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DIGITAL LEGAL INFORMATION: ENSURING ACCESS TO THE “OFFICIAL” WORD OF THE LAW

Claire M. Germain

In the United States today, digital versions of current decisions, bills, statutes, and regulations issued by federal and state entities are widely available on publicly accessible Internet Web sites. Worldwide, official legal information issued by international organizations and foreign governments is also becoming available on the Web. However, there are currently no standards for the production and authentication of digital documents. Moreover, the information is sometimes available only for a short time and then disappears from the site. Most of that digital information provides only a right of access and no ownership or control over the data, unless it is downloaded on a server or stored on a CD. The long-term access to digital legal information is a matter of concern.

EFFORTS TO MAKE LEGAL INFORMATION AVAILABLE ONLINE

Because of the American principle that citizens should have free access to government information, most federal and state publications, including official primary legal information, are in the public domain and available over the Internet without being subject to copyright. Official federal law, such as the U.S. Supreme Court decisions, U.S. Code, Federal Register, Code of Federal Regulations, and others—traditionally published on paper by the U.S. Government Printing Office—are now available from the GPO Web site in electronic form (www.access.gpo.org). But the GPO has not committed to serving as a permanent archive, because it is not in its legislative mandate. It may have the willingness, but it doesn't have the budgetary appropriation.

Federal appellate court decisions are available thanks to an informal consortium of universities. Some circuits and an increasing number of district, bankruptcy, and other courts are now starting their own Web sites. Most state law bills, statutes, court decisions, and regulations are also now available from state Web sites.

Cornell has made great contributions to the dissemination of legal information over the Internet. The Legal Information Institute (www.law.cornell.edu) is using the official texts and improving access to them through the addition of useful search engines and linking to other sources, to deliver, for example, U.S. Supreme Court and New York Court of

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Appeals decisions, as well as the U.S. Code and the Code of Federal Regulations.

The Cornell Law Library (www.lawschool.cornell.edu/library) created the first Web site to disseminate the decisions of the International Court of Justice, both in English and French, and helped the court start its own Web site. The court has now asked Cornell to continue the partnership and become the official mirror site for the World Court decisions in the Americas. That reduces the access time to the official court Web site, located in the Hague, for users on this continent. The Cornell Law Library is in a similar partnership with the International Labor Organization, located in Geneva, to disseminate its treaties, conventions, and national labor legislations in the Americas.

Worldwide, efforts to make official legal information available over the Internet include the Australasian Legal Information Institute (www.austlii.edu.au), a nonprofit organization that has been most successful in obtaining free public access to data from government and court sources. In other countries, such as France, the official information is made available through a government Web site (www.legifrance.fr), albeit the availability is limited because of an exclusive contract with a commercial publisher for a full database of statutory and case law.

Primary legal information is also provided by the commercial sector. The two giants, Lexis and Westlaw, have

greatly expanded their offerings, benefiting from increased mergers and consolidation in the legal publishing industry. They offer a greater degree of reliability than most free Internet sites, because of their extensive coverage and more-sophisticated search capabilities, and are still the tool of choice of legal professionals who can afford the high rates. They offer special rates for smaller law firms.

Among the many new entrants to the business of providing legal information over the Internet for a fee are Lois (www.pita.com) and Versuslaw (www.versuslaw.com). They have commercialized the information provided free through the Internet and are making it into attractive packages geared toward legal professionals. They are lower priced than Lexis and Westlaw, claim great reliability, and offer a CD with the text of the documents, ensuring long-term access. They are smaller databases, limited to primary legal information.

ADVANTAGES AND DISADVANTAGES

When it really matters, there is still a great degree of reliance on the "official" word of the law. Serious people still go back to "official" documents and printed publications. For instance, students cite-checking the three Cornell student-edited law reviews need to see the original print source, even if the quote was found online. Courts have been slow to make the transition to a reliance on the electronic text.

Some solid research skills are regrettably lost with the transition to the digital format. In the print world there was a distinct series of paper publications, with corrections in between (as evidenced in the editorial sequence of West slip opinions, advance sheets, softcover volumes, and bound volumes, with corrections at every step before the final version). In the electronic world cases are not systematically updated or corrected after they are put online. In the case of codes, the latest version is likely to be available, but often not the older ones, which may be essential to someone's research, to ascertain why a particular provision was repealed or amended, or simply to have a complete record of all the versions of a code.

The reliance on Internet search engines has led to the loss of a lot of sophisticated indexing tools, such as the elaborate West subject and digest keyword indexing system, created at the end of the nineteenth century and at the heart of the organization of U.S. law. The Internet makes legal information much more accessible to the public, but it is not clear that the greater accessibility makes the law more understandable; it may lack a context. There are some limitations to getting the plain text of the law. How much can one understand the law by looking at a text? If no context is provided, it may be harder to understand the issues, the procedure, and so on, that are provided in a commercial system such as West,

with headnotes and annotations, and in the traditional print publications. The greatest danger is for nonprofessionals who get the letter of the law but not the context.

On the other hand, the easy distribution of information and the hypertext and multimedia capabilities of the Internet make digital documents an irresistible proposition. The digital medium has opened up new fields of legal research; for example, empirical studies. You can take statistical data and manipulate them to study social indicators, and the like, as Professors Kevin M. Clermont and Theodore Eisenberg of the Cornell Law School did in their studies on jury verdicts (see their federal statistics Web site at teddy.law.cornell.edu:8090/questata.htm).

Documents are going digital for good reasons, and the process is politically and economically irreversible. However, the electronic environment raises both technological and policy issues. The three main problems arising with digital legal information are (1) its rapid obsolescence, because it is software- and hardware-dependent, which necessitates migrating and "refreshing" the information; (2) the need for

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standards of production and authentication; and (3) the lack of a plan to archive digital legal information and ensure that it will be accessible not only next week but in two, five, ten, and even fifty years.

Under good conditions books printed on acid-free paper—for example, official state reports and codes—will last for centuries. An excellent example is the extraordinary Bennett collection in the Cornell Law Library (established by a contribution in 1929 from Earl J. Bennett, class of 1901), composed of many original editions of the earliest state laws, over a hundred volumes printed before 1800 and the American Revolution. They represent the original record of colonial America and have survived several centuries in perfect condition.

Digital information, on the other hand, is characterized by fragility and rapid technological obsolescence. The life span of a CD or disk is estimated at ten to thirty years, and its life span is further limited by the hardware and software needed

to read it. That means that digital information may become obsolete within five years unless it can be refreshed or migrated to a newer technology. Refreshing data (copying it periodically to more stable media) cannot solve the long-term problem. It can save simple ASCII files, but anything more complex may lose the functionality that was built into it. Migration means moving files to a new system. It has risks, too, such as loss or change of information in the translation. Another approach is designing hardware and software that emulate the old system. Much research needs to be done on solving those technological issues.

In the print world it is easy enough to pull up a volume of the state reports or a state code and be sure to have the authentic text. But if in the future the state legislatures or courts decide to stop printing the texts, and they exist only in electronic form, there will be no equivalent to the print product.

In the print medium the book authenticates the content. The electronic text, on the other hand, is easy to alter unless precautions are taken. Because of the disintermediation inherent in the medium—the lack of something physical that allows one to see the original text and the amended, revised, repealed versions of the text—special care needs to be taken in producing the information. The Internet is decentralized and unregulated. Anybody can be an author. A Web whiz with no legal training can put legal information online.

In actuality, authenticity problems are more likely to result from error than from a deliberate attempt to corrupt. Some of the ways to provide assurances about authenticity have to do with the reputation of the source, including commercial and government publishers. Some of the technological solutions include the technique of the digital signature, which uses public key cryptography, to ensure the integrity of the record (that it has not been altered) and the source of the record, and digital watermarking. It is important to develop a partnership with the information technology industry.

FINANCIAL, LEGAL, AND POLICY ISSUES

Beyond the technical problems related to the fragility of the digital medium, there are a number of financial, legal, and policy issues at stake. Who will decide what to preserve and pay for preserving it? Who will be responsible for continued and long-term access to authoritative digital sources for primary legal information? That is especially important in a democracy where free access to government information is supposed to be a right. It is assumed here that most primary legal information is in the public domain. However, copyright may be an issue for some digital records in the United States and, because of different governmental policies, for many sources abroad.



M. Pierre Leclercq, conseiller à la Cour de Cassation, and Claire Germain in front of the Cour de Cassation, Paris

There is general agreement that official primary legal information in digital form needs to be accessible far into the future. However, no one has yet taken the responsibility to archive digital information for long-term public access. There is therefore a risk of loss of information. Several prospective models have emerged as potential archival sites for legal information: individual researchers and issuing bodies; federal, state, local, and foreign governments; national libraries; publishers; and consortia of law libraries (academic, court, state, county, etc.).

Individual researchers, universities who publish legal information, and issuing agencies (e.g., legislatures and courts) often archive their own materials. That may cause problems when the research project stops or the database exceeds the server capacity of the issuing body. Also, many digital-only materials are copyrighted and cannot be archived without permission. Are the information owners willing to pay for long-term preservation storage, and are users willing to pay for access?

Governments will or should take responsibility for preserving their own digital publications. Or they should provide funding for others to carry out digital preservation. But will money be available for that purpose? Government involvement may depend on whether preservation of digital information is seen as a national policy issue.

Publishers are already providing archives of digital legal information to their subscribers. Will they be available in perpetuity? What if the publisher goes out of business or the maintenance of the archive becomes unprofitable? Also, should citizens rely on commercial entities, or even the government, to find the official word of the law, or should there in addition be a reliable neutral source, similar to the current official state court reports in print?

National libraries may also play the role of archiving information through legal deposit programs. Depository legislation for electronic information varies widely among nations that have deposit laws. Copyright may be a problem in some countries. Continuous budget appropriations may be needed for implementation.

Over the centuries libraries have preserved information and made it available to present and future generations of scholars. One proposal, in addition to other preservation measures taken by courts, legislatures, and publishers, is that libraries form consortial agreements in every state. Each library would be responsible for the digital preservation of part of the corpus of official primary legal information. The scheme would extend access to that information far into the future. The American Association of Law Libraries and the Law Library of Congress could play a vital role, coordinating efforts with the major stakeholders. Each partner would buy servers and download a portion of the corpus of legal information.

For instance, Cornell could keep the New York Court of Appeals decisions (currently produced by the Legal Information Institute at Cornell), the documents of the International Labor Organization (currently running from a mirror site at Cornell), and the decisions of the International Court of Justice (also running from a mirror site at Cornell). Cornell would make those documents available to other libraries. It would rely on partner libraries for access to other materials. The plan would ensure that libraries successfully continue their leading role of preserving and making information available to present and future generations of scholars.

FOR MORE INFORMATION

Issues and Innovations in Preserving Digital Information: www.arl.org/transform/pdi/index.html

The Official Version: A National Summit to Solve the Problems of Authenticating, Preserving and Citing Legal Information in Digital Form: www.callacbd.ca/summit/index.html

Ensuring the Longevity of Digital Information: www.library.cornell.edu/library/dig-info-paper.rothenberg.pdf

A few libraries are moving in that direction in other fields. One notable example is Cornell's Mann Library, which has taken responsibility, in cooperation with the National Library of Agriculture and land-grant university libraries, for archiving research publications in digital form in the field of agriculture.

EXPLORING SOLUTIONS

Those important issues are being studied both in Canada and in the United States. The American Association of Law Libraries and the Law Library of Congress, following in the footsteps of the Canadian Association of Law Libraries, are starting a process of identifying the stakeholders considered to be producers, keepers, and consumers of digital legal information.

There was an exploratory program at the AALL annual meeting in Anaheim, California, in July 1998, followed the next month by a planning meeting at the Cornell Law School. At Cornell the group agreed to focus on state and federal official legal information, statutes, regulations, and cases. Some of the suggestions brought up at the meeting included a survey of the current digitizing and archiving practices; a list of "best practices," to use as prototypes for other states; and a discussion of standards for functionality and authentication of the digital legal information and of prospective models as potential archival sites for legal information. The outcomes of such efforts would be to make proposals and recommendations to standard-setting institutions and other groups and to help formulate a plan in each state to preserve and archive the digital legal information produced.

The contents of the Internet are becoming richer every day. One issue of particular importance that has emerged now is the need to have access to the permanent digital records far into the future. Current efforts have the same goal, to make sure that in a paperless world there will be a permanent record of the law in its many forms and that the document will be authentic. Those issues require expertise, technical skills, and an understanding of options, costs, and risks involved. They pose a difficult challenge, because there are many more creators of digital materials than of paper publications. Standards for functionality and performance are dearly needed, but choosing standards prematurely may also be a disaster.

Those unmet needs demonstrate the importance of working on problem solving with partners, including the legal information publishing industry, the information technology industry, computer scientists, and other interested stakeholders. What is at stake is the transmission of official documents, "the word of the law," to future generations.

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