The Closed Nature of the "Open-Access" SSRN

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Abstract

The Social Science Research Network (SSRN) offers online posting of papers on the SSRN web site. The system of posting is advertised by the SSRN as open access. Nevertheless, the SSRN hinders access to posted papers. This hindrance arises from the gatekeeper function of the SSRN system. Specifically, subjective determinations are made by the SSRN site administrators about whether posted papers should or should not be searchable by the SSRN search engine. It is difficult, sometimes impossible, to find posted papers on SSRN when a posted paper is not connected with the SSRN search engine. A posted paper which is not searchable is, in effect, not *really* posted, regardless of the nominal posting by the SSRN because it. Thus, the advertised open access feature of SSRN is essentially a misrepresentation by the SSRN of its true nature. The SSRN gatekeeper function is ill advised for another reason. It is doubtful that the SSRN site administrators are actually capable of distinguishing between posted papers which should benefit from the SSRN search engine, and posted papers which should not. The result: some poorly written or researched papers could be located through the SSRN search engine, while some very good papers may not be discovered through an SSRN search. Given this situation, three solutions are offered for the negation, by the SSRN, of open access to posted papers.

Introduction

The Social Science Research Network (SSRN) is a web site which maintains an electronic repository of scholarly papers in the fields of law, economics, social sciences, and humanities.[1]

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[1] For general information about the SSRN, *see* Norman Otto Stockmeyer, "Do You SSRN?" (2011), available at http://ssrn.com/abstract=1727484 (accessed 8/3/2013); Wikipedia, "Social Science Research Network" (n.d.), available at http://en.wikipedia.org/wiki/Social_Science_Research_Network (accessed 8/3/2011).

Benefits and Detriments

A benefit to writers for posting their work on SSRN, on the SSRN, is open access, by potential readers, to posted papers.[2] This benefit is offset by a detriment. After a paper has been submitted by a writer, a decision is made by the SSRN about whether a posted paper should or should not be searchable by the SSRN search engine. These decisions are unilateral, and the decisions are final. A writer has no way to request or obtain a review of a decision that a posted paper should not be searchable by the SSRN search engine. Thus, writers whose papers are not searchable are short-changed by the SSRN. The promise of open access to posted papers is unfulfilled.[3]

Categories of Posted Papers

Standard operating procedure of the SSRN is to categorize a paper, submitted to the SSRN for posting on the SSRN web site, in one of three categories. After categorization, a submitted paper becomes a posted paper. The three categories of posted papers are:
1. Publicly Available Papers,
2. Privately Available Papers, and
3. Inactive Papers.

Publicly-available papers are searchable by way of the SSRN search engine. Hence, there is open access to a publicly-available paper. Privately-available papers are not searchable by way of the SSRN search engine, but they can be found indirectly on the happenstance that a potential reader locates on the World Wide Web (the Web), a reference to a privately-available paper, and that reference also includes a link to the SSRN. Hence, there is no functional open access to a privately-available paper. There is merely limited access. Inactive papers are neither searchable by way of the SSRN search engine nor discoverable indirectly through the Web. Hence, there is no access at all to an inactive paper.

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[2] "Writers" includes a wide variety of people: professors, students, lawyers, economists, and historians are just some examples of typical writers who already do or - who may in the future - post their work on SSRN.

[3] Other views of the benefits and detriments of the SSRN are Ian Ramsay, "SSRN and Law Journals – Rivals or Allies?" (2012), available at http://ssrn.com/abstract=2216351 (accessed 8/3/2013), and James Grimmelmann, "SSRN Considered Harmful" (2007), available at http://ssrn.com/abstract=965633 (accessed 8/3/2013).

Division

A paper posted on SSRN, whether a publicly-available paper, a privately-available paper, or an inactive paper, is divided into two parts: abstract and paper. Initially, a search is directed by the SSRN to the abstract of a posted paper. On the abstract page, there is a "Download" button. A reader moves from the abstract page to the paper by pressing the Download button.

Unsearchable = Unpublished

A. Privately-Available Papers

A non-fiction book has an index. Imagine that, in the compilation of an index, a gatekeeper function was applied. The indexer decides which subjects are discussed in the book and which persons named in the book should be indexed and which should not. In this scenario, all indexing decisions are unilateral and final. The undesirable result would be that un-indexed subjects and un-indexed persons actually include in the book were not searchable. Thus, they are functionally unavailable to any given reader who searches the index of that book.

This analogy applies in cases of a paper privately-available on SSRN. The paper is excluded from the scope of the SSRN search engine, so it is not searchable. It is not available to a reader who may be searching for just such a paper. That privately-available paper is, in effect, an unpublished paper.

Perhaps, as mentioned previously, a privately-available paper would be found *indirectly*, through the Web, by happenstance. That is the equivalent of leafing through a book and finding a discussion of a subject or a reference to a person, by happenstance. Serendipity may have its place in early-stage research, but it should not be the default method of research discovery for any papers on SSRN that have been excluded from SSRN's search function.

B. Inactive Papers

Imagine a book which is on a library shelf, but is not in the library catalogue. That book would never be found by a reader using the library's catalog to locate material on a given subject, by a given author, or otherwise containing standard library cataloging fields of information. Similarly, an inactive paper on SSRN is entirely undiscoverable by a reader using the

SSRN search engine. An inactive paper might as well be unpublished, as it is invisible to researchers using the SSRN database.

C. Summary

Exclusion of privately-available papers and of inactive papers from the purview of the SSRN search engine negates the claim of the SSRN that it is an open-access repository of papers. The high number of posted papers which are not discoverable on SSRN makes the SSRN the world's largest repository of *samizdat*.[4]

Copyright

When a writer gives a paper to a colleague for review, there is no transfer of the copyright in the paper. The copyright remains with the writer of the paper. When the writer no longer wants his paper circulated, for any reason or for no reason, and the writer asks for the paper, the colleague is obligated to hand back the paper to the writer. In the electronic world, as in the physical world, there must be a "handing back" of a paper to its writer. An electronic "handing back" of a paper is effectuated by deleting a paper from an email page or from a web site.

Conversion

Suppose that, when the writer asks for his paper, the colleague refuses to hand back the paper. The professional discourtesy of the colleague is compounded by improper conduct. Wrongful refusal to hand back someone else's property is, in legal parlance, conversion. The SSRN acknowledges that every paper is transmitted to it without a transfer of the copyright in that paper. On the SSRN web site, there is a set of Frequently Asked Questions. The link to the web page which has the Frequently Asked Questions and their answers appears in small print in an out-of-the-way position on the first page of the SSRN web site.

Among the Frequently Asked Questions, under the heading, "Submitting a Paper to the SSRN eLibrary" (bold omitted), there is "11. What

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[4] Samizdat was a form of dissident activity across the Soviet bloc in which individuals reproduced censored publications by hand and passed the documents secretly from reader to reader. This grassroots practice to evade official censorship was very dangerous. Harsh punishments were meted out to those caught possessing or copying censored materials. See, http://en.wikipedia.org/wiki/Samizdat (accessed 12/10/2013).

do I need to know about Copyright Policies?" Part of the answer is, "SSRN does not take a copyright for any papers (or other documents) you post on SSRN. You grant SSRN a non-exclusive, revocable license that allows SSRN to provide its services to SSRN users. You retain the right to remove your paper from SSRN at any time, or to leave the paper on SSRN but make it only privately available."[5]

Clearly, the SSRN may not refuse to "hand back" a submitted paper or a posted paper, because each paper *belongs* to its writer. Yet, the SSRN does refuse, in the manner of the professionally-discourteous colleague, to return submitted papers to authors who request them. There is no "Remove" button for any publicly-available paper, for any privately-available paper, or even for any inactive paper. Denying the ability to delete an author's paper is both unprofessional and contrary to law.

For each submitted or posted paper, there should be a Remove button. There is not. The information in FAQ 11 (quoted above) regardless, the SSRN does not honor the assertion, "You retain the right to remove your paper from SSRN at any time[.]" There is no removal, by the SSRN, of any posted paper from its web site. On two separate occasions, I asked the SSRN to remove one of my own papers from its database. Neither request was acknowledged.

Author-Page Buttons

Each author has an author page on SSRN to which she alone has access. An author page is accessed, by an author, through the input by the author of his email address and her SSRN password. On an author page, there is a list of that author's posted papers. The list is arranged in three categories: Publicly Available Papers, Privately Available Papers, and Inactive Papers. A posted paper is listed in one category or another. In the Publicly Available Papers category, there is in a column headed "Availability," a "Modify" button for each posted paper. Similarly, in the Privately Available Papers category, there is, in a column headed "Availability," a "Modify" button for each posted paper. By contrast, in the Inactive Papers category there is a "Status" column, with a "Removed" button. The purpose and effect of "Modify: buttons and of "Removed" buttons are not explained on the Frequently Asked Questions page of the SSRN web site.

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[5] SSRN web site, "Social Science Research Network Frequently Asked Questions," available at http://www.ssrn.com/update/general/ssrn_faq.html (accessed 9/20/2013).

Bailment

A bailment is legal term for a kind of loan. The loaned item is the bailed property. The borrower is the bailee. Consider the owner (the bailor) of a car who loans his car (the bailed property) to the borrower (the bailee). No ownership interest in the borrowed car is acquired by the borrower. The owner of the car has the unconditional right, at any time, for any reason or for no reason, to demand the return of the borrowed car by the borrower.

In the context of SSRN, the SSRN is the borrower (the bailee) of all papers submitted to it. A submitted paper, or a posted paper, is the borrowed property (the bailed property). The writer of a paper, who is the lender (the bailor) of the paper which he owns, has the unconditional right, at any time and for any reason or for no reason, to demand the handing back by the SSRN of the paper.

Categorization

Who categorizes submitted papers as Publicly Available Papers, Privately Available Papers, or Inactive Papers? The SSRN does not say. Let us assume for the sake of argument that it is a group of graduate students. What criteria are used by these graduate students to categorize submitted papers?

Among the Frequently Asked Questions page of the SSRN web site, again under the heading, "Submitting a Paper to the SSRN eLibrary" (bold omitted), is, "2. Is my paper eligible for inclusion and public display in SSRN's eLibrary?" The response to that FAQ by the SSRN is that a "scholarly" submitted paper is posted in the Publicly Available Papers category. By contrast, "Non-scholarly papers such as Op Ed or opinion papers must be made 'Privately Available'."[6] There is no specification of a type of paper, other than "Op Ed" or "opinion," which the SSRN deems to be a Privately Available Paper. The characteristics of an Op Ed paper or of an opinion paper are not specified. No explanation is provided on the Frequently Asked Questions page of the SSRN web site about the circumstances under which a paper is relegated by the SSRN to the Inactive Papers category.

How do graduate students *know* whether a paper is scholarly, and so should be relegated to the Publicly Available Papers category? How do they know a given document is not scholarly, and so is relegated to the Privately

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[6] *Id.*

Available category? What is the unrevealed mystery of the Inactive Papers category? Clearly, with millions of papers currently published on SSRN and many, many papers submitted daily, graduate students (or any other group of readers) do not have sufficient time to read every submitted paper. In any event, no group of graduate students, however bright, has collective educational backgrounds sufficient to evaluate the merits of all submitted papers.

Perhaps pragmatic rules are applied. Without an explanation by SSRN of how it makes these determinations, critics – or even just the general public – are left to surmise about what rules are applied to this decision-making process. An example may look like this:

Right-Thumb Rule:	A submitted paper which has 1,000 words or fewer is posted as a privately-available paper.
Left-Thumb Rule:	A submitted paper which has no footnotes is posted as a privately-available paper.
Eight-Fingers Rule:	All other submitted papers are posted as publicly-available papers.

In practice, there would be some overlap between the word-count rule of thumb and the no-footnotes rule of thumb.

The problem with such simplified, pragmatic rules is the propensity for error. By appearance, a longer paper containing footnotes, but perhaps also containing serious errors of fact or omission is considered by SSRN to be a "scholarly paper," regardless that it is in fact not scholarly.

By contrast, a shorter paper, such as the Gettysburg Address, which has around 270 words, can have merit which a longer paper does not. Also in contrast, a paper without footnotes such *The Federalist Papers* No. 10, which has around 3,000 words, can have merit which an extensively footnoted paper does not.

Solution A

The SSRN should not categorize submitted papers. All submitted papers should be posted. Every posted paper would be searchable by way of the SSRN search engine. At the request of a writer, a posted paper would be deleted, unconditionally, by the SSRN, from the SSRN web site.

Solution B

There should be no categorization of submitted papers. Whether a submitted paper should be posted would be decided by a reading of the submitted paper by a person knowledgeable about the subject about which the paper is written. Again, every posted paper would be discoverable by the SSRN search engine; and, at the request of a writer, a posted paper would be deleted, unconditionally, by the SSRN, from the SSRN web site. The drawback of this solution is that the SSRN receives about 5,500 submissions a month. That figure is derived from the assertion, on the SSRN web site, that, in the preceding twelve months (the day/month/year reference point of which is not stated), 66,146 submissions were received by the SSRN.[7]

The probable lack of availability to the SSRN of a veritable army of knowledgeable persons is obvious. The flood of 5,500 submitted papers a month underscores that, as mentioned above, any group of readers, whether they be graduate students or full professors, do not have sufficient time to read every submitted paper.

Solution C

There should be no categorization of submitted papers. Readers/evaluators should give each paper submitted to SSRN a cursory review and make initial evaluations. A submitted paper which passes the most basic of quality tests should be posted. If it does not pass the first test, a submitted paper should be sent for a second, more thorough reading by a person knowledgeable in the field. He or she could approve of the posting of the submitted paper. Should the knowledgeable person find that the submitted paper ought not be posted, there would be a mechanism whereby the writer could defend his paper. Yet again, every posted paper would be discoverable via the SSRN search engine; and, at the request of a writer, a posted paper would be deleted, unconditionally, by the SSRN, from the SSRN web site.

Possible Categorization

Although categorization for the purpose of *exclusion* of posted papers from the purview of the SSRN search engine is unacceptable, categorization for the purpose of *identification* of types of posted papers would be helpful to

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[7] SSRN web site, Search page, "SSRN eLibrary Statistics," available at http://papers.ssrn.com/sol3/-DisplayAbstractSearch.cfm (accessed 9/20/2013).

intending readers. To categorize properly, the SSRN must come up with useful, neutral categories. One possibility is to specify which posted papers are empirical. The titles of those posted papers could be marked with an asterisk, a dagger or other indicator. Note that the symbol would do no more than convey information about the type of the posted paper. There would be no exclusion. Every posted paper, whether with or without a symbol like this, would be searchable and discoverable by way of the SSRN search engine.

Conclusion

The searchable/not-searchable distinction created and maintained by the SSRN stands in opposition to, and in defiance of, academic freedom. A censored open-access repository is an anti-intellectual plate of spaghetti. No matter whether submitted papers become posted papers pursuant to Solution A, Solution B, or Solution C, *every* posted paper should be searchable by way of the SSRN search engine. It is for a reader of a posted paper, not for the SSRN, to decide whether a paper is or is not worthwhile, original, significant, or interesting. Further, every posted paper should be subject to unconditional deletion, by the SSRN, from the SSRN web site, at the request of a writer. It is for the writer, not for the SSRN, to decide whether the paper is to be available to scholars and to members of the public.