

The meaning of 'Free Access to Legal Information' - a 20 year evolution

Graham Greenleaf

Professor of Law & Information Systems,
UNSW, and Co-Director, AustLII

Law via Internet Conference, LII, Cornell University, October 2012

Overview

Free access to legal information ...

1. Why are we here?
2. What is the 'free' bit in 'free access'?
3. 6 key statements 1992- 2012
4. 30 principles shrunk into 2 sound bites
5. Stress-testing a country
6. How to put them into practice better?

1. Why are we here?

- 20 years ago
 - § No free online access
 - § Commercial exploitation of Internet was more likely in early 90's
 - § Nothing inevitable about free access legal information
- 'Organised' free access: LIIs, FALM and portals
 - § Nearly 50 members of Free Access to Law Movement (FALM)
 - § 18 LIIs collaborate in WorldLII, CommonLII & AsianLII portals
 - § For many LIIs in developing countries, FALM performs a very valuable validating function and they are often the only form of free access in their country

The broader world of free access ...

- But most free access is outside FALM and LIIs:
 - § Thousands of free access official sources of law
 - § 'Government LIIs' aggregating/ adding value to them
 - § Legal scholarship repositories (eg SSRN/LSN)
 - § Primary materials repositories (eg Law.gov)
 - § Wikipedia legal commentary
 - § 'Open content' law journals (eg JILT, SCRIPTed)
- § Q: Is there a set of principles underlie all of these different forms of free access to law?

2. What is free in 'free access'?

- Does free access require *more* than 'no user charges' for access to official sources?
- **Argument:** It requires at least these freedoms:
 1. "Free as in speech, not beer" - Rights, not largesse
 2. 'Free from monopolies' - Still the main threat
 3. 'Free from surveillance' - Anonymous access
- We will now trace the details of these ideas, and their evolution over 20 years

(3) Development of free access principles 1992-2012

Six influential statements of 'free access' principles

1. The example of the LII (Cornell) & Lexum (1992-5)
2. AustLII's demands on official providers (1995)
3. FALM's Declaration on Free Access to Law (2002)
4. The Hague Conference 'Guiding Principles' (2008)
5. Law.Gov principles for repositories (2010)
6. UELMA - Uniform Electronic Legal Materials Act (2011)

From these 6 we will at least get a *working hypothesis* on what 'free access' could now mean.

1. The example of the LII (Cornell) & LexUM (1992-5)

- The Legal Information Institute (Cornell) led by example, not published principles:
 - NGO republishing primary materials
 - Used multiple US sources of data
 - Non-profit & no user access charges
 - Access was anonymous (no log-in)
- LexUM (U.Montreal) published Canadian Supreme Court cases *on behalf of the court*
- These examples inspired & established practices

2 AustLII's obligations of official sources (1995)

- AustLII (1995) advocated 6 obligations of official legal data sources, as necessary for 'full free access':
 1. Provision in a **completed** form, including additional information best provided at source (eg consolidation)
 2. Provision in an **authoritative** form, including citations
 3. Provision in the form best **facilitating dissemination**
 4. Provision to any 3rd-P republisher on a **marginal-cost**-basis
 5. Provision with **no re-use restrictions** or licence fees
 6. **Preservation** of a copy by the public authority
- **Main point:** Source self-publication is only useful (more choice), *not* essential. **Right of republication** *is* essential.

3 FALM's Declaration on Free Access to Law (2002)

Free Access to Law Movement Declaration
implies 10 principles, some new (***as highlight***):

1. 'Public legal information' is 'digital common property' and part of ***mankind's commons***
2. Access to it should be free of charge & non-profit
3. Government bodies that create or control it should provide access for republication
4. 3rd parties (LIIs) have the right to republish it
5. ***Publicly funded scholarship*** should be free access

FALM's Declaration (2002)

6. Free access is ***anonymous access***
7. ***Local initiatives*** have primacy, but LII ***networks*** are encouraged
8. ***Reciprocal international benefits*** of free access
9. ***Mutual support*** is an objective of LIIs
10. LIIs ***must not impede*** others from obtaining access to data from official source

For 10 years this Declaration has influenced both free access providers and official data sources

4 The Hague Conference 'Guiding Principles' (2008)

- 'Expert' meeting on Global Co-operation on the Provision of Online Legal Information (October 2008)
 - 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 used as evidence of overseas laws in disputes with trans-border elements?
- Result: An agreed set of 18 'Guiding Principles' that States should adopt as part of an international 'Hague convention'
 - States to agree to **ensure** that their main legal materials **are available** for free access
 - Many steps are then **'encouraged'** to facilitate this

Hague /EU joint conference (2012) endorsed 2008 Principles

- February 2012: Joint Hcch / EU conference involving State parties unanimously resolved:
 - "**Mindful of the "Guiding Principles** to be Considered in Developing a Future Instrument" (annexed hereto) proposed by the experts group convened by the Hague Conference on Private International Law in October 2008, the conference **confirms** that **States should make available without cost to users** legislation and relevant case law online. Such information should be **authoritative**, up-to-date, and also include access to law previously in force."
- The highest level of international endorsement to date for free access to law, and to the 'Hague GPs'

Hague principles: 10 essential elements

(New elements **highlight**)

1. **Ensuring free access** – only obligation
 - Ensuring that their ‘main’ legal materials are available for free access in electronic form by anyone
2. **Republication** - to allow and facilitate others reproducing & re-using their legal materials, and remove any impediments
 - but to **respect local privacy laws** concerning case law (and to anonymise if necessary)

Key elements in Hague principles

- **Authority, integrity & admissibility**
 4. To make available **authoritative** (official) electronic versions of their legal materials
 5. To ensure they can be re-published or re-used with their **integrity** (authenticity) and origins clearly indicated.
 6. To remove obstacles to their **admissibility** in their courts
- Application to both official publishers and NGO republishers the main GP contribution***

Why are these 3 Hague elements so significant?

Principles 4-6 can be interpreted to imply obligations :

1. Court-issued **authorised**/official versions of cases
 - no monopoly given to one publisher as at present
2. **Authorised**/official online legislation
3. 'Downstream' **authentication** of all legal documents
 - Courts & legislatures to provide authenticated versions (eg digitally signed) to all republishers, so they can distribute them with authenticity/integrity intact
4. Courts must regard as **admissible** these republished versions, *as both authoritative and authentic*

Key elements in Hague principles

7. to preserve their legal materials
 - in order to make them available as necessary
8. to adopt neutral methods of citation
 - Medium & provider-neutral & internationally consistent
9. to use **open formats** and metadata

Desirable elements in the Hague Principles

These 6 Hague elements are desirable practices

1. to provide translations in other languages (if possible) and to allow their reproduction
2. to develop multi-lingual access capacities
3. to make any knowledge-based systems available for free public access and re-use
4. to use networking and interoperability
5. to provide support for providers of free access
6. to cooperate internationally in fulfilling these obligations

5. Law.Gov principles (2010)

Law.Gov - legal repository run by Public Resources.org - 15 Workshops led to 9 principles:

1. No fees for disseminating primary materials
2. **Opposition to copyright** in primary materials
3. **Bulk download** mechanisms open to anyone
4. Documents should have authenticity and integrity
5. Historical archives should be available
6. Neutral citation mechanisms should be used
7. Structure, identifier & metadata standards should be used
8. Documents should be in open, best, formats & final form
9. Govts should sponsor research (eg automated redaction)

6 UELMA: Uniform Electronic Legal Materials Act (2011)

- Draft Act from US National Conference of Commissioners of Uniform State Laws
 - Law in Colorado, and Bills in 5 other States
- Strongly influenced by Hague Principles
 - First national implementation of part of them
- Whenever a State **only** provides an electronic version, it becomes 'official'
 - State can *choose* to make other versions 'official'
 - 'Official' = 'authorised'

UELMA (2011)

Consequences of a version being 'official':

1. Must be 'authenticated' (ie so integrity can be checked by recipient)
2. Presumed to be accurate (rebuttable)
3. **Presumed** also for **States with similar laws**
Viral or network element - powerful - advances Hague agenda
4. Records must be preserved permanently
5. Records must be kept 'reasonably available'
6. Official publishers must consider compatibility with State/ national standards

Comparative Table of principles (see the paper now online)

	<i>Principle</i>	<i>AustLII 1995</i>	<i>FALM 2001</i>	<i>Hague 2008</i>	<i>PROrg 2010</i>	<i>UELMA 2011</i>
	<i>Scope of obligations of free access</i>					
1	All primary legal materials	A 1-6	F 1	GP 1, 2	P 1-9	
2	Publicly-funded secondary materials		F 5			
	<i>State obligations</i>					
3	To ensure free access			GP 1		s8*
4	To remove impediments to republication	A 5	F 3	GP 3	P 3^	
5	To provide material for republication	A 3	F 4	GP 3	P 3, 8	
6	To provide material in completed form	A 1		GP 3	P 8	
7	No copyright in primary materials				P 2	
8	No fees for provision to republishers	A 4			P 1	
9	To redact/ <u>anonymise</u> cases (where privacy laws/practices require)			GP 11	P 9	
10	To adopt neutral citation	A 2		GP 12	P 6	
11	To preserve historical materials	A 6		GP 7	P 5	s7(a), (b)(2),(3)
12	To provide authoritative online versions of laws	A 2		GP 4	P 4	ss5, 6
13	To ensure integrity of online version of laws	A 3		GP 4	P 4	s7(b)(1)
14	To assist republication of authoritative versions	A 2		GP 5	P 9	^^

1992 to 2012: Many principles, but consensus

- Table in the paper identifies 30 separate principles, on which the last 5 sets are mapped
- There is a remarkable overlap (and no conflict) between all these sets of principles
 - FALM has now added endorsement of the Hague GPs and the Law.Gov principles to its Declaration
- But the principles serve two distinct purposes
 - A set of ‘obligations’ States should try to achieve
 - A definition of a provider of ‘free access to legal information’

Obligations of States - summary

- The obligations of the State, in relation to all primary legal materials ('materials'), are to provide these materials to other parties to republish, without fee, in the most complete, authentic and authoritative form possible, and so that materials may be republished with their authority and integrity intact. To assist republication the State shall maintain an archive of historical materials, provide materials with neutral citations, utilising open standards, and including available metadata, and provide bulk downloading facilities (subject to local privacy laws and practices). The State should anonymise (redact) materials where that is necessary or customary for privacy protection. The State should remove impediments to use of the materials including copyright, database rights, and obstacles to admissibility. If necessary, the State should provide free access to these materials.

A more summary version...

- The State should provide all primary legal materials to other parties to republish, without fee, in the most complete, authentic and authoritative form possible, so republication can preserve authority and integrity. It should remove legal impediments to use of the materials. If necessary, the State should provide free access to these materials.
- To support republication, the State should archive historical materials, use neutral citations, and open standards, provide available metadata, bulk downloading facilities (subject to privacy laws and practices). The State should anonymise materials where that is necessary.

Definition of a provider of free access to legal information

- From the 1992-2002 principles

“An organisation provides free access to legal information if it provides to all users anonymous, free-of-charge and non-profit access to all online legal materials it provides from a jurisdiction. It should not impede any other republisher from obtaining access to the sources of the materials, and should adhere to relevant privacy laws.”

That definition needs improvement. But this is the best we can do ...

“An organisation provides free access to legal information if it provides to all users free-of-charge access to all its online legal materials from a jurisdiction, and does so **without conflicts of interest** which are adverse to maximising the quality and quantity of free access. Such conflicts of interest may arise where surveillance of access occurs, or where the method of provision is dictated by maximising support advertising or treating user information as a product. A non-profit provider or involvement of non-profit data sources or governance bodies in the provision of access reduces the likelihood of such conflicts. Provision of anonymous access is desirable. Providers should adhere to relevant privacy laws, and should not impede any other republisher from obtaining access to the sources of the materials.”

Rejected possible principles

1. Free access republishers need not be repositories
 - Protection of sustainability, privacy and protection against legal risks
 - But they must not impede access to sources
2. Free access need not be open content
 - These are two different values

(5) Assessing Australia's free access against the principles

3	State obligation to ensure free access	Achieved except for some delegated legislation; State provision of free access is also achieved for legislation, but many courts/tribunals rely on <u>republishers</u> to provide free access	√
4	State removing impediments to / assisting republication	Largely achieved, except that some court decisions are not available to <u>republishers</u> for a week. Because of Crown Copyright, consent to republish must still be sought.	√
5	State provision of material for republication	Courts and tribunals provide cases to <u>republishers</u> by email; legislation offices provide data to <u>republishers</u> by a variety of automated means. All legislation offices in Australia provide a variety of bulk download mechanisms for <u>republishers</u> , at weekly or longer periods. ³¹	√
6	State provision of material in completed form	All legislation is provided in completed form, both as (i) annual Acts, and (ii) consolidations done by official legislation offices (often within days of amendments) and provide to <u>republishers</u> weekly. All courts/tribunals provide the final versions of judgments to <u>republishers</u> , including replacement copies where errors have been made. An important exception is that those superior courts that have 'authorised reports' do not usually provide the corrected judgments to any other publishers.	1/2
7	Abolition of copyright	Crown Copyright in both ³² ; but refusal to allow republication by	X

(6) Implementing these principles

Steps toward a new legal norm

1. Endorsement by FALM and other NGOs
 - Updating Declaration on Free Access to Law
 - Endorsement by other NGOs (eg Law.Gov)
2. National implementation
 - Changed practices by governments and official sources
 - Legislation where needed (eg UELMA)
3. International implementation
 - Hague Conference Convention on Access to Foreign Law
 - A UN General Assembly Resolution
 - Endorsement by other IGOs (eg EU, CHOGM)