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## Ever Onward: Expanding the Use of Perma.cc

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*Authors, law journal staff members, and courts can create permanent citations to online resources with Perma.cc, a free library-sponsored service. This article explores expanding the use of Perma.cc to capture material otherwise inaccessible behind “paywalls” and to material the Bluebook requires authors to cite in print. These expansions would be simple to implement and would enhance the utility of legal citations. The author suggests three areas in which Perma.cc might expand: using Perma.cc to capture images of print-only materials, using Perma.cc as a legal blog repository, and expanding Perma.cc beyond legal citations.*

**KEYWORDS** *legal citation, legal publishing, link rot, perma.cc, law reviews, archive, permalink*

### 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,”<sup>1</sup> 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.<sup>2</sup>

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<sup>1</sup> Kris Franklin, “. . . See Erie.”: *Critical Study of Legal Authority*, 31 UALR L. Rev. 109, 109 (2008).

<sup>2</sup> Darby Dickerson, *Reducing Citation Anxiety*, 11 Scribes J. Leg. Writing 85, 87 (2007).

These important purposes are not met, of course, if the citation does not lead the reader to the source. Dead links have 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; years later that URL may lead nowhere (or to a different place than the author intended). This problem has been dubbed “link rot,” and while it is well documented, an adequate solution has not been proposed—until now.

A group of law libraries are pursuing a project called Perma.cc (or just “Perma,” as I refer to it) with the goal of eliminating link rot by providing permanent links to cited Web materials. Perma, currently in beta, was developed by the Harvard Library Innovation Lab, a part of the Harvard Law School Library. As law libraries adopt Perma, they are wrangling with how and when to use the service. Some are determining that Perma should only be used on the “open Web” and only when a source is not readily available in print. In other words, Perma should *not* be used (1) if the material is behind a paywall, or (2) if the material is widely available in print.<sup>3</sup> I contend that this approach does not take full advantage of Perma’s potential. More specifically, fair use provisions of the copyright law<sup>4</sup> permit the use of Perma in limited circumstances beyond paywalls, and Perma should be used even when the source is available in print because its use advances the larger goals of legal citation and scholarship.

This article discusses the problem of link rot and how it has plagued legal citations over the last two decades, provides an introduction to what Perma is and how it works, and suggests a number of expanded uses.

## HOW LINK ROT UNDERMINES LEGAL CITATIONS

Citations in law (whether in court opinions or journal articles) carry special importance. Citations in court opinions are essential to determine what materials a court found persuasive or nonpersuasive. 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.”<sup>5</sup> How can lawyers or other judges fully parse a legal opinion if the citations are missing?

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<sup>3</sup> See *infra* notes 23–26 and accompanying text.

<sup>4</sup> 17 U.S.C. § 107 (2012).

<sup>5</sup> 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).

Essentially the same issue exists in legal scholarship. Legal scholarship builds on itself as authors respond to each other in a sort of dialogue. Without reliable citations scholars cannot adequately respond to their peers; after all, they may not be familiar with the cited materials. As the use of Internet sources in both judicial opinions and law review articles continues to increase,<sup>6</sup> it is important to ensure that those sources can be accessed.

A number of recent studies have demonstrated what many close watchers of legal academia and the courts 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.<sup>7</sup> Her findings were deeply troubling. In 2008, 8.3% of materials had fallen to link rot; in 2009 the rate had risen to 14.3%, and by 2010, the rate had risen to 27.6%.<sup>8</sup> 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.<sup>9</sup> The authors found that 29% of the links were no longer valid.<sup>10</sup> Given that this is the *United States Supreme Court*, the finding that nearly one-third of their Web citations have vanished is even more troubling.<sup>11</sup>

A more recent study by the people behind Perma found the percentage of rotten U.S. Supreme Court links to be *over 50%*.<sup>12</sup> 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* links

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<sup>6</sup> *Id.* at 286.

<sup>7</sup> Sarah Rhodes, *Breaking Down Link Rot: The Chesapeake Project Legal Information Archive's Examination of URL Stability*, 102 L. Lib. J. 581 (2010).

<sup>8</sup> *Id.* at 596.

<sup>9</sup> Liebler & Liebert, *supra* n. 5, at 287.

<sup>10</sup> *Id.*

<sup>11</sup> In what is perhaps the most infamous case of Supreme Court link rot, an individual purchased a Web site that the Court cited to in order to deliver the following message:

Aren't you glad you didn't cite to this webpage in the Supreme Court Reporter at *Brown v. Entertainment Merchants Association*, 131 S.Ct. 2729, 2749 n. 14 (2011). If you had, like Justice Alito did, the original content would long since have disappeared and someone else might have come along and purchased the domain in order to make a comment about the transience of linked information in the internet age. (<http://www.ssnat.com>)

<sup>12</sup> Jonathan Zittrain, Kendra Albert, & Lawrence Lessig, *Perma: Scoping and Addressing the Problem of Link and Reference Rot in Legal Citations*, 127 Harv. L. Rev. Forum 176, 178 (2014).

in our sample contained the material cited.”<sup>13</sup> 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.

The problem of link rot has become so bad that on October 24, 2014, Georgetown University Law Library held a full-day symposium addressing the issue.<sup>14</sup> While a number of potential solutions have been proposed over the years,<sup>15</sup> it seems we finally have an easy-to-use, durable solution in Perma.

## WHAT IS PERMA.CC?

In 2013 a group of law librarians joined together to create Perma in an attempt to eradicate link and reference rot. Put simply, “Perma.cc is a service, currently in beta, that allows users to create citation links that will never break.”<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup> Users can also upload screenshots if 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 sources within the “open Web” (i.e., sources users can access

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<sup>13</sup> *Id.* at 184.

<sup>14</sup> Georgetown Law Library, *404/File Not Found: Link Rot, Legal Citation and Projects to Preserve Precedent*, <http://www.law.georgetown.edu/library/404/>

<sup>15</sup> See, e.g., Benjamin J. Keele & Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 L. Lib. J. 383, 391–393, 402–403 (2012); Liebler & Liebert, *supra* n. 3, at 299–306.

<sup>16</sup> Perma.cc, *About Perma*, <http://perma.cc/about>

<sup>17</sup> Zittrain et al., *supra* n. 12, at 191–192.

<sup>18</sup> *Id.*

without paying a fee). However, as I argue in the next section, Perma could 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.

## PERMA BEYOND THE OPEN WEB

One large issue that librarians and law review editors 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 behind paywalls? Should it be used if the electronic source has a readily available print counterpart? This section addresses these issues.

What is the “open Web?” *PC Magazine* defines it as the “public side of the World Wide Web.”<sup>19</sup> Open Web sites are freely accessible and visible without registration or payment. This includes, for example, government Web sites, newspaper Web sites that do not use a paywall, and many blogs. It *does not* include, however, subscription databases such as Westlaw, or Web sites that require payment, such as the *New York Times’s* Web site.

The creators of Perma state: “Perma will be designed to run harmoniously with paywalls and other business models and practices common to the open Web.”<sup>20</sup> To “run harmoniously” with paywalls implies that Perma will *respect* the paywall—that is, *will not* display material behind 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.”<sup>21</sup> This “manual reference process” would require readers to contact the hosting library and ask for permission to see the material.<sup>22</sup>

Law librarians at various academic institutions seem to agree with this approach. Law librarians have been communicating with each other on issues relating to Perma through an email 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.<sup>23</sup> Librarians commenting on this very issue have stated, “My recommendation to the law journals is to create a

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<sup>19</sup> PC Magazine, *Definition of: Open Web*, <http://www.pcmag.com/encyclopedia/term/61933/open-web>

<sup>20</sup> Zittrain et al., *supra* n. 12 at 192.

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

<sup>22</sup> *Id.* at 192 n. 50.

<sup>23</sup> Indeed, the intent here is not to criticize but simply to demonstrate how Perma is being used at present.

perma link for any link to a freely accessible web source,”<sup>24</sup> “[law journals] shouldn’t be archiving on Perma any content that is behind a paywall or that is from a library (or other) subscription database,”<sup>25</sup> and “I think emphasizing to use Perma for open web materials only would make my instructions [to law journal editors] clearer.”<sup>26</sup>

This limitation strikes me as overly conservative. 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 librarians should not limit its use without carefully considering the fair use arguments for expanding its use. It seems to me that limited use of Perma beyond the open Web can be categorized as fair use.

## 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.<sup>27</sup>

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.”<sup>28</sup> However, a finding that the use is for educational and nonprofit 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.<sup>29</sup>

Regarding the second factor, the Court has stated that “fair use is more likely to be found in factual works than in fictional works.”<sup>30</sup> As stated in

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<sup>24</sup> Email from Todd G. E. Melnick, Assoc. Libr. for Pub. Servs., Fordham L. Sch. Lib., to Perma Partners Discussion List (Nov. 20, 2013, 6:17 a.m.) (copy on file with Author).

<sup>25</sup> Email from Dorie Bertram, Dir. of Pub. Servs. & Lecturer in L., Wash. U. L. Lib., to Perma Partners Discussion List (Nov. 19, 2013, 5:22 p.m.) (copy on file with Author).

<sup>26</sup> Email from Nick Szydlowski, Digital Servs. & Institutional Repository Libr., Bos. College L. Lib., to Perma Partners Discussion List (Nov. 19, 2013, 4:07 p.m.) (copy on file with Author).

<sup>27</sup> 17 U.S.C. § 107 (2012).

<sup>28</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).

<sup>29</sup> See, e.g., *Stewart v. Abend*, 495 U.S. 207, 237 (1990).

<sup>30</sup> *Id.*

*Patry on Fair Use*, “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.”<sup>31</sup>

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.<sup>32</sup> 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.”<sup>33</sup>

Finally, the Supreme Court has stated that the fourth factor “is undoubtedly the single most important element of fair use.”<sup>34</sup> 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.<sup>35</sup>

## Applying the Fair Use Factors to Perma

How might copyright fair use exceptions allow the use of Perma to provide permanent links to materials on the Web sites of Westlaw and the *New York Times*, two sites that are not accessible on the open web?<sup>36</sup> Consider a court case that is available only on Westlaw and a news article that is behind the *New York Times*’s paywall. Can Perma be used to provide permalinks to such items?

### FAIR USE OF WESTLAW CASES

*A brief aside regarding Westlaw pagination.* It is worth noting 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; 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

<sup>31</sup> William F. Patry, *Patry on Fair Use* § 4:1 (Thomson West, 2012) (citations omitted).

<sup>32</sup> See, e.g., *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561 (1985).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 566.

<sup>35</sup> *Id.*

<sup>36</sup> While this article uses Westlaw cases and *New York Times* articles as illustrative examples of how this sort of fair use analysis would work using Perma, one would follow these same steps in analyzing the use of any other materials behind paywalls (including other subscription periodicals like bar journals and other subscription databases like Polling the Nations, a poll aggregation database). This is not to imply that the use will always be a fair use but simply that conducting the fair use analysis would proceed in the same way.



part of which is internal page citations, are original works of authorship entitled to copyright protection.”<sup>37</sup>

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 directories and other fact-based works.”<sup>38</sup> 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.”<sup>39</sup> The court explicitly noted that it disagreed with the Eighth Circuit’s holding in *West Publishing*.<sup>40</sup>

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.”<sup>41</sup> 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).<sup>42</sup> The purpose of the foregoing is simply to provide some context for the discussion of fair use to come.

*Back to business.* In a fair use analysis, the first factor to consider is the purpose and character of the use. Law review articles often include citations to court cases and journal articles, some of which are only available in commercial databases. In providing a permalink to a court case accessible only

<sup>37</sup> *West Publ’g Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1227 (8th Cir. 1986).

<sup>38</sup> *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 359–360 (1991).

<sup>39</sup> *Matthew Bender & Co., Inc. v. West Publ’g Co.*, 158 F.3d 693, 699 (2d Cir. 1998).

<sup>40</sup> *Id.* at 707.

<sup>41</sup> 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)).

<sup>42</sup> 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).

behind Westlaw's paywall, Perma and the hosting library are not benefitting 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 an author is not strictly educational in purpose, it is at least "quasieducational." That is, it enriches the end user's understanding of the article and furthers the goals of legal academia by allowing readers to verify or challenge an author's use of sources. Therefore, the first factor seems to weigh in favor of fair use.

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

The third factor requires consideration of "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."<sup>43</sup> This, of course, depends on how a Perma user creates the permalink. Simply creating a permalink to a case on Westlaw would allow the end user to see the opinion along with West's headnotes, key numbers, and pagination.<sup>44</sup> Such a use would likely weigh against a finding of fair use, since the end user would have access to the case and its editorial enhancements. However, Perma also provides the option to upload screenshots. With Perma, a user can capture only the immediate context for the cited proposition. Such a minimal use would likely weigh in favor of fair use. But what if the user captures the holding? Is the holding the "heart of the work?" It may be the heart of the *opinion*, but it is not the heart of West's copyrighted enhancements. If a user captured West's headnotes, but nothing else, then he would have captured the "heart" of West's work.

The final factor is "the effect of the use upon the potential market for or value of the copyrighted work."<sup>45</sup> 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 readily available elsewhere. 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 case reports would be negatively impacted. Neither of these outcomes occurs in this scenario. Will a potential West user really abandon West in favor of tracking down law review articles that contain case citations and therefore gain free access to tiny portions of West's database?

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<sup>43</sup> 17 U.S.C. § 107 (2012).

<sup>44</sup> 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 Publ'g Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219 (8th Cir. 1986) with *Matthew Bender & Co., Inc. v. West Publ'g Co.*, 158 F.3d 693, 697 (2d Cir. 1998). Although, it may also be worth noting that *West v. Mead predates* the Supreme Court's decision in *Feist*.

<sup>45</sup> 17 U.S.C. § 107 (2012).

It seems highly unlikely. Certainly, though, under the current state of affairs, where a proper *Bluebook* citation is to a Westlaw citation number,<sup>46</sup> readers do not have much choice but to find a way to access Westlaw. Nevertheless, 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 likely not have a strong argument that its market share would be negatively impacted.

Even if a permalink provided access to an entire case complete with headnotes, key numbers, and pagination, it seems the fourth factor still arguably weighs in favor of fair use. As noted previously, 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.”<sup>47</sup> 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. 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 Westlaw in favor of accessing cases through journal article citations? 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 previously, the use of the entire case may be a fair use as well.

#### FAIR USE OF ARTICLES IN THE *NEW YORK TIMES*

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.<sup>48</sup> If the online article is not “an exact copy” of what appeared in

<sup>46</sup> Columbia L. Rev. Ass’n et al. eds., *The Bluebook: A Uniform System of Citation*, Rule 18.3.1 (19th ed., 2010).

<sup>47</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (quoting *Nimmer on Copyright* § 13.05[A] [4], p. 13–102.61).

<sup>48</sup> *The Bluebook*, *supra* n. 46, Rule 16.6(f).

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 the author's actual source.

What happens, however, when the URL takes the reader to a log-in screen? The 19th Edition of the *Bluebook* was released before the *New York Times* moved to its current pay model.<sup>49</sup> When Rule 16.6(f) was published in 2010, the *Bluebook* example would have taken the reader to the proper source. Now, it may take him to a log-in or registration screen. Would providing a permalink citation to a screenshot captured when the author or editor accessed the article be a fair use?

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 quasiaeducational. 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 earlier, *Patry on Fair Use* suggests that newspapers should be subject to liberal appropriation.<sup>50</sup> 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.

The next factor to weigh is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."<sup>51</sup> This, of course, depends on how much of the material the user archives. Consider, for example, the *New York Times* article by Jeremy Peters referenced earlier. To create a permalink, a user might capture the newspaper's name, the title of the article, the author's name, the date of publication, and the one paragraph in which the relevant material appears (in this case, paragraph three, stating the date on which the *Times*'s pay model took effect). The article contains 34 paragraphs, so taking one is a very small portion of the whole. And given the nature of the relevant 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.

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<sup>49</sup> The *NY Times*'s pay model took effect 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://www.nytimes.com/2011/03/21/business/media/21times.html?pagewanted=all&_r=0)

<sup>50</sup> Patry, *supra* n. 31, § 4:1 (citations omitted).

<sup>51</sup> 17 U.S.C. § 107 (2012).

Fourth, the most important factor to consider is “the effect of the use upon the potential market for or value of the copyrighted work.”<sup>52</sup> In other words, does providing a permanent link to a small snippet of a news article affect the market for the work? 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?

The answer to both of these questions would likely be *no*. Small portions of articles, even if amassed into a large number of links, would not form an adequate substitute for an original article or for total access to the *New York Times*. It is difficult to imagine that an individual who would otherwise pay to access the *Times* online would not subscribe because small parts 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” no greater than necessary.

### Toward a Set of Guidelines

So, we can take material from Westlaw and the *New York Times*—great! What now? We likely do not want second-year law review students making case-by-case fair use decisions as they create permalinks. It is easy to understand why librarians would favor a bright-line rule that limits the use of Perma to the open Web. However, can academic law librarians develop guidelines for the creation of permalinks beyond the open Web?

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

As an initial guideline, permalinks should go to material on the open Web whenever possible. The fair use analysis discussed earlier assumes that material is available *only* behind a paywall; if such is not the case, cite-checkers should create permalinks to the open Web source.

We may already have guidelines for the creation of permalinks. Cite-checking guidelines generally provide cite-checkers with rules to follow when gathering and checking sources. Of course, these guidelines were developed for the print paradigm, but they can be translated 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

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<sup>52</sup> *Id.*

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. So, users have 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 must determine 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) [<https://perma.cc/A4R4-CWKR>].

The user who goes to this URL will either be met with a blank white screen or with the WestlawNext sign-in page. This is what appears under the “live page view” tab. Next to that tab, will be 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 might actually allow cite-checkers to use the Web in verifying citations to newspaper articles. A journal policy might instruct cite-checkers to print out the article in its entirety and bracket or highlight the relevant material. This could be accomplished in Perma in the same way as discussed earlier for case law. Cite-checkers could 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 could 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/N5N7-9PQS>].

Unlike with the WestlawNext permalink provided earlier, users might actually see the *New York Times* Web page on which this article appeared. This is because the *Times* provides nonsubscribers with free access to 10 articles per month. Users who reach that 10-article limit are prompted to log in or to register. As earlier, the tab next to the “live page view” tab leads 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 chosen 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 in widely available reporters.

## 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.<sup>53</sup> At least one librarian, 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.”<sup>54</sup> I agree with this latter approach. Perma can be much more useful than simply preserving online-only materials, as we will soon see.

### 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.”<sup>55</sup> Even then, however, Rule 18.2.1 does not allow the use of URLs in such citations, requiring the author to essentially pretend the Web source was a print source.<sup>56</sup> Is there a way to work around this elephant in the room?

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 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 ground. So, with this in mind, librarians and journal staff are faced with a choice: Wait for the 20th Edition or forge ahead.

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<sup>53</sup> See, e.g., Email from Dorie Bertram, Dir. of Pub. Servs. & Lecturer in L., Wash. U. L. Lib., to Perma Partners Discussion List (Nov. 19, 2013, 5:22 p.m.) (copy 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”).

<sup>54</sup> Nick Szydowski, *A Dead Link, or a Final Resting Place: Link Rot in Legal Citations*, AALL Spectrum, Apr. 2014, at 7, 8, <http://www.aallnet.org/main-menu/Publications/spectrum/Archives/Vol-18/No-6/dead-link.pdf>

<sup>55</sup> *The Bluebook*, *supra* n. 46, Rule 18.2.

<sup>56</sup> *Id.*, Rule 18.2.1.

## The Benefits of Using Perma for Sources Available in Print

First, philosophically speaking, it makes little 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 is important so that users know how to refer to materials and how to find them later. Once that goal is achieved, however, if changes in the world make parts of the system outdated, it is time 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 librarians and journal staff have a responsibility to adopt those instead.

On a more practical and less grandiose level, 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*).”<sup>57</sup> A savvy reader would know that the *Federal Register* is readily accessible online, even though the citation unhelpfully does not cite the online version. A lay reader, however, might have no idea how to access the *Federal Register* online. A search for “Federal Register” on Google would track it down, but some readers might instead go to a library and access it in print. It is strange to require a reader to take these steps when the document is available for free online and has been authenticated by the federal government. 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 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 might simply give up trying to find it). Moreover, there are no copyright issues with government documents.

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 improve access to the source cited.”<sup>58</sup> We can quibble over the meaning of the word *substantially*, but if an author provides a link that will save a trip to the nearest public 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

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<sup>57</sup> *Id.* (emphasis added).

<sup>58</sup> *Id.*, Rule 18.2.3(a).



challenge the author's claims, surely using Perma in this way does a better job at achieving this goal than does the *Bluebook*.

### 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. True, cite-checkers would be asked to do some additional work, but they are already accessing these online resources 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.<sup>59</sup>

Another objection may be that such an approach would require some arbitrary line drawing. After all, a cite-checker with a citation to a source in print should not be expected to go on a wild goose chase searching for the source online. That would add an unreasonable burden.

### Toward a Set of Guidelines

For the reasons discussed earlier, it makes sense to establish permalinks for all federal government documents that are readily accessible through a .gov Web site. 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 and authentication of state government documents varies from jurisdiction to jurisdiction, so only documents from states that authenticate Web postings should be included in this project at this time.

In addition, even though the GPO is moving forward with uploading federal case law to the FDsys, the coverage is far from complete. As GPO notes, the service provides "public access to opinions from *selected* United States appellate, district, and bankruptcy courts."<sup>60</sup> 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

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<sup>59</sup> Of course, not all of these 100 hypothetical footnotes would require a permalink.

<sup>60</sup> U.S. Government Printing Office, *About United States Court Opinions*, [http://www.gpo.gov/help/index.html#about\\_united\\_states\\_courts\\_opinions.htm](http://www.gpo.gov/help/index.html#about_united_states_courts_opinions.htm)

FDsys, coverage is an issue, and authentication will likely always be an issue when citing to government documents from nongovernment sources.<sup>61</sup> While Google Scholar is making great strides in providing free case law to the public, 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.”<sup>62</sup>

So, what might librarians and journal staff do in the face of incomplete or inadequate 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. Until authenticated case law is freely available, it may make sense to continue citing to case law in print.<sup>63</sup>

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 response to the Durham Statement on Open Access to Legal Scholarship,<sup>64</sup> users can create permalinks to law review articles without worrying (or at least with substantially less worry) about copyright issues. Although, as one author notes, journals are not racing to go open access as quickly as we might have expected.<sup>65</sup> We can also create permalinks for newspapers that provide free online access.<sup>66</sup>

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 source” and not include a URL, as the *Bluebook* instructs.<sup>67</sup> Whenever an author uses such a source online, he should be free to create a permalink to that source. A precise list of sources would quickly become outdated, as more and more information goes online. Librarians and law review editors, though, could create guidelines for their cite-checkers. Factors that should guide their decision making include the following:

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<sup>61</sup> Although, as discussed later, librarians may “trust” certain nonauthenticated sources, such as West.

<sup>62</sup> Google Scholar, *Content Coverage*, <http://scholar.google.com/intl/en/scholar/help.html#coverage>

<sup>63</sup> Although, as FDsys (or any other content provider) continues to upload more case law content, this guideline should be reevaluated.

<sup>64</sup> Berkman Center for Internet and Society, *Durham Statement on Open Access to Legal Scholarship*, <https://cyber.law.harvard.edu/publications/durhamstatement>

<sup>65</sup> 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).

<sup>66</sup> Of course, the number of newspapers providing totally free access may continue to decrease as more adopt a *Times*-style pay model.

<sup>67</sup> *The Bluebook*, *supra* n. 46, Rule 18.2.1.

1. Is the source of the information “official”? Official government sources should be preferred for government documents, and the official publishing institution should be preferred for law review and newspaper articles.
2. Does the source provide authentication? Authenticated sources should be preferred.
3. Is the source acceptable in 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 and would require judgment calls.<sup>68</sup>

Creating these guidelines would 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’ workloads. The benefits to the readers of legal scholarship, I think, outweigh any such concerns.

## LOOKING TO THE FUTURE

Using Perma “beyond the open Web” and as a partial print replacement can be accomplished now. But Perma is an incredibly powerful tool that provides the opportunity to truly revolutionize legal citation practice. 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. Following are just two potential ideas.

### Perma Beyond Law Schools

While this article has focused on link rot as it impacts legal scholarship, the problem of link rot plagues all forms of academic scholarship.<sup>69</sup> As interdis-

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<sup>68</sup> 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.

<sup>69</sup> 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>) (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).

ciplinary legal scholarship continues to grow,<sup>70</sup> it is in our best interests as custodians of legal scholarship to help ensure that the articles legal scholars cite are 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 may seem. Legal scholarship is unique among academic scholarship in that law schools themselves publish legal journals. Of course law schools, as publishers, have a vested interest in ensuring the quality of their product. Given the model of nonlegal academic publishing, it is not necessarily clear that other academic institutions have the same interest in improving the work of third-party commercial publishers. Perhaps the publishers themselves could incorporate Perma into their editing process, as law reviews are doing. This is not an ideal solution, though, as ideally, the Perma hosting institution would be permanent, and publishers come and go over time. As such, a better solution would involve permalinks provided by the authors' academic institutions.

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 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."<sup>71</sup>

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

It should be noted that there exists a Permalike solution for nonlegal academic publications called WebCite.<sup>72</sup> WebCite functions very similarly to Perma, with either the author or an editor creating a permanently stored image of the Web site and appending a URL linking to this image in the citation. WebCite is a large step in the right direction, but Perma is a better solution for two reasons. First, because of the nature of nonlegal publishing, WebCite largely relies on buy-in from publishers rather than libraries. The

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<sup>70</sup> 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).

<sup>71</sup> Jean-Gabriel Bankier & Irene Perciali, *The Institutional Repository Rediscovered: What Can a University Do for Open Access Publishing?*, 34 Serials Rev. 21 (2008).

<sup>72</sup> WebCite, [www.webcitation.org](http://www.webcitation.org)

motivated librarian cannot put WebCite to much use if the journals that the faculty publish in are not participating. Second, librarians have much more leeway when using Perma. As WebCite's FAQ page states, "WebCite® is run by editors for editors, and by publishers for publishers."<sup>73</sup> It is not clear how librarians fit into this scheme.

As law librarians gain knowledge and experience with Perma over the coming months and years, we should share that knowledge with our nonlegal 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.

### Perma as Legal Blog Repository

One type of online source that has faced unusually harsh challenges with link rot is the legal blog (or the "blawg" as some insist on calling it).<sup>74</sup> Blogs are not simply the hobby horses of bored teenagers but 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."<sup>75</sup> 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 several ways Perma could help solve this problem. First, individual bloggers could register for Perma accounts and 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 might be difficult.

Perhaps a better solution is similar to Young's suggestion with librarians working together to archive blogs, rather than working in isolation. If all librarians archived blog permalinks to the same dashboard, we could build an exhaustive, but not duplicative, archive of blog posts. This would naturally require some sort of coordination—perhaps with individual librarians responsible for individual blogs. And as earlier, it would require that the permalinks be accessible by the public.

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<sup>73</sup> WebCite, *WebCite Consortium FAQ*, [www.webcitation.org/faq](http://www.webcitation.org/faq) (accessed Dec. 17, 2014).

<sup>74</sup> See Caroline Young, *Oh My Blawg! Who Will Save the Legal Blogs?*, 105 L. Lib. J. 493 (2013).

<sup>75</sup> *Id.* at 497.

## Using Perma with *Print* Materials

So far I have been discussing using Perma to archive Web materials. And indeed, that is really its originally intended purpose—to ensure that cited material on the Web does not disappear. But perhaps we can also 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 and ensure that when libraries discard print volumes or send print volumes offsite, users will continue to have easy access to cited materials.

In my discussion about cases on Westlaw and *New York Times* articles, I explained how uploading screenshots on Perma circumvents paywalls. Uploading print images to Perma could follow essentially the same steps. Instead of uploading a screenshot, users could upload a scanned image of the print material. This would not necessarily add substantial work for cite-checkers, as they already scan or copy print materials during cite-checking.

Perma does not allow archiving of scanned print images at the moment. To upload an image today, the user must first provide a URL. Indeed, the image option allows users to archive what they see on the screen in the event that the URL does not display properly on Perma. Since no URL is available for scanned print images, Perma users never reach the option to upload an image. Perma could easily develop a work-around, though, simply by allowing users to link to uploaded content even if no URL exists.

Uploading images that cite-checkers are already scanning or copying 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.

## CONCLUSION

Perma is a powerful tool capable of solving a number of problems related to legal (and nonlegal) citation. Rather than limit the use of this tool, Perma users should explore ways to expand its use and improve the world of legal citation. This sort of exploration would require a fair amount of trial and error. Not all the goals laid out in this article could be achieved with Perma in its current state. As librarians see more and more possibilities for Perma, surely it will develop to meet those demands.