Who had Access to JURIS?: A Failed Case of Open Access

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ABSTRACT
In the early 1990s, public interest groups and small legal publishers attempted to push for the public access to federal court decisions contained in JURIS, a legal information retrieval system used for in-house searching by government employees. This early open access effort to free the law not only failed, but eventually led to the shutdown of the JURIS system. This paper presents the findings of a historical investigation into the shutdown of the JURIS system. It argues that the open access movement involves complicated social negotiations—many factors were involved in shaping access rights to primary legal information in digital format. The factors leading to the failure of the open access request included relevant government agencies’ indifference about information dissemination, the involvement of commercial information providers’ interests, and the ambiguity of the copyrightability of case law information. This study contributes to the broader OA/OK debates by presenting a failed case in the early stage of open access movement and by summarizing the lessons learned from this failed case.

Keywords
Open access, open knowledge, primary legal information, JURIS, West Publishing, Department of Justice.

INTRODUCTION
The debates around open access and open knowledge (OA/OK) movement have been going on for more than a decade. Consensus is hard to reach because many factors are involved in this seemingly simple matter: who has the right to access. Proponents of OA/OK see knowledge as a public good, claiming that knowledge is important for democracy because it empowers citizens, especially the disadvantaged groups (Open Knowledge Foundation, 2004). In this sense, primary legal information makes a strong case for OA/OK because legal information is a basic resource desirable by many types of users. Moreover, according to the U.S. copyright law, the information generated by the government, including statutes, regulations, bills, resolutions, court opinions (or case law), is in the public domain (Copyright Act, 1976). Today a great number of legal resources are free over the Internet for public access, but a close look at the recent history shows that even in such a strong case, OA/OK movement did not come to success easily.

This paper presents the findings of a historical investigation into the shutdown of the JURIS system, a failed OA case in the early stage of the OA movement. By investigating the case, this paper argues that many factors were involved in shaping access rights to digital primary legal information. The OA movement involves complex social negotiations. OA to legal information is of particular importance because the ability to access primary law resources is crucial to an informed citizenry and a democratic society. In analyzing this specific case, the study contributes to the broader OA/OK debates by presenting a failed case in the early stage of OA movement.

METHODOLOGY
To understand and interpret the JURIS case and its related social-historical context, this study draws from the tradition of historical-analysis research. This method is particularly suitable for developing a rich understanding of the social world, for examining the past as a means to understand the present, and for explaining how and why the present came to be (Singleton & Straits, 1999). The author takes a historical constructionist approach in this study, which rests on the premise that objective knowledge of the past is impossible to obtain and that history is a product of perspective-laden constructions of the past (Hobart, 1989). The study relies on carefully selected historical sources and perspective-laden interpretations to reconstruct the past. These sources include various primary sources (i.e., key stakeholders’ discussions of digital legal information during the study period) and secondary documents (including mass media articles and research papers).

LEGAL INFORMATION AND THE LEGAL INFORMATION ENVIRONMENT IN THE EARLY 1990S
By the early 1990s, legal information publishing and distribution in the U.S. had been mostly dominated by commercial publishers. In the print arena, the dominance of commercial publishers was especially evident in the dominance of West Publishing Company (West) in the case law publishing. West had systematically collected and published all available court decisions from multiple
jurisdictions (both federal courts and state courts) of the U.S. since the late 19th century (Surrency, 1981). In the 20th century, West’s case law publications were the “quasi-official” record for American case information (Hanson, 2002, p.567). West’s case reports included not only the text of the opinions but also some “value-added” secondary information, including syllabi (summarizing each opinion’s general holdings), headnotes (summarizing the specific points of law recited in each opinion), and key numbers (categorizing the points of law into different legal topics and subtopics) (Tussey, 1998, p. 178). These sources served as important finding aids and research tools for legal professionals in the print environment (Hanson, 2002).

In the area of computer assisted legal research (CALR), Lexis (introduced in 1973 as the first commercially successful full-text online legal information service) and Westlaw (West Publishing’s online system introduced in 1975) were the dominant, comprehensive legal information systems. But as scholars point out, Lexis and Westlaw had served as self-contained digital legal resources (Tussey, 1998). A great deal of the information contained in the two services is in the public domain, but from the beginning, only subscribers willing to pay premium prices could access the services (Tussey, 1998). For lawyers representing low-income clients and for members of the general public, visiting public law libraries or law school libraries (if they happened to be open to the public) was often the only way to access legal information.

In the early 1990s, the legal information environment experienced major changes. The well-reported development of PCs, network technologies, and the Internet were part of the change. Scholars also noticed that the government’s information policy began to change. Different from the Reagan and Bush administrations which deemphasized the information dissemination functions of the government and emphasized the roles of the private-sector information providers, the Clinton administration was more active in developing an information dissemination infrastructure (Holden & Hernon, 1996). In the digital legal information market, Lexis and Westlaw still dominated, but new, free resources began to appear on the Internet. Meanwhile, small commercial providers began to use CD-ROM as a low-cost, alternative medium for legal publishing (Felsenthal, 1995).

With the changes in technologies, policies, and markets, social expectations toward information dissemination and access to legal information changed. Public interest groups and library associations made recommendations that the government make public-funded databases freely available (Thomason, 1995). Among other efforts, these groups aimed at an important government database, JURIS.

**A BRIEF HISTORY OF JURIS**

Officially launched in 1972, JURIS was an early online legal information system development by the Department of Justice (DOJ) containing public-domain legal information created by the DOJ or obtained from other government agencies. Users did not heavily employ JURIS until the DOJ contracted with Lexis to add federal case law materials to the system. After adding case law content, DOJ employees widely used JURIS to support investigation and litigation (Bourne & Hahn, 2003, p. 335). In the early years, DOJ attorneys and staff were the major users of JURIS, but just before its shutdown 15,000 government employees were using it (Wolf, 1994). It should be noted that although the DOJ maintained the JURIS system, it was not a free service. It relied on both government appropriation and user payments to recover its costs (Kavass & Hood, 1983).

In 1975, the DOJ and MDC did not reach agreement for a new contract for access to the federal court materials for reasons unknown (Bourne & Hahn, 2003, p. 336). JURIS then borrowed the Supreme Court case law database on magnetic tapes from a U.S. Air Force database called Federal Legal Information Through Electronics (FLITE) in the mid-1970s (Bourne & Hahn, 2003). The Air Force digitized data from paper-based West case law publications and supplied the data to both FLITE and JURIS until 1983, when JURIS contracted directly with West to use West’s federal case law database.

From 1983 to 1993, West provided JURIS not only the edited texts of federal case law but also West-created value-added materials, including annotated synopses, headnotes, and West Key Number classifications (Opperman, 1993). This information then constituted a large portion of JURIS databases. The contract terms, which became controversial later, required that if the vendor (West Publishing) ever withdrew, all the data they supplied would be returned or deleted from JURIS (Love, 1993a). Meanwhile, over the years, JURIS collected a large amount of other legal and non-legal materials from different avenues and integrated them into its system. JURIS was once the largest database of federal legal information (Love, 1993a).

**THE TERMINATION OF JURIS**

From 1992 to 1993, the DOJ and West were negotiating for a new contract. But in 1993, West terminated its contract with the DOJ and stopped supplying JURIS with federal case law. The literature of the day suggests that West withdrew from the JURIS contract in part because of public requests for access to JURIS (Wolf, 1994; Love, 1993a, 1993b). In the early 1990s, the public began to be interested in the legal information databases. Activist groups considered JURIS a public asset because taxpayers paid for it. These activists argued that it should be open to the public and started a campaign—“the Crown Jewel Campaign”—to open access to federal court decisions to the public (Hafner, 1993). On July 7, 1993, 295 lawyers, computer professionals, librarians, leaders of public interest groups, and other citizens wrote Attorney General Janet Reno, asking that she take steps to provide citizen access to JURIS, each motivated by different purposes (Love, 1993b). On September 30, 1993, West Publishing announced that it would not seek contract renewal with JURIS (Love, 1993b). West claimed that it supported
government dissemination of public information, but that it would provide even better services through the company’s (fee-based) service (Love, 1993b). West’s withdrawal from the JURIS arrangement illustrated the legal information industry’s concerns about public access to its data.

When the DOJ lost the contract with West, JURIS lost the data provided by West Publishing due to the license terms about withdrawing the content once the contracts were terminated. But another major reason the DOJ did not try to retain the rights to the federal case law materials might be the ambiguities surrounding the copyrightability of “edited” legal information, and especially digital versions of legal information. Although Wheaton v. Peters (1834) established the public nature of court decisions as early as 1848, it had not been clear whether West could have copyright protection on some of the value-added contents or features of the databases. While West’s headnotes and key number system were usually accepted as copyrightable work, some features were more contentious, e.g., the selection and arrangement of the case law (specifically the pagination) and the editorial additions and corrections to the basic texts of court decisions. Therefore, the content that West leased to JURIS was a combination of public legal information and West’s augmented, arguably copyrightable content. This ambiguous mix of arguably copyrighted and public-domain work might have been an important reason the DOJ signed the counterintuitive contracts and would not provide public access to the JURIS system.

Although the DOJ still owned some of the historical case law materials key-punched into databases by the U.S. Air Force, the officials of the DOJ said that the loss of the case law data made JURIS economically nonviable, and they decided to shut down the system and terminate all 29 JURIS employees on January 1, 1994 (Love, 1993b). Since that time, DOJ employees have been using commercial legal databases—usually Westlaw. At the point when West withdrew from the JURIS contract, the DOJ should have had the option to create its own database of case law, that is, to contract with another legal publisher to replace the lost data (McDonough, 1993). However, even though it would have been much less expensive to create and maintain its own database than to use commercial services, DOJ officials claimed that they would not pursue such a plan because the appropriation bill that funded the DOJ had already passed the Congress, and it was too late to seek additional appropriation to replace the missing case law (Love, 1993a; Hafner, 1993). Another problem was that the replacement information would not contain West’s citations and page numbers, and without the numbers the data might not be very useful to attorneys (Love, 1993a).

A more fundamental factor in the termination of JURIS might be that the DOJ did not want to compete with the private-sector information providers. Since a similar service was already available through commercial vendors—West and Lexis, many would argue that it was not imperative for the DOJ to fix its own system and compete with the commercial providers. Debates about the superiority of private or public information dissemination have been a reoccurring topic in the political economy of government information. The idea that the government should not impinge upon or compete with the private sector is an ideology deeply rooted in some American political beliefs (Gosling 2008, pp. 9–10). Further, the DOJ was unwilling to carry on the responsibility to disseminate information because doing so would “impose… an unreasonable burden on the Department” (U.S. Department of Justice, 1997).

THE AFTEREFFECT OF THE JURIS TERMINATION

Soon after the DOJ announced the termination of JURIS, many groups and individuals requested that the DOJ disclose the JURIS database under the Freedom of Information Act (FOIA) (1966). The DOJ complied, but they refused to disclose the West-provided portion of the database and the content that the DOJ had gotten from FLITE, key-punched by the U.S. Air Force. The DOJ only agreed to disclose the portion of the database created in-house or provided for the DOJ by other government agencies. Later the DOJ claimed that the case law portion of JURIS provided by West and the U.S. Air Force was considered “library reference materials” rather than “agency records” and thus not subject to the FOIA (U.S. Department of Justice, 1997). Even if it was, the DOJ maintained, the content provided by West was also confidential commercial information and should be exempt, as the FOIA did not apply to commercial information (U.S. Department of Justice, 1997).

Although activist groups failed to gain access to the JURIS database for the public in the 1990s, as an early case of OA to primary legal information this case was important to the OA movement. First, it illustrated rising public expectations for OA to primary legal materials. Public interest groups reopened the question of who should own the legal information and attempted to make an important database available to the public. Second, the lawsuits surrounding the shutdown of JURIS also reopened the question concerning who owns the law in digital format. The JURIS campaign did not directly challenge West’s copyright claim on the federal case law information, but many followers did and finally clarified, in the late 1990s, that West had copyright protection on neither the pagination system nor the text of the written court decisions of the case law it published. Third, information activists’ actions related to JURIS had significant influence to commercial information providers because they demonstrated the changes and destabilization of the existing social norms about access rights.

CONCLUSIONS: LESSONS LEARNED

The history of JURIS and the failure of the OA request to JURIS reveal the complexity and difficulty of OA/OK movement. The analysis shows that many factors were involved in shaping access rights to primary legal information in digital format. Technological advancements and the heightened user rights for access were only the prelude to the story. The history has manifested
complicated social negotiations within OA movement, involving law and information policies, government agencies, public sector information providers, commercial publishers and vendors, public interest advocates, researchers, consumers, and the general public.

The author has mentioned some of the reasons for the failure while detailing the history. First, the activists pushed the DOJ to open up its internal information system, but the DOJ was not prepared to carry out the responsibilities of information dissemination. Second, a large portion of the information in the JURIS databases was not produced by the DOJ itself, but provided by a powerful commercial publisher, West Publishing. And the DOJ had no intention to compete against West. Third, although by that time the court had ruled that the law did not protect fact databases, the copyrightability was still very controversial. Therefore, it was pre-mature to request OA from a government agency in the early 1990s.

Based on these reasons, there are three lessons that OA movement could learn from the JURIS case. First, it is often unrealistic to rely solely on the government to provide OA because not all government agencies care about information access and not all of them are willing to have the extra responsibility of disseminating information. Second, OA might get even more complicated when there are big corporation’s interests involved. Government agencies might be reluctant to compete with powerful corporations, especially when similar services already exist. Third, it is critical for OA activists to make a difference in the information property legislation. The JURIS case shows that what is in the public domain can be a controversial issue. It is important that the OA movement continues to challenge the current legal arrangements of information resources because information providers often rely on these arrangements to restrict access. It is the key to the balance between openness and proprietarization of information and other types of intellectual properties.

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