants hired by each author.<sup>49</sup>

It's not clear how much money law journals would expect to get from the electronic books they publish. They might conclude that they should get a share of the proceeds, because they've put work into the book and because their brand contributes to the book's success. Or they might conclude that their customary journal subscription revenue is meant only to compensate for printing and mailing costs, and that the editorial expenses are part of the

---

49. In my experience, some faculty-edited law journals provide fairly heavy line editing by faculty members, but others already don't, even as to short articles.

journal's service to the academy and of the journal's education of its members.

But in any event, it seems likely that law journals will take only a relatively modest amount of the sales price, much less than publishers tend to do. Law journals are historically heavily subsidized in two ways: First, law schools are used to providing free office space to the journals, and often secretarial and management help from a staffer paid by the school. This is done because journals are seen as important educational tools, and not having at least a general-interest journal would make the law school look bad.

Second, law students are used to providing free labor to the journals, because of the educational and credential value of participating on the journal. With relatively few bills to pay, journals can thus afford to take little or no money in royalties. Nor are the subsidizing law schools likely to see the royalties as an important revenue stream that needs to be harnessed to reduce the subsidies they give their law journals.<sup>50</sup>

This gives law journals a substantial edge over professional publishers. In the abstract, it's not clear that such subsidies are necessarily socially optimal. But they do exist, and they do create a possible benefit to authors and readers, because they make possible the distribution of books at much lower cost.

#### b. *Marketing*

The main downside for authors would be that law journals don't have the marketing abilities of publishers. Yet much of that could be overcome.

To begin with, many authors could take advantage of the marketing services of think tanks or advocacy groups with which they're affiliated, or that support the book's position. The authors could then enjoy the credibility provided by an impartial journal's imprimatur, coupled with the active behind-the-scenes help provided by a supporting organization. Some universities might also be able to promote their faculty members' writing, though it's not clear to me that universities are generally good at that.

Beyond that, internet media can also help authors themselves promote the book. Authors can, for instance, contact legal bloggers who write about the field, and ask to guest blog about the book, or at least ask for a link to the book.<sup>51</sup> And while legal blogs have many fewer readers than many newspapers and magazines have, the legal blogs' readers are generally the very

---

50. Law schools already don't ask their faculties to share scholarly book and textbook royalties with the school, even though those books are written with the help of salaries, equipment, and research assistance funded by the law school. To be sure, that is an accommodation for the schools' own faculty members, and perhaps the schools might want to get money from other professors who publish books through the school's law journals. But the school's own faculty members might want to publish books through other schools, and might thus press their own school to maintain a norm in which the publishing law review's school doesn't demand any royalty. And the money to be had from royalties on sales of such books is small enough that it strikes me as unlikely that law schools will insist on trying to claim much of it.

51. They can also ask the bloggers to review the book, but that's work for the blogger, work that many bloggers are unlikely to invest.

readers who are most likely to read a legal book that's aimed at academics or scholarship-minded practitioners.

Authors can also contact bloggers with an even wider readership than the legal bloggers have. Northwestern University law professor Jim Lindgren, for instance, reports that his article debunking Michael Belle-siles's work on the history of guns in America was downloaded over 130,000 times, chiefly because of a link on Instapundit.com.<sup>52</sup> Instapundit at the time had over 50,000 readers per day, and now has over 250,000 per day. And while Instapundit isn't focused solely on law, it often covers academic and legal topics, partly because the author of Instapundit, Glenn Harlan Reynolds, is himself a law professor.

Likewise, the article "*I've Got Nothing to Hide*" and *Other Misunderstandings of Privacy*, by George Washington University law professor Daniel J. Solove, has been downloaded over 70,000 times from the Social Science Research Network ("SSRN").<sup>53</sup> Solove reports that this stemmed from a link to the article on the Slashdot site and on computer security expert Bruce Schneier's blog, which in turn triggered many online recommendations (for instance, through the Digg social filtering site) and much online commentary.<sup>54</sup> Bill Landes & John Lott's *Multiple Victim Public Shootings* paper was downloaded 45,000 times from SSRN.<sup>55</sup> Naturally, these are unusual examples, and there would have been many fewer downloads if the papers had cost even a little money. But given that many books sell only 2000 or so copies, the bar for what would constitute sales success is not very high.

Marketing of electronic books can also be made especially efficient precisely because the book is online. Any blog posts linking to or excerpting the books, or even any article citing the book, can direct the reader directly to the book's home page. So can any ads that a helpful think tank or the university might buy. The reader could then see the linked-to excerpt of the book, and quickly buy the whole book with just a few keystrokes.

And if the publisher is cut out of the loop, the book could sell for a good deal less. My colleague Stuart Banner's *The Death Penalty: An American History*, for instance, sells for \$18.45 plus tax and shipping from Amazon

---

52. James Lindgren, *Is Blogging Scholarship? Why Do You Want To Know?*, 84 WASH. U. L. REV. 1105, 1107-08 (2006). Lindgren also reports that it may have been disseminated up to a half-million times more as a result of being reprinted on the History News Network ("HNN") site, but "HNN did not have a counter of the manuscript itself, so that number is little more than a guess." *Id.* at 1108.

53. Soc. Sci. Research Network, SSRN Top Downloads, <http://papers.ssrn.com/sol3/topTen/topTenResults.cfm?groupingtype=2&groupingId=201> (last visited Nov. 15, 2009).

54. E-mail from Prof. Daniel J. Solove, George Washington University Law School, to author, (Sept. 16, 2009, 19:34 PST) (on file with author). Solove also placed his book *The Future of Reputation* online; because of online coverage, the site has gotten over 100,000 unique visits, Site-meter, Daniel Solove: Site Summary, <http://www.sitemeter.com/?a=stats&s=s14solove> (last visited Nov. 15, 2009), though this doesn't reveal how many people actually read the book chapters and how many just saw the front page of the site.

55. Soc. Sci. Research Network, *supra* note 53.

(and that's the paperback price).<sup>56</sup> The Kindle edition sells for \$10. I suspect publishing through a law journal can lower the price to, say, \$5, to cover the author's royalty, the online bookstore fees,<sup>57</sup> and perhaps some compensation to the journal. It takes less persuasion to convince people to spend \$5 than to convince them to spend \$20.

Online marketing of e-books would not reach those readers who prefer physical browsing—who tend to buy books that they see at a physical bookstore, or borrow books that they see on a library shelf. The paper books might still exist, since the law journal is obviously capable of publishing them, and they might even be delivered to some law libraries. But they probably wouldn't make their way to bookstores or physical libraries (other than law libraries), unless the law journals could somehow develop new relationships with those institutions.

So there is a big unknown here: would the extra advantages of marketing a cheaper, instantly downloadable book online overcome the disadvantages of losing purchases through browsing at physical bookstores and physical libraries?<sup>58</sup> But my sense is that, especially for specialized scholarly books, online promotion through sites that are already often read by the target audience will likely largely compensate for the loss of any physical browsing sales.

#### 4. Other Alternatives

There would also be other alternatives as well. Some authors could choose to self-publish. Some think tanks and advocacy groups could publish books directly, rather than just helping authors market them. There are already models for this, such as the Cato Institute, the Brookings Institution, and the Hoover Institution.

---

56. I couldn't find breakdowns of where this money goes when it comes to scholarly books. But as to the typical \$27.95 bestseller sold in a traditional bookstore, the breakdown seems to be 15% to the author, 10% to the middleman wholesaler, 45% to the retailer, 13% for editing, copy editing, graphic design costs, and presumably publisher management expenses and profits, 10% for physical printing, and 7% for marketing. Kate Ashford, *Where Your Money Goes . . . for a \$27.95 Bestseller*, MONEY, Apr. 2009, at 20.

57. The Kindle store currently charges a very high royalty: 65%. See Posting of ebooknow to Ebook Success: Guide to Writing, Marketing, Delivering, and Selling Your Ebook, Amazon's Digital Publishing Agreement, <http://e-booknow.com/blog/2008/06/28/amazons-digital-publishing-agreement/> (June 28, 2008). But one can easily set up an online bookstore that's accessible from readers' computers, and that then emails the books to the readers' Kindles and Amazon's charge for that email is only fifteen cents. Such an online bookstore doesn't offer the ability to buy directly from one's Kindle; but that ability should be less significant for legal books than for novels and the like, since legal books are more rarely impulse purchases.

58. Even some mass-market books have recently been published in Kindle-only format. See Edward Nawotka, *Foreword: Stay Thirsty Lures Veteran Writers*, PUBLISHERS WKLY., June 29, 2009, at 9 (pointing to some such books, including one by a detective-story writer who had won the Shamus Award for an earlier novel). It's not clear how successful such books will be, at this early time in the adoption of the Kindle; but for the reasons I describe in the text, I think that scholarly books (as opposed to mass-market novels) will be more likely to succeed in electronic-only distribution, especially as e-readers become more common.

On balance, I suspect that most academic authors would prefer to get the brand of an established impartial entity, such as a top faculty- or student-edited law journal, both for the sake of increasing readership and for the sake of having the book be more impressive to colleagues and evaluators. But if law journals don't quickly move into book publishing, these other options could be reasonable alternatives for authors who want their ideas distributed without the high reader cost barriers that now exist.

And of course, if my prediction is correct, the established publishers may change their approach to compete more effectively. There may be limits to the price cuts that the publishers might offer, because the publishers don't enjoy the subsidies that law journals or advocacy-group presses might have. But presumably competition will have some substantial effect, at least in encouraging publishers to reduce book cost if not to increase the range of books they're willing to publish.

The important point is that electronic distribution substantially reduces barriers to entry into the publishing market. One way or the other, that should lead to more competition, lower cost, and more options.

### B. *Textbooks*

The legal textbook market differs from the academic book market.

First, most legal textbooks are probably written at least partly for the money. Textbook writing is generally less valued as intellectual activity than is writing original scholarship: less valued by tenure, promotion, and lateral hiring committees, less valued by colleagues, and less valued by the scholar-authors themselves. Many professors do create their own materials, with no payment, just to more effectively teach their own classes. But creating a book that others can use, with material that you might not use in your own class but that other teachers might demand for their classes—and with a teacher's manual, a feature that adopters have generally come to expect—is a good deal more work.

At the same time, endorsement by an authoritative institution is probably less important for a legal textbook. The authors' names, and the content of the book, will tend to be more important than the fact that West Publishing agreed to publish the book. The people selecting which textbook to use are law professors themselves, and tend to know who the important people in the field are.

Adopters are also, I expect, less likely to rely on textbook publishers' selection processes as a real assurance of quality. An author-provided list of adopters, or (for a new book) of people who had looked at the book and can vouch for the book's quality, is probably going to be more informative to would-be adopters than the West Publishing trademark.

The marketing for textbooks is also quite different from the marketing for scholarly books. Because the buying decisions are done by a small group of people—law professors deciding which books to assign—legal textbook publishers have salespeople who visit the schools, knock on professors' doors, and offer to talk about the books.

Finally, if many students don't have e-readers, professors would have to make sure that print copies of the textbooks are also available. But those will often be easily produced by campus printing services, which already produce coursepacks for professors. Such printing will eliminate much of the cost advantage of electronic distribution; but students could get back those cost advantages simply by investing in an e-reader.

My sense is that, once e-readers become common among law students, the textbook market can fairly easily move away from the established publishers and toward something like self-publishing. Professor-authors can generally find effective ways to promote their own books to their fellow professors, for instance by mentioning them on discussion lists and on blogs, emailing academic friends and acquaintances, and the like. They can also realize huge cost savings for students while still maintaining or even increasing their royalty streams. This will be especially so if adopters end up being even slightly sensitive to student costs, so that faced with a choice between a \$25 self-published book by a prominent scholar and a \$100 West Publishing book by another prominent scholar they will—all else being equal—prefer the former.

Of course once this begins to happen, textbook publishers will try to compete, likely by reducing their prices. As with the other markets, I don't expect traditional publishers to entirely vanish. But we will likely see a move toward a much more mixed market, with prices likely considerably lowered by the presence of self-publishing authors who have very low costs (besides, of course, their time, which is already paid for by their universities).

#### CONCLUSION

The Internet has radically changed the dissemination of opinion. The Internet has radically changed the shape of classified advertising, and the change has seriously undermined the finances of newspapers. Internet music distribution has dramatically influenced the music industry, both through the increase in illegal file sharing and in the growth of legitimate online stores that distribute music on a per-song or a subscription basis. Television distribution has only recently begun to shift to internet delivery, but already many people are watching television very differently from how they did before—by watching shows on demand, whenever they want to watch them, rather than asking “What's on tonight?” And of course computer technology has radically changed how lawyers, students, and academics find and read cases, statutes, and law review articles.

It seems likely that electronic distribution will likewise radically change book distribution, especially when it comes to utilitarian works such as legal books. I can't be at all confident that the changes will happen quite as I've speculated. But it seems nearly certain that the books reviewed in a *Survey of Books Related to the Law* issue twenty years hence will often be read in a different format than they are now, and likely published and written in different ways as well.