GLOBAL INFORMATION SOCIETY WATCH 2009

Focus on access to online information and knowledge
– advancing human rights and democracy

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Information and democracy: Accessing the law

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Not so long ago, to gain access to information about the law, one had to go to a specialised law library, to a courthouse, or to a legislature. In many parts of Europe and the United States (US), today, the primary law is published online. If you want to know about legislation recently passed in the US Congress, the answer is a Google search away. The same is true of a new opinion handed down from the Supreme Court. Publication tends to be prompt; access is nearly instantaneous and free.[1] And efforts such as the World Digital Library[2] have sought to pull together key primary legal materials from jurisdictions around the world.[3] But this general state of affairs applies only to a very few places around the world. We remain a long way from achieving a vision of universal, free, easy access to basic legal materials on a global basis.

In most countries, primary legal information is broadly accessible in one format or another, but it is rarely made accessible online in a stable and reliable format. Typically a citizen cannot open a web browser, search for a topic, statute, or judicial opinion, and access the current state of the law. Even in places where the law is published online, it is often too hard to find or navigate for average users and is provided out of context. In China, the law is published in a variety of formats: it can be searched in online databases, but they are proprietary for which libraries and businesses have to pay.[4] From the perspective of an average citizen, the law is hard enough to understand when it is accessible – and in an era of near-ubiquitous information, we should not be introducing additional roadblocks to the use of legal information for democratic purposes by failing to render it accessible to non-specialists.

The importance of ordinary citizens being able to access the law that governs their behaviour is obvious. Practicality and fairness are reasons for prioritising legal information as against other forms of information. In many jurisdictions, including the US, ignorance of the law is no excuse for wrongdoing.

The theoretical reasons for making the law broadly accessible online are even more important. In democratic regimes, we believe that there is a direct connection between having access to legal information and to the full and free exercise of rights such as free expression, freedom of assembly, and freedom of association. We consider robust debate about the law to be essential to the proper functioning of the rule of law. In common law jurisdictions, we embrace the adversary system as a means of refining what the law in fact means. We believe also that the rule of law is necessary bedrock in a system of governance in which human rights and democracies are to flourish. For each of these reasons, it is essential that citizens can access the primary law that governs their behaviour.

Our first step should be to envision what a global legal information ecosystem should look like over the next decade. We need to describe a stable, open ecosystem that allows for widespread access to legal information at a low cost. In designing this ecosystem, we ought to consider three essential attributes: the process of creation of legal materials; provision of access; and reliable preservation.

Consider the process by which legal information comes into being. In most cases, a legislature drafts, considers and passes a new law relating to any given topic. This rule takes its form in a digital format; it is born digital, as a document on a computer somewhere. Most of the time, the law is also published in hard copy format by a state's official printer. The same is true of many other forms of the basic law of a jurisdiction or of multiple jurisdictions: the decisions of courts, the treaties into which they enter, the directives that they need to implement.

One key switch that we ought to make is to commit to making the official version of primary law anywhere in the world to be the digital version, published online, and then mirrored in various secondary locations. The law should be made available directly by the body that created it in this stable, open version – on which policy makers need to agree, if possible at a global level. Those of us in law schools will continue to pay for access to these materials through proprietary systems which serve professionals and cater for their needs (such as Lexis and Westlaw). But the public would have direct access through the internet to these free and open repositories (which require no payment or special expertise to navigate).

The goal should be that basic legal materials are provided to everyone, regardless of class, gender, or other potential dividing lines, online, for free and by the state. Those in the private sector can then build applications (such as search engines, social networks, and so forth) to sort and to access it. We should allow citizens to create the data about the data – metadata – that will help others to find particular things within this online commons when they search for the

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1 Even in the United States, though, the online version is not considered "official". It can take years, through the printing process, for the official version of US law to be published in its formal, hard copy format.

2 www.worlddigitallibrary.org

3 For a discussion of this effort in the context of the changing world of legal information, see Germain, C. (2007) Legal Information Management in a Global and Digital Age: Revolution and Tradition, *International Journal of Legal Information* 35 (1), p. 134-163.

4 www.chinalaw.gov.cn

information the next time through any search engine. We can together help to build links between laws, ideas, and works of scholarship in ways that we never have before (think of a system by which we can work together to link a statute, the case law, the article that critiques it, the treatise that comments on it, the foreign law that copies it, the treaties that drive it). We discuss it in public, in the "talk" or "discuss" modes we see in Wikipedia. We can show updates and share "playlists" together as laws change, as case law builds out, and scholarship develops.

In addition to making the data freely available online, the presumption should be that the data are publicly available, subject to no intellectual property restrictions, and maintained by each state that publishes them. In some cases the intellectual property rules relating to primary law are clear. In the US, for instance, the federal law itself is by statute not subject to copyright.[5] Other systems are not so clear, and should be, if we are to realise this vision of broadly accessible primary legal material.[6]

Several stumbling blocks stand between our current place and the accomplishment of this vision for universal access to legal information. The first is the opportunity cost and literal financial costs: for many states, the up-front cost of setting up this publishing system for legal material – even in a simple, open format – may seem prohibitive. The process, however, of online publication of new laws in a standardised format should be no greater, and in fact may be less, than the current mode of publishing legal materials today in print formats, for those states that do so. Over the long term, this publishing method will be cheaper, not more expensive, than the print method for most states.

A more fundamental problem is that the leaders of some states may not wish for their citizens to have greater access to legal information. The rule of law is not universal around the world, nor is the norm of publishing all relevant rules and decisions handed down by courts. Certain states take steps to obscure, rather than to render transparent, political and other information online.[7] The issue relates to power relations: some states, such as Iran and Uzbekistan, fear the power that a more open information ecosystem may afford citizens as against the state. These states seem to fear the freedom of expression and collective action that networked technologies make cheap and easy. The notion that all citizens – of any race, gender, class, or relative power within the system – might have equal access online to the set of rules that govern their activities (not to mention the ability to comment on those rules publicly) may seem too radical to be embraced. Other states prefer systems of law that rely upon custom and norms which are not often translated into written form.

There are technical stumbling blocks to clear as well. As suggested, the data should also be made accessible in online formats that are standardised and which allow for others not just to view them but also to build upon them. A common extensible markup language (XML) schema, for instance, would allow for presentation and searching of basic legal materials on a wide range of devices, from personal computers to mobile devices.[8] The standards we adopt should be open standards.

This vision for what information citizens should be able to access, such as the primary law in all jurisdictions, should be established in clear and normative terms. Information technologies today make possible a much more open system of supporting the creation, access and preservation of legal information worldwide than we are realising. The benefits for human rights and democracy of realising this vision would repay the upfront investment many times over. ∎

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5   17 USC Section 105.

6   Consider the fight in Oregon state last year in the US, described by the Citizen Media Law Project at: www.citmedialaw.org/blog/2008/update-oregon-statutes-copyright-spat

7   See www.opennet.net for studies of internet filtering, whereby more than three dozen states censor the information that citizens can come to see on the internet.

8   Examples of this sort of schema can be found at: www.it.ojp.gov/default.aspx?area=implementationAssistance&page=1017

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GISWatch has three interrelated goals:

- **Surveying** the state of the field of information and communications technology (ICT) policy at the local and global levels

- **Encouraging** critical debate

- **Strengthening** networking and advocacy for a just, inclusive information society.

Each year the report focuses on a particular theme. **GISWatch 2009** focuses on *access to online information and knowledge – advancing human rights and democracy.* It includes several thematic reports dealing with key issues in the field, as well as an institutional overview and a reflection on indicators that track access to information and knowledge. There is also an innovative section on visual mapping of global rights and political crises.

In addition, 48 country reports analyse the status of access to online information and knowledge in countries as diverse as the Democratic Republic of Congo, Mexico, Switzerland and Kazakhstan, while six regional overviews offer a bird's eye perspective on regional trends.

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