Obligations of public authorities originating legal materials

Graham Greenleaf
University of New South Wales
Co-Director, AustLII

Outline

- 'Full free access' (1995 version)
- Three versions falling short
  1. Jon Bing's 'statist' model (2003)
  2. Tom Bruce's distributed source-publication model (2001)
  3. 'Leave it to Google'
- Is 'full free access' enough?
  - Hague Convention 'log of claims' (2008)
  - Deficiencies of 'full free access' model

AustLII's 1995 approach: 'full free access'

- AustLII (1995) advocated 6 obligations of legal data sources necessary for 'full free access':
  - 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
- Not a recipe for a LIS - preconditions for safe operation
- **Main point:** Source self-publication is only useful (choice), not essential. Right of republication is essential.

'Full free access'

- Summary of AustLII's 1995 version
  - Legal data sources should have a public duty to provide a copy of their output (judgments and legislation) in the most authoritative, timely and best computerised form that they can produce (which changes from time to time) to anyone who wishes to publish their output, whether for free or for fee.
- Many jurisdictions now satisfy *most* of these 6 'obligations', for both legislation and case law
  - In Australia, all 9 jurisdictions do so, in fact, for most
  - not rocket science, just good public policy
- Compare alternatives: Jon Bing and Tom Bruce

(1) Jon Bing's 'statist' model

- Bing (2003): strategy for an integrated national LIS, particularly for developing countries. 7 main elements:
  1. To cater for both online and offline technologies
     - § To provide all forms of publication
  2. To serve both government and lawyers
  3. Central editorial unit to convert and normalise data, including consolidating legislation
  4. Free public access only to a version of legislation
     - § The 'professional' paid version will have more value-adding
     - § Other legal documents (eg cases) not necessarily free
  5. No right of others to republish LIS data (limited exceptions)
  6. Managed by an independent foundation
  7. Self funding (to some extent??) via user fees

Critique of Jon Bing's model

- Does it work?
  - May have worked tolerably in Norway: *Løvdata* gives limited free access
  - Seems consistent with Germany's limited public access: *Justis* dominance
- No obligation on legal sources (Courts, Parlt. etc) to provide data for republication by others (except the LIS)
  - Nor to even publish it themselves
- Editing role means key data in electronic form (eg consolidated Acts) might only be held by the LIS
- Dual for free / for fee role means LIS has a vested interest in minimising free access and maximising commercial sales
  - Public access will = 2nd rate access
- Different needs of diverse users cannot be anticipated/ solved by one publisher
- No exit strategy: what if fees are insufficient?
- **Bottom line: A non-profit monopoly is still a monopoly**

(2) Tom Bruce's model - distributed source-publication

- Bruce (2000, 2001) argues this model applies to all countries (in the long run)
- The sources of legal data (Courts, legislatures)
  - Should publish it themselves
  - Are better placed to do so than anyone else
- The sources should use common standards for preparing and sharing legal data => interoperability
  - [Who provides central search points is not specified]
- (Free) publication by anyone else is inefficient and unsustainable in the long run
  - 'Centralised' 3rd party publishing (eg LIIs) have short-term advantages (and value)
  - They should be succeeded by distributed source publishing

Critique of Tom Bruce's model

- Sources are not competent to judge the needs of all audiences - their version is just a foundation
- If sources adhere to standards (even partly) this also reduces cost of 3rd P *re*publication
  - Republication remains sustainable, and essential
- Fails to show free 3rd P publication is doomed, only shows source publication is good
  - Continued complementary parallel development likely
- Does not *require* sources to provide data to any 3rd P wishing to republish
  - US lack of Crown © allows republication in theory (only) and may obscure importance of positive duties re republication
- Bottom line: Not sufficiently explicitly anti-monopoly

(3) 'Leave it to Google'

- A model that some would find tempting
  - Adopt Bruce's source self-publication, and turn it into an obligation
  - Drop an essential (but expensive?) element of Bruce's model, common standards and interoperability
  - Substitute Google's web spiders and common search engine
- What's wrong with the model?
  - Conflicts with some national approaches of 'identified publication + protection' in relation to case law
  - No interoperability between content items from different sources
  - No consistency in standards of presentation
  - Would Google be able to add value as effectively as LII 'aggregators'? - an open question

The Hague draft principles (2008)

- 'Expert' meeting on Global Co-operation on the Provision of Online Legal Information
  - Called by Permanent Bureau, Hague Conference on Private International Law, 19-21 October 2008
  - Over 30 free access to law providers, major law libraries, and conflict of laws experts
  - **Issue:** How can online free resources be made to be more useful in resolving disputes with trans-border elements?
- Result was a largely consensual first draft of 17 principles that States should adopt
  - Consensus that they should, by a Convention, agree to **ensure** that their main legal materials **are available** for free access
  - Many steps are then **'encouraged'** to facilitate this
  - The Hague draft principles are like a 'log of claims' on the State

Key elements in Hague principles

- **Ensuring free access** - the one proposed obligation
  - Ensuring that their 'main' legal materials are 'available for free access in electronic form by any persons' (including overseas)
  - Includes whatever legal materials the State has from time-to-time
- **Republication** - encouraged to allow and facilitate others reproducing & re-using their legal materials
  - and to remove any impediments to such publication.
- **Integrity and authoritativeness** - encouraged to make available authoritative electronic versions of their legal materials
  - To do whatever they can to ensure those who re-republish or re-use the authoritative legal materials can do so with the **highest integrity possible** and **clear indications** of their origins and integrity.
  - to **remove obstacles** to the recognition of these materials in their courts.

Key elements in Hague principles (2)

- State Parties are also encouraged
  - to **preserve** their legal materials, in order to make them available as necessary;
  - to provide **historical** legal materials;
  - to adopt **neutral methods of citation** of their legal materials
    - medium-neutral, provider-neutral and internationally consistent;
  - where possible, to provide **translations in other languages**
    - and to allow them to be reproduced by other parties; .
  - to develop **multi-lingual access capacities**
    - and to co-operate in doing so
  - to make any **knowledge-based systems** available for free public access and re-use;
  - to use **open standards** for primary materials; and
  - To provide **metadata** with primary materials.

A critique of 1995's 'full free access': A 2008 perspective

- Overlooks obligation of the State to **ensure that there is free access** to law provided
  - Right to republish supports but does not replace this
  - Hague draft principles give this obligation first priority
- In some countries, the **only** party likely to provide free access to law is the State
  - Bing and Bruce's models reflect this more than AustLII's
- **International reciprocity** in providing free access needs stress
  - Declaration on Free Access to Law & Hague principles both do this
- Right to republish needs to **respect local privacy laws**
  - AustLII model & Hague principles both overlook this
  - National privacy standards on republication of **case law** vary
  - Additional principle needed: '*National privacy policies on republication of case law must be observed, but should not restrict republication more than is necessary.*'