Sheffield Hallam University

Open law : technology in service of the rule of law

GLASSMEYER, Sarah and SMITH, Peter <http://orcid.org/0000-0002-3640-9516>

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Sarah Glassmeyer- Director of Community Development, The Center for Computer-Assisted Legal Instruction (CALI), Chicago

Pete Smith- Information Adviser, Development and Society Faculty Support Team, Sheffield Hallam University

As law librarians we have ready access to the full range of legal materials - from free sources and powerful commercial legal databases, from medieval times to the modern day. We can have the entirety of primary law (and the secondary materials needed to decipher it) at our fingertips within seconds.

For those without such access- which is the majority of the general public - what are their options? How do those who do not have access to the likes of Lexis and Westlaw, or even a library with printed legal materials, find legal information- and why is it important that they can?

This article will consider these questions, covering the United Kingdom and the United States of America, with a particular focus on the issue of open law. First we will have a short historical overview of access to legal information; we will then turn to the reasons why wide and full access to legal information is important, and look at some examples of systems which aim at providing such access. Some of the issues with such systems are discussed, followed by a brief outline of an ideal open law system. We end with a look at the social and political elements needed to make the technology of open law systems work.[1]

A brief history of access to legal information

In the earliest stages of English legal history statutes were available only to a limited group of the powerful and literate. With the switch to English as the language of Parliament and the courts, and the later development of mass literacy, statutes gradually became more widely available; after 1850 and the creation of public libraries, many people would have had access to statutes via their local library.

In more recent times, legislation has been made available through online services such as the British and Irish Legal Information Institute[2] and the Government's site for legislation, www.legislation.gov.uk[3] This site publishes all legislation created within the UK, including the acts of the Scottish Parliament and Welsh Assembly. Ongoing work should ensure that it is up to date, but for now many acts do not incorporate amendments and it can take some effort to track down all of the changes- a potential challenge for lay people, although the use of an out of date statutory instrument by Customs counsel in 2007 makes it clear that it is also a risk for the professional!

Turning to the decisions of courts and tribunals, early case reports such as the Year Books were written by and for legal professionals in Latin and Law French, and circulated amongst a small group of practitioners. Later reports, such as those published as the *English Reports*, whilst mainly written in English were also created by practitioners and for them. The voluminous nature of case law and the common law system have dictated that accurate and consistent reporting, indexing and citation tracking systems be created to make the law findable.

This need was part of the drive behind the creation of the modern law reporting system in England and Wales, which dates to the late 19th century and the creation of the Incorporate Council of Law Reporting. The ICLR is a not-for-profit company and charity; this does not mean, of course, that its work is freely available. To access ICLR reports you- or somewhere you have access to- must subscribe either to the print reports, to the

ICLR online service, or to a commercial provider which has the ICLR reports as part of their service.

The ICLR reports have been deemed 'official', and where citations to reports are made in court the reports of the ICLR are preferred. This can pose a problem for litigants-in-person who may not have access to them; it is also a challenge for lay-persons researching the law, who cannot get hold of the authoritative case reports.

Access to decisions has been improved in recent times by the work of sites such as BAILII, the Judiciary[4] site, and the site of the UK Supreme Court[5]. The work of these sites has seen judgements being made available online as transcripts.

Leith and Fellows argue that access to transcripts, in their case via BAILII, is vital as it allows people to see how law is interpreted.[6] And this access to transcripts of cases alongside access to legislation is valuable, but it does not deal with the issue of how to identify what the important cases are- access to law reports, citators, or legal textbooks are needed for this. Many universities allow members of the public access to their print resources, which goes some way to bridging this gap- but many who need such information may not always be aware of this resource.

The United Kingdom Supreme Court has made moves towards improving the accessibility- in terms of being understood by lay people- of its decisions by issuing press statements alongside them, but this is unlikely to be followed by other courts, on grounds of practicality and cost.

The current situation, then, is one in which the bulk of primary law materials in the U.K. is freely available online, with some issues as outlined. The main exception is law reports, which are only accessible through subscription services. Commentary and support materials- encyclopaedias, dictionaries, citators and the like- are available only via commercial services

On the other side of the Atlantic, the publication of primary law by private publishers has occurred from the very earliest days of the republic, either as a complement to official government publication or as complete replacement. In the 18th and 19th century this did not cause too many issues, because - as in the U.K. - the only people buying books were either the very wealthy or libraries serving the legal practice world.

Additionally, the amount of law created was not overwhelmingly large. Then a late 19th century disruptive innovator named John West set in motion a series of changes to legal publishing that forever changed the access and publishing of legal information. These changes were so disruptive that they even limit the government bodies of the United States from accessing their own law.

Traditionally case law in the United States at the state and federal level is published in chronological order and only chronological order. Statutory and regulatory law is published in chronological order as well, but then later re-published in subject order as codes. The organization of these codes is determined by bodies within the government. (e.g. The U.S. House of Representatives Office of the Law Revision Counsel.[7]) The low number of adjudications combined with the tradition of circuit riding with all judges and most attorneys in a jurisdiction remaining together, the common law rule of stare decisis was relatively easy to maintain with case law. However, as the country aged and expanded, keeping track of its body of law became increasingly difficult.

West's first innovation was creating a taxonomy for American Law. This taxonomy still exists today as the West Key Number System[8]. Every published case (whether officially published or not) at every level of government in the United States is assigned key numbers for the areas of law covered in the decision. West then created a series of publications called "Digests" that allow one to find cases on a topic across jurisdictions. For those too young to remember life before electronic information and full text searching, it really was a miracle of legal knowledge management. At present, there are over a 100,000 topics and subtopics in this taxonomy. [9]

The second innovation wasn't quite as clever as far as information science goes, but it was perhaps more economically devastating to libraries and other purchasers and purveyors of legal information. West began grouping states into regions[10] and publishing the National Reporter System of case publishing, beginning with the Northwest Reporter in 1879. Within a decade, all states, territories and federal cases were published in a West National Reporter. The problem with this publication scheme actually has nothing to do with the actions of West. The difficulty lies in the fact that most courts require a citation to a West National Reporter and thus, even if there is an alternative publishing option available, libraries are required to purchase or have electronic access to these publications for a comprehensive collection for their users.

West - the man and the company - are not the only closed information systems or innovators in the legal information space. Another huge innovation was the creation of Shepard's Citations by Frank Shepard in 1876. This publication tracks the number of times a case was cited and how it was cited by later courts - an obvious need in a common law jurisdiction. Although competing services have been developed in recent times, this service is so ubiquitous that "Shepardizing" has become the common term for all citation checking, regardless of service used.

It should also be noted that all legal publishers have their versions of Shepardizing or Key numbers. It should also be noted that other publishers are the "official publisher" of state codes. cases and regulations. However, the relatively recent corporate consolidation of legal publishers binge[11] means that the options for alternative services are very limited.

It will forever remain a mystery as to why the various U.S. government bodies declined to create their own taxonomies or citation services when the opportunity presented itself. Whatever the result, the fact remains that it is nearly impossible to find, cite or read the law in the United States without someone paying a for-profit corporation for the ability to do so.

Why is access to legal information important?

Given that there are barriers -some significant- to access to legal information, why is that a problem? In the words of The Declaration on Free Access to Law , "Maximising access to this [legal] information promotes justice and the rule of law."[12]   Public access to legal materials is key to the rule of law, as it enables those who are subject to law to (i) know what their rights and obligations are and (ii) with this knowledge vindicate their rights and discharge their obligations effectively.[13] While this sounds like academic or aspirational language, the reality of the situation is that every day thousands of people lose their rights, property and possibly even their life due to an inability to access legal information.

The rule of law is based on the following principles:

- laws are publicly made and promulgated
- all citizens are subject to these laws; no-one is above or beyond the law, and there are no private laws
- all citizens can vindicate their rights through the operation of fair and open courts.[14]

The first principle relates to the public creation and availability of law. The second principle states that there should be no privilege. The third states that anyone should be able to bring their case to court and there receive a fair and balanced hearing.

Taken together these principles show how access to legal information is an important element in enabling public understanding of rights and responsibilities, meaningful participation in the legal system. In order to understand the impact of legislation and the decisions of courts it is necessary that you be able to read them. In addition to this it can be argued that access to commentary and interpretive material is equally important, to assist lay readers in making sense of primary legal materials.

In England and Wales, the recent cuts to legal aid and the related increase in the number of litigants in person (LiPs) have brought access to legal information into sharp focus[15]. Similar cuts in the United States plus increasing debt load of lawyers have made legal help scarce. For LiPs in the U.K. and Self-Represented Litigants (SRLs) in the U.S., it is not simply a rather abstract matter of access to the laws which govern us; rather it is a practical matter of being able to access the information needed to vindicate their rights- or defend themselves- in court.

How then can we provide access to legal materials? For most people, access to legal information is contingent on access to libraries. In the UK public libraries provide access to the internet, through which people can access sites such as legislation.gov.uk and BAILII; they may also stock print copies of legal materials, although this is much less common than it was. Some people may have access to a University library with print legal materials. In the USA some law libraries provide access to legal materials for the public, such as the Cook County Law Library in Chicago.

As well as giving access to free sources, providing access to commercial sources is another solution. Some local authorities in the UK, and law libraries in the USA, have provided access to legal databases but this is an expensive option. Where access has been provided it has often been with restrictions; for example the database may only be available in one library, with the attendant accessibility issues this presents. Even where such services could be maintained, training and support in their use would represent a further cost.

Open law systems, such as BAILII, represent one response to the need for legal information; it is to these systems we now turn.

LII leading the way

The creation of the Internet and World Wide Web allowed for new opportunities in providing access to law. In 1992, Professor Peter Martin and technologist Tom Bruce of

Cornell Law School created the world's first free legal information service - the Cornell Legal Information Institute (LII). Originally a GOPHER based system, it soon moved to the web and became not only the first legal information site, but also one of the first websites of any kind in existence!

Today the Cornell LII operates as both a legal information provider as well as a laboratory for exploring new frontiers in legal information technology. They currently provide access to U.S. Supreme Court cases, the U.S. Code and Code of Federal Regulations. Within these materials, they have created new ways of accessing and relating the information through tools like the Semantic Web.

You will notice throughout this article several organizations with -LII at the end. The Cornell LII was the inspiration for legal information institutes all around the world. While not officially connected, the Cornell LII welcomed these new providers into the Open Law fold and encouraged their growth instead of preventing them from using the LII name, which many would have done. The connections between the LIIs and their respective home governments varies from full support and assistance as is the case in Canada to publishing law under threat of prosecution and death as is the case in some of the African LIIs. Included in this group of LIIs is the British and Irish Legal Information Institute (BAILII.) Set up in 2000, BAILLI provides access to primary legal materials from the United Kingdom, the Republic of Ireland, and the case law of the European Union.

LIIs are not the only free or open law providers. The group was semi-formalized in 2002 with the signing of the Declaration on the Free Access to Law and is known as the Free Access to Law Movement (FALM.[16]) Currently there are 54 members of the Free Access to Law Movement. The membership includes LIIs, academic projects, libraries, non-profits and consortiums. Despite the geographic or subject differences of the members, they all remain committed to the concept of Open Law.

What is 'open law?'

The 'open' in 'open law' has much the same meaning it does in 'open access', namely the assertion that publicly funded materials should be made freely available. Drawing on the work of Greenleaf, Mowbray and Chung[17] and The Declaration on Free Access to Law we can define an open law system as one which ensures that primary legal materials are available for consultation, use, and re-use; this access is provided free of charge.

To achieve these goals current public and private open law systems are based online, with materials licenced as generously as possible allowing for reuse by other sites. Ideally, they also publish law in formats conducive to the use and reuse aspect of open law as well. For example, many U.S. courts publish their decisions freely on the Internet in the PDF format. This format inhibits copying and searching. A better solution would be to publish the cases in HTML.

Primary legal materials are those documents produced by bodies empowered to make law or deliver legal judgments. In both the United Kingdom and the USA this would encompass legislation- in the UK this would include European Union material and that from devolved institutions such as the Scottish Parliament- and decisions from courts and tribunals. It can also cover preparatory materials such as consultation documents, and commentary such as committee and inquiry reports.

Access to secondary materials, those which explain the law, could be the next area of interest and development for supporting access to justice through open law. Thus far, most Open Law purveyors have concentrated on Primary Law, both since it is easier to access and also easier to argue for its openness. However, The Declaration on Free Access to Law included "publicly funded secondary materials" in the remit of open law. In this vision the work of legal academics at publicly funded universities would be made available to the public. The Declaration noted the possibility of using institutional repositories to disseminate such work, with appropriate reservations concerning author

and institutional copyright. The Open Law provider CanLII has recently created CanLII Connects[18] which allows for open commentary and analysis of cases.

Issues

There are a number of issues facing open law projects. We can divide them into technical issues such as authentication and maintenance, and legal issues such as jurisdiction and copyright.

Reliability

Can electronic copies of legal documents be trusted? This is an argument frequently put to open law providers even though the status quo of relying upon commercial legal publishers which are not authentic either is not questioned.   But there are real issues here that should be solved regardless of the legal information provider.

If electronic versions are to be seen as reliable, there must be adequate controls over quality in reproduction- especially if statutes are reproduced and used on sites other than those maintained by government. If people are to rely on electronic versions- and this is important for access to legal information, as by its nature print is less widely available- they need to be able to rely on them as accurate.

The statutes placed on the legislation.gov.uk site have official status as they are printed under the authority of the Queen's Printer.[19] An audit trail for all documents is created as part of the publication process.[20] Thus the online versions can be relied upon as accurate representations of the statutes.

This said, any copy of a statute - print or electronic, free or commercial- can be accepted as authentic by the courts, and if the copy is challenged reference will be made to the vellum copies lodged with the House of Lords and the National Archives.[21]

In terms of EU legislative material and case law the digital version of the Official Journal has been the authentic version since July 2013[22]. A system of electronic signature and certificate is used to authenticate the digital version. The Official Journal, along with other EU material, is made available via the Europa suite of websites.[23]

The American Association of Law Libraries (AALL) produced a series of reports on authentication of US legal information[24]. As part of this work it recommended that until adequate safeguards in the online publication of legislation were in place- means of digital authentication being one- print should remain the standard authentic copy. The development of authentication processes and standards in the USA is made more complex by the jurisdictional issues noted below.

Jurisdictions

In the UK, devolution means there are several law making bodies alongside the Westminster Parliament; there are also several jurisdictions, each with their own courts-England and Wales, Scotland, and Northern Ireland. Any system has to take this into account- it needs to provide access to the distinctive materials of each jurisdiction, and have access to experts in each area.

In the United States there is the U.S. Supreme Court, 11 Federal Circuits (which contain an appellate court and approximately 2-3 district courts), and 50 states each with a Supreme Court and several appellate level courts. All of these are self-governing and even if it were legally possible for a national standard of case law publication, it would be difficult to implement in the current political climate of decreasing national power.

Copyright

To whom does the copyright in legal materials belong? For UK legislative materials this is covered by the Open Government Licence (OGL).[25] Under this licence the re-use of material covered is encouraged; exemptions relate primarily to areas affected by data protection issues and certain intellectual property issues, such as logos and trademarks.

Decisions of the courts are a more complex area.[26] A definitive statement on their copyright statement has yet to be issued. This situation has made it difficult for open systems to make use of decisions and judgments;

In the United States, all government created information is considered to be public domain. However, that government information is often interspersed with proprietary information making straight copying difficult.[27] In some jurisdictions, such as the State of Indiana, this goes as far as the section headings of the Indiana State Code being created by an outside corporation and thus under copyright while the rest of the code is public domain. And, of course, there are some states like Wyoming that claim copyright on their laws.[28]

Technical issues- access, format, maintenance, archiving

As with other forms of digital information, open law presents several technical challenges. How can the primary material be obtained? In what format should the information be presented? How can the providers guard against the danger of the format becoming obsolete? Who will look after the system and ensure its workings? And is there a need to keep older versions of texts when they are amended?

In the UK the principal access to material issue is around cases. Legislation is published by government and made available to services such as BAILII via the OGL. Cases are more available than they once were, but not all cases appear in electronic format, and there have been occasions where transcripts have been withheld by the courts.[29]

The maintenance of electronic records in the UK is one part of the work of the National Archives. [30] A suite of tools and protocols have been developed for government bodies to manage their electronic records and documents. In a paper discussing the preservation of electronic records, the idea of 'parsimonious preservation' was advanced.[31] Under this idea materials are preserved in such a way that they are accessible to the next line of IT systems; a rolling system of format refreshment. In this

way a sustainable system can be created, whereby materials are always available. As part of this process it should also be possible to preserve originals- as enacted legislation, for example- and the various stages through which a document may pass, including the final version of an act before repeal.

It has been common in the United States to have duplicate publications for state legal materials - the "official" state version and the unofficial commercial version that most everyone actually uses. In the late 1990s, states realized that they could save a lot of money in their official publications by mounting them on the World Wide Web instead of paying for a print publication. Unfortunately, like most of the people on the Internet in the late 1990s, little thought was given to ongoing maintenance or archiving. For instance, the State of Illinois deletes previous versions of its code every year. Other states incorporate changes to codes immediately without noting history.

Funding

Many of these projects face the issue of funding. BAILII receives donations from professional bodies- including BIALL- and benefactors within the profession. The Cornell LII is funded in part by Cornell University and in part by public donations and grants. CanLII is funded by a fee paid by all of the lawyers in the country. Some projects are completely un-funded and are labours of love of their creators. In all jurisdictions, dependence on inherently unpredictable sources of income acts to limit the work the projects can do.

What would an ideal open law system be like?

We have mentioned a number of open law projects- the LIIs, legislation.gov.uk- and highlighted some of the issues which they face. How would an ideal system work- one which took into account these issues and delivered on the ambitions of the open law / free access to law movement.

These ambitions, simply stated, aim at free to use and re-use legal information provided on publicly accessible online systems at no cost to the end user. What is needed to achieve this?

Perhaps the most important issue is funding, and the broader issue of sustainability. Any system requires adequate and guaranteed funding to be effective and sustainable. Long term planning requires long term investment.

The Good Law project in the UK highlights the importance of "good data in".[32] This project aims at ensuring that the material that would go into open law systems - in this case legislation - is well written and structured so that it is as easy to use as possible. An ideal open law system would treat all legal information in this way, with guidance for plain language. Legislation would be drafted to be as clear as possible, and judgments written to be as accessible as is reasonable given the complexity of the cases. Ways of highlighting the relationships between information sources, such as amendments to legislation and interpretations of statutes by judges- open citators in essence- would be part of the system.[33]

The Good Law project also focuses on the importance of "good data out". An ideal open law system would publish material in an accessible format; in addition, the documents would be made available in formats which enable re-use. As Andy Williamson pointed out in his plenary at BIALL's 2014 conference, a PDF is accessible but is not as easy to reuse as a machine readable version of a document.

An ideal system would be built on open software principles, using open source rather than proprietary systems and formats where possible. Collaboration and contributions from various sources would be encouraged. In the legislation field example of this can be seen in the "Expert Participation" programme whereby the UK online statute book will be updated and maintained in part by experts from outside the National Archives team.[34] The WeCite project is an example of such a system applied to cases.[35]

Technology is a hugely important element of open law- it allows for legal information to be presented to the widest range of people, in formats which enable it to be used and re-used as those people need, and in time will enable those people to be part of creating and managing the information.

Yet technology by itself is not sufficient. There needs to be sustained commitment on the part of governments and courts to making legal information open and accessible; in particular there needs to be a commitment to proper funding of open law.

Primary materials alone are not enough. Commentary and support materials need to be provided to enable people to make best use of the 'raw data' of the law. Beyond providing such support material there is a need for public legal education so that people can make informed use of the information available.

Conclusions

An ideal open law system would, in summary:

- be properly funded and staffed
- have manageable plans for records management and sustainability
- be based on, and provide their users with, well-structured information
- enable re-use of documents by using appropriate file formats
- be open not only in respect of re-use of documents, but in terms of software and approach
- provide access to primary and secondary materials
- be supported by public legal education

There are clear roles for information professionals in creating and maintaining open law systems. We can contribute to creating open legal taxonomies, search systems, and citators; we can support public legal education; and we can lobby, individually and through our professional associations, for developments towards openness in legal

information. In this way we will support a key element of the rule of law, and a defining aspect of our profession- ensuring access for all to legal information.

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[2] http://www.bailii.org

[3] See also Carol Tullo 'Legislation.gov.uk: essential for the law business' Legal Information Management (2013) 13 (4) 218

[4] http://www.judiciary.gov.uk/

[5] http://supremecourt.uk

[6] P Leith and C Fellows 'BAILII, legal education and open access to law' European Journal of Law and Technology (2013) 4 (1) <online> http://ejlt.org/article/view/209/289

[7] http://uscode.house.gov/about/info.shtml

[8] http://lawschool.westlaw.com/knumbers/history.asp?mainpage=16&subpage=4

[9] ibid

[10] http://lawschool.westlaw.com/federalcourt/NationalReporterPage.asp

[11] http://www.slaw.ca/2010/04/23/fascinating-graphic-on-consolidation-in-legal-publishing/

[12] http://www.falm.info/declaration/

[13] P Leith and C Fellows 'BAILII, legal education and open access to law' European Journal of Law and Technology (2013) 4 (1) <online> http://ejlt.org/article/view/209/289

[14] See T Bingham The rule of law (Penguin 2011) for a detailed discussion

[15] P Leith and C Fellows 'BAILII, legal education and open access to law' European Journal of Law and Technology (2013) 4 (1) <online> http://ejlt.org/article/view/209/289

[16] http://www.falm.info

[17] G Greenleaf, A Mowbray, and P Chung 'The meaning of "Free access to legal information": a twenty year evolution' Journal of Open Access to Law (2013) 1 (1) <online> http://ojs.law.cornell.edu/index.php/joal/article/view/11

[18] http://canliiconnects.org/en

[19] See https://twitter.com/ctullo/status/484783441935077376; Carol Tullo 'Legislation.gov.uk: essential for the law business' Legal Information Management [19](2013) 13 (4) 218, 222

[20] See https://twitter.com/johnlsheridan/status/484743458079662080; Carol Tullo 'Legislation.gov.uk: essential for the law business' Legal Information Management 2013) 13 (4) 218, 222

[21] Personal communication, Dawn Dean, The National Archives

[22] http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013R0216

[23] http://europa.eu/index_en.htm

[24] For an example see http://aallnet.org/Documents/Government-Relations/authen_rprt/authenfinalreport.pdf

[25] See http://www.nationalarchives.gov.uk/doc/open-government-licence/version/2/

[26] See Philip Leith 'Enabling Free On-line Access to UK Law Reports: The Copyright Problem' Int J Law Info Tech (2010) 18 (1): 72 for a full discussion

[27] see: https://www.flickr.com/photos/sarah_g/10557489183/in/photostream/lightbox/

[28] http://legisweb.state.wy.us/titles/statutes.htm

[29] P Leith and C Fellows 'BAILII, legal education and open access to law' European Journal of Law and Technology (2013) 4 (1) <online> http://ejlt.org/article/view/209/289

[30] http://www.nationalarchives.gov.uk/information-management/manage-information/preserving-digital-records/our-role/

[31] http://www.nationalarchives.gov.uk/documents/information-management/parsimonious-preservation.pdf

[32] See https://www.gov.uk/good-law

[33] See http://www.ischool.berkeley.edu/programs/mims/projects/2012/legalcitationtracker for an example of such a citator

[34] http://www.scl.org/site.aspx?i=ed34527

[35] https://casetext.com/wecite/