

OPEN ACCESS, LAW, KNOWLEDGE, COPYRIGHTS, DOMINANCE  
AND SUBORDINATION

by  
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*The concept of open access to legal knowledge is at the surface a very appealing one. A citizenry that is well informed about the law may be more likely to comply with legal dictates and proscriptions, or at a minimum, will be aware of the consequences for not doing so. What is less apparent, however, is whether an open access approach to legal knowledge is realistically attainable without fundamental changes to the copyright laws that would recalibrate the power balance between content owners and citizens desiring access to interpretive legal resources. A truly useful application of open access principles would require adoption of compulsory licensing regimes with respect to proprietary legal resources, and significant government subsidies as well. Because affluent individuals today are both more likely to gain access to information and more likely to have the resources to use it, this Article concludes that the open access construct currently does little to actually empower access to legal information.*

I.	INTRODUCTION.....	870
II.	KNOWLEDGE AND POWER.....	870
III.	PATENTED KNOWLEDGE.....	872
IV.	LAWS AND LEGAL INFORMATION.....	874
V.	CULTURAL RESOURCES.....	877
	A. <i>Lost in Translation</i> .....	877
	B. <i>The Pretend War on Pornography</i> .....	880
VI.	CONCLUSION.....	884

I. INTRODUCTION

The concept of open access to legal knowledge is at the surface a very appealing one. A citizenry that is well informed about the law may be more likely to comply with legal dictates and proscriptions, or at a minimum, will be aware of the consequences for not doing so. What is less apparent, however, is whether an open access approach to legal knowledge is realistically attainable without fundamental changes to the copyright laws that would recalibrate the power balance between content owners and citizens desiring access to interpretive legal resources. A truly useful application of open access principles

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would require adoption of compulsory licensing regimes with respect to proprietary legal resources, and significant government subsidies as well.

## II. KNOWLEDGE AND POWER

The Internet offers a convenient portal through which a wealth of legal information can be accessed. Rather than mitigating resource-based disparities in access to legal information, however, development of the Internet may have exacerbated them. The “knowledge-gap hypothesis,” first proposed by Phillip J. Tichenor, suggests that each new communication medium increases the gap between the “information rich” and the “information poor” because of differential access to the medium.<sup>1</sup> While the Internet provides access to many free sources of legal information, they are likely to be substantially less useful and efficient than fee-based legal resource providers. Though I will argue below that monetary resources are not the only important access considerations, one would expect that the correlation between “information rich” and generalized wealth, and “information poor” and overall impoverishment would be a high one.

Affluent people undoubtedly subscribe to greater numbers of periodicals both offline and online than poor people, and their computers and Internet connections are undoubtedly better and faster. Wealthier people likely have more satellite radios and superior cable subscriptions; radio transmissions with wider varieties of programming; and more big screen, high definition televisions which broadcast larger numbers of channels than those with lower incomes. As with most commodities, the quantity and quality of available information will be affected by economic resources. Consequentially, at the surface, an economics-based heuristic appears to offer a useful, unifying framework with which to analyze a topic as broad as “access to legal knowledge.” If “legal knowledge” is cognitively reduced to a semi-tangible commodity, then “access” to knowledge may be either purchased or subsidized. The “digital divide” can then be conceptualized primarily as a chasm which has been excavated by the unequal distribution of financial resources, and that is bridgeable through affective changes in market conditions, or by acts of charity.

In the United States, the “digital divide” is not a clean fracture point from which to map legal information haves and have-nots. Via schools and libraries, most citizens have some access to computers and to the Internet.<sup>2</sup> Some citizens

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<sup>1</sup> George A. Donohue, C.N. Olien & Phillip J. Tichenor, *Mass Media and the Knowledge Gap: A Hypothesis Reconsidered*, 2 COMM. RES. 3, 3–5 (1975) (available at Agricultural Communications Documentation Center, Doc. ID B01785, <http://web.library.uiuc.edu/asp/agx/acdc/view.asp?ID=B01785>).

<sup>2</sup> KATHLEEN B. COOPER & MICHAEL D. GALLAGHER, U.S. DEP’T OF COMMERCE, A NATION ONLINE: ENTERING THE BROADBAND AGE (2004), available at <http://www.ntia.doc.gov/reports/anol/NationOnlineBroadband04.htm>; Am. Library Ass’n, Libraries and the Internet Toolkit: Libraries, the Internet and Filtering Fact Sheet, <http://www.ala.org/Template.cfm?Section=litoolkit&Template=/ContentManagement/ContentDisplay.cfm&ContentID=50667>; see also Digital Divide Network,

have better access than others, though,<sup>3</sup> and the solution to this dimension of the digital divide is, at least at the macro level, a fairly straightforward matter of increasing access to knowledge through public investment in free libraries, distribution of electronic equipment such as computers and modems, and subsidization of cable and wireless access. However, while the allocation of access portals is a critical dimension of the “digital divide,” to focus exclusively on concrete media resource issues is to ignore one fundamental question that no one has yet answered to this author’s satisfaction: What is the scope and content of the useful legal knowledge that rich people have access to, but poor people do not?

One could be sarcastic and quip that, for starters, rich people “know” where the money to pay their lawyers is coming from. The truth underlying this rather heartless jibe is that wealthier people have an ability to reap material benefits from the “knowledge” they have access to in ways that are inaccessible to poor people, regardless of how much “knowledge” they absorb. Tax shelters, liability-shielding corporate structures, and government contracts all require resources to formulate and administer.

It is also true, however, that people with few economic resources are somewhat insulated from the deleterious consequences that certain kinds of “knowledge”—misinformation and false knowledge, for example—can inflict upon the vulnerable and the unwary. Though money and resources are always important variables, the power relationships inherently vested in any information access paradigm will transcend economic considerations.

Feminist legal scholar Catharine MacKinnon articulated “dominance theory” as a way to frame the contrasting legal and social positions of women and men.<sup>4</sup> Dominance theory is also a useful and appropriate framework for analyzing various aspects of “access to knowledge,” some of which are explicitly genderized (in the sense that they have disparate impacts upon women and men), others less obviously so.

Attributes of dominance and subordination manifest themselves within three discrete approaches to improving access to knowledge, which are each guided by distinct visions of what success with the mission of providing “open access” might look like. The first understanding construes “knowledge” as a positive social good, a resource that is unequally distributed among various groups and interests. The goal of increasing access to knowledge would be met when access was redistributed such that every discrete, cognizable interest group has access to knowledge in roughly equal amounts. This requires a standard of equality of access, against which the actual access of discreet groups is measured.

The second conception equates “knowledge” with transformative empowerment. Access to knowledge is conceived as a positive capacity that

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<http://www.digitaldivide.net>; Sam Paltridge, *Local Access Pricing and the International Digital Divide*, E-ONTHEINTERNET, Sept.–Oct. 2000, <http://www.isoc.org/oti/articles/1000/paltridge.html>.

<sup>3</sup> Digital Divide Network, *supra* note 2.

<sup>4</sup> See, e.g., CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 89 (2005).

can be actuated and facilitated by affirmative practices, and the goal of improving access to knowledge would be met when access itself enabled positive political and social changes.

The third view understands “knowledge” not as a possessable, distributable resource, but as the foundational focus of a series of relationships of domination and subordination. The ability to grant or deny access is the power to dominate those who seek access to knowledge. Rather than equalizing power, the goal of improving access to knowledge under this construction would require dismantling the structures that facilitate domination and subordination.

All three views will be considered in three contexts: Access to patented knowledge; access to laws and legal information; and access to cultural resources, specifically contrasting access to works of philosophy with access to works of pornography. Patented knowledge and cultural resources are of interest because of the ways in which they present alternative models of access, or lack thereof, and overlap with legal information access paradigms. The unique challenges of making legal knowledge accessible in a relatively transparent and effective way will also be evaluated.

### III. PATENTED KNOWLEDGE

The patent system is intentionally designed to provide exceptional access to knowledge. The knowledge “owned,” including the most productive uses of it, is tightly and monopolistically controlled—but only for a finite period of time. Eventually the knowledge is openly dedicated to the public domain. Patent applications are usually published eighteen months after they are filed, and patent applicants are required to make enabling disclosures about the claimed inventions.<sup>5</sup> People skilled in the pertinent scientific disciplines can obtain and read patent applications rather readily, even if the applications have not resulted in the grants of related patents. Patents themselves are published and available for scrutiny and dissemination after they issue. A patent’s validity can be successfully challenged if its disclosures fail to provide a person of ordinary skill in the pertinent art with adequate access to the knowledge it adds to the body of scientific or technical information, so patentees are motivated to make full and complete disclosures.

Though patented knowledge is potentially useful information that has been significantly commodified, the mechanics of the patenting process actually facilitate access to knowledge when knowledge itself is construed as a fungible end unto itself. The knowledge that patents and affiliated patent documents contain is accessible to anyone with access to a patent database, such as the one maintained by the U.S. Government.<sup>6</sup> Within a “positive social good” framework, patents are a wonderful access device, encouraging the disclosure and distribution of innovative knowledge. Published patents, while they are in

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<sup>5</sup> 35 U.S.C. § 112 (2000).

<sup>6</sup> U.S. Patent & Trademark Office, Patent Full-Text and Full-Page Image Databases, <http://www.uspto.gov/patft/index.html>.

effect, represent a vast array of pseudo-open-source information about new, useful, and non-obvious inventions.<sup>7</sup> They morph into true open-source-style knowledge resources once the patents' terms of protection have expired.

If one conceptualizes knowledge as a force of transformation and empowerment, however, patents are an unmitigated disaster. Developed nations that enforce patent rights are not precluding access to knowledge. They are preventing people who are unwilling or unable to pay surcharges from reaping the benefits of knowledge that in and of itself is freely available. Simply knowing, for example, that a certain vaccine or drug has been developed does not mean that it is accessible to the person who desires it. Not even knowing the specific biological or chemical composition of a pharmaceutical product that a patent application might provide is of any practical use unless the tools of production and reasonably efficient distribution chains are available. Knowledge of the existence of certain drugs or vaccines could conceivably be a catalyst for political pressure on a government to make pharmaceutical products available, but only in a reasonably democratic environment in which there was a functioning free press.<sup>8</sup>

"Knowledge" will manifest itself in useful, accessible form only to the extent that it is made tangible and embedded in particularized consumable goods, and then only to the extent that such goods are available and affordable. A patented process for synthesizing vaccines may be used only to make certain vaccines, which are available only to those who can afford them. Knowledge of the process or the beneficial properties of the vaccine is rendered worthless. While it may be possible to obtain a license to use patented knowledge in relatively unfettered form, it is far more likely that usage will be constrained, and conditioned upon compliance with restrictive limitations. Compulsory licensing is generally not available, and licensing may be altogether impossible in many contexts.

A direct application of dominance theory to the patent system requires one to think explicitly about the power relationships that patents facilitate. Access to knowledge can be regulated in ways that facilitate the subordination of discrete groups by those who control the access. For example, if the people in

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<sup>7</sup> See 35 U.S.C. §§ 102–103 (2000).

<sup>8</sup> Ann Bartow, *Women in the Web of Secondary Copyright Liability and Internet Filtering*, 32 N. KY. L. REV. 449, 451 (2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=755724](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=755724) ("Economist Amartya Sen has . . . argued that famines can result from political rather than agricultural failures. Famines, he has asserted, is a consequence of the distribution of income within a political subdivision, and the allocation of entitlements to food. The actual food supply is certainly not irrelevant, but a nation experiencing a famine can have adequate food within its borders that is inequitably distributed. Countries that lack an effective press or mass media lack information about where the food is, how it got there, and what efforts, if any, are being made to redistribute it. That the press can have a profound impact on the well-being of a nation was explained quite powerfully by economist Peter Griffiths, who described how a man named Steven Lombard prevented a famine in Tanzania in part by leaking information about the impending disaster to the BBB World Service, which in turn informed the Tanzanian people. This focused public scrutiny upon Tanzanian politicians, who otherwise stood to[] reap enormous personal profits by controlling the dispersal of emergency famine aid.").

power are concerned about the health and welfare of their citizens, poor countries can be bullied into a range of trade or political concessions to gain access to patented pharmaceuticals. Individuals without the financial resources to obtain needed drugs through the health care marketplace must rely on charity rather than any sense of health care as an entitlement or human right, or else they must agree to participate in clinical trials and other forms of pharmaceutical experimentation to obtain therapeutic treatment.<sup>9</sup>

From a practical standpoint, patent law advances the state of “open source” knowledge very slowly. By the time an invention reaches the public domain by way of patent expiration, the state of the art technology in the pertinent field has made two decades’ worth of advancements and the knowledge now freely available is likely to be obsolete and have little, if any, practical application value (possibly excepting pharmaceutical products, or adoption in geographic areas with less technological development). The patented knowledge could, however, become “public domainesque” if a patent holder grants liberal and affordable usage rights during the term of the patent, or decides to forgo enforcing patent rights at all, and widely and effectively communicates its intentions in this regard, or where a patent was subject to a compulsory licensing regime.

#### IV. LAWS AND LEGAL INFORMATION

“Access to the law” is a broad construct that is ill-suited to ready definition. Federal statutes are highly accessible in the sense that the specific words of the laws promulgated by Congress can be free from the constraints of copyrights<sup>10</sup> and, especially if one has Internet access, are available at very little cost. The actual meaning of the laws as they are interpreted by courts is somewhat less accessible, despite the relatively unfettered availability of federal court opinions on the Internet. Without access to highly indexed and pre-digested for-profit repositories of case law summaries, the individual court opinions that contextualize and ground statutory authority in particular factual circumstances can be difficult to locate, compile and assimilate. Secondary sources such as treatises that supply shortcuts may function as imperfect substitutes, but whether even these are likely to be accessible to the person who does not have access to paid online legal research services or the specialized collections of law libraries is unclear. To the extent that the online accessibility of federal statutes and court opinions constitutes “open access” to the law, it achieves very little in the way of assisting or empowering citizens who are bound to comply with laws they lack the independent analytical tools to fully comprehend.

Knowledge of laws is easily characterized as a social good if one assumes that laws are just, and increased awareness of the text and meaning of laws

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<sup>9</sup> Susan K. Sell, *The Quest for Global Governance in Intellectual Property and Public Health: Structural, Discursive, and Institutional Dimensions*, 77 TEMP. L. REV. 363, 375 (2004).

<sup>10</sup> 17 U.S.C. § 105 (2000).

leads to enhanced compliance. Laws that are easily communicated, understood, and applied will be distributed with the most frictionless efficiency, but whether they are conformed to more frequently than more complicated legal proscriptions is difficult to gauge. Consider traffic laws, which are signaled with roadside signs. Almost every motor vehicle operator can readily ascertain the designated speed limit on a thoroughfare, but that doesn't necessarily mean that almost every driver will obey a posted speed limit.

Knowledge of laws is similarly potentially empowering if the nature of the legal system is such that citizens feel they have access to responsive legal forums that can stop bad actors or require positive actions, as a given situation requires. Civil rights reforms are often viewed as a series of contexts in which "law" in the form of courts, government actors, and eventually actual legislation broke down the institutionalized structures of segregation and discrimination. Passage and enforcement of various environmental laws also provide examples of productive, empowering uses of legal tools.

The concept of meaningful "access to the law" has many dimensions. The law must be rendered learnable, teachable, understandable and usable. Though most statutory laws are freely accessible in the sense that they are either uncopyrightable<sup>11</sup> or largely treated as though they are uncopyrighted,<sup>12</sup> functional knowledge of the law often requires the interpretive powers of a lawyer. "Legal information" that might substitute for a consultation with a lawyer is copyrightable and often treated in very proprietary ways; digests, treatises, hornbooks, and annotated versions of statutes are generally copyrighted commodities accessible only through specialized library collections or outright purchase. Attorneys, and those who can readily purchase the time and expertise of attorneys, use the complexity of the law and the legal system to assert dominance over those who lack access to interpretive, no less proactive, legal services.

Congress could act affirmatively to make legal information available much as it did to "incentivize" the use of Internet censoring software in schools and libraries through promulgation of the Children's Internet Protection Act (CIPA).<sup>13</sup> The implementation of CIPA and the ongoing maintenance of the

<sup>11</sup> *Id.*

<sup>12</sup> *See, e.g.,* *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 796 (5th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 969 (2003) (when a state adopts a privately drafted model building code as law, to the extent it is "law" it is not copyrightable); *but see* *County of Suffolk v. First Am. Real Estate Solutions*, 261 F.3d 179, 188 (2d Cir. 2001) (holding a New York county could own an enforceable copyright in its tax maps); *Georgia v. Harrison Co.*, 548 F. Supp. 110 (N.D. Ga. 1982), *order vacated on other grounds*, 559 F. Supp. 37 (N.D. Ga. 1983).

<sup>13</sup> "The Children's Internet Protection Act (CIPA) is a federal law enacted by Congress in December 2000 to address concerns about access to offensive content over the Internet on school and library computers. CIPA imposes certain types of requirements on any school or library that receives funding support for Internet access or internal connections from the 'E-rate' program—a program that makes certain technology more affordable for eligible schools and libraries . . . .

o Schools and libraries subject to CIPA may not receive the discounts offered by the E-Rate program unless they certify that they have an Internet safety policy and

content-censoring software it requires absorb a substantial amount of resources by both schools and libraries that could instead be directed toward providing positive access to information, such as by educating people about the law. Or, both goals could be pursued simultaneously. Legislators show no hesitation to manipulate the workings of the Internet when such interference appears to serve some conception of the public good.<sup>14</sup> If they could be persuaded of the rectitude and value of widespread access to legal information, disinclination toward Internet interventionism could be easily overcome.

There is nothing to prevent Congress from adopting a *Kelo*<sup>15</sup>-style eminent domain approach to proprietary legal information, and, after justly compensating the works' authors with reasonable royalties, making hornbooks and treatises available on an "open source" basis to the populace. Or, a government agency such as the Library of Congress could be tasked with compiling similar materials itself, access to which would not be bound and fettered by copyright law.<sup>16</sup> Gaps could conceivably be filled by "volunteers" who devised and edited Internet informational resources such as wikis.<sup>17</sup>

## V. CULTURAL RESOURCES

From the diverse universe of cultural output, consider two rather disparate categories of works: philosophy and pornography. Cultural resources that

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technology protection measures in place. An Internet safety policy must include technology protection measures to block or filter Internet access to pictures that: (a) are obscene, (b) are child pornography, or (c) are harmful to minors, for computers that are accessed by minors.

- o Schools subject to CIPA are required to adopt and enforce a policy to monitor online activities of minors; and
- o Schools and libraries subject to CIPA are required to adopt and implement a policy addressing: (a) access by minors to inappropriate matter on the Internet; (b) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications; (c) unauthorized access, including so-called "hacking," and other unlawful activities by minors online; (d) unauthorized disclosure, use, and dissemination of personal information regarding minors; and (e) restricting minors' access to materials harmful to them.
- o Schools and libraries are required to certify that they have their safety policies and technology in place before receiving E-rate funding."

FCC, Children's Internet Protection Act: FCC Consumer Facts (Jan. 12, 2006), *available at* <http://www.fcc.gov/cgb/consumerfacts/cipa.html>. *See also* Am. Library Ass'n, Children's Internet Protection Act: Advice & Resources, <http://www.ala.org/ala/washoff/WOissues/civilliberties/cipaweb/adviceresources/links.htm>.

<sup>14</sup> *E.g.*, the notice and take down provisions of 17 U.S.C. § 512 (2000).

<sup>15</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005). In *Kelo*, the Court held that the individual states were free to determine whether economic growth due to redevelopment of property taken by eminent domain qualifies as a permissible "public use" under the Takings Clause of the Fifth Amendment.

<sup>16</sup> 17 U.S.C. § 105 (2000) ("Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.")

<sup>17</sup> *See, e.g.*, Wikipedia, Law, <http://en.wikipedia.org/wiki/Law/>.

qualify as “knowledge” are embodied in tangible products that can be beneficially accessible as social goods via display and performance spaces such as museums and theaters; through media outlets such as radio, television, and the Internet; and at libraries. Both philosophy and pornography are commodities, the accessibility of which is determined by the interplay of market conditions and legal constraints.

#### A. *Lost in Translation*

Initially, consider philosophy. Access to the work product of philosophers is largely controlled by publishers through the judicious use of marketing strategies and copyright laws. When embodied in commercially circulated books, a work is available for consumption through the marketplace. Once a book goes out of print, however, it may be available only to a consumer through short term loans from a library that retains copies in its collections, thereby performing an important archiving function.

Works of philosophy are not in the least bit fungible. The works of individual philosophers are distinct and not interchangeable, not even when various approaches to philosophy may be cabined within identifiable schools. Sometimes fairly complex ideas can be telegraphed by the invocation of a single proper name, as in the cases of Locke, Rawls, Foucault, Nietzsche or Camus. The owners of copyrights in philosophical works control not only the dissemination of the written output of the commodified philosopher, but can also regulate the meaning and impact of the philosopher’s tangibly recorded thoughts. Copyright laws can function as tools of repression by which copyright holders censor or distort philosophical works. For example, one online biography reports:

Friedrich Nietzsche was a German philologist and philosopher who became well known for his iconoclastic style, aphoristic writings, and harsh critique of religion and contemporary ideas about morality. Nietzsche’s sister, a virulent anti-[S]emite, ended up with control over his papers after he died and she worked to ensure that his legacy would be used to support anti-[S]emitic politics and the Nazi regime, albeit in an edited form.<sup>18</sup>

Toward different but no less deleterious ends, French philosopher Simone de Beauvoir has been socially marginalized through bowdlerization of her writings, particularly her seminal book *The Second Sex*. In a collection of essays about *The Second Sex*, scholars criticized the English version of this important work for containing numerous serious translation errors. For example:

[A] sentence in which Beauvoir seems to generalize about women’s limitations, when she writes that French mothers are stymied “in spite of” the availability of conveniently organized day nurseries. But this was a translation error. In the original French (“faute de crèches, de jardins

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<sup>18</sup> About.com, Friedrich Nietzsche, [http://atheism.about.com/library/glossary/general/bldef\\_nietzsche.htm](http://atheism.about.com/library/glossary/general/bldef_nietzsche.htm)

d'enfants convenablement organisés') Beauvoir was in fact attributing women's "paralysis" to the lack of child care—a realistic comment on women's limited choices in France of the 1940's, when day care was scarce and both birth control and abortion were illegal.<sup>19</sup>

The English version was so severely edited that there are significant omissions as well. The same scholar asserted:

In addition to misconstruing words and phrases, the American edition deleted nearly 15 percent of the original French text (about 145 pages), seriously weakening the sections dealing with women's literature and history—Beauvoir being one of the first to declare these as legitimate subjects for study. Gone were numerous quotations from women's novels and diaries, including those of Virginia Woolf, Colette and Sophie Tolstoy, that she used to support her arguments. Little-known historical accounts of women who defied feminine stereotypes, like Renaissance noblewomen who led armies, also vanished from the English edition.<sup>20</sup>

Like most authors, Simone de Beauvoir probably had to capitulate to demands made by her publisher just to see her book in print, and even the French version most true to her original authorial vision may well contain errors and omissions with respect to her original text. The only commercially available English translation, however, was constructed without any consultation with the author at all.<sup>21</sup> For her part, according to one biography, Simone de Beauvoir "was so upset by the changes that she wanted the Knopf edition to carry a statement dissociating herself from them."<sup>22</sup> Her surviving

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<sup>19</sup> Sarah Glazer, Essay, *Lost in Translation*, N.Y. TIMES, Aug. 22, 2004, § 7, at 13 ("In 'The Legacy of Simone de Beauvoir,' a new collection of essays edited by Emily R. Grosholz, several Beauvoir scholars contend that the English-language translation is so badly botched that it distorts Beauvoir's intent and presents her as an incoherent thinker. One scholar, Nancy Bauer of Tufts University, says that she has counted 'literally hundreds' of mistakes in translation ranging from elementary bloopers to misunderstandings of scholarly jargon. 'Philosophical terms with a precise meaning in French are turned into the opposite of what Beauvoir says,' according to another contributor, Toril Moi, a professor of literature and romance studies at Duke University. As a result, 'Beauvoir comes across as a sloppy thinker in English.'").

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* ("In May 2000, Beauvoir's adopted daughter and literary heir, Sylvie Le Bon de Beauvoir, called for a new translation. 'This edition is a scandal and we have wrongly tolerated it for too long,' she wrote to Beauvoir's French publisher, Gallimard, citing 'numerous protests from scholars.' Beauvoir 'was appalled by the cuts,' she added, 'but worse, by the mistranslations that betrayed her thinking, and she complained frequently about this.' Yet when Gallimard approached Knopf and its paperback division, Vintage, which together hold the exclusive rights to the English-language translation, about commissioning a new one, they declined to act on it. 'We were astounded by their lack of interest,' said Anne-Solange Noble, Gallimard's foreign rights director. Harvard University Press, among other American publishers, was also interested in commissioning a new 'Second Sex,' but has been discouraged by the rights situation. 'It is a masterwork of 20th-century philosophy, but in English it is in chains,' an executive editor at the press, Lindsay Waters, says.").

daughter continues to press for a new translation.<sup>23</sup> In response, publisher Knopf makes unverifiable and frankly dubious claims that there are marketing and economic reasons why a new translation is financially unattractive.

This entire situation is an example of the intersection of copyright law and philosophy, and not a very happy one. The idea that one must either remain alive, sentient and interested until 2056, or become fluent in French, to read *The Second Sex* as Beauvoir intended it to be read, is appalling. There may be underground unauthorized English translations already in existence, and the Internet would be a perfect distribution tool for them, but scholars capable of doing or recognizing better English language versions are unlikely to want to risk civil or even criminal liability to make them broadly accessible. Copyright cases like *BMG Music v. Gonzalez*<sup>24</sup> suggest that simply downloading (no less uploading or offering to sell) an unauthorized version of a book could lead to serious legal consequences.

In this instance copyright laws are preventing rather than incentivizing the creation and distribution of important ideas and expression. Moreover, when the government brings the force of law to bear to prevent the authorship, distribution and reading of certain words, it begins to seem a lot like censorship. The copyright laws contain provisions for the compulsory licensing of musical compositions. If a musician wants to “cover” an existing tune after its first commercial exploitation, the composer of the song cannot prevent this, but is entitled to a reasonable royalty.<sup>25</sup> The same sorts of rules should apply to translations, but they don’t, due to political reasons rather than “moral” ones. Literary works can be censored by copyright holders. Copyright laws allow Beauvoir’s publisher to change and control her message, precluding it from potentially undermining a particular cultural narrative. Consider this assessment of the effects of the abridgements made by the English translator:

In general, Fallaize demonstrates that Parshley’s cuts hit hard Beauvoir’s extensive documentation of women’s lived experience. Her lively quotes from women’s diaries, novels, and letters; from male novelists describing women; and from psychoanalytic case studies disappear without trace. “There is a loss of anecdote told from women’s point of view, making the text seem less rooted in women’s experience,” Fallaize writes. The text comes across as “Beauvoir’s personal opinion,” she concludes, rather than as well-supported analysis of a specific historical and cultural situation.

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Such cuts are not ideologically innocent. According to Fallaize, they impoverish Beauvoir’s text by depriving us of the rich variety of women’s voices that make up the French text. In my view they also make it particularly easy for hostile critics of Beauvoir to claim that she was uninterested in women, and therefore “male-identified,” yet even the most

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<sup>23</sup> *Id.*

<sup>24</sup> 430 F.3d 888 (7th Cir. 2005).

<sup>25</sup> 17 U.S.C. § 102(a) (2000).

cursory reading of the French text shows that this accusation could not be more unfair.<sup>26</sup>

To the extent the text is a social good, the market is not solving the inaccurate translation problem and making the preferred informational product available. Though it intuitively seems as though the market for a new translation would equal if not at least initially surpass current sales levels, which are adequate to keep the book in publication, the potential earnings are disregarded by the publisher.

Empowering aspects of the book as written are explicitly minimized and undermined, as noted above. The only translation available to English speakers “makes it very difficult to see that Beauvoir has a coherent and deeply original philosophy of sexed subjectivity, one that never degenerates into a general theory of ‘femininity’ or ‘difference.’”<sup>27</sup> Thus the only accessible adaptation of *The Second Sex* undercuts the potentially activating, energizing implications of the true version.

The acts of domination embedded in all this are fairly obvious. The copyright holder has made clear its desire, power, and ability to subordinate the communicative wishes of the author and interested readers to its own dominant, censorious agenda. The ways that copyright precepts can be used to control the philosophical ideas that are available to the reader parallel the mechanisms by which proprietary controls can be used to regulate access to legal information. While in the Beauvoir example the issue is literally one of translation, many legal resources can be intentionally distorted to instrumentally advance a particular perspective.<sup>28</sup>

#### B. *The Pretend War on Pornography*

Though normalized, it would be inaccurate to suggest that pornography has been overly embraced by mainstream culture as a positive social good. It is, however, something that is, at a minimum, tolerated. Access to pornography is largely viewed as a right, and pornography has gained currency in certain spheres as positive and encouraging evidence of the continued vibrancy of the First Amendment despite lamentable restrictions increasingly applied by the government against political speech. Individual soldiers, for example, may not be able to blog even generally about their war experiences without fear of censorship and retribution,<sup>29</sup> but at least their basic freedom to download videos of anonymous naked people having sex is intact and inviolable.<sup>30</sup>

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<sup>26</sup> Toril Moi, *While We Wait: The English Translation of The Second Sex*, 27 SIGNS 1005, 1009–10 (2002), available at <http://www.journals.uchicago.edu/SIGNS/journal/issues/v27n4/270403/270403.html>.

<sup>27</sup> *Id.* at 1012.

<sup>28</sup> See generally Bartow, *supra* note 8.

<sup>29</sup> Jennifer L. Peterson, *The Shifting Legal Landscape of Blogging*, WIS. LAW., Mar. 2006, at 8; Joseph Mallia, *Soldier's Blogs: U.S. Cracks Down*, NEWSDAY, Jan. 2, 2006, at A04.

<sup>30</sup> See Mark Glaser, *Porn Site Offers Soldiers Free Access in Exchange for Photos of Dead Iraqis*, USC ANNENBERG ONLINE JOURNALISM REV., Sept. 20, 2005,

As a predictable corollary, access to pornography has been unambiguously embraced by many as transformative and empowering. It proves that we are a free country, a nation of laws that is not yet a Christian theocracy. It illustrates in unclothed splendor the libertine rights and freedoms adorning the lives of consenting adults in pursuit of happiness.

The internal artifice of pornography is generally all about domination and subordination. Externally, pornographers have effectively and dishonestly portrayed themselves as subordinate to a dominant puritanically censorious social ordering. In fact, pornography is the dominant industrial force that has driven the evolution of the Internet. The law of cyberspace is largely the law of pornography. Statutes and court cases regarding content-based restrictions, copyrights, domain names, anonymity and privacy have been rooted to some extent in purveyors, consumers or putative opponents of pornography. Despite the rhetoric, there has never been a clear, focused attempt to preclude or remove pornography from the Internet, though both free speech activists and pornographers seem to find it useful to pretend that access to pornography is chronically imperiled.

If social conservatives had ever truly wanted to reduce or eliminate pornography, their approaches to doing so would have been markedly different. While it is true that they might not have met with any more success than the Potemkin-like anti-pornography bulkheads they established, such efforts would have been more closely tailored to pornography, and less transparently targeted at acts or behaviors that are completely unrelated to pornography, but which contravene a particular view of acceptable social interactions, such as homosexuality and contraceptive information.

The Communications Decency Act<sup>31</sup> was purportedly pitched at reducing the amount of pornography on the Internet that was accessible by juveniles, but that isn't at all what the language of the statute said. The content restricting provisions stated in pertinent part that: "Whoever . . . initiates the transmission of . . . any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;" or "uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service

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<http://www.ojr.org/ojr/stories/050920glaser/>; see also Brian Hartman, *Did Troops Trade Photos of Iraq Dead for Porn?*, ABC NEWS, Sept. 28, 2005, <http://abcnews.go.com/Technology/IraqCoverage/story?id=1166772&page=1>.

<sup>31</sup> Communications Decency Act of 1996, Pub. L. No. 104-104, tit. V, 110 Stat. 133, 133-42, *invalidated by* Reno v. ACLU, 521 U.S. 844 (1997), *available at* [http://www.epic.org/free\\_speech/CDA/cda.html](http://www.epic.org/free_speech/CDA/cda.html).

placed the call or initiated the communication . . . ,” would be subject to fines, or imprisonment, or both.<sup>32</sup>

Critics of the Communications Decency Act focused largely on the impact that compliance with its provisions would have on the materials that were available to adults, both as an absolute matter, and in a practical sense. Fear of prosecution in the event certain content was displayed to minors would affect the quantity and content of materials that were made available generally. Even if some materials were rendered accessible, adults would be dissuaded from accessing them because the necessity of verifying their ages and identities might be burdensome and would compromise personal privacy interests. It has been claimed that sensitive information related to AIDS and other sexually transmitted disease prevention, birth control, drug abuse, and other critical social issues would not be sought out if recipients were required to identify themselves, even if the information was made available at no cost to the viewer. Yet when people access “pay per view” pornography, privacy concerns do not appear to be particularly acute. Bank accounts, credit cards, and “PayPal” accounts all create personally identifiable links between people and pornography. Despite the lack of “privacy,” not to mention the fees charged, pornography is by far the most successful business model on the Internet. Pornographers make strategic use of gay teenagers searching for nonjudgmental information about their sexual orientation and suicidal pregnant incest victims seeking information about procuring abortions to thwart a regime of government-mandated personal identifiability on the Internet, instrumentally framing them as important beneficiaries even while privately imposing such restrictions themselves upon customers to ensure they get paid. Pornography marches quietly behind more compelling claims to inalienable anonymity, but it nevertheless stealthily dominates the terrain when legal strategies are fashioned, and farcical yet appeasing content restriction regimes are contrived to contain it.<sup>33</sup>

Copyright law could be reconfigured to discourage pornography. Until 1979, copyright protection was effectively unavailable for pornographic movies, though people created and distributed pornographic works anyway, and presumably did so profitably.<sup>34</sup> One consequence of initial judicial

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<sup>32</sup> *Id.* § 502.

<sup>33</sup> Examples include the “V chip,” censorware, or parental controls. *See, e.g.*, Thomas Hazlett, *Requiem for the V-Chip*, SLATE, Feb. 13, 2004, <http://www.slate.com/id/2095396/>; 47 U.S.C. §§ 303(x), 330(c) (1996); Richard E. Wiley & Rosemary C. Harold, *Communications Law 2005: On the Brink of Change*, 848 PLI/PAT 163, 233 (2005); Peter Johnson, *The Irrelevant V-Chip: An Alternate Theory of TV and Violence*, 4 U.C.L.A. ENT. L. REV. 185, 189–90 (1997) (for the proposition that the V-chip was ineffective at reducing the amount of violence that children watch on television).

<sup>34</sup> *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979) (holding it was improper to permit the assertion of obscenity as an affirmative defense to a copyright infringement claim. First, the court concluded that nothing in the 1909 Act indicated that obscene materials could not be copyrighted. Second, the Act was constitutional under the Necessary and Proper Clause even though it accorded protection to works that arguably did not promote “science and useful arts” under the Copyright Clause. Finally, the court held it was improper to apply the equitable unclean hands doctrine in

determinations that even obscene works were entitled to copyright protection may well have been to spark the production of more of them.<sup>35</sup> Another likely effect was to incentivize even broader distribution of pornographic works.

Until pornography took to the Internet, “adult content” providers did not often sue for infringement, possibly in part because they feared that neither judges nor juries would be inclined to treat them favorably, though there is little, or perhaps “mixed” evidence that adult content has received lesser copyright protections than creative works that do not have sexual themes.<sup>36</sup> Not only has Internet distribution facilitated extensive distribution of pornography, but it has also normalized pornographic content to the extent that copyright holders in digital works of pornography seek and obtain expansive copyright protections.<sup>37</sup>

One might confidently assert that as a general matter the social benefits of broad access to legal knowledge exceed the social benefits of broad access to pornography. Access to legal knowledge can be touted as a bona fide social good, while access to pornography is often portrayed as something that must be tolerated as an unintended consequence of the First Amendment. Yet far greater social resources are poured into preserving access to pornography than have ever been invested in facilitating access to legal information. Not coincidentally, pornography is much more abundant and affordable via the Internet than online legal research services are ever likely to be.

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contravention of the Act’s pro-creativity purposes.); *Jartech, Inc. v. Clancy*, 666 F.2d 403 (9th Cir. 1982).

<sup>35</sup> Kurt L. Schmalz, *Problems in Giving Obscenity Copyright Protection: Did Jartech and Mitchell Brothers Go Too Far?*, 36 VAND. L. REV. 403 (1983).

<sup>36</sup> *Compare Devils Films, Inc. v. Nectar Video*, 29 F. Supp. 2d 174, 175 (S.D.N.Y. 1998) (“Given the clearly criminal nature of plaintiff’s operations, it is self-evident that the Court should not use its equitable power to come to plaintiff’s assistance and should invoke the doctrine of unclean hands and leave the parties where it finds them”) *with Nova Prods., Inc. v. Kisma Video, Inc.*, Nos. 02 Civ. 3850(HB), 02 Civ. 6277(HB), 03 Civ. 3379(HB), 2004 U.S. Dist. LEXIS 247124171, at \*5 (S.D.N.Y. Dec. 1, 2004) (noting that in Manhattan hard-core pornography is not patently offensive under “contemporary community standards”).

<sup>37</sup> See generally Warren St. John, *Naked Came the Vintner*, N.Y. TIMES, Feb. 26, 2006, § 9, at 1, available at <http://www.nytimes.com/2006/02/26/fashion/sundaystyles/26SAVANNA.html> (“Savanna Samson—her real name is Natalie Oliveros—is a porn star, and a noted one at that. As a Vivid girl, one of the actors whose work is produced and marketed by the goliath Vivid Video, Savanna Samson is a porn celebrity. She is the star of 25 sexually explicit films, a two-time winner of the Adult Video News Award for best actress, and her work with Jenna Jameson in “The New Devil in Miss Jones,” a remake of a classic, won last year’s award for the best all-girl sex scene. But Ms. Oliveros is also an aspiring winemaker. Her first production, a 2004 vintage of an Italian red wine that she calls *Sogno Uno* (Dream One), makes its debut this week at wine stores and restaurants in Manhattan.”); Jane Stern & Michael Stern, *Lovers and Other Strangers*, N.Y. TIMES, Sept. 5, 2004, § 7, at 14 (article in the New York Times reviewing porn star Jenna Jameson’s bestselling book *How to Make Love Like a Porn Star*).

## VI. CONCLUSION

The “open access” construct does little, in and of itself, to formulate an extant or empowering form of access to legal information. Like a valid, enforceable patent, an overview of the law pertaining to a given subject merely informs an individual about what might be possible with suitable financial investment, and about the involvement of appropriate intermediaries. The patented invention cannot be lawfully used unless it is licensed; the law cannot be usefully reinvented unless there are lawyers.

An expansive construction of open access principles, which included proprietary interpretive legal devices, could be very beneficial, with the caveat that unless access was fully open, like works of philosophy, they can be distorted in ways that undercut their usefulness or are even actively deceptive. A comprehensive arrangement of compulsory licensing and government subsidies could underpin an open access approach to both legal resources and works of philosophy that made them usefully accessible to people across income levels.

Existing societal memes about the increasing openness of the legal system strictly as a result of the Internet should be carefully scrutinized. As with claims about pornography, government actions may not directly address the specific issues they purport to, instead instrumentally colluding with dominant entrenched interests. Euphoric claims about the increased accessibility of legal information provided by the Internet may intentionally derail efforts and distract energy from efforts at expansive openness-oriented reform. It is critical to unpack and evaluate the true agenda of putatively activist agents, to discern whether dismantling of the power structures precluding open access to legal information will forcefully be attempted.