

3-31-2011

Jurisprudence For A Digital Age: Free Software And The Need For A New Media Legal Authority

Nicholas Clark

Follow this and additional works at: <https://digitalcommons.law.udc.edu/udclr>



Part of the [Computer Law Commons](#), [Internet Law Commons](#), and the [Jurisprudence Commons](#)

Recommended Citation

Nicholas Clark, *Jurisprudence For A Digital Age: Free Software And The Need For A New Media Legal Authority*, 14 U.D.C. L. Rev. 193 (2011).

Available at: <https://digitalcommons.law.udc.edu/udclr/vol14/iss1/8>

This Article is brought to you for free and open access by Digital Commons @ UDC Law. It has been accepted for inclusion in University of the District of Columbia Law Review by an authorized editor of Digital Commons @ UDC Law.

JURISPRUDENCE FOR A DIGITAL AGE: FREE SOFTWARE AND THE NEED FOR A NEW MEDIA LEGAL AUTHORITY

Nicholas Clark*

INTRODUCTION

In an age of digital multimedia, it may still make sense to construct our laws as purely textual documents, in the same way that it still makes sense to publish written documentation for users of our digital devices, and written source code for all of our software. These are operating instructions, and we value the unique power of the written word to embody abstract concepts in highly adaptable relationships. However, just as documentation will feature illustrations to guide users through an interface, and just as programmers map out hash tables, trees and directed graphs, so too do lawyers and law students make charts, tables and illustrations to help them understand the complex concepts the discipline has generated. As distribution of visual media becomes increasingly inexpensive and immediate, and our collective consciousness becomes increasingly dominated by new media, perhaps the management of the operating instructions underpinning those media can help to inform the way we manage, understand, and even produce laws.¹

This note seeks to illustrate the irresistible necessity of formulating an authority on illustrations of laws and legal concepts employing the immediacy and inexpensiveness of distribution through new media. Moreover, this note explores the parallel importance of freedom both to the software underlying much of new media and to American jurisprudence by using the “four freedoms” of Free Software as a framework through which to imagine the form and jurisprudential effect of a definitive legal authority on laws and legal concepts based in new media.

I. LAW IS CODE (?)

A. *Law is Not Code*

Before proceeding further with the comparison of operating instructions as they exist in software source code, documentation, and laws, it is important to point out the very different ways which laws and computer code function; although jurists strive for predictability in our discussions and interpretations of

* J.D. Candidate 2010, University of the District of Columbia, David A. Clarke School of Law.

¹ See generally LAWRENCE LESSIG, *CODE v2* (2006), available at <http://codev2.cc/download@emix> (last visited Mar. 2, 2010) (discussing at length the significance of computer code in comparison to legal authority).

laws, laws cannot be relied upon to provide the sorts of foreseeable outcomes that computer code will.² In part, the lack of legal predictability is the fault of the fact that judges are human beings, incapable of being relied upon to make the sorts of wholly dispassionate calculations made by computers, and sometimes more interested in just outcomes than in predictable outcomes.³ While predictable application of laws is deemed by some legal scholars to promote justice by providing the individuals with clear notice of what is expected of them, this is a fiction where laws and legal thought are opaque to laypeople.⁴ Since predictable legal outcomes only benefit justice to the extent that they are predictable to the people they affect directly, a new media authority on legal thought should strive to increase the transparency and accessibility of laws to those people.

B. *Human Readable Codes*

Programmers typically write “source code” for programs in “human readable” programming languages that resemble casual verbal communication closely enough that a determined novice reading the code could arrive at a fairly accurate guess as to the function of the commands.⁵ In order to function as computer software, human readable source code needs to be compiled - essentially a process of translation - into the machine readable binary language of ones and zeroes.⁶

The distinction between the human readability of source code and the human readability of legal authority is vital to this note. The expression “human readable” has been employed to some degree by those working at the intersection of new media and the law to criticize the use of opaque legalese, or applaud the use in legal materials of verbiage penetrable to those without a legal background.⁷ The comparison of source code and legal code inherent in this use of the term “human readable” helps to emphasize the earlier point about the difference in the operation of the two; while the words in source code can be read and understood, each one stands for a particular, definite computational operation that will

2 Podcast: Software Freedom Law Show: Episode 0x01: The Engineer and the Lawyer, held by the Software Freedom Law Center (2008), available at http://www.softwarefreedom.org/podcast-media/Software-Freedom-Law-Show_0x01_Engineer-and-Lawyer.ogg (last visited Mar. 2, 2010) (discussing the tendency among programmers to expect laws to provide outcomes predictable on the basis of circumstances).

3 John M. Walker, *Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge*, 58 N.Y.U. ANN. SURV. AM. L. 203, 237 (2001) (“The judicial discretion promoted by seeking to effect purposes or to ‘do justice’ detracts from the law’s certainty and predictability.”).

4 Nita Gheii and Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*, 25 CARDOZO L. REV. 1367, 1371 (2004).

5 *Apple Computer, Inc. v. Franklin Computer Corp.* 714 F.2d 1240, 1243 (3d Cir. 1983).

6 *Id.*

7 See, e.g. Fred Benenson, *The Value of Human Readable Deeds – Creative Commons*, Feb. 18, 2009, <http://creativecommons.org/weblog/entry/12778>.

not ordinarily be altered by interpretation. Legal codes attempt to provide unambiguous definitions of the terminology they employ, but ultimately the value of verbal language to a human reader is its adaptability rather than its precision.⁸ It is because of the adaptability of verbal language that it needs to be supplemented by the specificity of illustration when used in areas such as law wherein definiteness could benefit justice.

II. DISTRIBUTION, DIGITAL MIND, AND THE PRINTING PRESS PRISON

A. *Illustrating Legal Thought*

Although digital media has enabled the effortless, inexpensive, and seemingly boundless reproducibility of images, text remains the default medium by which to disseminate information that seeks to be taken seriously. The history of this tendency is long, but not indefinite. The 18th century B.C.E. Code of Hammurabi appeared on an illustrated stele.⁹ Before the invention of the printing press, the pages of books took the form their authors dictated while illustrations and text flowed into one another.¹⁰ For example, laws in European texts were illustrated with tree diagrams in the middle ages.¹¹ Movable type was a revolution for distribution, but meant that books would come to be synonymous with blocks of text. Today's jurist seldom, if ever, picks up a code service or court reporter expecting to see illustrations more informative than a state seal, nor does she typically visit an online resource like LexisNexis expecting the sorts of illuminations that predated Gutenberg.

The Hammurabi Code and the legal trees point to the use of illustration as it would be incorporated into legal works absent the textual focus brought about by the invention of the printing press. In both these examples, the laws are textual, and the illustrations merely top the stele or occupy a page in a largely textual book. Laws seem to invite text because, just like user documentation or source code, the concision and abstraction they require seems to be more efficiently communicated in text.

8 ARIE VERHAGEN, CONTEXT, MEANING, AND INTERPRETATION, IN *A PRACTICAL APPROACH TO LINGUISTICS, IN DISCOURSE ANALYSIS AND DISCOURSE EVALUATION* 16 (L. Lentz & H.L.W. Panfer Maat eds., 1997).

9 Martha T. Roth, *Mesopotamian Legal Traditions and the Laws of Hammurabi*, 71 *CHI.-KENT L. REV.* 13, 16 (1995).

10 DAVE GRAY, *MARKS AND MEANING* 70 (2008).

11 Mike Widener, Yale Law Library – Rare Books Blog, *Legal Trees*, <http://blogs.law.yale.edu/blogs/rarebooks/archive/2008/04/30/legal-quot-trees-quot.aspx> (last visited May 3, 2010) (the Yale Law Library's Rare Books Blog contains many other images of illustrated laws from books dating back centuries).

B. *Seeing Laws*

Visual information aids the work of programmers, in the form of hash maps and data trees, and users, in the form of illustrated directions and graphical interfaces. Where verbal information, in the form of either text or speech, is augmented by visual images memory retention is enhanced; in a study conducted by the Swedish Broadcasting Corporation, subjects who were shown images of a map corresponding to a spoken news item scored 15% higher on a test of retention than did subjects who heard the item accompanied by images of the reporter reading the report, and 14% higher than subjects hearing the audio only.¹² The study also showed that the most positive impact on retention of the news item came when the illustrations corresponded well to the item and when they were detailed and easy to follow.¹³ As consumers of informational media, we owe it to ourselves to facilitate learning of difficult concepts with correlated, detailed, easy to follow illustrations.

As jurists, and indeed, as citizens in a nation of laws, we are all to some degree responsible for the operating instructions embodied in our laws. While we may not see illustrations adorning our legal codes as they did before Gutenberg, there are certain areas where governments have recognized the importance of the immediacy of communication that visual illustrations can afford in reminding us of those operating instructions. Specifically, traffic signs and warning labels visually communicate legal expectations or consequences. Their ubiquity may be an irritating eyesore, but it may just as well be a step toward letting “men and women and yes, even children. . . know that which is expected of them and that which they can expect of others.”¹⁴ We know then from our day-to-day experiences that our legal responsibilities can be communicated visually. Obviously safety restrictions are not the only laws to which we are all held answerable. Communication of legal expectations in a manner that is immediate, and that enriches our understanding and retention need not stop with safety regulations when our legal rights and responsibilities extend so far beyond safety.

III. THE NEED FOR A NEW MEDIA LEGAL AUTHORITY

A. *The Jurist's Need for Respected Authority*

Visual legal illustration is an informal reality without a decisive clearinghouse comparable to the authoritative niches topical areas of law frequently find in respected Law Reviews and journals. At the New York Law School, the Visual

12 Olle Findahl, Swedish Broadcasting Corp., *The Effect of Visual Illustrations Upon Perception and Retention of News Programmes*, 9 (1971), <http://www.eric.ed.gov/ERICWebPortal/content/delivery/servlet/ERICServlet?accno=ED054631>.

13 *Id.* at 10-12.

14 Edgar Cahn and Jean Camper Cahn, *This I Believe* (1977) (unpublished credo, on file with Edgar Cahn) (this source appears in full in this note's Appendix).

Persuasion Project focuses a keen eye on the value of visual materials and new media to the litigator in the persuasive presentation of evidence, and to a lesser degree on the value of visual materials and new media for the understanding of underlying laws and legal concepts.¹⁵ The Visual Persuasion Project's founder and Director Richard K. Sherwin has identified an important shortcoming in the communication and critical interpretation of visual legal materials: "legal scholars have been less quick than their counterparts in other academic fields to heed the implications of the cultural shifts to the visual and the digital."¹⁶ Moreover, Professor Sherwin concedes to some degree that the work of the Visual Persuasion Project exploits that shortcoming, while simultaneously identifying a vital resource that does not yet exist; "Responses to pictures are not arguable in the same way that responses to legal texts are. Absent an extensive tradition of critical interpretation and without readings that have been applied over time, there can be no appeal to more authoritative texts or to any consensus of scholars."¹⁷ A decisive critical resource to distribute and perfect visual legal illustration must be created in order that authoritative texts can emerge by which the influence of new media on finders of fact can be assessed, and on the basis of which laws can be made more widely accessible and just, both in substance and in freely distributable form.

B. *Free Software and the Layperson's Need for Legal Conversation*

Opening legal discourse to non-lawyers through a new media authority on visual legal illustration could promote the just application of the laws that authority explicates; this authority should model itself on the freedom of both the existing form of the verbal laws it interprets, and of the operating instructions behind much of the new media behind it. The United States Government has refused to copyright its work, such that any laws or legal materials created by the United States Government are, to the extent that they are available, freely usable as verbal material, freely distributable to the extent their secrecy is not otherwise ensured, and freely malleable as verbiage without constituting violations of copyright law.¹⁸ An analogous subset of programming exists, under which source code is made freely available. The operating instructions, like laws, are only fully understandable—even to experts—when they are available for scrutiny. Were bad laws concealed from the public eye, people might still be subject to an arbitrary or draconian restriction, but without access to the law itself, could not under-

15 Visual Persuasion Project Home, <http://old.nyls.edu/pages/2734.asp> (last visited Feb. 25, 2010).

16 Richard K. Sherwin, *Law In The Digital Age: How Visual Communication Technologies Are Transforming The Practice, Theory, And Teaching Of Law*, 12 B.U. J. Sci. & Tech. L. 227, 236-37 (2006).

17 *Id.* at 263.

18 17 U.S.C. §105 (2009).

stand, challenge, or work to correct it. What is known as “Free Software” is actually, unlike federal government materials, typically protected by copyright, and usable only by adoption of a strict license.¹⁹ It is the particular terms of these free software licenses that resemble in effect the non-copyright status of federal laws; the Free Software Foundation describes the intended outcomes of their licenses as a set of “four freedoms”:

First, Freedom Zero is the freedom to run the program for any purpose, any way you like. Freedom One is the freedom to help yourself by changing the program to suit your needs. Freedom Two is the freedom to help your neighbor by distributing copies of the program. And Freedom Three is the freedom to help build your community by publishing an improved version so others can get the benefit of your work.²⁰

A distribution scheme for visual legal resources should strive to embrace these four freedoms, inasmuch as they are relevant. The goal of illustrating laws is to make them accessible in order that jurists can better ply their trade, and laypeople can better understand their expectations. Indeed the freedoms for which free software strives are inspired in part by an expectation of liberty in access to laws.²¹ Respectful of the relationships between new media and freedom, and between freedom and laws, a new media legal authority that stiffens the final link in the circle between laws and new media would benefit from an observation of the means by which the freedom of new media operating instructions is ensured – to wit, the four freedoms, each of which can define both the literal form the authority is to take and the jurisprudential effects the authority should strive to achieve.

IV. THE “FOUR FREEDOMS” AND THE JURISPRUDENTIAL EFFECTS THEY BEG OF A NEW MEDIA LEGAL AUTHORITY

A. *The Freedom to Know*

The first freedom, the freedom to run the program for any purpose, might be adapted to legal thought as the freedom to use applicable laws. While a new media legal authority would be encouraging frivolous lawsuits if it literally encouraged the use of laws for any purpose, the gist of this freedom is ownership

19 Lawrence Lessig, *Introduction* to RICHARD M. STALLMAN, *FREE SOFTWARE, FREE SOCIETY* 12 (2002).

20 RICHARD M. STALLMAN, *FREE SOFTWARE, FREE SOCIETY* 65 (2002).

21 Lessig, *supra* note 19 (“Free software” would assure that the world governed by code is as “free” as our tradition that built the world before code. For example: A “free society” is regulated by law. But there are limits that any free society places on this regulation through law: No society that kept its laws secret could ever be called free. No government that hid its regulations from the regulated could ever stand in our tradition. Law controls. But it does so justly only when visibly. And law is visible only when its terms are knowable and controllable by those it regulates. . . .”).

over the operating instructions that affect you.²² “[W]hether you run or change a program I wrote affects you directly and me only indirectly.”²³ In the same sense that a programmer may not use all of his published programs, lawmakers often prescribe expectations to which they themselves are not subject. If the lawmaker lacks ownership of a law because he is not affected by it, and the person whom a law directly affects lacks ownership over it because he is unaware, or misunderstands it, the law lacks the guidance of those it governs, and can become - or indeed, it can begin - out of touch with reality.²⁴ The analogy from free software is the much derided proprietary software notion of “security through obscurity,” which suggests that software can provide greater security if its source code is hidden, despite the fact that a visible source code enables quick patching of flaws, bugs, and vulnerabilities in one of the most sensitive areas of computing.²⁵ Just as the Sixth Amendment guarantees a public trial and laws such as the Government in the Sunshine Act and FOIA seek to ensure that laws and their operations are technically accessible, a new media legal authority should seek to ensure that they are meaningfully accessible.²⁶ The vital function of a new media legal authority in this regard is to promote its audience’s awareness and understanding of the laws that affect it. The adapted freedom might be defined as the freedom to know when a law or legal authority applies to oneself.

B. *The Freedom to Understand and Challenge*

The second freedom, the freedom to adapt the program to your needs, might be adapted to legal thought as the freedom to make non-frivolous challenges to existing laws.²⁷ This freedom is tightly knit with the first; while only those affected by laws are able to understand them fully, the right to go to court to petition for a redress of grievances is meaningless if the law itself is so opaque as to

22 FED. R. CIV. P. 11(b)(2) (frivolous argument for extending laws can be grounds for sanctions).

23 Stallman, *supra* note 20 at 49.

24 Lee J. Strang, *Originalism and the “Challenge of Change”: Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 933 (2009) (“Legal norms that do not fit the circumstances of their society cannot effectively coordinate the activities of the society’s members.”).

25 STEPHANIE FORREST ET AL., BUILDING DIVERSE COMPUTER SYSTEMS 5 (1997), http://www.bennetyee.org/ucsd-pages/Courses/cse190_A.s99/steph.ps (“Within computer security there is widespread distrust of security through obscurity for example, proprietary cryptographic algorithms that are kept secret on the grounds that publishing their algorithms would weaken their security. Such distrust is warranted proprietary cryptographic algorithms, once revealed, often turn out to have serious flaws.”).

26 Act of Aug. 31, 1976, Pub. L. 94-409, 1976 U.S.C.C.A.N. 2183, 2186, *quoting* THE FEDERALIST NO. 49 (“the people are the only legitimate foundation of power, and it is from them that the constitutional charter . . . is derived.’ Government is and should be the servant of the people, and it should be fully accountable to them for the actions which it supposedly takes on their behalf”).

27 FED. R. CIV. P. 11(b)(2).

discourage grievances from being raised in the first place.²⁸ Those affected by a particular law need a way of understanding the logic behind that law in order to determine whether it should be challenged as being out of touch with reality. The second adapted freedom might be defined as the freedom to understand the justice, and challenge the injustice of the laws that affect oneself.

C. *The Freedom to Communicate Legal Information*

The third freedom (“freedom two”), the freedom to distribute copies to help one’s neighbor, might be adapted to legal thought as the freedom to discuss laws and legal concepts. While this may seem an inane provision in a country whose constitution guarantees free speech, lawyers, the experts in laws and legal concepts, are sometimes reluctant to discuss legal issues with the general public for fear of creating an attorney-client relationship, which could subject them to liability.²⁹ To minimize this liability while attempting to facilitate the use of new media to communicate legal concepts to interested laypeople, attorneys must avoid offering advice “tailored to the unique facts of a particular person’s circumstance”.³⁰ The challenge lies in providing relevant, but not tailored information. Those who know the law need a way of easily communicating it to those who need to know it without exposing themselves to liability. This form of communication will be discussed in the next section. The third adapted freedom might be defined as the freedom of jurists to communicate relevant legal information to those who need it.

D. *The Freedom to Build Communities Around Legal Interpretation*

The fourth freedom (“freedom three”), the freedom to distribute copies of one’s changes to help the community, might be adapted to legal thought as the freedom to discuss and advocate non-frivolous challenges to existing laws, and to associate in communities focused around achieving those challenges. The value of community to free software is tremendous, in that it focuses significantly more critical eyes on the set of operating instructions; testing has shown that the community approach of free software produces the most reliable programs.³¹ The lawyer’s secretive posture is suited to an adversarial court system, but is out of

28 *BE & K Const. Co. v. N.L.R.B.* 536 U.S. 516, 525 (2002) (“the right to petition extends to all departments of the Government,” and that “[t]he right of access to the courts is . . . but one aspect of the right of petition.” (citing *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972))).

29 MODEL RULES OF PROF’L CONDUCT R. 4.3 (2004); see also Judy M. Cornett, *The Ethics of Blawging: A Genre Analysis*, 41 *LOY. U. CHI. L.J.* 221, 261 (2009) (admonishing against provision of legal advice in “blawgs”).

30 D.C. Bar Legal Ethics Comm., Op. 316 (2002), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion316.cfm.

31 Stallman, *supra* note 20, at 169.

step with the demands of a critical community wherein open dialogue helps to refine a set of operating instructions to more reliably produce a desired outcome. Where the fecundity of software freedom is the refusal of its community to ever be satisfied with its products, the interest of judges and lawmakers in the status quo poses a high obstacle. Where legislatures wind up deadlocked and bound to concede meaningful improvements in favor of scoring a putative victory, perhaps a community of concerned laypeople acting solely out of passion and interest in improving the operating instructions that most affect their work can develop meaningful alternatives. Where courts and legislatures are immovable, a new media legal authority needs to fiercely promote discourse toward the improvement of laws. The fourth adapted freedom might be defined as the freedom to discuss, share and contribute to the improvement of ideal laws, and to generate communities.

V. THE “FOUR FREEDOMS” AS STRUCTURAL PRINCIPLES OF A NEW MEDIA LEGAL AUTHORITY

A. *Dissemination of Legal Information*

The first freedom, the freedom to run for any purpose, will define the access the public will have to the new media legal authority; it will be available to anyone regardless of expertise, interest in a particular area of law, or in law at all. Using the resource should be as free and unfettered as possible. While making comments and submissions may require some minimum amount of identifying information, too much already stands between the average person and an understanding of the laws that affect him.³² The first principle of a new media legal authority is that it must disseminate legal information as freely as possible.

B. *Organization by Circumstances Rather than Laws*

The second freedom, the freedom to adapt the program to your circumstances, will define the authority’s organizational interface. A person without a background in law, rather than questioning whether a given cause of action would apply, might begin a search for a piece of legal understanding from the knowledge that her particular set of circumstances seem to imply some legal recourse. An authority directed at enriching the legal understanding of laypeople should not be divided into categories according to subjects taught in law schools, but according to real life circumstances as they are likely to arise. The second princi-

32 Thomas O. Rice, *The Public’s View of the Law*, 71 N.Y. ST. B.J. 5, 5 (1999). See also Kimberlianne Podlas, *Impact of Television on Cross Examination and Juror “Truth”*, 14 WIDENER L. REV. 479, 498-99 (2009) (S500-01s’ opinion of laws and legal procedures more likely to be confused by television than aided by it).

ple of a new media legal authority is that it must be organized according to categories of real-life experience rather than - or in addition to - areas of law.

C. *Liberal Attribution Licensing*

The third freedom, the freedom to freely copy and distribute, will define the new media legal authority's licensure. Because laws and the systems behind them affect everyone and have the power to terminate one's freedom, family, and life, a resource successfully making laws cognitively accessible is of tremendous value. To hold content of this value without making it available freely would be a tragedy. The licensure scheme for the authority should ensure the widest possible audience. Because commercial distribution reaches a wide market, licensing the authority's content under a noncommercial license could exclude an important portion of the interested public. Where availability is the goal, the content should be "free as in speech, not free as in beer".³³ Similarly, a requirement that derivative works be shared under the same license precludes penetration of the illustrative content into markets interested in using other licenses; the disappointment of not having your license reserved in derivative works is eased by the knowledge that the license remains intact on your original copyrighted work.³⁴ The third principle of the new media legal authority is that it must be published under a license that permits republishing, commercial use, and the creation of derivative works, but requires an attribution directing the user of derivative or republished works back to the authority.

D. *Community Critique and Contributions*

The fourth freedom, the freedom to benefit the community by sharing your changes, will define the authority's responsiveness to user generated content and critique. While editing of visual illustrations is not yet feasible in a wiki-type environment, the form of the authority should reflect an intent to mimic that functionality as nearly as is realistic. The fourth principle of new media legal authority is that it must accept user generated content and critique to facilitate adaptation and collaboration.

VI. SUMMARY OF THE NEW MEDIA LEGAL AUTHORITY'S FORM AND FUNCTION

It should not surprise the reader at this point that the basic form for a new media legal authority envisioned by this note is a website. According to the prin-

³³ Stallman, *supra* note 20, at 43.

³⁴ Creative Commons, Frequently Asked Questions, http://wiki.creativecommons.org/Frequently_Asked_Questions (last visited May 3, 2010).

ciples and freedoms defined above, this website should have the following characteristics:

- it should accept illustrations of laws and legal concepts from anyone willing to license them for the authority's use;
- it should facilitate open and meaningful critical discussion of those illustrations so that their understandability and applicability can be improved;
- it should guide users to the illustrations best suited to their own circumstances;
- it should facilitate broad dissemination of useful illustrations both in its form and in its licensure;
- it should promote itself by being effective, so that disseminated materials lead users back to the authority.

While it is important that the authority empower its users by having a lenient submission policy, it must also meaningfully identify the usefulness of the illustrations it publishes. In order for the website to take on the character of a respected authority, jurists at the organization maintaining it will need to actively mediate and assess the illustrations submitted. The authority must engage its users as meaningful co-producers; it can only do that to the extent that it respects those users by providing them with an easy way of identifying valuable, meaningful illustrations, and clearly distinguishing them from illustrations in need of revision.

Those illustrations which need revision will benefit tremendously from vibrant discussion. Each illustration should be accompanied by a discussion forum permitting contributors from legal and nonlegal backgrounds alike to comment on the value of the illustration to understanding of the legal concept depicted. To focus the discussion, jurists at the maintaining organization should comment regularly on illustrations in need of revision, in order that the authors of those images, or other readers, could reconfigure the illustration to most effectively communicate the intended legal concept. To this end, the maintaining organization should develop a set of criteria by which to assess illustrations tailored to generating clear, authoritative work. I suggest the following:

- 1) Conceptualization:** How completely does the visual material imagine the logical connections between elements or steps of the law or legal concept depicted? How much of the proverbial elephant would the proverbial blind men perceive?
- 2) Boundaries:** Does this image make clear the extent of the applicability of the legal concept? How easily could a person use this image to determine whether the law or legal concept applies to him?
- 3) Judicial Splits, Conflicts, and Unsettled Law:** Does the image clarify areas where an individual might expect a different outcome on the basis of

procedural differences? Does it illustrate the logic behind competing interpretations?

4) Communicative Efficacy: Is the visual material something you could readily call to mind for reference in court, or while sitting for the bar?

5) Dissemination of Knowledge: Would a non-lawyer feel more comfortable with the concept after seeing the visual material? Is it something an interested layperson could remember, describe, or reproduce for the benefit of others?

6) Social Justice Subject Matter: How relevant to social justice and public interest is the subject matter depicted? Does the material illustrate legal concepts relevant to folks who can't afford their own attorneys? If it appears not, what could make it relevant?³⁵

By applying these criteria, editors from the maintaining organization can direct the conversations surrounding visual materials toward meaningful revisions, and inspire further discourse.

In order for meaningful illustrations to reach the greatest number of people they would benefit, the authority as a whole should be available under a Creative Commons Attribution license, which will enable reuse and adaptation of the content on the condition that users provide attribution leading back to the authority.³⁶ Because the biggest challenge to the efficacy of the authority will likely be the digital divide, free reproducibility of the authority's material in any media will help ensure that the authority's material can appear in media that reaches those who need it.³⁷

VII. THE MAINTAINING ORGANIZATION

The ideal organization to maintain the new media legal authority imagined in this note would be the University of the District of Columbia David A. Clarke School of Law (DCSL); DCSL is uniquely focused on the public interest, populated by dedicated legal scholars, accessible to artists and system administrators, proximate to important legal resources, and eager to distinguish itself. Indeed, DCSL has approved an organization - still in its infancy - whose goal is the main-

³⁵ Memorandum from Nicholas Clark to Katherine S. Broderick, Dean, UDC David A. Clarke School of Law (Nov. 17, 2009).

³⁶ Creative Commons, *Attribution 3.0 United States*, <http://creativecommons.org/licenses/by/3.0/> (last visited May 3, 2010).

³⁷ See Press Release, Creative Commons, *Developing Nations Copyright License Frees Creativity Across the Digital Divide* (Sept. 13, 2004), available at <http://creativecommons.org/press-releases/entry/4397> (discussing a license targeted at the digital divide between developing and developed nations. Because the digital divide the new media legal authority faces is primarily social rather than geographic, differential treatment of licensees is neither expedient nor helpful.).

tenance of such an authority.³⁸ The youthfulness of DCSL is a rare blessing, in that the vision and passion that informed the creation of the institution and its predecessors persists, most conspicuously embodied in the person of Edgar Cahn, who, along with his late wife Jean founded the school and composed the credo – reprinted in the appendix - that informs its mission.

The mission embodied in this credo, together with the need for “legal education [to] adapt to the contingencies of technology and the emerging vernacular of digital culture and the digital mind”³⁹ demand the creation at DCSL of an authority critically assessing visual illustrations of law and legal knowledge. This authority will provide unambiguous information to interested laypeople, help to break the lawyer’s monopoly, and let those who use it know that which is expected of us and that which we can expect of others.

The credo’s penultimate stanza emphasizes the Cahns’ passion for co-production, a model Edgar has promoted and developed into systems, economies and infrastructures empowering poor people around the world.⁴⁰ Put simply, no one likes to feel useless, and traditional welfare systems treat apparent uselessness as a person’s only value.⁴¹ Co-Production, like free software, emphasizes the good that comes of connecting people with distinct skills and perspectives to tackle one another’s problems. In fact, Edgar Cahn has defined a set of four core values for Co-Production that echo the Four Freedoms’ ethos of communities:

- **Assets:** The real wealth of this society is its people. Every human being can be a builder and contributor.
- **Redefining Work:** Work must be redefined to include whatever it takes to rear healthy children, preserve families, make neighborhoods safe and vibrant, care for the frail and vulnerable, redress injustice, and make democracy work.
- **Reciprocity:** The impulse to give back is universal. Whenever possible, we must replace one way acts of largesse in whatever form with two-way transactions. “You need me,” becomes “We need each other.”
- **Social Capital:** Humans require a social infrastructure as essential as roads, bridges, and utility lines. Social networks require ongoing investments of social capital generated by trust, reciprocity, and civic engagement.⁴²

The relationships between these principles and the four freedoms are so striking as to suggest that there may be something elemental and universal about the

38 Interview with Kemit Mawakana, Faculty Advisor, UDC-DCSL Journal of Legal Illustration (Mar. 17, 2010).

39 Sherwin, *supra*, note 16, at 259-60.

40 EDGAR S. CAHN, NO MORE THROW-AWAY PEOPLE, at xvi-xvii (2004).

41 *Id.* at 28-29.

42 Cahn, *supra* note 40, at 24.

values they both describe. Indeed, it is somewhat in keeping with the notion of Co-Production that inherent in both is the notion that the value of the individual is her capacity and tendency to contribute to the community.

CONCLUSION

New media has revolutionized the individual's capacity to contribute to communities by destroying geographic barriers between skills and needs. This is especially true of abstract work that can be wholly transmitted electronically. As long as there are individual needs, there will be needs for communities. As long as there are laws to regulate behavior, there will be a need for explanations of legal concepts. As jurists at an institution uniquely dedicated to justice, the students and faculty at the David A. Clarke School of Law have an obligation to see that a future increasingly defined by visual media can also shepherd communication in a way beneficial to the cause of justice, and to all who come to the community to contribute from their passion, to receive what they need, to discuss how more needs can be met and more contributions can be offered. With the speed and inexpensiveness of new media behind us, with a world of potential contributors around us, and the establishment of an organization to maintain a new media authority of visual legal illustrations, the David A. Clarke School of Law is poised, through the principles of Co-Production as embodied in free software, to enrich our understanding by welcoming our skills and knowledge.

APPENDIX

Edgar Cahn and Jean Camper Cahn, *This I Believe* (1977) (unpublished credo, on file with Edgar Cahn).

This I Believe

I believe the day will come

when rich and poor will stand equal before the law

And I believe the day will come when Black and White

Hispanic, Asian and Native American,

Young and old, man and woman

will stand equal before the law

This I believe

And I believe the day will come when the monopoly

over law and legal knowledge — the lawyers' monopoly

the law schools' monopoly — will be broken

When men and women and yes, even children will know that which

is expected of them and that which they can expect of others:

to refrain from harm

to honor their word

to respect the dreams of others and the right of others

to dream in their own way

This I believe

And I believe that the day will come when courts of law

will be courts of justice, courts for people, not courts for lawyers —

above all, courts to render simple justice, to see

that promises are honored

that the injured are made whole

that the weak are protected from the powerful and the greedy

This I believe

For in the fullness of time, I must believe that the voices of love

shall prevail over the voices of hate and the forces of justice

shall triumph over the forces of injustice and inhumanity

This I believe

But in the here and now, there can be no safety,

no guarantees and no easy way.

At each point, our faith will be tested and when weighed in the balance,

if we are honest, our best efforts will be found wanting

This is true, this I believe

And so, all that we have, in the here and now is
our love for each other,
our willingness to forgive each other,
our willingness to come to each other's rescue,
and our unwillingness to stand by silent or passive
in the face of injustice.

This is my belief, this is our joint belief and this we shall try to honor
so long as life and breath permit.