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Ever Onward: Expanding the Use of Perma.cc

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Ever Onward: Expanding the Use of Perma.cc

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to fulfill course requirements for Current Issues in Law Librarianship, LIS 595,
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Ever Onward: Expanding the Use of Perma.cc

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I. Introduction

Legal citations are important. Even if “[l]aw students hate to learn it, lawyers hate to do it, and law faculty hate to teach it,”¹ legal citation is an essential skill for lawyers and legal academics alike. After all,

Citations serve important purposes in legal writing. They inform readers where to find the cited sources, provide information about their weight and persuasiveness, convey the type and degree of support that the sources provide for a particular proposition, give attribution for words and ideas, and demonstrate that a position is well researched and supported.²

These important purposes of legal citation are not met, of course, if the citation does not lead the reader to the source cited. This issue has plagued authors citing to internet sources ever since such sources became available. An author may cite to the uniform resource locator (URL), or web address, at which she located the material, but years later, that URL may lead nowhere, leaving the reader confounded. This problem has been dubbed “link rot,” and while it has been well documented, an adequate solution has not been proposed – until now.

A group of law libraries has banded together to pursue a project called Perma.cc, with the goal of providing permanent links to cited web materials and eliminating link rot from the world of legal academia. As law libraries adopt perma.cc as a solution, they will wrangle with certain issues regarding how and when to use the service. Some are determining that Perma should be used on the “open web” and when a source is not readily available in print. In other words, Perma should not be used if 1) the material is behind a paywall, or 2) the material is widely available in print. This approach stifles the possibilities that Perma presents us with. More specifically, fair use permits the use of Perma in limited circumstances beyond paywalls, and Perma should be used even when the source is available in print because doing so advances the larger goals of legal citation.

But first, some background is necessary. This article will discuss the problem of link rot and how it has plagued legal citations over the last two decades. It will also provide an introduction to Perma, discussing what it is and how it works.

II. How Link Rot Undermines Legal Citations

As noted above, citations in the field of law (whether in court opinions or journal articles) carry special importance. In the case of court opinions, citations

¹ Kris Franklin, “...See Erie.”: *Critical Study of Legal Authority*, 31 U. ARK. LITTLE ROCK L. REV. 109, 109 (2008).

² Darby Dickerson, *Reducing Citation Anxiety*, 11 SCRIBES J. LEGAL WRITING 85, 87 (2007).

are essential to determine what materials the court found persuasive or non-persuasive. Indeed, one might even say that the citations in an opinion are part of “the law.” And Raizel Liebler and June Liebert note, “Access to the sources in citations is critical in legal scholarship due to the doctrine of *stare decisis* and the development of the common law.”³ How can lawyers or other judges fully parse a legal opinion if the citations are missing?

Essentially the same issue exists in legal academia. Legal scholarship builds on itself with authors responding to each other in a sort of dialogue. Without reliable citations, scholars cannot adequately respond to their peers; after all, they do not know what materials are being relied upon. As the use of internet sources in both judicial opinions and law review articles continues to increase,⁴ we need to make sure those sources can be accessed.

A number of recent studies have demonstrated what many close watchers of legal academia already knew: link rot is rampant in legal citations. In a study initiated in 2007, Sarah Rhodes tracked the availability of a randomly selected group of web materials that were archived in the Chesapeake Project’s legal information archives in 2007.⁵ Her findings were deeply troubling. In 2008, 8.3 percent of materials had fallen to link rot; in 2009 the rate had risen to 14.3 percent; and by 2010, the rate had risen to 27.6 percent.⁶ More than a quarter of links that existed in 2007 had vanished only three years later.

Another recent study looked at all 430 internet links cited in United States Supreme Court cases up to and including the 2009-2010 term.⁷ By the time of publication in 2013, the authors found that 29% of the links were no longer valid.⁸ Given that this is the *United States Supreme Court* we are talking about, the fact that nearly one third of their web citations have vanished is even more troubling.

A more recent study by the people behind Perma actually found the percentage of rotten U.S. Supreme Court links to be *over 50 percent*.⁹ They also looked at web citations in three Harvard journals: the *Harvard Law Review (HLR)*, the *Harvard Journal of Law and Technology (JOLT)*, and the *Harvard Human Rights Journal (HRJ)*. The findings here are the most troubling of all. “Only 29.9% of the *HRJ* links, 26.8% of the *HLR* links, and 34.2% of the *JOLT*

³ Raizel Liebler & June Liebert, Something Rotten in the State of Legal Citation: The Life Span of a United States Supreme Court Citation Containing an Internet Link (1996-2010), 15 *Yale J. L. & Tech.* 273, 287 (2013) [<http://perma.cc/6LEK-JY2M>].

⁴ See id. at 286.

⁵ Sarah Rhodes, Breaking Down Link Rot: The Chesapeake Project Legal Information Archive’s Examination of URL Stability, 102 *LAW LIBR. J.* 581 (2010).

⁶ Id. at 596.

⁷ Liebler & Liebert, supra note 3, at 287.

⁸ Id.

⁹ Jonathan Zittrain, Kendra Albert, Lawrence Lessig, Perma: Scoping and Addressing the Problem of Link and Reference Rot in Legal Citations, 127 *HARV. L. REV. F.* 176, 178 (2014).

links in our sample contained the material cited.”¹⁰ Put another way, 70.1% of the *HRJ* links, 73.2% of the *HLR* links, and 65.8% of the *JOLT* links suffered from link rot.

This sort of citation deterioration is simply unacceptable. While a number of potential solutions have been proposed over the years,¹¹ it seems we finally have an easy to use, durable solution in Perma.cc.

III. What is Perma.cc?

In 2013, a group of law librarians banded together to create Perma.cc in an attempt to eradicate link and reference rot. Put simply, “Perma.cc is a service that allows users to create citation links that will never break.”¹² This is a bold statement, but the methodology for achieving this goal is relatively simple. “As the author cites the material, the author can provide a link to Perma, and the Perma server will save a copy of the information relevant to the citation--at that address at that particular time--thereby capturing what the author determined was a source requiring the citation. Perma will then return to the author a new link, and a formal citation, which is designed to last as long as the Perma system survives.”¹³

When a user clicks on or types in the URL provided by Perma, he will first see a “live view” of the site, showing the cited resource as it presently exists. Perma, however, will also show the site as it existed when the author viewed it.¹⁴ Perma also allows authors to upload screenshots in the event that Perma does not properly display the viewed content.

Perma was created to cure the disease of link rot. In that sense, one might assume that it should be used only when the Bluebook allows authors to cite to internet sources (which is not that often). This would include sources that are available exclusively online (or not readily available elsewhere) and within the “open web” (i.e., sources that users do not have to pay to access). As I argue in the next section, though, Perma can be used to enhance legal citations far beyond this narrow scope. Indeed, fair use permits Perma users to create permalinks for material behind paywalls in certain circumstances, and it makes good sense to create permalinks to certain online materials even when they are readily available in print.

¹⁰ *Id.* at 184.

¹¹ See, e.g., Benjamin J. Keele & Michelle Pearse, How Librarians Can Help Improve Law Journal Publishing, 104 *LAW LIBR. J.* 383, 391-93, 402-03 (2012); Liebler & Liebert, *supra* note 3, at 299-306.

¹² PERMA.CC, FREQUENTLY ASKED QUESTIONS, <http://perma.cc/faq> (last visited Apr. 3, 2014).

¹³ Zittrain et al., *supra* note 9, at 191-92.

¹⁴ *Id.*

IV. Perma Beyond the Open Web

One large issue that librarians and law review editors will face in using Perma is determining when to use it. Should it be used for sources on the “open web” only? Can it be used for sources beyond paywalls? Should it be used if the electronic source has a readily available print counterpart? This section will discuss these issues.

First, we must define “open web.” For the purposes herein, open web refers to that section of the web that is freely accessible and visible without registration and/or payment. This definition includes, for example, blogs, government websites, newspaper websites that do not use a paywall, etc. It would not include, however, subscription databases such as Westlaw, or websites that require payment such as the New York Times’ website.

It appears that the creators of Perma.cc intend for it to be used to create permalinks for citations to the open web. They state, “Perma will be designed to run harmoniously with paywalls and other business models and practices common to the open Web.”¹⁵ To “run harmoniously” with paywalls means, one must presume, to respect the paywall – that is, not to display the material beyond the wall. Indeed, the Perma creators state as much: “If for some reason the original site’s content should not be displayed publicly” (e.g., the content is behind a paywall), “Perma will respect that by only serving them up to users through a manual reference process brokered by the hosting library.”¹⁶ This “manual reference process” would require readers to contact the hosting library and ask for permission to see the material.¹⁷

Law librarians at various academic institutions seem to hold this opinion regarding Perma’s proper use in the open web as well. Law librarians have been communicating with each other on issues relating to Perma through an e-mail discussion list. Any quotations from such discussions should be placed in the context of librarians attempting to figure out how to use a brand new service.¹⁸ In responses to an e-mail discussion list regarding this very issue, librarians have stated, “My recommendation to the law journals is to create a perma link for any link to a freely accessible web source,”¹⁹ “[law journals] shouldn’t be archiving on Perma any content that is behind a paywall or that is from a library (or other

¹⁵ Id. at 192.

¹⁶ Id.

¹⁷ Id. at 192 n.50.

¹⁸ Indeed, the intent here is not to criticize, but simply to demonstrate how Perma is being used at present.

¹⁹ E-mail from Todd G.E. Melnick, Associate Librarian for Public Services, Fordham Law School Library, to Perma Partners Discussion List (Nov. 20, 2013, 6:17 AM) (on file with author).

subscription database,”²⁰ and “I think emphasizing to use Perma for open web materials only would make my instructions [to law journal editors] clearer.”²¹

This limitation strikes me as overly conservative. Surely we as law librarians do not want to be responsible for getting our institutions sued by the likes of West or the New York Times, but Perma is a powerful tool, and we should not limit its use without deeply considering the fair use arguments for expanding its use. It seems that limited use of Perma outside of the open web can be categorized as fair use.

a. The Fair Use Factors

The Copyright Act of 1976 states as follows:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.²²

Regarding the first factor, the U.S. Supreme Court has made clear that “the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement.”²³ However, a finding that the use is for educational and non-profit purposes weighs in favor of a finding of fair use, while a finding that the use is for commercial purposes weighs against such a finding.²⁴

Regarding the second factor, the Court has stated that “fair use is more likely to be found in factual works than in fictional works.”²⁵ As Patry on Fair

²⁰ E-mail from Dorie Bertram, Director of Public Services & Lecturer in Law, Washington University Law Library, to Perma Partners Discussion List (Nov. 19, 2013, 5:22 PM) (on file with author).

²¹ E-mail from Nick Szydowski, Digital Services & Institutional Repository Librarian, Boston College Law Library, to Perma Partners Discussion List (Nov. 19, 2013, 4:07 PM) (on file with author).

²² 17 U.S.C. § 107 (2012) [<http://perma.cc/YBS7-WK5Z>].

²³ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994).

²⁴ See, e.g., Stewart v. Abend, 495 U.S. 207, 237 (1990).

²⁵ Id.

Use states, “Newspapers, talk show material, transcripts of earnings calls, and television news reporting broadcasts should be subject to liberal appropriation since they typically contain little expression.”²⁶

Regarding the third factor, the Court has held that from a quantitative perspective, the proper inquiry is how much of the Plaintiff’s work was taken, not how much of the Defendant’s work the appropriated material constitutes.²⁷ From a qualitative perspective, however, the Court noted that the use of even a very minor portion of a Plaintiff’s work may not weigh in favor of fair use if that portion constitutes the “heart of the work.”²⁸

Finally, the Supreme Court has stated that the fourth factor “is undoubtedly the single most important element of fair use.”²⁹ The proper inquiry is essentially whether the defendant’s use negatively impacts the plaintiff’s ability to market the work, or would negatively impact the plaintiff’s ability to market the work if defendant’s use became widespread.³⁰

b. Applying the Fair Use Factors to Perma

Let us take a close look at the two examples of material beyond the open web that I have already mentioned: Westlaw and the New York Times. Specifically, let us consider a court case that is available only on Westlaw and a simple news article that is behind the New York Times’s paywall. Can Perma be used to provide permalinks to such items?

1. Fair Use of Westlaw Cases

A. A Brief Aside Regarding Westlaw Pagination

It is worth noting at this point that it is unclear how far Westlaw’s copyright protection extends in its presentation of case law. Westlaw is, after all, presenting facts, not original creations. Surely its headnotes and Key number digest system are protected. But whether its pagination is protected is a somewhat murkier issue. In 1986, the Eight Circuit Court of Appeals held that “West’s case arrangements, an important part of which is internal page citations, are original works of authorship entitled to copyright protection.”³¹

In 1991, in *Feist Publications Inc. v. Rural Telephone Service Company, Inc.*, the United States Supreme Court held that copyright protection did not extend to the contents or construction of white pages. The Court made clear that “originality, not ‘sweat of the brow,’ is the touchstone of copyright protection in

²⁶ Patry on Fair Use § 4:1 (citations omitted).

²⁷ See, e.g., *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561 (1985).

²⁸ Id.

²⁹ Id. at 566.

³⁰ Id.

³¹ *West Pub. Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1227 (8th Cir. 1986).

directories and other fact-based works.”³² In 1998, the Second Circuit Court of Appeals applied *Feist* in holding that “[b]ecause the internal pagination of West’s case reporters does not entail even a modicum of creativity, the volume and page numbers are not original components of West’s compilations and are not themselves protected by West’s compilation copyright.”³³ The court explicitly noted that it disagreed with the Eighth Circuit’s holding in *West Publishing*.³⁴

When Westlaw merged with Thomson in 2006, the Department of Justice required that Westlaw “license openly the right to use the pagination of individual pages in West’s National Reporter System to any interested third party for a fee.”³⁵ This was not necessarily a recognition of Westlaw’s copyright in its pagination, but simply a recognition of Westlaw’s *claim* to copyright.

Whether West’s copyright claim in its pagination can ultimately survive the holdings in *Feist* and *Matthew Bender* is beyond the scope of this article (although I strongly suspect that the *Matthew Bender* court got it right).³⁶ The purpose of the foregoing is simply to provide some context for the discussion of fair use to come.

B. Back to Business

In our fair use analysis, we must look first at the purpose and character of the use. In providing a permalink to a court case beyond Westlaw’s paywall, Perma and the hosting library are not benefitting themselves commercially. Indeed, the purpose and character of the use is not-for-profit. In addition, while allowing the reader of a law review article to see the source cited by the author may not be strictly educational in purpose, it is at least “quasi-educational.” That is, it enriches the reader’s understanding of the article and furthers the goals of legal academia by allowing readers to verify and/or challenge the author’s use of sources. Therefore, the first factor would seem to weigh in favor of a finding of fair use.

³² *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 359-60 (1991).

³³ *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 693, 699 (2d Cir. 1998).

³⁴ *Id.* at 707.

³⁵ See Olufunmilayo B. Arewa, Open Access in A Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market, 10 LEWIS & CLARK L. REV. 797, 839 (2006) (quoting *U.S. v. Thomson Corp.*, Proposed Final Judgment and Competitive Impact Statement, 61 Fed. Reg. 35250, 35254 (July 5, 1996)).

³⁶ For in-depth discussions of the impact of *Feist* on databases and other factual compilations, see, e.g., Carl J. Khalil, Are Page Numbers Really Copyrightable? The Effect of Feist on the West Publishing v. Lexis Case, 76 J. PAT. & TRADEMARK OFF. SOC’Y 807 (1994); Deborah Tussey, The Creative As Enemy of the True: The Meaning of Originality in the Matthew Bender Cases, 5 RICH. J.L. & TECH. 10 (1999); Miriam Bitton, Protection for Informational Works After Feist Publications, Inc. v. Rural Telephone Service Co., 21 Fordham Intell. Prop. Media & Ent. L.J. 611 (2011); David E. Shipley, Thin but not Anorexic: Copyright Protection for Compilations and Other Fact Works, 15 J. INTELL. PROP. L. 91 (2007); John F. Hayden, Copyright Protection of Computer Databases After Feist, 5 HARV. J.L. & TECH. 215 (1991).

Second, the “nature of the copyrighted work” likely weighs in favor of a finding of fair use as well. Here, the text of the court’s opinion constitutes factual material. Certainly, Westlaw adds value in other ways, but the opinion itself is factual.

Third, we must consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”³⁷ This, of course, depends on how a Perma user goes about creating the permalink to the case. Simply creating a permalink as we would for any other site on the open web would allow the end-user to see the whole opinion along with West’s headnotes, key numbers, and pagination.³⁸ Such a use would likely weigh against a finding of fair use. After all, the user is taking the case in its entirety. However, Perma also provides users the option to upload their own screenshots. Using this tool, a user could provide the immediate context for the proposition being cited. Such a minimal use would likely weigh in favor of a fair use finding. But what if the user captures the holding? Is that not the “heart of the work?” It may be the heart of the opinion, but it is not the heart of West’s copyrighted additions. If a user captured West’s headnotes, but nothing else, then he would have captured the “heart” of West’s work.

Finally, we must consider “the effect of the use upon the potential market for or value of the copyrighted work.”³⁹ In other words, will the creation of permalinks using screen captures of small portions of cases hinder the marketability of West’s products? Certainly West benefits from the fact that its database contains cases that are not found in any other readily available case reporter or database. So, if such cases were to be published elsewhere, West would arguably lose that advantage. In addition, if West’s headnotes and key numbers were published elsewhere, the market for West’s products would be negatively impacted. Neither of these outcomes are occurring in our scenario, though. Small portions of cases are being linked to in law review articles. Will a potential West user really abandon West in favor of tracking down law review articles that contain such citations and therefore gain free access to tiny portions of West’s database? It seems highly unlikely. Certainly, though, under the current state of affairs, where a proper Bluebook citation cites only to the Westlaw citation number,⁴⁰ readers do not have much choice but to find a way to access Westlaw. However, if the choice is between purchasing a Westlaw subscription and not viewing the case, it seems more realistic to assume that the overwhelming majority of users would choose the latter. As such, West would

³⁷ 17 U.S.C. § 107 (2012) [<http://perma.cc/YBS7-WK5Z>].

³⁸ It is worth noting that Circuit Courts have split on the issue of whether West is entitled to copyright protection for its pagination. Compare West Pub. Co. v. Mead Data Cent., Inc., 799 F.2d 1219 (8th Cir. 1986), with Matthew Bender & Co., Inc. v. W. Pub. Co., 158 F.3d 693, 697 (2d Cir. 1998). Although, it may also be worth noting that West v. Mead pre-dates the Supreme Court’s decision in Feist.

³⁹ 17 U.S.C. § 107 (2012) [<http://perma.cc/YBS7-WK5Z>].

⁴⁰ THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, R. 18.3.1 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010).

likely not have a strong argument that its ability to market its products would be negatively impacted.

Even if the permalink constituted the entire case, complete with headnotes, key numbers, and pagination, it seems the fourth factor would still weigh in favor of fair use. As noted above, the Supreme Court has stated that the fourth factor requires the court to determine “whether unrestricted and widespread conduct of the sort engaged in by the defendant... would result in a substantially adverse impact on the potential market’ for the original.”⁴¹ The outcome here would depend on how we define “conduct of the sort engaged in by the defendant.” If we define it simply as the creation of permalinks to cases only available on Westlaw, then “unrestricted and widespread conduct” of that sort would include the creation of massive lists of permalinks to all such cases. Such conduct would undoubtedly hinder the marketability of West’s product. However, such a definition seems unreasonably broad. An essential part of the conduct of Perma and the hosting library is that the creation of the permalink is associated with and tied to an academic journal article. So, the more appropriate inquiry seems to be whether West’s market would be injured if other journals began providing permalinks to West’s cases. Would a potential Westlaw user forego using the service in favor of accessing cases through journal article citations? Even if every journal began using permalinks for cases that are only available on Westlaw, they would constitute only a tiny fraction of the cases in Westlaw’s database. It is nearly inconceivable that a user who would have otherwise purchased a West product would rely instead on law journal footnotes for access to case law.

For these reasons, use of Perma to create permalinks to portions of (or the entirety of) cases published only on Westlaw would likely pass fair use muster. The case is certainly stronger if the user is taking only a small portion of the case, but as discussed above, the use of the entire case may be a fair use as well.

2. Fair Use of New York Times Articles

The Bluebook states that an author may cite to an online version of a newspaper article if it is “an exact copy of the original” or if it is only available online.⁴² If the online article is not “an exact copy” of what appeared in print, then by definition, the slightly different online version is only available online. When viewed this way, *any* online newspaper article can be cited without the author being forced to imply that he accessed it in print. Perhaps this is not what the Bluebook intended, but allowing an author to cite an article that he accessed online with a URL makes good sense. The reader will see what the author actually accessed, and it enhances access for the same reasons as before.

⁴¹ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (quoting Nimmer on Copyright § 13.05[A] [4], p. 13–102.61).

⁴² THE BLUEBOOK, supra note 40, R. 16.6(f).

We run into problems, though, when the URL takes the reader to a login screen. The 19th Edition of the Bluebook was released before the New York Times moved to its current pay model,⁴³ and so the example provided in the Bluebook accompanying Rule 16.6(f), including a link to a Times article, would have actually taken the reader to the proper source back in 2010. Now, it may take him to a screen asking him to log in or register. So, in order to display the content, we would need to provide screenshots as discussed above. Would this be a fair use, though?

The analysis of the first fair use factor is essentially the same here as it was in our Westlaw example. The purpose and the character of the use is not-for-profit and at least quasi-educational. The first factor would weigh in favor of a fair use finding.

The second factor, the nature of the copyrighted material, is a bit fuzzier in this example. Newspapers do present facts rather than creative expression (excluding editorials and other creative work that appears in newspapers), and as noted above, Patry on Fair Use suggests that newspapers should be subject to liberal appropriation.⁴⁴ There is no denying, however, that a good news story contains creative elements. A good journalist does not simply report facts; she tells a story. So, given that newspapers straddle this line between fact and creative expression, this factor would likely be neutral.

Next, we must assess “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”⁴⁵ This, of course, depends on how much of the material we choose to archive. As an example, the permalink I created for footnote 43 (<http://perma.cc/5K84-37XB?type=pdf>) contains the newspaper’s name, title, author’s name, date of publication, and the one paragraph in which the relevant material appears. The article contains 34 paragraphs, so taking one is a very small portion of the whole. And given the nature of the paragraph, it would be unreasonable to claim it is the “heart of the work.” As such, at least in this example, the third factor would weigh in favor of fair use.

Fourth, and most importantly, we must consider “the effect of the use upon the potential market for or value of the copyrighted work.”⁴⁶ In other words, does providing a permanent link to a small snippet of a news article affect the market for the work? We can look at this in at least two ways. First, does it affect that specific author’s market for that specific article? And second, does it affect the New York Times’s ability to sell online subscriptions?

⁴³ The Times adopted its pay model on March 28, 2011. See Jeremy W. Peters, Times’s Online Pay Model was Years in the Making, N.Y. TIMES, Mar. 20, 2011, http://www.nytimes.com/2011/03/21/business/media/21times.html?pagewanted=all&_r=0 [<http://perma.cc/5K84-37XB?type=pdf>].

⁴⁴ Patry on Fair Use § 4:1 (citations omitted).

⁴⁵ 17 U.S.C. § 107 (2012) [<http://perma.cc/YBS7-WK5Z>].

⁴⁶ Id.

The answer to both would likely be “no.” Because we are taking small portions of the articles, even if we amassed a large number of these links, they would not form an adequate substitute for the original article or for total access to the New York Times. It is hard to fathom that an individual who would otherwise pay to access the Times online would choose not to because small pieces of a smattering of articles are scattered across the footnotes of law review articles. Therefore, the fourth factor likely weighs in favor of fair use, although this finding is contingent, at least in part, upon keeping the “amount and substantiality of the portion used” to as little as necessary.

c. Towards a Set of Guidelines

So, we can take bits of material from both Westlaw and the New York Times – great! What now? Not that we don’t trust our cite checkers, but we do not want second-year law students making case-by-case fair use decisions as they create links in Perma. Therefore, it is understandable why librarians would favor a bright-line rule that limits the use of Perma to the open web. However, we should first see if we can develop an easy-to-follow set of guidelines for the creation of permalinks beyond the open web before we give up on the enterprise entirely.

Of course, as with the use of Perma more broadly, any guidelines should be subject to experimentation to see what works and what does not. These proposals are merely suggested jumping-off points; they are not intended to be ironclad rules.

As an initial guideline, we should pull material from the open web whenever possible. The analysis above assumes that material is available only behind a paywall, but if such is not the case, cite-checkers should simply create permalinks to the source on the open web.

It seems that we may already have guidelines for the creation of permalinks right in front of our faces. Cite-checking guidelines generally provide cite-checkers with rules to follow when gathering and checking sources. Of course, these guidelines are built for the print paradigm, but we can translate them into the language of the Web and Perma. For example, when verifying a citation to a case, a cite-checker might be told to copy the first page on which the case appears in the reporter and then any subsequent pin-cited pages, either bracketing a paraphrased point or highlighting a direct quote. Such a rule could easily guide a cite-checker in creating a permalink for a Westlaw case. She would take a screenshot of the header, including the case name, court name, case number, and so on. Then she would take a screenshot of the relevant language in the text of the opinion, just as she would bracket or highlight the relevant language in a printed case.

Unfortunately, at present, Perma permits users to upload only one image per permalink created. So, we are faced with two options: first, forego the image of the case header and simply take a screenshot of the relevant language, or second, paste both images into a PDF and upload that file. The latter is certainly more work, and librarians or law review editorial staffs should use their discretion in determining how best to allocate cite-checker time. Here is how such a citation and permalink might look:

Moore v. Hovensa, LLC, No. Civ. 171/2004, 2005 WL 1677522, at *4 (V.I. Super. June 22, 2005) [<http://perma.cc/LN2A-T339>].

When you go to this URL, you will either be met with a blank white screen or the WestlawNext sign-in page. This is what appears under the “live site view” tab. Next to that tab, however, you should see a tab that says “PDF.” That tab will show the uploaded file – in this case, a PDF composed of two merged screenshots.

Again, current cite-checking guidelines could form the basis for policies regarding permalinks and newspapers. Journals may actually allow cite-checkers to use the web in verifying citations to newspaper articles. A journal policy may instruct cite-checkers to print out the article in its entirety and bracket or highlight the relevant material. Again, this could be accomplished in Perma in the same way as discussed above for case law. Cite-checkers would take a screenshot that (ideally) includes the newspaper’s name, the author’s name, the title of the article, and the date of publication. Then they would take a screenshot of the relevant portion of the article. For example, a citation for the proposition that “Paul Krugman argues that the so-called ‘skills gap’ in the American economy is a ‘zombie idea’ that needs to die once and for all,” might look like this:

Paul Krugman, *Jobs and Skills and Zombies*, N.Y. Times, Mar. 30, 2014 [<http://perma.cc/VN5Z-25TH>].

Unlike with the WestlawNext permalink provided above, you may actually see the New York Times webpage on which this article appears when you go to this URL. This is because the Times provides non-subscribers with free access to ten articles per month. If you have reached that ten article limit, though, you may be prompted to log in or register. As above, the tab next to the “live site view” tab takes you to the uploaded file – in this case, a single screen capture.

The arguments presented in this section surely apply beyond case law databases and newspapers. I have simply presented Westlaw and the Times as examples because if a user does not have direct access to them through a subscription, tracking the material down can be unusually difficult. The fair use arguments presented herein would likely apply just as well to other materials that may be easier to access, such as law review articles or cases that are printed in

widely available reporters. How far to extend this logic, of course, is up to the discretion of individual law libraries.

V. Perma as a Replacement for Paper

Some librarians are instructing their law journals to use Perma only when the material is not readily accessible in print.⁴⁷ At least one, however, has argued that the use of Perma should be expanded into the realm of materials that are available in print, noting that “[a]llowing citation by permanent URL even when a print copy exists unlocks further benefits.”⁴⁸ I agree with this latter approach. While Perma may have been developed to store permanent copies of the types of links we have always been citing to, the tools that it puts at our disposal allow us to do much more than that.

a. The Blue Elephant in the Room

Now, why would anyone want to limit the use of this great new tool? One reason, of course, is that ever looming presence in legal academia – the Bluebook. Librarians who take the more conservative view of the role of Perma in these instances undoubtedly have the Bluebook on their side. Rule 18.2 states, “The Bluebook requires use and citation of traditional printed sources when available, unless there is a digital copy of the source available that is authenticated, official, or an exact copy of the printed source, as described in rule 18.2.1.”⁴⁹ Even then, though, Rule 18.2.1 does not allow for the use of URLs in such citations, requiring the author to essentially make believe that the web source was found in print.⁵⁰ How do we get around this?

We must consider the purpose of Rule 18.2. While we do not have a legislative history of sorts for the Bluebook, we can make an educated guess. The Bluebook, even the latest edition, was written in a time when there was no good solution to the problem of link rot. So, it makes good sense that the editors of the Bluebook would encourage authors to cite to print sources whenever possible (and would not approve of the use of URLs even when authenticated web sources can be located). The fear that internet sources could disappear was ever present.

This fear was completely reasonable in 2010, when the 19th Edition of the Bluebook was published, but it is becoming less and less so as Perma gains

⁴⁷ See, e.g., E-mail from Dorie Bertram, Director of Public Services & Lecturer in Law, Washington University Law Library, to Perma Partners Discussion List (Nov. 19, 2013, 5:22 PM) (on file with author) (instructing law review members to use Perma for “[m]aterials that are freely available on the Web that are not published in permanent form”).

⁴⁸ Nick Szydowski, A Dead Link, or a Final Resting Place: Link Rot in Legal Citations, AALL SPECTRUM, Apr. 2014, at 7, 8, available at <http://www.aallnet.org/main-menu/Publications/spectrum/Archives/Vol-18/No-6/dead-link.pdf> [<http://perma.cc/4QGD-JXN2>].

⁴⁹ THE BLUEBOOK, supra note 40, R. 18.2.

⁵⁰ Id., R. 18.2.1.

ground. So, with this in mind, we are faced with a choice. Do we wait and see what the editors of the Bluebook decide to do in the 20th Edition, or do we forge ahead on our own?

b. The Benefits of Using Perma for Sources Available in Print

First, philosophically speaking, it does not make sense to follow a uniform citation system (whether it be the Bluebook or otherwise) simply for the sake of following a uniform citation system. Uniform citation makes good sense in a number of ways. For example, if we are to make effective use of abbreviations, we all need to agree on what they mean. And we need uniformity in citing particular materials like cases or statutes so that we can see when those materials are referenced. In other words, uniformity is important so that we know how to refer to materials and how to find them later. Once that goal is achieved, though, if changes in the world around us make parts of the system outdated, we surely have the right to abandon them. And if there are better options for achieving the goals of a citation system (i.e., allowing the reader to see what is being cited and to verify the author's claims), then it is our responsibility to adopt those instead.

On a more practical and less grandiose level, though, let us consider how a reader would fare dealing with a typical Bluebook citation versus a Perma citation. Take, as an example, a citation to the *Federal Register*. Even though the author likely accessed the *Federal Register* through an online source like FDSys or federalregister.gov, Bluebook Rule 18.2.1 requires the author to cite “as if to the original print source (*without any URL information appended*).”⁵¹ A savvy reader would know that the *Federal Register* is readily accessible online, even though the citation unhelpfully said nothing about such handy resources. A lay-reader, though, would have no idea how to access the *Federal Register* online. Perhaps they would search for “Federal Register” on Google and track it down that way, but perhaps they would be forced to go to a library and access it in print. As much as I enjoy helping patrons find resources, this is a foolish system. The document they are looking for is available for free, authenticated by the Federal government, online. The author has the URL in front of him as he is accessing it, but the Bluebook tells him to ignore it. Plugging that URL into Perma would create a permanent link to that material and put it one click away from the reader, while a standard Bluebook citation puts it at best a Google search away, and at worst a trip to the library away (or perhaps worse yet, the reader may simply give up trying to find it). And at least with government documents, there or no copyright issues to fret over.

Even the Bluebook (or at least a liberal reading of the Bluebook) seems to recognize the logic behind this argument. Rule 18.2.3(a) states, “Even when a source is available in a traditional printed medium, a parallel citation to an Internet source with identical content may be provided if it will substantially

⁵¹ Id.

improve access to the source cited.”⁵² We can quibble over the meaning of the word “substantially,” but if an author provides a link that will save a trip to my local law library, it would not be unreasonable to say that access has been “substantially improve[d].”

Perma does not have to be simply a cure for link rot for “traditional” online sources. It can be a way to bring a whole world of legal materials to readers’ fingertips. If the point of citations is to allow readers to verify or challenge the author’s claims, surely using Perma in this way does a better job at achieving this goal than does the Bluebook.

c. Possible Objections

Some may object and argue that creating permalinks for more and more citations would put an unreasonable load on the shoulders of cite-checkers. Surely, cite-checkers would be asked to do some additional work, but they are already accessing these online resources in order to verify citations. Taking a screenshot, uploading it to Perma, and inserting the permalink into the article would add maybe one to two minutes per citation. In the context of an article with 100 or more citations, this is not a trivial undertaking, but it is not so burdensome as to be unreasonable, either.

Another objection may be that such an approach would require some arbitrary line-drawing. After all, when a cite-checker is faced with a citation to a source in print, we do not want him to go on a wild goose chase to see if the source is available online. That would add an unreasonable burden to our cite-checkers. Rather, we need to establish some rules for what sorts of sources will get permalinks.

d. Towards a Set of Guidelines

For the reasons discussed above, it makes sense to establish permalinks for all federal government documents that are readily accessible through a .gov website. This would include sources like the United States Code, the Code of Federal Regulations, the Federal Register, the Congressional Record, and so on. The availability of state government documents varies from jurisdiction to jurisdiction, so such documents should probably not be included in this project at this time.

In addition, even though the GPO is moving forward with uploading federal case law to FDSys, the coverage is far from complete. As GPO notes, the service provides “public access to opinions from *selected* United States appellate,

⁵² Id., R. 18.2.3(a).

district, and bankruptcy courts.”⁵³ Coverage excludes such major courts as the United States Supreme Court, the First Circuit Court of Appeals, and the District Court for the Southern District of New York. And coverage extends, at best, only back to 2004.

Case law is an unfortunately confounding set of sources. Opinions are generally not published in an easily and freely accessible manner. Resources offering free access to case law like FindLaw are available, but as with FDSys, coverage is an issue, and authentication will likely always be an issue when citing to government documents from non-government sources. While Google Scholar is making great strides in bringing free case law to the masses, the opinions are not authenticated. Indeed, Google states, “Legal opinions in Google Scholar are provided for informational purposes only and should not be relied on as a substitute for legal advice from a licensed lawyer. Google does not warrant that the information is complete or accurate.”⁵⁴

So, what are we to do in the face of this incomplete or inadequate set of sources? Is it worth cite-checkers’ time to check FDSys whenever a federal case decided in 2004 or later is cited? These, naturally, are questions that different librarians will answer differently. I suspect that within the next decade or so, authenticated case law will be freely available. At this point, though, it may make sense to continue citing to case law in print.⁵⁵

Permalinks can be used beyond the realm of government documents, too. For example, as more and more law reviews and journals move to an open access model in the wake of the Durham Statement on Open Access to Legal Scholarship,⁵⁶ we can create permalinks to law review articles without worrying (or at least with substantially less worry) about fair use issues. Although, as one author notes, journals are not racing to go open-access as quickly as we might have expected.⁵⁷ We can also create permalinks for newspapers that provide all of their online material for free.

Essentially, if an author actually uses an online, authenticated source for information, there is no reason that he should cite it “as if to the original print

⁵³ U.S. Government Printing Office, About United States Court Opinions, http://www.gpo.gov/help/index.html#about_united_states_courts_opinions.htm [<http://perma.cc/AM5U-EUXU>] (last visited Apr. 3, 2014) (emphasis added).

⁵⁴ Google Scholar, Content Coverage, <http://scholar.google.com/intl/en/scholar/help.html#coverage> [<http://perma.cc/VN6J-U9GG>] (last visited Apr. 3, 2014).

⁵⁵ Although, as FDSys (or any other content provider) continues to upload more case law content, this guideline should be reevaluated.

⁵⁶ Berkman Center for Internet and Society, Durham Statement on Open Access to Legal Scholarship, <https://cyber.law.harvard.edu/publications/durhamstatement#statement> [<http://perma.cc/G4Z4-HFV3>] (last visited Apr. 3, 2014).

⁵⁷ Christopher J. Ryan, Jr., Not-So-Open Access to Legal Scholarship: Balancing Stakeholder Interests with Copyright Principles, 20 RICH. J.L. & TECH. 1, 27 (2014).

source” and not include a URL, as the Bluebook instructs.⁵⁸ Whenever an author uses such a source online, he should be free to create a permalink to that source. Creating a precise list of such sources here would be foolish, as it would surely become quickly outdated, as more and more information becomes available online. Librarians and law review editors, though, will be faced with creating such a list to guide their cite-checkers. Certain factors should guide their decision making, including the following:

- 1) Is the source of the information “official”? If citing government documents, official government sources should be preferred. If citing a law review or newspaper article, the official publishing institution should be preferred.
- 2) Does the source provide authentication? When citing government documents, authenticated sources should be preferred.
- 3) Is the source viewed as acceptable by the community? This factor is much more vague, but it is important. If the academic community finds an online source acceptable (even if not authenticated or “official”), perhaps members of the community should be free to cite to the source. Of course, this sort of “acceptance” is not represented in hard data, so this will require judgment calls.⁵⁹

Creating these guidelines will certainly add a burden for law librarians or law review policy-makers up front, but expanding the use of Perma in this way should not add substantially to the cite-checkers’ work loads. The benefits to the readers of legal scholarship, I think, outweigh any such concerns.

VI. Looking to the Future

Using Perma “beyond the open web” and as a partial print replacement can be accomplished now. Perma is an incredibly powerful tool, though, and we have the opportunity to truly revolutionize legal citation practice. We as librarians should continue to brainstorm new and innovative ways to use Perma, even if those ideas might require changes to the way we view Perma and its mission or even changes to Perma itself. Below are just two potential ideas.

⁵⁸ THE BLUEBOOK, *supra* note 40, R. 18.2.1.

⁵⁹ For example, Google Scholar as a source for case law could theoretically become accepted by the legal community, even though it is not an “official” source and does not provide authentication.

a. Perma Beyond Law Schools

While this article has focused on link rot as it impacts legal scholarship, it has been well established elsewhere that the problem of link rot plagues all forms of academic scholarship.⁶⁰ As inter-disciplinary legal scholarship continues to grow,⁶¹ it is in our best interests as custodians of legal scholarship to help ensure that the articles that legal scholars cite are themselves free of link rot. How can we help expand Perma beyond the hallowed walls of our legal institutions?

This question is actually more difficult to answer than it seems. Legal scholarship is special among academic scholarship in that law schools themselves publish legal journals. Of course law schools, as publishers, will have a vested interest in ensuring the quality of their product. Given the model of non-legal academic publishing, it is not necessarily clear that other academic institutions would have the same interest in improving the work of some third-party publisher.

Perhaps the publishers themselves could incorporate Perma into their editing process, as law reviews are doing. This is not an ideal solution, though, as we need the hosting institution to be permanent. As we have seen, publishers come and go over time. As such, a better solution would involve the academic institutions of the authors providing the service.

It is clear that academic institutions are interested in promoting the scholarly work of their authors. Indeed, promotion of scholarly work for the benefit of the institution is at least one factor behind the move to open access institutional repositories. As one author notes, archiving scholarship in an institutional repository “is a service to scholarship, to the university, and to the research community.”⁶²

As academic institutions move to become content providers (if not publishers) through their institutional repositories, perhaps they will have the vested interest necessary for them to buy in to the Perma service. Of course, the issue still remains of how they should implement Perma. As law schools are a part of the publishing process, their role in implementing Perma is clear. Other academic institutions will need to experiment in order to determine best practices.

⁶⁰ See, e.g., Jason Hennessey & Steven Xijin Ge, A Cross Disciplinary Study of Link Decay and the Effectiveness of Mitigation Techniques, 14 BMC BIOINFORMATICS S5 (2013), available at <http://www.biomedcentral.com/1471-2105/14/S14/S5> [<http://perma.cc/G3L9-PRPC>] (discussing link rot in biology, medicine, communications, ecology, law, library and information science, and social sciences); MICHAEL BUGEJA & DANIELA V. DIMITROVA, VANISHING ACT: THE EROSION OF ONLINE FOOTNOTES AND IMPLICATIONS FOR SCHOLARSHIP IN THE DIGITAL AGE (Litwin Books) (2010).

⁶¹ See Paul J. Stancil, The Legal Academy As Dinner Party: A (Short) Manifesto on the Necessity of Inter-Interdisciplinary Legal Scholarship, 2011 U. ILL. L. REV. 1577 (2011).

⁶² Jean-Gabriel Bankier & Irene Perciali, The Institutional Repository Rediscovered: What Can a University Do for Open Access Publishing?, 34 SERIALS REV. 21 (2008).

Perhaps they should train and encourage their authors to create Perma links at the front end – that is, when the author is drafting the work. Or perhaps the librarians can add Perma links on the back end – that is, as the material is being placed into the institutional repository.

Either way, as law librarians gain knowledge and experience with Perma over the coming months and years, we should share that knowledge with our non-legal colleagues. It would be a shame to see Perma’s use limited to our small niche of academia when it could do so much good elsewhere.

b. Perma as Legal Blog Repository

One type of online source that has faced unusually harsh times in the face of link rot is the legal blog (or the “blawg” as some insist on calling it).⁶³ Blogs are not simply the hobby horses of bored teenagers, but actually contain serious legal scholarship. As such, losing this scholarship to the scourge of link rot would be disastrous. Perhaps we can use Perma to prevent this from happening.

Caroline Young suggests that “Each law library, at a minimum, should be preserving and archiving blogs that are essential to its individual collection.”⁶⁴ Granted, this author did not reference Perma, but regardless of what archiving resources we are talking about, this suggestion seems unnecessarily duplicative. If each law library archived blogs on its own, we would end up with the same blogs archived hundreds of times. This would take up unnecessary amounts of space and time.

There are a couple of ways we could use Perma to help solve this problem. First, individual bloggers could register for Perma accounts and could create permalinks to their posts in real-time as they write and publish them. Of course, the permalinks would have to be outward-facing (i.e., accessible to the public), rather than hidden away in a Perma member’s “dashboard” as they are now. In addition, we would need to somehow spread the word to bloggers that they should be doing this. Getting buy-in would undoubtedly be difficult.

Perhaps a better solution is similar to Young’s suggestion, but involves librarians working together to archive blogs rather than working in isolation. If librarians could all add archived blog permalinks to the same dashboard, we could build an exhaustive, but not duplicative, list of blog posts. This would naturally require some sort of coordination – perhaps assigning individual librarians responsibility for individual blogs. And as above, it would require that the list of posts be outwardly facing. A list of archived blog posts does not do the public any good if only law librarians can access it.

⁶³ See Caroline Young, Oh My Blawg! Who Will Save the Legal Blogs?, 105 LAW LIBR. J. 493 (2013).

⁶⁴ Id. at 497.

c. Using Perma with *Print* Materials

We have, so far, been discussing using Perma to preserve web materials. And indeed, that is really its whole purpose – to ensure that cited material on the web does not disappear. But perhaps we can even use it with *print* materials. While print materials do not need preservation, per se, archiving them with Perma links will increase access to them for readers. But how would we accomplish this goal?

In the discussion above regarding Westlaw cases and New York Times articles, we saw how Perma users can upload screenshots in order to get around paywalls. Uploading print images to Perma would follow essentially the same format. Instead of uploading a screenshot, users would upload a scanned image of the print material. This would not necessarily add substantial work for cite-checkers, as they already scan in or make copies of print materials in order to do their cite-checking.

Perma does not allow this sort of use at the moment. In order to upload an image, you need first to provide a URL for the original page. Indeed, the image option is provided to allow users to show what they see on the screen in the event that the URL does not display properly on Perma. Because we want to upload scanned images from print sources, there is no URL to enter, and thus we never reach the option to upload an image. Perma could easily develop a work-around, though, simply allowing users to create links to uploaded content that has no URL.

Uploading the images that cite-checkers are scanning or copying anyway would allow readers to see what the author and the cite-checker saw without having to track down the print material. This would be a great added value in terms of achieving the larger goals of legal citation.

VII. Conclusion

As we have seen, Perma is a powerful tool capable of solving a number of problems related to legal (and non-legal) citation. We should not unnecessarily limit the use of this tool, but rather we should constantly be thinking of ways to expand its use and improve the world of legal citation. This sort of exploration will require a fair amount of trial and error. Not all of the goals laid out here in this article will be achievable at present, with Perma in its current state. As librarians see more and more possibilities for Perma, surely it will develop to meet those demands. After all, it's run by law libraries – we can do whatever we want with it.