

Is Open Access Equal Access?

PACER User Fees and Public Access to Court Information

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Our country has a long history of striving for openness and transparency in government processes. In 1978, the United States Supreme Court held, “It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”¹ Long before America’s high court recognized this common law principle, court records were historically accessible for inspection by lawyers, journalists, land title companies, credit agencies, academics, and members of the general public.² These individuals were also permitted to take notes as a part of their right to inspect court documents.³ Having free access to copies (i.e. reproductions), however, was a completely different matter. Unlike the right of free inspection, the right of free copies did not exist, and copies of court records could be extremely expensive to citizens seeking the information. For example, in 1853, a copy of a court document was ten cents a page, a steep price for the mid-nineteenth century.⁴ One could even make an argument that the right to simply inspect court documents was not actually “free” for many, due to the associated travel costs of physically going to the courthouse in an era before mass transportation and the internet.

Thus was the state of public access to court documents for several generations. However, with the advent of computers and the internet came new implications for information dissemination to the public and the judiciary. Today, US federal court documents are publicly accessible through PACER (Public Access to Court Electronic Records), the online access portal that “provides electronic public access to federal court records. PACER provides the public with instantaneous access to more than 1 billion documents filed at all federal courts.”⁵ These publicly available court records include dockets, court opinions, searches of case-related information, information about the status of a case, and audio files of court hearings.⁶ Despite the free accessibility of PACER to the public, registered users are charged ten cents per page.⁷ Another barrier is that one has to register to even search PACER’s records.⁸

In 2010, Adrienne A. De Witt, then an MLS candidate at Indiana University School of Library and Information Science, published an article for DttP: Documents to the People in which she introduced PACER and its access fees, gave a brief explanation as to why the controversy is relevant to government documents librarians, and considered potential privacy issues surrounding the topic.⁹ While questioning whether PACER’s fee-based system constitutes free public access to court documents, De Witt argued that there needs to be a balance between “the right to full and open electronic access and the right to protect personal information” but “perhaps the paywall is [the] most effective means of protecting private information.”¹⁰

The purpose of this paper is to build upon De Witt’s 2010 article and consider the litigation and legislative efforts that have since been made to reduce or even eliminate PACER’s fee policies. It will trace the history of the US government’s Electronic Public Access program and the creation of PACER, the legislative history of PACER’s fees, the Electronic Court Records Reform Act of 2018, and the Electronic Court Records Reform Act of 2019, both designed to eliminate PACER’s fees, and various class action suits filed against the Administrative Office of US Courts. This paper strikes at the heart of our country’s long history of striving for permanent public access to government information by examining how courts and lawmakers have defined, and often limited, what “public access” really means in the context of disseminating court information to the public.

Electronic public access to court documents began with the Electronic Public Access (EPA) program in September of 1988. The Judicial Conference of the United States, which oversees the administration of judicial courts, “authorized ‘an experimental program of electronic access for the public to court information in one or more district, bankruptcy, or appellate courts in which the experiment can be conducted at nominal cost.’ A dozen courts signed up for the pilot Public Access

to Court Electronic Records (PACER) system.”¹¹ In short, the intent of the program was to allow anyone with internet access to view court case documents.

A couple of years later, the Judicial Appropriations Act of 1991 provided funds to the federal judiciary for the purposes of establishing a system that provided “access to information available through automatic data processing equipment” and instructed the Director of the Administrative Office of the United States Courts to “prescribe a schedule of reasonable fees for electronic access” to court documents.¹² Congress did not, however, appropriate any revenue for the start-up costs associated with this project. What resulted was a dial-in bulletin board service that charged one dollar a minute for public access to court documents.¹³ In comparison to the ten cents per page of the nineteenth century, not much progress had been made and financial barriers to full and open public access to court records still exist.

The Electronic Public Access program began in a select few federal courts but as the idea caught on, more and more courts started to provide public access to their records. In a 1993 report, the House Appropriations Committee, urged the judiciary to “equip all courts, as rapidly as is feasible, with the capability for making such records available electronically and for collecting fees for doing so.”¹⁴ As a result, by the mid-1990s, approximately 180 federal courts offered fee-based public access to their court records.¹⁵ However, by 1995, the fees had decreased to 75 cents per minute, and then to 60 cents per minute in 1996.¹⁶ While attorneys could have passed this cost on to their clients, *pro se* litigants may not have been able to afford these rates.

Because users were required to find case records on a jurisdiction-by-jurisdiction basis, and many non-lawyers did not necessarily have this information, searching the system was extremely difficult. In response, the Administrative Office of the United States Courts went to work in 1995 to construct a national index for records housed in individual courthouses. In 1997, the US Party/Case Index was completed and launched online.¹⁷ PACER finally went online in 1998, along with the new Case Management/Electronic Case Files (CM/ECF) system. This new filing system expanded the types of publicly available court records from simply docket sheets to petitions, motions, orders and other documents.¹⁸ The Judicial Conference set an access fee of seven cents per page for the new online version of PACER.¹⁹ While this rate seems reasonable when compared to the former ten cents per page, the length and number of documents in any given court case had increased over the previous decades and seven cents was likely cost prohibitive for many people.

With this explosion of internet access came unprecedented public access to government documents. Both the public’s expectation that official information would be available online and the judiciary’s long-standing policy of providing open access to its records led to a rapid growth in the use of PACER. However, this increase in users also led to an increase in complaints over PACER’s fees. In 2001, to quell dissatisfaction among the public, the Judicial Conference passed a provision stating, “attorneys of record and parties in the case shall receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer.”²⁰ Over the next two years, the Judicial Conference added a 30-page cap on the seven-cents-per-page fee. This cap was eventually expanded in 2003 to include all case documents including dockets sheets and case-specific reports but excluding transcripts.²¹

These efforts by the judiciary did not placate PACER users, and more disaffection by the public grew. Finally, in 2002, Congress passed the E-Government Act which primarily concerned non-judicial agencies. Section 205 of the act, however, established the requirements for electronic dissemination of federal court records. It mandated court websites containing courthouse location and contact information, local court rules, docket information, and “access to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.”²² Congress further declared that “each court shall make any document that is filed electronically publicly available online.”²³ Notably, the act did not eliminate PACER’s fee system, but rather eliminated the policy that access to court documents be conditioned on fees by setting those fees “only to the extent necessary.”²⁴ The Judicial Conference took one step further in 2003 and issued fee exemptions for “indigents, bankruptcy case trustees, individual researchers associated with educational institutions, courts, section 501(c)(3) not-for-profit organizations and pro bono ADR neutrals.”²⁵ Two years later, however, the PACER fees were increased from seven cents per page to eight cents per page.²⁶

In 2006, the American Association of Law Libraries (AALL) drafted a document titled “Resolution on No-Fee FDLP Access to PACER” imploring the GPO to work with the Administrative Office of US Courts in providing free access to PACER for users of federal depository libraries.²⁷ This led to a pilot program offering free access to PACER in seventeen depository libraries starting in 2007.²⁸ Unfortunately, the pilot program was terminated in September of 2008 after activist Aaron Swartz, working with Public.Resource.org, downloaded about 20 million PACER documents from various FDLP libraries and made them publicly available for free online.²⁹

Since De Witt's 2010 article, PACER has gone through additional changes regarding fees, often not in the interest of better accessibility. In 2011, the Judicial Conference authorized an increase in the PACER fee from eight cents per page to its current rate of ten cents per page.³⁰ Yet, in the proceeding years, activists and lawmakers would continue to lead the charge for tangible and permanent change in permanent public access to court records.

PACER Fees and Forces of Change Litigation Over Fees

Multiple legal challenges have been made regarding various aspects of PACER's user fees. A 2015 class action lawsuit in the US Court of Federal Claims alleged a systematic error in PACER's programming that overcharged users by billing by bytes rather than page number.³¹ As of March 9, 2021, the case was still pending and awaiting trial.³² A 2016 class action lawsuit in the US District Court of the District of Columbia alleged that the access fees were being used to purchase audio and video equipment for courtrooms instead of maintaining the PACER system in contravention of the E-Government Act of 2002.³³ The trial court indeed found a misappropriation of funds and held that this was not a permissible use of PACER fees.³⁴ The judgement was subsequently affirmed by the Court of Appeals.³⁵

More pertinent to the actual elimination of PACER fees was a 2016 class action lawsuit filed in the US District Court for the Southern District of Florida claiming that PACER failed to provide its users with free access to court opinions in violation of PACER's policies and the E-Government Act of 2002.³⁶ In September 2017, Judge Robert N. Scola, Jr. dismissed the case stating, "The E-Government Act neither mandates free access to judicial opinions nor creates a remedy for the return of monies purportedly paid to access such documents. The Court does not believe that Congress intended the term "access" to mean "free access" with respect to judicial opinions."³⁷ The Plaintiffs appealed the decision of the trial court, but the Court of Appeals for the Federal Circuit affirmed the dismissal on June 15, 2020.³⁸

Proposed Legislation

The Electronic Court Records Reform Act of 2018 was introduced by Congressman Doug Collins of Georgia on September 6, 2018. The bill primarily directed the Administrative Office of the US Courts to consolidate the Case Management/Electronic Case Files system into a singular system, but it also established certain requirements for PACER, namely that its documents be made available to the public and case parties free of charge.³⁹ It

was referred to the House Committee on the Judiciary where it was never passed.⁴⁰

In February of the following year, Congressman Collins once more attempted to force the Judicial Conference to provide court documents to the public for free by introducing H.R. 1164, the Electronic Court Records Reform Act of 2019.⁴¹ It was again referred to the House Committee on the Judiciary but never enacted.⁴² A companion bill, S. 2064, was introduced in the Senate by Robert J. Portman of Ohio on July 9, 2019.⁴³ It was referred to the Senate Committee on the Judiciary and likewise was never enacted.⁴⁴ In a letter dated December 2, 2019 to members of the House Committee on Appropriations, the Judicial Conference expressed its opposition to H.R. 1164 and S. 2064. In particular, the Judicial Conference opposed the elimination of the Judiciary's statutory authority to charge user fees for PACER without providing an alternative funding mechanism to finance the system.⁴⁵

The most recent legislative effort to eliminate the PACER fees was the Open Courts Act of 2020. Introduced as H.R. 8235 by Congressman Henry Johnson of Georgia on September 14, 2020, this proposed law required the Administrative Office of the US Courts to establish a single electronic system for all public court records that would be freely available to the public, thereby eliminating the pay wall and user registration requirement currently established by PACER.⁴⁶ As a mechanism for eliminating the PACER paywall, H.R. 8235 allowed the Judicial Conference to annually collect from federal agencies an amount equal to that which those agencies paid in PACER fees in 2018, adjusted for inflation.⁴⁷

The Judicial Conference submitted a letter dated December 7, 2020 to the House Majority Leader, Steny Hoyer, once again objecting to the legislative attempt to eliminate PACER's fee system, as it would in the words of the Judicial Conference, "force the Judiciary to slash funding for staff and other critical operations. Moreover, the Judiciary's backbone case management system, and therefore the Judiciary itself, could grind to a halt."⁴⁸ The Judicial Conference's concerns can be seen as either disingenuous or uninformed. A 2019 CRS Report titled "Economics of Federal User Fees," stated, "federal courts collect more in PACER fees than is needed to maintain the underlying computer system, with excess fees being earmarked for other court improvements."⁴⁹

On December 8, 2020, during floor debate on H.R. 8235, Congressman Collins argued that wealth should not prohibit individuals from accessing the courts and that compelling the public to pay for access to court records constituted an unnecessary and unconscionable burden on those who are exercising their constitutional rights. Collins declared, "Transparency

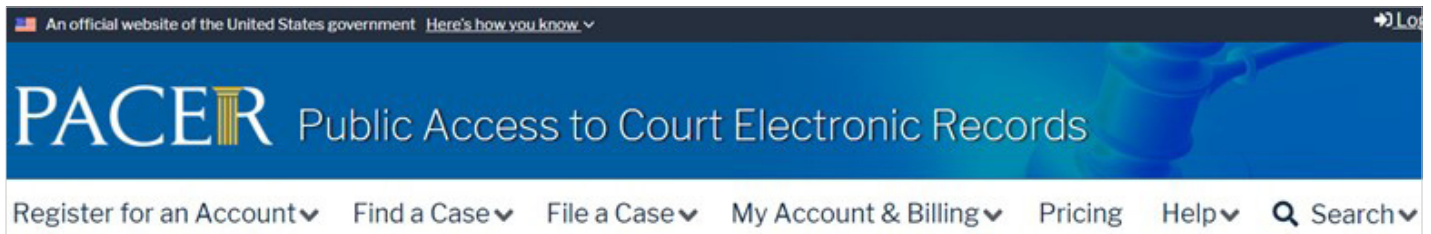


Figure 1. ACER homepage menu, <https://pacer.uscourts.gov/>

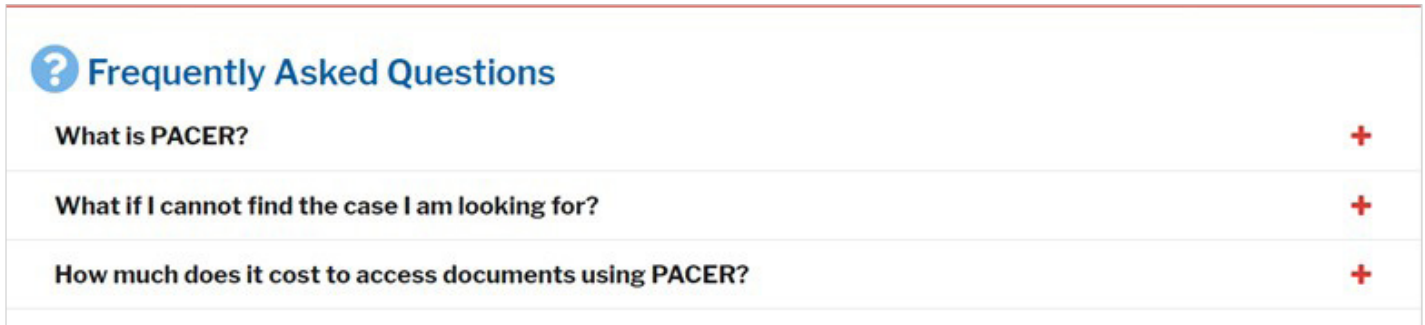


Figure 2. PACER FAQs, <https://pacer.uscourts.gov/>

and accessibility should be our goal, not profits and limited access. Court records should be as easy to access as legislation is on Congress.gov. Convenient access to public records in public courthouses shouldn't be a privilege for the few who can afford it."⁵⁰ Co-sponsor Congressman Armstrong took the floor next and noted, "The reforms contained in the Open Courts Act are not new ideas. Advocates of judicial transparency have long supported efforts to make court records free to the public. The Open Courts Act makes long overdue, common sense reforms."⁵¹

Rising in opposition to the bill, Congressman Andy Barr from Kentucky echoed the concerns of the Judicial Conference over the bill's alleged budgetary impact. Citing the December 7 letter from the Judicial Conference, Barr stated, "This bill has a \$2 billion price tag, and the entire budget of the Federal judiciary is only \$8 billion, annually."⁵² In rebuttal, Congressman Johnson called the \$2 billion figure preposterous, especially in light of the Congressional Budget Office's estimate of the cost of the Open Courts Act, which came to \$46 million over 10 years.⁵³ "That is a drastic difference than a \$2 billion cost estimate submitted at the last minute to confuse and try to derail passage of this very common sense, necessary legislation that brings judicial records into the 21st century," declared Johnson.⁵⁴ After 40 minutes of debate, H.R. 8235 was passed as amended by voice vote.⁵⁵ On December 9, 2020, the bill was sent to the Senate, read twice, and referred to the Committee on the Judiciary. It was never enacted.

Recent Developments

On June 26, 2020, the Administrative Office of the US Courts announced it would be launching a redesigned website for PACER. According to the news release, "The new PACER website includes features that will make it easier for users to learn how to navigate the system, find what they are looking for more quickly, and understand the fee structure for downloading records."⁵⁶

While screenshots of the old PACER website are difficult to locate online, the author has experience working with the pre-2020 PACER website and can verify that there was nothing obvious on the homepage outlining access fees. The redesigned website, however, makes certain that users have access to the fee system. (See figure 1.)

At the top of PACER's new homepage, users immediately have access to not only pricing, but account management and billing, two topics that were not readily accessible on the pre-2020 PACER website.

Towards the middle of the homepage are excerpts and links to the FAQ page. One such FAQ that was prominently placed on the homepage was, "How much does it cost to access documents using PACER?" It appears from all the references and links to PACER's access fee system, the Administrative Office wanted to make it abundantly clear to the public that they would indeed be charged for accessing court documents. (See figure 2.)

Clicking on the "Pricing" tab on the homepage menu takes users to an entire page on PACER pricing and how fees work. The layout on the page is very easy to read and contains

Cost for Accessing PACER

\$0.10 per page:

THE DIFFERENT TYPES OF PAGES

Document, such as a docket, motion, order, judgement or brief in a case. **You won't be charged more than \$3 per document.**

PACER Search Results – Anytime a search is performed you are charged a fee based on the number of pages generated in the search, even if the search displays “no matches found.” There is no maximum fee for these searches.

Reports that are not case-specific, such as the cases report. There is no maximum fee for these reports.

Transcript of court proceedings are added to PACER 90 days after they are produced. There is no maximum fee for transcripts in PACER. [Learn more.](#)

Figure 3. PACER rates, <https://pacer.uscourts.gov/pacer-pricing-how-fees-work>

several individual information boxes that break up the reading for users. One of the first boxes is titled, “Cost for Accessing PACER.” It makes it very clear as to the current ten cents per page fee and breaks down the different types of pages that are and are not included under this rate. It is interesting to note that users are explicitly told that there is a \$3 cap on document fees. (See figure 3.)

The “Pricing” page also informs users that if they spend \$30 or less on court records in a quarter the fees are waived. Additionally, users are advised that PACER access is free if you are a party in a case, you review court documents at a physical courthouse location, you were granted a fee exemption, or you are requesting court opinions. Links to fee exemptions are also provided.⁵⁷ Another aspect to the new generation of PACER that was not present on the old website, is an information box on the “Pricing” page titled, “Tips for Limiting Fees.” (See figure 4.)

Dissemination of Information/Access Issues

The recent legislative and litigation efforts over PACER’s access fees tell a story with two opposing viewpoints. On one hand, members of the public expect and demand access to federal court documents free of charge. On the other hand, while the judiciary recognizes the users’ constitutional right to open and permanent public access to these documents, it nonetheless maintains that the system which provides such access cannot be financially maintained without charging fees. This controversy

TIPS FOR LIMITING FEES	
Search by Case Number instead of Party Name	+
Use Docket Report Filters	+
Search by a Specific Court vs. Using the PACER Case Locator	+

Figure 4. Reducing fees, <https://pacer.uscourts.gov/pacer-pricing-how-fees-work>

is at the heart of permanent public access to government information, and in this context, court records.

Perhaps the biggest underlying dissemination issue here is that the judiciary did not establish PACER to provide the public better access to court records. It was created for the administrative benefit of judges, court staff, and attorneys.⁵⁸ Yet, the principle remains—the majority of court documents are a matter of public record and should be accessible to the public. Anytime a paywall or any other barrier, no matter how insignificant it may seem to the information purveyors, calls into question the extent to which the documents are, in reality, publicly accessible.

Opponents of this financial barrier have taken up the mantle of disseminating federal court records for free when the judiciary refused to do so. Special interest groups such as RECAP (PACER spelled backwards) have led an effort to make PACER documents available free online. RECAP is a software program which allows users to search for free copies of documents found in PACER. Activist Aaron Swartz was investigated by the federal government for downloading activities connected to RECAP. Swartz had committed no crime, the government did not file charges, and the FBI eventually dropped the investigation. On January 11, 2013, Swartz committed suicide.⁵⁹

Conducting the research for this paper brought to the forefront the many issues surrounding PACER, its access fees, and aspects of permanent public access to federal court documents. The irony in relying on PACER to obtain court documents for the purposes of discussing the cases outlined above is not lost on the author. Not only did the fees present a challenge in gaining access to these records but being forced to create an account did as well. Like many public users of PACER, I eventually turned to public interest websites, such as *Court Listener*, which includes RECAP archived court documents.

Conclusion

It has been 43 years since the US Supreme Court explicitly stated that the public has a general right to have open access to court documents. Yet, this principle of law was born in a pre-internet world in which access to such documents at the click of a button could not have been imagined. As we all know, aspects

of technological advancement come with both great benefits and daunting challenges. PACER is one such advancement. While it has dramatically expanded public access to court documents by removing the physical barriers of the courthouse, it no less is obstructive. Herein lies the question—Does open access mean equal access?

Even though ten cents per page is a comparatively small amount of money, having an access fee at all can have detrimental and deterring effects on certain users; particularly those who may not be computer savvy and may not know what constitutes a page, thereby inadvertently running up their PACER bill. This calls for not only continuing education and awareness among the public, but also additional legislative and litigation efforts to eliminate the PACER access fees and find alternative methods of funding. Moreover, the GPO program providing free access to PACER documents to FDLP libraries should be reinstated. When it comes to court documents, equal financial access must be a part of open access. Without it, effective public awareness, criticism of, and confidence in, the judicial process will be compromised.

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