

IFLA 2010 session 96

Creating an International Legal Information Policy Agenda

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Open Access – Free Access to Primary Legal Materials

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Abstract

This brief presentation addressed free access to primary legal materials, discussing the scope and nature of open access, and referring to the Free Access to Law Movement. The social imperatives for free access were outlined. Various sectors providing free access and their funding models were discussed. Requirements for freely accessible legal information were enumerated including existing standards. The definition of added value and the role of commercial publishers was discussed. The Presentation ended with questions for the audience. This paper is an outline with notes on legal publishing and extensive reference to websites and further reading.

Introduction

- Institute of Advanced Legal Studies, University of London – ials.sas.ac.uk
- International Association of Law Libraries – www.iall.org
- Scope: Primary legal materials (Constitution, Legislation, Gazettes, Codes, Law Reports) rather than legal scholarship and published research.
- See Notes on Legal Publishing and Further Reading below

Open Access

- The advantages of globalisation of technical standards
- Free-to-Internet and Free-to-user
- Free Access to Law Movement and its declaration. Montreal Declaration on Free Access to Law, 2002 as subsequently amended, <http://www.worldlii.org/worldlii/declaration/>:
 - *Public legal information from all countries and international institutions is part of the common heritage of humanity. Maximizing access to this information promotes justice and the rule of law;*
 - *Public legal information is digital common property and should be accessible to all on a non-profit basis and free of charge;*
 - *Organizations such as legal information institutes have the right to publish public legal information and the government bodies that create or control that information should provide access to it so that it can be published by other parties.*

Why?

- To promote and uphold the rule of law and the administration of justice
- To fulfil the obligations of government to society
- To reduce the costs of the legal system

By whom?

- Government and the courts. Responsibility in the electronic environment lies with the creator for quality, distribution, preservation, For the current state of publication of legislation in Europe see: European Forum of Official Gazettes, <http://circa.europa.eu/irc/opoce/ojf/info/data/prod/html/index.htm>
- Non-profit or charitable organizations, for example: Legal Information Institutes, see the list at <http://www.worldlii.org/>, including the British and Irish Legal Information Institute at <http://www.bailii.org/>

- Impact on commercial publishers and the nature of 'added value'.
- General ending of the assertion of government copyright; option in the Berne Convention
- The breaking of monopolistic or exclusive rights and the 'Right to Republish'.
Hague Principles, drafted at a Meeting of Experts at the Hague Conference on Private International Law, November 2008, towards a convention on access to foreign law. Graham Greenleaf, 'The obligations of public authorities originating legal materials',
<http://www.ittig.cnr.it/LawViaTheInternet/templates/lawviatheinternet/slides/GreenleafIParallela.pdf>
- Leave it to Google?

Who funds?

- Charitable donation, foundations, research funding
- The legal profession, e.g. Canadian Legal Information Institute (<http://www.canlii.org/en/info/about.html>).
- Government
- Leave it to Google

What Requirements?

- Equitable and permanent public access to legal information
- For reliability of content, official status, authenticity, and preservation, see Claire Germain's presentation.
- AustLII (<http://www.austlii.edu.au>) in 1995 advocated 6 obligations of legal data sources necessary for 'full free access' and re-publication:
 - Provision in a **completed** form, including additional information best provided at source (eg consolidation)
 - Provision in an **authoritative** form, including citations
 - Provision in the form best **facilitating dissemination**
 - Provision to any 3rd-P republisher on a **marginal-cost**-basis
 - Provision with **no re-use restrictions** or licence fees
 - **Preservation** of a copy by the public authority
- The American Association of Law Libraries in 2007 advocated '*Principles and Core Values Concerning Public Information on Government Web Sites*',
<http://www.aallnet.org/committee/aelic/aelic%20Core%20Values%20Brochure.pdf>
covering: Accessibility, Official Status, Reliability including Authenticity, Comprehensiveness, Preservation
- Accessibility. The Electronic Legal Information Access and Citations Committee of the American Association of Law Libraries charged with assisting courts and government agencies to advance and improve the delivery of legal information to the public via the Internet. <http://www.aallnet.org/committee/eliac/> has extensive resources pages including Guidelines for Evaluating Government Information on the Web:
<http://www.aallnet.org/committee/eliac/websiteguidelines.html>

Added Value

- What should be free and what should be at a cost. What is the realm of commercial legal publishing. Indexing? Point-in-time legislation? Commentary? Other enrichment of data? Guiding / advice for 'Life Events' for citizens?
- Translations of legal information. Can and should free-to-Internet resources also offer translations?
 - The importance of translations and official status. See: 'The binding force of Babel: the enforcement of EC law unpublished in the languages of the new member states'. Michal Bobek, 2007. Available (on open access) on the Social Science Research Network at <http://ssrn.com/abstract=988033> and 9 (2006-07) Cambridge Yearbook of European Legal Studies.
 - 'In Europe there are government-provided (though not necessarily 'official') databases of English translations of collections of significant legislation from at least twelve more countries: Austria, Armenia, Belarus, Bosnia-Herzegovina, Estonia, Finland, France, Lithuania, Malta, Montenegro, Sweden, and Switzerland. In most other countries if there

is no official database of English translations, there will be numerous English translations of sets of legislation, or individual Acts, on the websites of many government agencies. In Asia the position is much the same, with large government-supported free-access collections of English legislation translations from Japan, Korea, China, Vietnam and Laos (see <http://www.asianlii.org>). 'The Free Access to Legal Information ...' by Graham Greenleaf, see footnote 3 below.

- Can free legal information on the Internet replace commercial sources or only supplement it?

Questions

- What primary legal materials are freely available in your jurisdiction?
- If not, why not?
- Has the organization adopted standards? cf *Principles and Core Values* above
- Do you use the service? For whom?
- Is there provision for input / feedback from librarians?
- What should be the role of librarians: in advocating standards, in advisory role, in creating the service, in representing the needs of the public?

(Do our own organisations pass the tests?)

- Creator has continuing responsibility
- Accessibility
- Life-cycle document management
- Retrieval
- Preservation
- Permanent access

Notes on Legal Publishing

The efforts of commercial legal publishers and of the free-to-Internet publishers have gone a long way to providing an electronic legal research library of up to date materials. However there is still room for a large amount of printed legal materials of various types which are either not available in electronic form or there are good reasons why one should still purchase them in print.

There is an ongoing process of globalization in commercial legal publishing through merger and acquisition. The largest companies have acquired a huge portfolio of traditional national legal publishers. This has enabled them to offer, in an increasingly electronic format, real progress towards a library of international legal materials although the process of integrating the various national libraries of legal materials into a seamless product has proved to be a long term project.

Companies are no doubt reacting to market needs and have made a huge investment in content and delivery systems. This has made it easier for customers to acquire foreign content offered via a familiar interface. In turn this promotes more dependence on fewer products and more inertia in the market especially as the products become more customisable and integrated into the workflow of the information consumer and it is more difficult to change supplier. This has been exemplified by the launch of new 'platforms' or versions of the product which require consultants placed in each law firm retraining and

merging the new product into each individual firm's intranet. The products become more akin to new versions of major software suites or operating systems and achieve almost as much penetration into organizations.

All this availability of legal information from around the world contained within sophisticated retrieval systems, whose content is updated frequently and supported extensively, comes at a cost. The cost, although it is shared by large numbers of customers around the world, must support all this and the very high profit margins which are regularly reported by the largest of these publishing conglomerates. After the introduction of a new version of a product in the United Kingdom three years ago, an informal survey by the British and Irish Association of Law Libraries showed that 45 per cent of academic institutions had a price increase of between 60 and 100 per cent in one year and increases ranged up to 533 per cent with the initial lowest buy in price for the product having trebled. As institutions move from print to electronic products, with the inevitable increase in price and in some cases the imposition of sales tax not levied on print materials, there is an inevitable temptation to reduce the amount of space occupied by print by relinquishing ownership of sets of printed materials. The danger is that database owners may believe they can increase the price to whatever level it chooses since the institution no longer has any ownership over the information, only access to what the latest annual subscription can buy.

The countertrends to this are growing in number and strength. There is a welcome return of small and niche publishers as well as alternative publishing initiatives. There is now again a market for individual research monographs in a way that had almost disappeared some years ago as major publishers bought up smaller publishers and concentrated on in-house production.

Marshal McLuhan declared that 'Xerox made everyone a publisher'. It is now the Internet which has made everyone a global publisher (and perhaps everyone an author). Globalization offers the advantages of technical standardisation such that worldwide distribution can take place without control or support of each individual's means of access to the material. In the old model an author created content but was not so good at quality control, distribution, and archive preservation. The publisher controlled the quality and the distribution but was not good at preservation. The libraries were good at long term preservation, bibliographic control, and sharing the content. Now there is a new model of communication where the author or their institution has the ability to distribute but the responsibility of preservation must now lie with the creator. There has been a dramatic vertical integration of processes of communication.

Free-to-Internet publishing, whether by institutions such as universities or governments or international organisations or non-profit organizations, is now a major trend. It has the potential to replace a wide range of commercial products, particularly where commercial

products exist through the repackaging of free information without substantially adding to the value of that information.

There has been a continuing crisis in scholarly publishing as authors sign away copyright and universities buy back the content. As the market shrinks and prices go up in a strange distorted economic model, the situation is unsustainable and has engendered UK government and European Union enquiries into academic journal publishing. The response has been the creation of institutional and disciplinary repositories of scholarly work which both enhance institutional visibility while operating within a network of global interoperability and federated searching.

Public institutions, government and courts are generally now accepting responsibility for publishing their primary legal materials and providing court assigned citations rather than relying on commercial publishers to repackage the information and sell it to information consumers. These developments have implications for various vital policy issues such as the need to verify authentic versions of information to reproduce it in a comprehensive and trustworthy fashion, to ensure access by the citizen, and to offer guarantees of long term preservation.¹ In some countries non-profit organizations have led the way in opening up for the citizen free access to primary legal materials and have even constructed large multi-jurisdictional databases such as the Commonwealth Legal International Institute² which have enabled smaller jurisdictions to take advantage of technical infrastructure to publish their own legal materials free to the Internet. The successful and growing number of legal information institutes and others which comprise the Free Access to Law Movement and their struggles to release primary legal materials from restrictive practices and commercial agreements and make them available to the citizen are described by Graham Greenleaf.³

These developments may threaten the traditional role of librarians through direct desktop delivery and the role of publishers and their revenue streams since content creators may be able to undertake quality control and distribution without the costs incurred by the publisher. It may also offer librarians a range of new avenues to exploit their skills at more and different points in the chain of communication, in setting standards, in the process of creating and making the services available, in representing the user community, and in information literacy and training.

Further Reading

¹ These issues are discussed in 'Digitising the World's laws' by Claire Germain in *International Handbook of Legal Information Management* edited by Danner and Winterton (Ashgate, forthcoming) and in her paper at WLIC 2010.

² <<http://www.commonlii.org>>.

³ See 'The Free Access to Legal Information' by Graham Greenleaf in *International Handbook of Legal Information Management* edited by Danner and Winterton (Ashgate, forthcoming) from which the further reading is selected.

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