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

by **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 Websites. Worldwide, official legal information issued by international organizations and foreign governments is also becoming available on the Web. However, there are recurrently 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 (GPO) - are now available from the GPO Website in electronic form (<http://www.access.gpo.gov>). But the GPO has not committed to serve as a permanent archive, because it is not in its legislative mandate. It may have the willingness, but not the budgetary appropriation.

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

Cornell has made great contributions to the dissemination of legal information over the Internet. The Legal Information Institute (<http://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, e.g., for the delivery of U.S. Supreme Court and New York Court of Appeals decisions, as well as the U.S. Code, and the Code of Federal Regulations.

The Cornell Law Library (<http://www.lawschool.cornell.edu/library>) created the first Website to disseminate the decisions of the International Court of Justice, both in English and French, and helped the Court start its own Website. The Court has now asked Cornell to continue the partnership and become the official mirror site for the

World Court decisions in the Americas. This reduces the access time to the official court Website, located in the Hague, the Netherlands, for users on this continent. The Cornell Law Library is in a similar partnership with the International Labor Organization (ILO), located in Geneva, Switzerland, 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 Australian Legal Information Institute (<http://www.austlii.org>), a non-profit organization, which 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 governmental Website (<http://www.legifrance.fr>), albeit to a limited extent, 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 being Lexis and Westlaw, which have greatly expanded their offerings, benefitting 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 them many new entrants to the business of providing legal information over the Internet for a fee, Lois (<http://www.pita.com>) and Versuslaw (<http://www.versuslaw.com>) offer lower priced alternatives to the two giants, Lexis and Westlaw. 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, and offer claims of great reliability, including ownership of CD with the text of the documents. 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 print publications. For instance, students cite -checking the three Cornell student -edited law reviews need to see the original print source, even when the quote might have been 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's slip opinions, advance sheets, soft cover 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 19th 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, because 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, etc., which 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, as well as the hypertext and multimedia capabilities of the Internet makes digital documents an irresistible proposition. The digital medium has opened up new fields of legal research, e.g., empirical studies. You can take statistical data and manipulate them, to study social indicators, and the like, e.g., studies on jury verdicts conducted by Professors Ted Eisenberg and Kevin Clermont at Cornell Law School on their federal statistical Website (teddy.law.cornell.edu:8090/questata.htm).

Documents are going digital for good reasons, and the process is irreversible politically and economically. 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 leads to the need to migrate and "refresh" the information; (2) the need for standards of production and authentication; and (3) The current lack of plan to archive digital legal information and ensure that it will be accessible not only next week, but in 2, 5, 10 and even 50 years from now.

Digital information is characterized by fragility and rapid technological obsolescence. Under good conditions, books printed on acid-free paper, e.g., 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 (J.D. 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 mint condition. By comparison, the lifespan of a CD or disk is estimated at 10 to 30 years, but its lifespan is further limited by the hardware and software needed to read it. This means that digital information may become obsolete within five years unless it can be refreshed or migrated to a new 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. Emulation consists of designing hardware and software that emulate the old system. Much research needs to be done on solving these 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 only exist 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 the production of the information. The Internet is decentralized and unregulated. Anybody can be an author. A Web whiz can put legal information online, without any need for legal training.

In actuality, authenticity problems are more likely to result from error rather than 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 insure 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 with digital legal information. Who will decide what to preserve and pay for preserving digital information? Who is going to be responsible for continued and long-term access to authoritative digital primary legal information sources? This is especially important in a democracy where free access to government information is supposed to bear right. It is assumed here that most primary legal information, at least in the US, is in the public domain. However, copyright may be an issue for some digital records in the US and for many sources abroad because of different governmental policies.

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) currently often archive their own materials. This 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 conversely, are users willing to pay for access?

Governments will or should take responsibility to preserve their own digital publications. Or they should provide funding for others to carry out digital preservation. The question will be the money available. The 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 be a reliable, neutral source, in addition to others available, similar to the current print of official state court reports?

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 played the role of preserving and making information available to present and future generations of scholars. One proposal to consider, in addition to other preservation measures taken by courts, legislatures, and publishers, would be for libraries to form consortial agreements in every state. Each library would become responsible for the digital preservation of a portion of the corpus of official primary legal information, and rely on others for other parts. The scheme would extend access to that information far into the future. The AALL (American Association of Law Libraries) and the Law Library of Congress could play a vital role in this venture, by 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 set up at Cornell; include treaties and national labor laws from foreign countries), and the decisions of the International Court of Justice (running from a mirror site at Cornell). Cornell would make these documents available to other libraries. It would rely on partner libraries for access to other materials. This plan would ensure that libraries successfully continue their leading role of preserving and making information available to present and future generations of scholars.

A few libraries are moving in that direction in other fields. One notable example is the Mann library at Cornell University, which has taken responsibility for archiving research

publications in digital form in the field of agriculture, in cooperation with the National Library of Agriculture and land grant university libraries.

EXPLORING SOLUTIONS

These important issues are being studied both in Canada and in the U.S. Following in the footsteps of the Canadian Association of Law Libraries (CALL), the American Association of Law Libraries (AALL) and the Law Library of Congress are recurrently 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, following by a Planning Meeting at Cornell Law School, Ithaca, New York, in August 1998. In Ithaca, 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; a discussion of standards for functionality and authentication of the digital legal information, and of several 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. These 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 material than of paper publications. Choosing standards prematurely may also be a disaster. Needed are standards of functionality and performance. These unmet needs demonstrate the importance to work with partners on joint problem solving, 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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For more information :

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