The meaning of "free access to legal information": A twenty year evolution

Graham Greenleaf[*], Andrew Mowbray[°], Philip Chung[°°]

[*] *Professor of Law & Information Systems, University of New South Wales (UNSW), and Co-Director, AustLII*
[°] *Professor of Law and Information Technology, University of Technology, Sydney (UTS) and Co-Director, AustLII*
[°°] *Senior Lecturer in Law, University of New South Wales (UNSW), and Executive Director, AustLII*

Abstract. Free online access to legal information is approaching maturity in some parts of the world, after two decades of development, but elsewhere is still in its early stages of development. Nowhere has it been realised fully. The main question asked in this paper is what should "free access" mean in relation to legal information in order for it to be fully effective? As with software, we must ask whether free access to law is "free as in beer, or free as in speech?"
The six most significant attempts over the last twenty years to answers this question are analysed to show that a substantial degree of international consensus has developed on what "free access to legal information" now means. Of thirty separate identifiable principles, most are found in more than one statement of principles, and many are now relatively common in the practices of both States and providers of free access to legal information (government and NGO). Many concern measure to avoid the development of monopolies in publication of the core legal documents of a jurisdiction. Which principles are essential to the meaning of "free access to legal information", and which are only desirable, is usually clear.
Two complementary meanings of "free access to legal information" emerge. The first states the obligations of the State in relation to ensuring free access to legal information – but not necessarily providing it. The key elements concern the right of republication. The second meaning states the conditions under which an organisation can correctly be said to be a provider of free access to legal information. We argue that a better definition is needed than the "consensus" suggests, and propose one based on the avoidance of conflicts

with maximisation of the quality and quantity of free access.
One use of such a set of principles is to help evaluate the extent to which any particular jurisdiction has implemented free access to legal information. A brief example is given of Australia, a county with a generally good record but some deficiencies. Finally the paper considers what steps should be taken to most effectively realise a reformulated concept of "free access to legal information", by civil society, by States at the national level, and at the international level.

1. Introduction: An idea with a short modern history

1.1 TWENTY YEARS AGO

Twenty years ago there was no significant free online[1] access to legal information. This is not very surprising, because the Internet was only in its infancy as a means of distributing information to the general public, and the project to develop the Internet's World-Wide-Web was only announced in August 1991. Prior to the World-Wide-Web (and its predecessor, the gopher protocol) there were many online legal information systems, and numerous legal information products distributed on CD-ROM, but there was no significant provision of free access to legal information anywhere in the world. Both government and private sector online legal publishers charged for access (Greenleaf, 2004).

Online legal information retrieval had existed, through dial-up services, since the 1970s, but free public access was unknown. When Jon Bing published his *Handbook of Legal Information Retrieval* his global survey did not refer to any

[1] This is not to discount the importance of free access to physical copies of legislation, case law and treatises provided by public libraries, and by government and other institutions in some countries. "Free access to legal information" has an important pre-Internet history, but that is not the subject of this paper. Nor are we discussing here the extremely long history of efforts by governments, publishers, Councils of Law Reporting and others to make both legislation and case law more easily understandable and more easily found, although not usually for free.

systems available for free public access (Bing, 1984). One of many reasons was the cost of dial-up telecommunications. During the 1980s the situation got worse, as across the world governments tried to commercialise government information provision and were certainly not predisposed to offer free online services. The *reductio ad absurdum* was the decision of the New Zealand government to privatise its government printing service, including the only digital copy of its national legislation, which it then had to repurchase as part of the eventual creation of a free access service.

Australia was a slightly less awful example. From 1983-92 various State governments had given a monopoly over electronic provision of cases and legislation to CLIRS, a partly Murdoch-owned company (Greenleaf, Mowbray and Lewis, 1988). The CLIRS (later Info-One) dial-up service was a failure. By the early 90s it was trying to charge up to $720/hour for some bare case law databases, and the system never had more than four concurrent users. The Federal government's SCALE service charged $100 per hour or more, and was planning to put this onto the World-Wide-Web as a commercial service, not a free one. The Queensland State government had already launched its own commercial dial-up service. Various Australian industrial courts already charged users for dial-up access to cases and industrial awards. CD-ROM providers were already very innovative in Australia by the early 90s, but charged $100s for each re-issue of bare case or legislation CD-ROMs. This was the environment in which the Internet arrived in Australia.

There was nothing inevitable about the Internet delivering *free* access legal information services. The early 1990s were more hospitable to commercial services and to monopolisation. A theme of this paper is that the danger of monopolies in legal information is ever-present, and has not yet been put to rest despite the considerable successes of the last 20 years. Another theme, to which we now turn, is that human agency can change the directions of technology, and governments.

1.2. A VERY SHORT HISTORY

In 1992 two academics at Cornell Law School first started to use the Internet (using the Gopher protocol) to provide free public access to some US legal materials, and gave their project the name "the Legal Information Institute", soon abbreviated to "the LII" (Martin, 2000). This was, as far as is known, the first significant provision of legal information via the Internet – free or otherwise. By 1994 they had developed a graphical browser for the web (Cello) and migrated their content to that new platform. The high levels of usage that their site soon achieved demonstrated that there was a public demand for access to legal information that went far beyond lawyers and law schools. In 1995 the Australasian Legal Information Institute (AustLII), based at two Australian law schools (UTS and UNSW) was the first to follow Cornell's lead, and to borrow the "LII" name. By 1999 AustLII had developed databases from all nine Australian jurisdictions covering key case law, legislation, treaties and some other content. AustLII was the first LII to build a comprehensive national free access legal information system (Greenleaf, 2011), and it has continued to expand, exceeding 500 databases in 2012. From 2000 LexUM at the University of Montreal built the Canadian Legal Information Institute (CanLII) in cooperation with the Canadian legal profession. It is a mark of its continued growth that in 2012 it added its one millionth full text decision.

A decade ago, in 2002, these three LIIs and four others that AustLII was helping develop, in the UK (BAILII), Pacific Islands (PacLII), southern Africa (eventually, SAFLII) and Hong Kong (HKLII) agreed at the 4th Law via the Internet Conference, held in Montreal, to make the *Declaration on Free Access to Law*[2]. The Declaration set out the principles they considered were the foundations of free access to legal information, and in particular the demands they made on governments to facilitate free access (Greenleaf, 2011). By the

[2] Declaration on Free Access to Law < http://www.fatlm.org/declaration/ >, also called the "Montreal Declaration".

Declaration, they also created the Free Access to Law Movement (FALM), which has accepted new members by consensus since that time, and now has 45 members from all continents,[3] many of which provide free access to legal information from multiple sources to the public, but some of which do research which supports such provision.

Far more important than the Free Access to Law Movement and LIIs is the fact that free Internet access to at least some legal information has become commonplace and expected in most countries in the world over this twenty year period[4]. In most cases this provision of free access legal information is from individual courts, legislatures, government departments and law schools, but in some countries there are also co-ordinated portals for various sources of free access legal information from the country. Some of these "government LIIs" are members of FALM, but most are not[5]. In addition to these developments within governments, very important developments by non-government organisations (NGOs) have also occurred, including the development of free access legal scholarship repositories, the development of Creative Commons and similar licences providing authors with a means of making their scholarship able to be reproduced by others, the organisation of primary materials repositories such as Law.Gov. At the inter-governmental level policy initiatives such as the European Union's public sector information (PSI) Directive, and similarly motivated initiatives by the OECD (see Greenleaf and Bond, 2011 for details), have provided impetus for many countries to make more legal materials available for reproduction.

Globally, the growth of legal information which can be accessed at no charge to users continues. But is that all "free access to legal information" is about?

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[3] For members, see the FALM website at <http://www.fatlm.org/>.

[4] See Greenleaf, 2011, section "How global is the Free Access to Law Movement?"; see also links to free access sites from every country in the WorldLII Catalog <http://www.worldlii.org/catalog/>.

[5] See Greenleaf, 2011, section "Free access outside the FALM and LIIs".

1.3. BEER OR SPEECH?

What does it now mean if we say that a country has "free access to legal information"? Is it sufficient that within that country there is some online access to the main current cases and legislation, for which users do not have to pay? Is the absence of end-user costs the *sine qua non* of "free access"?

This paper argues that this is not enough, and that the famous slogans of the Free Software Movement "Free as in speech, not beer" and "Free software" is a matter of liberty, not price[6] apply in particular ways to free access to legal information, giving "free access to legal information" a much more complex meaning. The Free Access to Law Movement's Declaration on Free Access to Law takes the view that its members republish legal information (for free access by users) as a matter of right, not because of some largesse of governments. This republication is the equivalent of "free speech", even if from a user perspective the no-charge access to legal information could be regarded as equivalent to "free beer".

Free access to law is also similar to other aspects of free speech in that it usually has to be fought for, both against governments and against commercial interests. We argue that free access to legal information requires that it be "free from monopolies", just as free speech has to prevail over the monopolies of intellectual property in some situations before it is genuinely free. Assertions of monopoly privileges as part of the publication of legal information are a recurring threat as technologies and publishing methods change. We also argue that "free access" must be substantially free from surveillance.

1.4. CONFUSING TERMS: "AUTHORITATIVE", "OFFICIAL", "AUTHENTICITY" AND WITH "INTEGRITY"

Some of the most important types of legal documents, particularly legislation,

[6] Free Software Definition at < http://www.gnu.org/philosophy/free-sw.html>.

case reports, and treaties, have special characteristics that go beyond merely being reliable copies. When print was all we had, the copies of legislation printed by government printing offices, and the copies of certain series of law reports printed by particular designated publishers (whether commercial or governmental) were the only "official copies" in the sense that they were the only copies regarded as sufficiently authoritative for many purposes including admissibility in at least some courts, and their authoritative nature is often supported by legal presumptions that they are correct unless shown to be otherwise. "Official" and "authoritative" (or "authorised") are often therefore regarded as synonyms. We will use "authoritative" or "authorised".

A document can have "integrity", however, even if it is not designated as "authoritative". For example, a document obtained from court, if the court's digital signature has been used in relation to it, can be regarded by anyone who obtains it as having integrity because the digital signature can be used to authenticate that the document is unchanged from what was provided by the court. Such documents are said to "have integrity" or "be able to be authenticated", and in this context "integrity" and "authenticity" are often used as synonyms, as we will do. A widely used definition, in relation to legal documents, is that "[a]n authentic text is one whose contents have been verified by a government entity to be complete and unaltered when compared to the version approved or published by the content originator".[7]

However, although integrity and authority very often go together, this is not necessarily so: an electronic copy[8] of a court decision or of an Act can have integrity without necessarily being designated as "authoritative".

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[7] American Association of Law Libraries State-by-State Report on Authentication of Online Legal Resources, 2007: 8; adopted by NCCUSL, 2011.

[8] A formal model which includes the role of such copies (called "items") is the FRBR (Functional Requirements for Bibliographic Records) model developed by the International Federation of Library Associations and Institutions (IFLA). Examination of that model is not necessary for the argument in this article.

2. The evolution of free access to law principles, 1992-2012

Since the early 1990s there have been a succession of statements of "free access" principles in relation to legal information. We will consider the evolution of those principles, through six significant statements, before concluding what "free access" does and should mean now. Explicit attempts at such definition have been relatively few. They are not the same as various justifications of the importance and value of free access to legal information both locally and globally (for example, Martin, 2000; Poulin, 2004), because those justifications do not directly provide a statement of what "free access" actually requires on the part of various actors.

2.1. The implications of the LII (Cornell) and LexUM (1992-4)

From 1992, the LII at Cornell was the first significant practical implementation of free access to legal information via the Internet, but this was not accompanied by any detailed statement of principles about what "free access" meant (see, for example, Bruce, 1995 and Martin, 1995).

Various US developments influenced the creation of the LII, and the development of free access to legal information generally in the USA, according to the LII's founders. The report by Perritt (1994) to the US government about public sector information generally stated similar principles to those later explicitly applied to legal information, and was influential (Bruce, 1995), as was his earlier work (Perritt, 1990) on the position that free-access providers could play in the value-adding chain for legal information. A report by a committee chaired by John Lederer to the Wisconsin Board of Bar Governors (Wisconsin Bar, 1994) contained two key recommendations which anticipated many future statements of principle: (a) a State Authoritative Archive of Opinions, to be maintained by the Court and the State law Library in electronic format, as an archive of all opinions in their final and authoritative form, available to anyone who wished to copy part or all of the archive, for the

cost of copying; and a (b) Universal Citation System, the adoption of a universal, vendor independent, citation system that can be used by any publisher, and is suitable for any media. Bruce considers that an insistence on the importance of open standards also underlay the LII's development[9]. Martin also points to the influence in the early 90s of the efforts by the Taxpayer Assets Project[10] to establish the right of public access to all public information, including legal information. Another inspiration to the LII[11] was the Cleveland Freenet which from 1989 provided to the Cleveland region a free access (local call cost) pre-Internet dial-up facility offering decisions of the US Supreme Court, the relevant Federal Court of Appeals for Cleveland, and the Ohio Supreme Court, plus historic documents including the US Constitution.

However, what turned out to be most important to free access to legal information internationally was that the LII simply embodied principles (without necessarily spelling them out) as well as technological innovations: it was a NGO which republished primary materials from multiple US sources; and it provided anonymous, non-profit, access free of user charges (see Martin, 2000). This example was enough to inspire others.

LexUM at the University of Montreal (which later developed CanLII), was also an early significant developer of free access legal content, putting Canadian Supreme Court decisions online for free access in 1993, on behalf of the Court, using the Gopher platform initially until the web became available as a means of distribution. Like the LII at Cornell, LexUM's example was important, particularly because it involved active cooperation between a court and an academic institution to make the court's information available for free access, with the Court's imprimatur. Commercial publishers already had a long history of publishing decisions on behalf of courts, but here was a non-profit academic

[9] Tom Bruce, personal communication, August 2012.
[10] Founded by Ralph Nader in 1988, and headed by Jamie Love from the early 1990s: see <http://www.tap.org/govinfo.html>.
[11] Peter Martin, personal communication, August 2012.

body doing so for free access. The LII at Cornell, and LexUM, gave early shape to characteristics of free access Internet publication.

2.2. AUSTLII'S STATEMENT OF THE OBLIGATIONS OF PUBLIC BODIES (1995)

One of the earliest explicit statements of what free access to law required from the State was the advocacy by the Australasian Legal Information Institute (AustLII) of five obligations of legal data sources (courts, legislatures etc) (Greenleaf, Mowbray, King, and van Dijk, 1995), summarised here (in full in Annexure 1):

1. Provision in a **completed** form, including any additional information best provided by the source, such as corrections made to decisions, catchwords added to them, and consolidation of legislation.
2. Provision in an **authoritative** form, including "citations and numbering such that it can be cited to any court in an acceptable way".
3. Provision in the form best **facilitating dissemination**, including in any computerised form produced by government bodies **"**as a by-product of their normal work".
4. Provision to anyone who wishes to obtain it on a cost recovery (**marginal-cost)** basis.
5. Provision with **no restrictions on re-use** including for re-publication by any third parties with no licence fees.

The main justifications given for these policies were that "Public policy should support maximising public access to the law", and should not be seen as a "profit centre" for government (a significant issue in the 1990s), and that "The fostering of maximum competition in the provision of different types of legal products seems to be the only way to meet the public interest". These policies were formulated at the time AustLII commenced its operations in 1995.

The main point of this 1995 article was that self-publication for free access by the source of the data (the court or legislature) is only useful (it gives more

choice), but is *not* essential. What is essential is the right of others, such as LIIs, to republish the data, and that courts and others should facilitate this by effective provision of the data for republication. The "right to republish" was identified as the cornerstone of free access to legal information. In retrospect, this was a good but incomplete start. Obligations 3-5, assisting republication, seemed most important at the time. However, obligations 1 and 2, which to some extent anticipate the importance of the integrity and authenticity of public sources available for republication (an emphasis of The Hague "Guiding Principles" of 2008), are likely to be increasingly important in the future.

In a restatement of these principles in 1997 (Greenleaf, Mowbray and King, 1997), a sixth principle was added: "6. **Preservation** of a copy by the public authority". This was regarded as necessary because otherwise later entrants would be disadvantaged in their ability to compete against earlier entrants.

There are other statements from the mid-90s onward which are relevant to these questions but which do not amount to free access principles. For example, in 1995 the Committee of Ministers of the Council of Europe made a Recommendation concerning legal information retrieval systems,[12] which recommended that members States "take appropriate steps to ensure that all users have easy access to legal information retrieval systems that are open to the public", and other useful recommendations concerning the comprehensiveness and timeliness of such systems, but which does not recommend free access. Earlier, in 1983, the Committee had recommended[13] that "States should endeavour, whenever necessary, to ensure or to encourage the creation" of such computerized systems, and should provide the operators

[12] Council of Europe Committee of Ministers *Recommendation No R (95) 11 of the Committee of Ministers to Member States Concerning the Selection, Processing, Presentation And Archiving of Court Decisions in Legal Information Retrieval Systems*, adopted 11 September 1995.
[13] Council of Europe Committee of Ministers *Recommendation No R (95) 11 of the Committee of Ministers to Member States Concerning the Protection of Users of Computerised Legal Information Services*, adopted 22 February 1983.

of such services "should, wherever possible, be permitted to use materials existing in machine-readable form" but this "should not apply if the state itself supplies any available legal source data directly to the users." In other words, this is an explicit endorsement of maintenance of government monopolies in provision of legal information (when governments choose to provide services themselves), the antithesis of the provision of data for republication identified above as the core principle of free access to legal information.

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

When the Free Access to Law Movement (FALM)[14] was formed in 2002 in Montreal, its Declaration on Free Access to Law[15] was drafted between conference sessions. All members of FALM (now more than 50) endorse the Declaration as a condition of membership. The Declaration (in full in Annexure 2) can be interpreted to imply ten principles, although it does not directly state them:

1. "Public legal information"[16] ("legal information produced by public bodies") from all countries and international institutions is "part of the common heritage of humanity" and "digital common property".

2. It should be accessible to all on a non-profit basis free of charge.

3. Third parties such as LIIs have the right to republish public legal information.

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[14] Free Access to Law Movement website <http://www.fatlm.org> .

[15] *Declaration on Free Access to Law*, made by legal information institutes meeting in Montreal in 2002, as amended at meetings in Sydney (2003), Paris (2004) and Montreal (2007) <http://www.fatlm.org/declaration/>.

[16] The Declaration says "Public legal information means legal information produced by public bodies that have a duty to produce law and make it public. It includes primary sources of law, such as legislation, case law and treaties, as well as various secondary (interpretative) public sources, such as reports on preparatory work and law reform, and resulting from boards of inquiry. It also includes legal documents created as a result of public funding."

4. Government bodies that create or control it should provide access for republication.
5. Publicly funded interpretative legal materials (such as some legal scholarship) should be accessible for free.
6. Free access is anonymous access (free from surveillance).
7. Local initiatives have primacy, but LII networks are encouraged.
8. There are reciprocal international benefits of free access.
9. Mutual support is an objective of LIIs.
10. LIIs must not impede others from obtaining public legal information from its sources.

The Declaration combines a statement of the obligations of the state with a statement of the aspirations and obligations of legal information institutes. In retrospect, the Declaration was not drafted as a clear set of principles, but it does add valuable additional principles to those not included in the AustLII list, and it has lasted largely unchanged for a decade. Requiring free access to be anonymous access (free from surveillance) (principle 6) makes that point that this freedom is "free as in speech", and not only a matter of free from user charges. The balanced approach to the international role of free access (principle 8), which is in many ways taken up again in The Hague "Guiding Principles" of 2008. The second, third and fourth principles continue the emphasis on the right of republication taken by AustLII. Principle 5 is consistent with the increasing recent demands for open access scholarship.

2.4. The Hague Conference "Guiding principles" (2008) – Essential elements

Another six years passed before the most detailed statement of the desirable

obligations of governments and the sources of legal information came out of an "Expert" meeting on *Global Co-operation on the Provision of Online Legal Information* (October 2008), called by the Permanent Bureau of The Hague Conference on Private International Law in October 2008. Over 30 free access to law providers, major law libraries, and conflict of laws experts were asked to focus on how online free resources can be made to be more useful in resolving disputes with trans-border elements.

The result was a largely unanimous first draft of 18 principles that States should adopt (in effect, a "log of claims" on the State). The consensus was that States should, by an international Convention, agree to a requirement that their main legal materials are in fact available for free access, and to consider many particular steps designed to facilitate this (States are "encouraged" to implement them).

In February 2012 a formal international conference in Brussels involving State parties was convened jointly by The Hague Conference and the European Commission to consider the next steps in this process. The joint conference unanimously endorsed a set of conclusions and recommendations, which gave implied endorsement[17] to the approach taken by the Expert meeting in 2008, and annexed the principles it set out, retitled as "Guiding Principles to be Considered in Developing a Future Instrument". The 18 principles are set out in full in Annexure 3, and referred to below, by number, as GP's.

In our opinion, ten of these principles set out six elements of The Hague Guiding Principles that are essential to the meaning of "free access to legal information". The absence of any of them will make the others unachievable,

[17] Conference on Access to Foreign Law in Civil and Commercial Matters, Recommendation 8 – "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."

or incomplete (not fully achievable). They are:

(1) *Ensuring free access*: States are to ensure that their “main” legal materials are “available for free access in electronic form by any persons” (including those overseas) (GP 1). This is the only proposed obligation. Who is the provider is not specified – it is not necessarily the State. Previous statements had not stressed this *default obligation* of the State. The materials to be so made available include legislation, court and tribunal decisions and international decisions (GP 1), but States are also encouraged to make available for free access historical materials, preparatory documents, amended legislation (i.e. consolidations), repealed legislation and explanatory materials (GP 2).

(2) *Assisting republication:* States are encouraged to allow and facilitate others reproducing and re-using their legal materials (for free electronic access as in (1)), and to remove any impediments to such publication (GP 3). This clearly implies that there should be no licence fees for republication, because that would be an impediment to free access republication. Unlike the 1995 AustLII and 2002 FALM statements, the right of republication is not phrased as obligatory, but is still central. One caveat is that any republication of case law must respect local privacy laws, but States should if necessary use anonymisation so as to provide free access (GP 11). The context makes it clear that it should be the role of the State to do the redaction/ anonymisation, not the role (and at cost) of the re-publisher.

(3) *Integrity and authoritativeness*: States are encouraged to “make available *authoritative* versions of their legal materials in electronic form” (GP 4), and to do whatever they can to ensure those “authoritative legal materials can be reproduced or re-used by other bodies with clear indications of their origins and *integrity* (authenticity)” (GP 5). They are also encouraged to remove obstacles to the admissibility of these materials in their courts (GP 6).

(4) *Preservation:* to preserve their historical legal materials (GP 7). This is necessary for GP 2.

(5) *Citations:* to adopt neutral methods of citation (medium and provider-neutral, and internationally consistent) (GP 12). Impediments to admissibility (GP 6) are unlikely to be overcome unless Courts adopt neutral citations.

(6) *Open formats & metadata:* to use open formats for legal materials, and provide metadata with them (GP 8); and to cooperate in developing metadata standards (GP 9). Open formats are vital, because if official bodies only provide data in formats such as PDF text (or, far worse, PDF image) then the process of republication, if it is to provide any value-adding, becomes unnecessarily difficult and expensive. When official bodies have already created metadata, they should provide it with the source data to republishers (as the AustLII principles state).

The third element, *Integrity and authoritativeness,* is in our view the most important new emphasis of The Hague Guiding Principles. It treats "integrity" and "authoritativeness" as synonyms (not strictly correct, as discussed earlier), and therefore in effect states that both characteristics must be able to be present in the versions of legal materials that are republished by publishers other than the original source. The wording and context of these principles implies that both the authoritativeness and integrity of the legislation or cases should be (a) available in free access versions; and (b) available in the versions provided by re-publishers, not only the versions that come from the source. AustLII's 1995 principles (1) and (2) implied similarly. These two points are not completely clear in the Guiding Principles (though they were discussed at the 2008 meeting), but we consider that our interpretation is justifiable. The encouragement to ensure admissibility of "these materials" (GP 6) clearly implies that republished materials are encompassed by this.

These three principles (GP 4, 5 and 6) have major implications for the future of free access to law, if adopted by States, as follows:

(i) Courts would have to provide the most authoritative versions of their cases to all republishers, thus abandoning the situation (at least in some common law countries) where a commercial publisher is given a monopoly over disseminating the “authorised” version in return for some editorial work to make the case report complete. The result would be that there would be no exceptions to “Court-issued authorised versions”.

(ii) Legislatures would have to declare that the online versions of their legislation, and delegated legislatlon, were as authoritative as the print versions (as some already have);

(iii) Courts, legislatures etc would have to provide authenticated versions of their outputs (e.g. digitally signed copies) to all republishers, in a way that the republishers could distribute copies with the authenticity intact, so that they did not retain a monopoly over “authenticated” versions. We can call this “downstream authentication”.

(iv) Courts would have to regard as admissible these republished versions, accepting them as both authoritative and authentic.

In our view, these will continue to be issues of contention in coming years, and free access to law will not be fully established until national governments accept and implement them.

2.5. The Hague Conference “Guiding principles” (2008) – Desirable elements

The other eight of the draft Hague principles encourage State parties to adopt

six other practices, which we have classified (a subjective assessment) as "desirable" principles:

1. *Knowledge-based systems:* to make any knowledge-based systems available for free public access and re-use (GP 10)
2. *Translations:* to provide translations in other languages (GP 13) and to allow their reproduction (GP 14)
3. *Multi-lingual access:* to develop multi-lingual access capacities, and to co-operate in doing so (GP 15)
4. *Networking*: to make materials more accessible through interoperability and networking (GP 16). Re-publishers are also encouraged to do this.
5. *Support for providers:* to "assist in sustaining" those that fulfil these objectives (GP 17). This would include financial support to LIIs and other re-publishers, where appropriate.
6. *International cooperation:* to cooperate in fulfilling these obligations (GP 18), including assisting other States to do so (GP 17).

In our view, none of these practices are essential for free access to legal information, but each will assist its better achievement. For example, Mongolia provides cost-free and anonymous access to all of its legislation, case law, and other legal materials, through a government operated (and initially World Bank funded) national legal information system[18]. It does not seem to have any objection to others republishing that information. However, it does not have any translations into other languages or multi-lingual interfaces. Its national service is not a member of FALM (at least not yet), and it does not seem to be involved in any other international networking or cooperation. But none of these matters are significant impediments to Mongolians being able to obtain very valuable free access to the laws that govern them, nor to anyone else in the world who speaks Mongolian from researching the Mongolian legal

[18] Mongolian Unified Legal Information System at <http://www.legalinfo.mn/pages/1/page1.php>.

system for free. Mongolia seems to have a more comprehensive free access legal system than most of its neighbours. No doubt the Mongolian system would be improved by any of these desirable “Hague” features, but the extent or future of its achievement of free access to legal information does not seem imperilled by the lack of any of them.

2.6. THE LAW.GOV PRINCIPLES OF PUBLIC RESOURCES.ORG (2010)

In 2010 Public Resources.org organised fifteen Law.Gov workshops across the USA, in which over 600 attendees examined “issues such as privacy, technical details of document dissemination, authentication, copyright, and other aspects of the distribution of primary legal materials”[19]. The workshops resulted in “a consensus on 10 core principles” for “the dissemination of primary legal materials in the United States”, as set out below.

1. Direct fees for dissemination of primary legal materials should be avoided.

2. Limitations on access through terms of use or the assertion of copyright on primary legal materials is contrary to long-standing public policy and core democratic principles and is misleading to citizens.

3. Primary legal materials should be made available using bulk access mechanisms so they may be downloaded by anyone.

4. The primary legal materials, and the methods used to access them, should be authenticated so people can trust in the integrity of these materials.

5. Historical archives should be made available online and in a static location to the extent possible.

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[19] See <https://law.resource.org/index.html>.

6. Vendor- and media-neutral citation mechanisms should be employed.
7. Technical standards for document structure, identifiers, and metadata should be developed and applied as extensively as possible.
8. Data should be distributed in a computer-processable, non-proprietary form in a manner that meets best current practices for the distribution of open government data. That data should represent the definitive documents, not just aggregate, preliminary, or modified forms.
9. An active program of research and development should be sponsored by governmental bodies that issue primary legal materials to develop new standards and solutions to challenges presented by the electronic distribution of definitive primary legal materials. Examples include the automated detection and redaction of private personal information in documents.
10. An active program of education, training, and documentation should be undertaken to help governmental bodies that issue primary legal materials learn and use best current practices.

The 33 Co-Convenors of Law.Gov are a very distinguished group of US experts on all aspects of the technical and public policy aspects of the provision of legal information[20].

2.7. THE USA'S DRAFT *UNIFORM ELECTRONIC LEGAL MATERIALS ACT* (2011) AND IMPLEMENTATIONS

The draft *Uniform Electronic Legal Material Act* (UELMA)[21] recommended in

[20] See Co-Convenors of Law.Gov at <https://law.resource.org/index.html>.
[21] For documents and current developments, see American Association of Law Libraries UELMA Resources webpage <http://www.aallnet.org/Documents/Government-Relations/UELMA> .

2011 by the US National Conference of Commissioners of Uniform State Laws (NCCUSL) provides the most important national consideration to date of the implementation of some of these principles in legislation. The UELMA commentary makes frequent reference to The Hague Guiding Principles. Commentators on UELMA described as "the best practices document of The Hague Conference on Private International Law" which "were important guidelines that were repeatedly consulted in the drafting process" (Bintliff, 2011).

UELMA can therefore be seen as the first attempt at a national formulation of some of those principles, particularly those relating to authority, integrity and preservation of legal materials. Other aspects of The Hague Guiding Principles are not relevant to the objectives of UELMA, in particular that it is not directly concerned with republication of legal materials. As of May 2013, UELMA Bills have become law in eight states: California, Colorado, Connecticut, Hawaii, Minnesota, Nevada, North Dakota, and Oregon (AALL, 2013). Bills have been introduced in other States and territories including the District of Columbia, Illinois, Missouri, Pennsylvania, and Rhode Island (withdrawn).[22] The pace of legislative enactment makes UELMA the most important advance as yet in the adoption and enactment of parts of The Hague Guiding Principles.

The UELMA legislation (where enacted) only applies when two conditions are satisfied: (a) a state prepares its legal materials (as defined below) in an "electronic format" (whether this is a by-product of the drafting process, or from conversion of old legislation from paper to electronic form), and (b) "the state then designates that electronic format as official".

Where UELMA applies, it has the following eight consequences:

[22] American Association of Law Libraries, Uniform Electronic Legal Material Act Bill Chart, updated July 5, 2013
<http://www.aallnet.org/Documents/Government-Relations/UELMA/uelmabilltrack2013.pdf>

(i) It can apply to a very wide range of "legal materials", designated as such (s2(2)), including state constitutions, legislation or delegated legislation, reported decisions of specified courts or tribunals, court rules, or "any other category" of legal materials included.

(ii) It applies to any "official publisher" so specified (s2(3)[23]) (but these can only include state agencies and officials, not commercial publishers), and the materials must be "displayed, presented, or released to the public, by the official publisher" (s2(4)).

(iii) "If an official publisher publishes legal material only in an electronic record" it must designate it as an official record (so the Act applies), but otherwise it can choose whether or not to designate an electronic record of legal materials as an official record (s4).

(iv) The official publisher must then "authenticate the record" which means it "shall provide a method for a user to determine that the record received by the user from the publisher is unaltered from the official record published by the publisher" (s5). Various US jurisdictions are already so authenticating[24].

(v) Legal materials so authenticated are presumed to be an accurate copy (s6(a)), with the burden of proof in rebutting this presumption on the party contesting it (s6(c)).

(vi) A similar presumption will apply, in courts or tribunals of the State with such a law, in relation to laws of a state which have adopted a

[23] This abbreviation means "sub-section 3 of section 2".
[24] The US Government Printing Office uses digital signatures to authenticate legislation and other materials, as do Delaware for administrative rules and Arkansas for court opinions; Utah authenticates its administrative code using hash values: UELMA Prefatory Note and Comments, 2011: 10-11

"substantially similar" law (s6(b)). In this respect (potentially reciprocal operation) this law operates similarly to many international conventions.

(vii) Such electronic records as are designated as official must be preserved by the official publisher, either in electronic or non-electronic form (s7(a)), and if preserved in electronic form the publisher must ensure its integrity, its backup and disaster recovery, and its continuing usability (s7(b)).

(viii) The publisher must also "ensure that the material is reasonably available for use by the public on a permanent basis" (s 8). "Providing free access or charging reasonable fees for access to electronic legal material is a decision left up to the states"[25], so UELMA does not guarantee free access, but it does provide a legal guarantee against charges that would make materials "not reasonably available" to the general public. In practice, this would very often result in free access, and would prevent governments making sale of legal materials a "profit centre".

(ix) Official publishers must consider standards and practices of other state jurisdictions, and compatibility with them, as well as national standards (s9).

Many of these provisions, as shown in the Table following, implement some of the free access principles. UELMA only applies to legal materials once they are designated as "official" (i.e. authoritative), and then sets out when they must also be authenticated (i.e. have integrity). So any materials authenticated under UELMA must also be authoritative. But, under UELMA, this only applies to the original publisher, not to a republisher, and so "downstream authentication" is not one of its direct results. Although the presumption in favour of other

[25] UELMA Prefatory Note and Comments, 2011: 16.

jurisdictions in s6(b) is very valuable, it does not have any obvious effect on inter-jurisdictional reciprocity in free access to legal information, and is therefore not suggested as a separate principle.

3. Comparison of principles (1992-2002) and emerging consensus

The following Table compares the principles appearing in the five sources considered above[26]. There is a remarkable degree of overlap, consistency and lack of direct conflict between these five sources. To the extent that they are not the same, it is mainly because the purpose of each source is slightly different: only the Declaration on Free Access to Law is directed primarily at providers of free access to legal information, the others four sources are directed primarily at the obligations of the State (and so is the Declaration in part). The Table shows that The Hague Guiding Principles are more comprehensive than any of the others, because they were built on fifteen years of prior experience, incorporating the various principles developed in the USA prior to 1995, the AustLII principles, and the experience of LIIs, librarians and other parties around the world up to 1998. While The Hague Guiding Principles are a convenient and valuable basis on which to build an understanding of "free access to legal information" there are, however, a few principles found in the other sets that are not in The Hague Guiding Principles, but are in the FALM, Law.Gov or UELMA principles, as follows:

(i) The FALM Declaration includes the additional principles that free access should be anonymous, that publicly funded secondary materials should be available for free access, that local initiatives should have primacy, and that republishers (including LIIs) must not impede others from obtaining materials from the official

[26] The various pre-1995 US sources could perhaps be combined into another column, but this has not been done.

sources.

(ii) The Law.Gov principles are explicit that there should be no copyright in primary materials, and that there should be no fees (or royalties) for provision of materials by official sources to republishers (also included in AustLII's principles).

(iii) UELMA adds the principle of cross-jurisdictional reciprocity of recognition.

The preceding discussion, summarised in the following Table, shows that over the last twenty years, an international consensus has developed on what free access to legal information now means. Most of the above principles are found in more that one statement of principles, and most are now relatively common in the practices of both States and providers of free access to legal information (both government providers and NGO providers such as LIIs). We can divide these principles into those stating (i) the scope of the other principles (1-2 below), (ii) the meaning of free access from the perspective of the obligations of States in relation to its provision ("State obligations") (3-22 below); and (iii) the meaning of free access from the perspective of its providers ("Provider obligations").

Comparative table of free access to law principles (1992-2002)[27]

	Principle	*AustLII 1995*	*FALM 2001*	*Hague 2008*	*PROrg 2010*	*UELMA 2011*
	Scope of obligations of free access					
1	All primary legal materials	A 1-6	F 1	GP 1, 2	P 1-9	
2	Publicly-		F 5			

[27] In this Table, and subsequently in this article, A = "AustLII Principle"; F = "Free Access to Law Movement principle"; GP = "The Hague Guiding Principle"; P = PublicResources.org principle; and U = "UELMA principle".

	Principle	*AustLII 1995*	*FALM 2001*	*Hague 2008*	*PROrg 2010*	*UELMA 2011*
	funded secondary materials					
	State obligations					
3	To ensure free access			GP 1		U 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/anonymise cases (where privacy laws/practices require)			GP 11	P 9	
10	To adopt neutral citation	A 2		GP 12	P 6	
1	To preserve	A 6		GP 7	P 5	U s7(a),

	Principle	*AustLII 1995*	*FALM 2001*	*Hague 2008*	*PROrg 2010*	*UELMA 2011*
1	historical materials					(b)(2),(3)
12	To provide authoritative online versions of laws	A 2		GP 4	P 4	U ss5, 6
13	To ensure integrity of online version of laws	A 3		GP 4	P 4	U s7(b)(1)
14	To assist republication of authoritative versions	A 2		GP 5	P 9	^^
15	To assist republication with integrity preserved	A 1		GP 5	P 9	^^
16	To remove obstacles to admissibility of republications	A 2		GP 6		U s6(a)
17	To use open formats and provide metadata	A 1,3		GP 8, 9	P 7	U s9
	Desirable State practices					
1	Cross-			^^^		U s6(b)

	Principle	*AustLII 1995*	*FALM 2001*	*Hague 2008*	*PROrg 2010*	*UELMA 2011*
8	jurisdictional reciprocity of recognition					
19	To include any knowledge-based systems			GP 10		
20	To provide translations, and allow reproduction			GP 13, 14		
21	To develop multi-lingual access			GP 15		
22	Funding support for free access providers		F 9	GP 17	P 10	
	Obligations of providers of free access to law					
23	To provide access free of charge to all end-users		F 2	GP 1		
24	To provide non-profit access		F 2			
25	To provide anonymous access		F 6			
26	To respect local privacy			GP 11	^	

	Principle	*AustLII 1995*	*FALM 2001*	*Hague 2008*	*PROrg 2010*	*UELMA 2011*
	laws					
27	To not impede others from obtaining materials from official sources		F 10			
	Desirable practices of providers					
28	Local initiatives should have primacy		F 7			
29	Networking of materials is desirable		F 7	GP 16		
30	International (or inter-jurisdictional) cooperation (technology, standards etc.)		F 8	GP 18		U s9

*Section 8 refers “reasonably available for use by the public”, not “free access”.
^ As discussed below, Public Resources.org has a separate principle requiring no impediments to bulk downloading, which is consistent with US policies on privacy in case law, whereas The Hague Guiding Principles reflects other countries’ acceptance that robot exclusions can be used to support national policies on privacy in case law.
^^ UELMA may have this result, depending on the method of authentication used.
^^^ This is a main objective of The Hague Conference, but was surprisingly not included in the Gps.

3.1. THE MEANING OF FREE ACCESS FROM THE PERSPECTIVE OF STATE OBLIGATIONS

Principles 3-18 above, which we regard as the essential elements of the obligations of the State in relation to free access to legal information, can be summarised as follows:

> 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 should 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 take the role of providing free access to these materials.

We propose that this is what "free access to legal information" now means in relation to State obligations. The principles set out in 19-22 above add desirable elements, but the absence of any of them does not impede the achievement of any of the other principles, and would not usually impede its effectiveness within the county concerned. Principle 19, "cross-jurisdictional reciprocity of recognition", could be a powerful "viral" element encouraging States to adopt online authoritative and authentic primary materials, but is not essential to achievement of free access. We accept that others may have different views on some of these elements being essential.

It is important to note that none of the previous sets of principles required the State to be the provider of free access legal information, they are all neutral as to whether the State assumes the role of a publisher to end-users. However, an innovation of The Hague Guiding Principles is that there is State obligation to *ensure* that free access to primary legal materials does exist, with the implication that if it does not, then the State will need to fulfil the obligation itself. In some countries, State provision may be necessary, and such provision is clearly valuable provided it is not accompanied by assertions of State monopolies over the right of republication. The "right to republish", which is the key to the AustLII, FALM and Law.Gov sets of principles, can be seen as complementary to, but not replacing, this obligation of the State to ensure that its citizens have access to primary legal information. The Hague Guiding Principles give this obligation first priority, but other sets of principles have different priorities. This approach taken in these principles recognises both that (a) in some countries courts and legislatures do not provide certain categories of free access legal information themselves, but rely upon other providers such as LIIs to do so (and often assist them financially to carry out this task), and (b) that in some countries it may be unrealistic to expect any party other than the State to provide free access to legal information.

3.2. The meaning of free access from the perspective of its providers

If we take principles 23-27 above as a definition of what it means to provide free access to legal information, which is what the *Declaration on Free Access to Law* suggests (other than the explicit reference to privacy laws), then "provider obligations" can be summarised as follows:

> *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.

There are justifications for arguing that this is still what "free access to legal information" means in relation to the obligations of those who should be described as "free access to law providers",[28] but each element requires some consideration and changes may be needed.

The reference to "to all legal materials it provides" comes from principle 1, and its purpose is to exclude providers who provide only a small proportion of what they publish for free access, while retaining most of the material for paid access. This also excludes publishers who claim to charge only for "value-added" materials while providing the rest for free. The problem is that there is no way to define the boundary where "value-adding" starts, as is clear from the differences between what is available for free access now, and what was available in 1995. A "value-added" exception involves an inherent conflict of interest, with the provider having an incentive to hold materials back from free access, and free access always being second-rate access. So, in our view, being a free access provider is an "all or nothing" proposition: a free access provider does not also sell legal information.

The "non-profit" and "anonymity" elements of the definition do identify aspects of the provision of legal information which are desirable, but whether they should be regarded as necessary is a more difficult question.

[28] This is not exactly the same as a debates within the Free Access to Law Movement about who should be admitted as members of FALM, because FALM includes various research and development institutes who are not necessarily themselves providers of free access legal information, and are not necessarily non-profit bodies, and so FALM membership is wider than this definition. It is also narrower because the Declaration also refers to the publication of legal information "originating from more than one public body". That is only a rationing mechanism for membership of FALM, not a principle attempting to describe free access, and so we have omitted it from the list of principles.

It is possible to take the view that the "non-profit" element in the definition[29] is essential, on the basis that there is an inherent tension in an organisation with a profit maximisation objective simultaneously pursuing the objective of maximising the quality and quantity of the legal information it provides. There could be an incentive to maximise the advertising, surveillance or other revenue-generating aspects of the service on which the profit generation depends. But that is not necessarily so, and there are instances of for-profit organisations whose provision of free-access information is difficult to distinguish from a LII that carries out similar contract-funded development of databases for governments. One possible approach is to consider whether there are factors which mean that the provider has conflicts of interest which detract from making the information freely available in the best way which is reasonably achievable, such as where the method of provision is dictated by maximising support advertising or "selling consumers as the product". Where a non-profit data source such as a Court or legislature has to approve the way in which the information is provided, these conflicts are very unlikely to arise. This is not a tidy distinction, but may be workable.

In similar fashion, it is arguable that to also require anonymous access is counter-productive, since all non-profit organisations require revenue generation for sustainability, and many revenue models require some knowledge of user behaviour. It could be argued that adherence to data privacy laws concerning monitoring of user behaviour should be sufficient. Anonymous access would then become a desirable objective, not a necessary one. Alternatively, we could take an approach similar to the one suggested above: does the provider have conflicts of interest which mean that provision of free access is not the principal objective, with user surveillance a non-dominant means to that end. Where a provider is a non-profit body, it may be easier to

[29] Noting, as in the previous footnote, that this only refers to the actual provider of the legal information, and does not refer to consultancy, technical or other organisations that may be involved in the facilitating free access to legal information.

satisfy this, but this would not be so if a government provider wanted to know which legal resources identified users were accessing. Targeting advertisements is one thing, but identifying potential dissidents is at the other end of the spectrum. Again, this is not a tidy distinction, but some distinction is still necessary.

Principles 28-30 are more oriented toward encouraging free access to legal information to become more effective internationally, rather than clarifying what it means within a particular jurisdiction, and so (similarly to our approach to "State obligations" above) we have treated them as desirable rather than essential.

It is worth stressing here that any of these conditions, requirements or definitions of the provision of free access are not criticisms of anyone who provides access under any other conditions, including completely commercial access to legal information. They also only apply to "legal materials" (primary materials and other "public legal information"). It is only an attempt to clarify which aspects of the spectrum of provision of legal information can reasonably be called "free access", so that this expression retains the element of "free speech" and not only "free beer", and distinguishes free access from commercial legal publishing.

The complexities discussed above would result in a more nuanced definition that the one which is derived primarily from the *Declaration on Free Access to Law*. One possible version is:

> 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. Provision of anonymous access is desirable. 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. Providers should adhere to relevant privacy laws, and should not impede any other republisher from obtaining access to the sources of the materials.

In the absence of a more elegant formulation, this is the definition we propose.

4. Are any other principles essential for free access to legal information?

There are some potential additional principles which deserve more detailed discussion to assess whether they should be considered an essential aspect of free access to legal information: (i) Is removal of copyright and database rights necessary?; (ii) Must "downstream" authority and integrity be further guaranteed?; (iii) Is government use of technical blocks on republication a problem?; (iv) Must free access providers also be repositories?; (v) Must "open content" be achieved?

4.1. Is removal of copyright and database rights necessary?

Are copyright or database rights in case law or legislation a serious impediment to free access to legal information, so that their removal should be one of the principles on which free access is based? Globally, copyright in legislation or case law is rarely a problem in practice. Almost all countries exempt legislation and case law from copyright, as the Berne Convention allows. A small rump of "Crown Copyright" countries (UK, Australia, Myanmar, etc.) are theoretical exceptions, but in practice none use this as a bar. In some countries translations on government sites are also exempt, as are official reports such as law reform

reports (see Greenleaf and Bond, 2011). In AustLII's experience in developing databases from many countries for AsianLII, CommonLII and WorldLII, no country has raised copyright as an impediment to republication of legislation or case law databases. As a general proposition, law worldwide supports republication of government sources. We consider that this "passive cooperation" allowed by most copyright laws enables LIIs to republish *as of right*, without the need to request permission (a licence). AustLII acts accordingly in building databases from many countries on the portals it operates, although it also requests active cooperation in many instances in order to improve efficiency of provision of data.

However, in the USA, copyright in some State legislation, and in the reports of decisions of some State courts, has resulted in republication being prevented in some cases. There are calls for abolition of this copyright[30]. Assertions of copyright in primary legal materials are opposed by the Law.Gov principles (P 2). If there was a universal practice of courts and governments to always allow republication (and not just a very common practice), then perhaps it would not be important to see removal of copyright from case law and legislation as an essential requirement of free access to law. This was the approach taken by AustLII in 1995, and copyright issues have not been a problem in Australia since then in relation to legislation and case law. However, there are problems that continue to be experienced in the USA (and possibly in other jurisdictions) in relation to cases and legislation. There are also unresolved issues in all jurisdictions concerning restrictions on free access republication of technical standards which are mandated by legislation, but are blocked from free access by copyright held by private parties.[31]

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[30] See for example Ed Walters "Tear down this (pay) wall: The end of private copyright in public statutes". VoxPopuLII blog, 15 July 2011.

[31] For example, see the successful settlement of Public.Resource.Org's suit against Sheet Metal and Air Conditioning Contractors' National Association (SMACCNA), regarding SMACCNA's copyright in four standards that have been incorporated by reference into the U.S. Code of

Therefore, it seems desirable that, as in the Law.Gov principles, removal of copyright should be included as a separate and essential principle. It is important to note here, that in relation to case law, privacy considerations are separate from copyright considerations, and may (in some jurisdictions) result in some restrictions on republication of case law.

The database right (EU Directive and its implementation) has been raised by one European body as a second objection, along the lines that even if individual cases are not protected by copyright, their collection into a database is protected. But governments are not "beneficiaries" of the sui generis right (A 11), so official databases are not protected. It would only be if there was some sufficient originality in the selection of cases that protection might arise. European case law is ambiguous on this question,[32] but indicates that there is no such protection (Sappa, 2011). The database right is probably a "straw man", but it is not necessary to establish that for the purposes of this article. As a practical matter, is any EU member state really going to say, in the face of the PSI Directive, "our Acts are not copyright, but we will use the database right to create an effective monopoly in their supply?" However for the avoidance of doubt, and because we have come across one European organisation raising database protection as an argument against republication, the principle should also state that there should be no database rights in primary legal materials.

We support the removal of copyright (and database rights, if necessary) in cases and legislation or other primary legal materials[33] and agree with the Gov.org approach that abolition of such rights (or claims of such rights) should

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Federal Regulations and some state statutes and regulations ; see <http://legalinformatics.wordpress.com/2013/07/10/settlement-in-public-resource-org-suit-regarding-copyright-in-standards-incorporated-into-regulations/>.

[32] Some cases deal with legal databases but not with any database rights that governments may have: Apis-Hristovich EOOD v Lakorda AD, Case C-545/07, Judgment of the Court (Fourth Chamber) of 5 March 2009, European Court reports 2009 Page I-01627.

[33] See Greenleaf and Bond, 2011, Part 4.2. "Abolish Copyright in Legal and Related Information".

be included as one of the principles of free access to legal information.

4.2. MUST "DOWNSTREAM" AUTHORITY AND INTEGRITY BE FURTHER GUARANTEED?

As the UELMA Commentary says, UELMA "supports governments fulfilling their obligations to provide trustworthy legal information"[34], but it does nothing directly to assist republishers (including free access LIIs or repositories) to provide trustworthy legal information. Does UELMA create an artificial (in the sense of unnecessary) advantage for an official publisher over a republisher? If a free access republisher obtains from their official source some legal materials which are regarded as official (authoritative), the authenticity (integrity) of which is guaranteed by some technical authentication method, this could make the republisher better able to convince its users that they now "provide trustworthy legal information". After all, the end-users of the republisher's copy will be able to use the authentication method to satisfy themselves that they hold an official copy with its integrity preserved.

However, this benefit to republishers depends on whether the definition of the material being "official" requires that it be downloaded from an official website, excluding it being sourced from some other publisher. Similarly, an authentication method can be defined in such a way that it is independent of between whose hands the legal material passes (e.g. a digital signature), or it can be defined in a way that is dependent on a relationship between the official source and the end-user, with no room for intermediaries.

Worse, if any dispute arises, the copy provided by the republisher might not have the benefit of the presumption in favour of authenticity provided by UELMA s6 (depending on the method of authentication specified by the Court), which indirectly also guarantees that courts and tribunals will regard the legal materials as admissible. Without the benefit of this presumption, the

[34] UELMA Prefatory Note and Comments, 2011: 10.

republisher is at a considerable disadvantage in attracting users, compared with the official publisher.

This seems to be an artificial and unnecessary disadvantage, one that can be removed as easily as it was created. Printed official statutes or authorised law reports do not lose either their authority or their integrity, or their admissibility, because they are purchased from a second-hand bookstore. Similarly, it should be possible to preserve authority, integrity and admissibility when electronic legal information passes between several hands. We consider that it is essential for free access principles to achieve the preservation of "downstream" authority and integrity, under appropriate safeguards, when electronic legal materials pass through the hands of non-official republishers (free access or commercial) before reaching end users or being tendered or cited in courts or tribunals. UELMA alone, for all its virtues, is potentially anti-competitive because it fails to provide this. However, as previously discussed there is no need for additional principles to deal with this, because The Hague Guiding Principles 5 and 6 already do so, on the interpretation we have given them. But UELMA does not in itself give clear enough support free access to legal information.

4.3. Is government use of technical blocks on republication a problem?

Do government sources use technical methods to prevent the access needed for republication by LIIs, to an extent that requires a separate principle? Such blocking can be both intentional and inadvertent. Inadvertent blocking occurs where the data is only accessible through form-based search interfaces, which often defeat comprehensive copying by automated web spiders/robots (even though no robot exclusion is used, so there is no obvious intentional blocking). Persistence and investment in staff time to develop special algorithms for data extraction can often overcome such impediments. The Hague Guiding Principles (GP 3) already say that States should "remove any impediments to

such reproduction and re-use", and so already covers this situation in general terms. We therefore don't see a need for a separate "bulk downloading" principle as proposed by the Law.gov principles, but an elaboration of GP3 to expressly note the need for bulk downloading facilities is desirable.

Intentional blocking is where, at the root of a server, a "No robots" file (robots.txt) is used in order to implement the Robot Exclusion Protocol[35]. LIIs and most search engines observe this protocol, and do not copy for republication the content of sites where it is employed to exclude them. In practice robot exclusion is very rarely used by public sources. In AustLII's experience over the last decade, working in many countries around the world, we have not encountered an instance of it being used in relation to legislative materials. The exception is that robot exclusion is sometimes used to block systematic copying of non-anonymised case law (for privacy reasons), although the practice varies a great deal between countries. Practices of anonymisation or redaction make the use of robot exclusion for privacy protection unnecessary, but these also vary a great deal between countries. In Australia, all courts and tribunals, and AustLII, use robot exclusion in relation to case law. Most other LIIs do likewise. However, in Africa, SAFLII and local courts do not (in the interest of maximum dissemination of case law), and the Philippines has a similar approach. In the USA most case law is identified (non-anonymised) but we are not aware of robot exclusion being used. In Europe (except the UK), case law is generally anonymised, and so robot exclusion is not used as it is not needed. Where a robot exclusion is used, active cooperation from the source must be obtained, either by direct provision of data, or amendment of the robots.txt file to allow copying by the LII or other republisher. Given that privacy laws and practices in relation to case law vary a great deal between countries, for justifiable policy reasons in the local context, we support the approach in The Hague Guiding Principles (GP 12) that leaves this question to local practice.

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[35] The Web Robots Pages <http://www.robotstxt.org/ >.

The conclusion from AustLII's experience is that technical impediments very rarely prevent the exercise of rights to copy and republish. Republication of cases, legislation and government reports on the basis of "passive cooperation" is therefore usually available as a default option. Where volumes of data are large and/or updates are frequent, it can be better to obtain active cooperation, if this is possible. However, in some cases courts that publish identified cases (e.g. in Australia) do use technical impediments such as robot exclusion in order to ensure that privacy policies are observed, and require republishers to obtain data through active cooperation from the court (such as being put on a mailing list for decisions).

However, active cooperation is not always possible, and if robot exclusion is used in relation to content such as official sources of legislation, its use is not justifiable. The Law.Gov principles include that "[p]rimary legal materials should be made available using bulk access mechanisms so they may be downloaded by anyone" (P 3). This could be seen as covered by Hague Guiding Principle 3, requiring the State to facilitate republication, but on the other hand that could be regarded as too imprecise an obligation. To make this principle of global application, we consider it needs modification to something like "States should make primary legal materials available using bulk download mechanisms, except where contrary to local privacy laws and policies". We support the inclusion of such a principle, but possibly not as a separate principle. It could rather be an elaboration of principles 4 and 5 requiring States to remove impediments to republication and to provide materials for republication, to clarify that they should do so by the most effective means reasonably achievable.

4.4. MUST FREE ACCESS PROVIDERS ALSO BE REPOSITORIES?

All of the existing sets of principles, including The Hague Guiding Principles, refer to government organisations or the State having obligations to remove obstacles to republication of legal materials, or to actively facilitate such

republication. They do not refer to the republishers also having such obligations, whether they are commercial republishers or free access republishers like LIIs. This is much the same as asking whether a republisher should be a "repository" of legal information, in the sense of a store-house from which other republishers are free to source the content they wish to publish.

We consider that the current position is correct, and that republishers, whether commercial or free-access, should have no obligation to be content repositories for others. Some republishers, such as Public Resources.org, explicitly aim to be such repositories, in that case with a Law.Gov subsidiary facility with the subtitle "A Proposed Distributed Repository of All Primary Legal Materials of the United States". This is entirely admirable, where an organisation can develop a sustainable model of funding its operations on this basis. Law.Gov provides primary materials largely as it obtains them from the original government sources, without providing significant value-adding.

However, where a free access republisher has a funding model which is substantially based on donations because of the perceived benefits to users of the value-adding that it provides to the "raw" primary materials (including for example, restructuring of data, internal or external hypertext links, and addition of parallel citations to those included in the text), then if it allows other republishers to use it as a repository it will undercut its own business model and endanger its own sustainability. The provision of repository facilities will also add to its costs. There are also potential legal liabilities that can arise from knowingly supplying data to potential republishers. Similar considerations would apply *a fortiori* to a commercial republisher of legal information dependent on end-user payment for value-added data. Of course, a LII could choose to also be a repository and allow any of its data to be copied in bulk and republished (LawPhil does so), or could allow this for some of its data, but that is a matter of choice.

In our view, the important principle here is that stated in FALM principle 10, that republishers (including LIIs) must not impede others from obtaining legal materials from the official source of those materials. This needs to be read in conjunction with the well-accepted principle that official sources of legal materials should maintain copies of their historical legal materials (AustLII P 6; Hague GP 7; Law.Gov P 5; UELMA s7). Therefore, in our view, a LII should not put itself in the position of being the sole holder of a set of decisions provided to it by a Court or Tribunal because a court or tribunal has failed to maintain an archive of decisions it has previously provided to the LII. For example, AustLII refuses to be a supplier to other republishers, even at the request of courts or tribunals, insisting that they obtain their data from the official source (and enforces this by robot exclusion and other means). If a Court or Tribunal has failed to keep a copy of the decisions it has previous supplied to AustLII, then AustLII will supply those decisions back to it so that it can provide them in response to future requests. This does not necessarily apply to decisions that AustLII has digitised from paper copies.

Our conclusion is therefore that there should be no obligation on free access republishers to be repositories for other republishers. It is a question of choice for any republisher whether it also wishes to act as a repository. The Law.gov system of Publicresources.org is perhaps the best example of a republisher-repository.

The European Union's EUR-Lex system is not a republisher, but an original and official publisher of European Union law. However, it is one of the most extensive and important examples of an explicit repository of legal information in its policies authorising republication,[36] and in the facilities it provides to assist republication.[37]

[36] See the Copyright Notice on the EUR-Lex "Important legal notice" page <http://new.eur-lex.europa.eu/content/legal-notice/legal-notice.html>.
[37] See EUR-Lex Webservices page <http://new.eur-lex.europa.eu/content/help/web-service/web-

4.5. MUST "OPEN CONTENT" OR "OPEN ACCESS" BE ACHIEVED BY FREE ACCESS PROVIDERS?

There is some inconsistency in the ways in which "open" and "free" are applied to the provision of information. It is beyond the scope of this article to explore the issues involved here, beyond stating how our usage fits (in our view) reasonably conventional usage:

(i) "Open content" refers to content which is made accessible with no copyright restrictions on its re-use, or at least less restrictions than copyright law provides. Material in which there is no copyright is open content. There are numerous forms of licences (including all Creative Commons licences) which when applied voluntarily to works by copyright owners result in open content, but may vary in the extent to which they eliminate copyright-based restrictions (e.g. some Creative Commons licences restrict derivative works, some restrict commercial re-publication). From an "open access" (OA) perspective, Suber (2013) refers to open content as "libre OA".[38]

(ii) "Free access" (used in a simple sense, not the more complex usage in this article), means online access to the content in question, free of any access charges. It implies nothing about copyright restrictions on re-use. Suber (2013) refers to as "gratis OA" and says, it "removes price barriers alone".

In most countries, except the few that still have Crown Copyright, primary legal materials are "open content" in the sense that they have no copyright protection, and are therefore in the public domain in the strongest sense. However, as the experience of Australia, the UK, and some other Crown

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service-general.html#top>; see also "APIs for EU legislation" on the Legal Informatics Blog at <http://legalinformatics.wordpress.com/2013/08/10/apis-for-eu-legislation/>.

[38] Suber (2013) says "libre OA removes price barriers and at least some permission barriers as well"; "Libre OA is free of charge and expressly permits uses beyond fair use".

Copyright jurisdictions show, there can be effective free access to legal information even when these primary materials are not “open content”. So there is a clear distinction between “free access” and “open content”. As stated above, we favour the abolition of copyright in primary legal materials.

Secondary materials such as legal scholarship – law journal articles, conference papers etc – are different. The Creative Commons movement has created an exceptionally valuable mechanism whereby authors of such scholarship (and of a myriad other forms of creative works) can if they choose to allow their otherwise copyright works to be republished by others, through use of any of the variety of CC licences. Some law journals now make their whole journals open content by insisting that authors use a creative commons or similar licence when publishing there. However the bulk of legal scholarship available on the web for free access is not subject to any such condition of publication. The two largest sources of free access scholarship (as far as we are aware), SSRN’s Legal Scholarship Network (LSN) and AustLII’s Legal Scholarship Library[39] are free access but not (for most items) open content.

All open content scholarship is of necessity by its licence available to be republished for free access. But all free access content is not necessarily open content. “Open content” is not some higher species, it is just different from legal scholarship which has been made available for free access. The existing FALM principles include that “publicly funded secondary materials should be free access” (F 5). This is consistent, for example, with requirements by funding bodies, and demands by scholars, that publicly funded research outputs should be put into free access repositories, or published in free access journals, within a period of time (say, six months) after any other publication[40]. We

[39] AustLII’s Legal Scholarship Library <http://www.austlii.edu.au/au/journals/> contains over 50,000 searchable items, from more than 80 Australasian law journals.

[40] For example, the Australian Research Council (ARC) Open Access Policy now states: “The ARC has introduced a new open access policy for ARC funded research which takes effect from 1 January 2013 … the ARC requires that any publications arising from an ARC supported

support that principle but do not consider there is any need for any additional principle requiring such materials to be open content.

In relation to "Open Access" (OA, as in the name of this Journal), it all depends on the version to which you refer. "Free access" (in both the weak sense and in the strong sense used in this article) requires ""gratis OA". It does not require, but it is satisfied by, "libre OA".

5. Assessing national practice against these principles: Australian example

One function of a set of principles for free access to legal information is to test national practice against them. For purposes of example, we have done so here very briefly in relation to Australia, as that is the jurisdiction (more accurately, 9 jurisdictions) with which we are most familiar. The Table below refers to AustLII where it is the only free access republisher, otherwise it refers to "republishers". The numbering of principles used in this Table is the same 1-30 used in the previous table. In the third column, a tick indicates substantial compliance with a principle, a cross the opposite, and "1/2" indicates part-compliance.

	Principle	***Australian practice***	
1	All primary legal materials should be free access	Has been achieved with only minor exceptions	√
2	Publicly-funded secondary materials to be free access	Over 80 law journals are available for free access (over 50,000 items) via AustLII; Australian Research	1/2

research project must be deposited into an open access institutional repository within a twelve (12) month period from the date of publication… The policy will be incorporated into all new Funding Rules and Agreements released after 1 January 2013. <http://www.arc.gov.au/applicants/open_access.htm> .

	Principle	*Australian practice*	
		Council advocates research output availability via public repositories, but does not yet require it.	
	State obligations		
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 republishers to provide free access	√
4	State removing impediments to / assisting republication	Largely achieved, except that some court decisions are not available to republishers 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 republishers by email; legislation offices provide data to republishers by a variety of automated means. All legislation offices in Australia provide a variety of bulk download mechanisms for republishers, at weekly or longer periods.[41]	√
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 republishers weekly. All courts/tribunals provide the final versions of judgments to	1/2

[41] For précised details for every form of legislation, see AustLII's "Update Status for Legislation" page at <http://www.austlii.edu.au/cgi-bin/legstatus.cgi>.

	Principle	*Australian practice*	
		republishers, 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.	
7	Abolition of copyright in statutes and cases	Crown Copyright in both[42]; but refusal to allow republication by law services is now effectively unknown.	X
8	No fees for provision to republishers	No official source charges free access republishers, but some may charge commercial publishers.	√
9	State to redact/ anonymise cases	All courts and tribunals in Australia accept the responsibility to anonymise cases provided to republishers where law or court/tribunal practice require this (not required in most cases)	√
10	State to adopt neutral citation	All Australian courts and tribunals have adopted neutral citations, applied by them when decisions are made, since 1998. This also applies where "authorised" report series exist.	√
11	State to preserve historical materials	5/9 Australian jurisdictions are digitising legislation back to inception of jurisdiction; AustLII is doing so where official sources do not; AustLII is digitising all historical reported cases.	√
12	State to provide	The majority of Australian	√

[42] For a critical discussion, see Greenleaf and Bond, 2011.

	Principle	*Australian practice*	
	authoritative online versions of laws	jurisdictions now provide that the online version of legislation is the authorised/official version, but they do so in very different ways[43].	
13	State to ensure integrity of online version of laws	No Australian official sources of legal materials yet provide those materials with any technical authentication mechanism. In practice, reliable systems of provision have created assumptions of integrity.	X
14	State to assist republication of authoritative versions	Not yet done, either for legislation where there is an authoritative online version, nor for court decisions in authorised reports series.	X
15	State to assist republication of versions with integrity	No courts, tribunals or legislative offices yet provide material that is digitally signed or otherwise uses technical means to guarantee integrity; Integrity is provided by well-developed procedures, and is assumed by AustLII users including courts and tribunals.	1/2
16	State to remove obstacles to admissibility of republications	In most instances, courts and tribunals accept copies of decisions or legislation sourced from reputable publishers, including AustLII. A minority of courts will not accept copies of decisions except those published in "authorised" reports.	1/2
17	State to use open formats and provide	Some legislation offices use open DTDs. Some courts and tribunals	1/2

[43] For this and other aspects of online Australian legislation, see Rubacki, 2013.

	Principle	*Australian practice*	
	metadata	provide metadata such as catchwords and headnotes.	
18	Cross jurisdictional reciprocal recognition	No legislation or court practices as yet.	X
19	State to provide free access to knowledge-based systems	Not done; no significant knowledge-based systems known in current government use. (May be some back-end systems not publicly available.)	X
20	State to provide translations, and allow reproduction	No translations done, except in some specialist areas like family law; low priority in a largely monolingual and English-speaking county.	X
21	State to develop multi-lingual access	Not done, as above.	X
22	Support for providers encouraged	AustLII receives financial support from numerous Courts, Tribunals and Regulators[44], and from numerous Agencies.[45]	√
	Provider obligations		
23	Access should be free of charge	All Australian primary legal materials are available free of charge, both through AustLII, and often through official sources (all legislation, some cases). No court, tribunal or legislation office, or AustLII, charges for access, including for "value added" services.	√
24	Access should be anonymous /	Neither government or court/tribunal providers, nor AustLII, require users	√

[44] Court, Tribunal and Regulator funding is listed at <http://www.austlii.edu.au/cgi-bin/s_type.cgi#cttr>.

[45] Agency funding is listed at <http://www.austlii.edu.au/cgi-bin/s_type.cgi#gov>.

	Principle	*Australian practice*	
	surveillance free	to log in, or otherwise identify users beyond IP addresses; one exception – ComLaw's "notify me when" service.	
25	Access should be non-profit	All Australian primary legal materials are available from non-profit sources: AustLII, Jade (some cases), and official sources.	√
26	Respect for local privacy laws	All courts and tribunals block search engines from making cases searchable. AustLII does likewise.	√
27	Republishers must not impede others from obtaining materials from source	AustLII does not accept a role as "sole publisher" for any official body. If a Court/Tribunal has not kept a back set of its own decisions previously provided, AustLII will re-supply these decisions to the Court/Tribunal.	√
28	Local initiatives have primacy	Australia is comprehensively served by local initiatives, except all commercial legal publishing is owned by multinationals.	√
29	Networking of materials encouraged	Australian legal materials are comprehensively networked, both among Australian jurisdictions, and internationally, via AustLII and AustLII-operated portals (CommonLII, WorldLII).	√
30	International (or inter-jurisdictional) cooperation	Little international cooperation on these matters as yet by government; AustLII is involved with Commonwealth Secretariat, Hague Conference and other international bodies.	X

It would not be meaningful to attempt to compute some “overall score”, as the items in this list are incommensurable. Australia obviously has a reasonably good record in relation to free access to law standards, its main weak spots being in relation to the methods of guaranteeing authority and integrity of republishers (“downstream” authority and integrity), in the provision of materials in translation (a reflection of an English-speaking and substantially monolingual country), and (in theory) its Crown Copyright doctrine. Other jurisdictions like Canada (and many others) would also have an equally good, but different, record. A full assessment of the extent to which a country’s practices satisfy the principles for free access to law would require a more detailed study than this short table, which is only for illustration.

6. Implementation of free access principles: What is to be done?

As movements for change often ask, “what is to be done”,[46] in this case to achieve free access to legal information? How can the objectives of a reformulated set of free access to legal information principles best be realised? In our view, valuable steps could be taken at the NGO, national and international levels.

6.1. FALM & OTHER NGOS: REVISION OF THE DECLARATION ON FREE ACCESS TO LAW

The Free Access to Law Movement needs to update the 2002 Declaration to incorporate relevant parts of the further thinking that has taken place over the last decade. Representatives of FALM members have a substantial involvement in those developments. In our view, consideration should be given by FALM to

[46] Most famously, Lenin, VI “What is to be done? Burning Questions of Our Movement” (pamphlet, 1902), “in which Lenin outlines the concept of the vanguard revolutionary party run according to the principles of democratic centralism” http://www.marxists.org/; also a sub-heading in Bruce (1995), though without the same answer.

amending the Declaration to include all of the 30+ free access principles on which there is now substantial international consensus, particularly in relation to the obligations of the State. We have also suggested some additional changes to the definition of a "free access provider".

There are two main approaches to such a revision which are possible:

(i) The Declaration could be re-written, incorporating all the 30+ Principles (or summaries of them) in the course of the rewriting, with additional consideration to the changes we have advocated.

(ii) Since there is nothing in the Declaration which is inconsistent with The Hague Guiding Principles, or with the additional principles proposed by Law.Org, the Declaration could (at least initially) simply be amended by a statement endorsing both of those sets of Principles, either (or both) by annexing them, or by referring to their titles and their web addresses. The additional matters could be left for later consideration, because they would be difficult to incorporate without substantial rewriting of the Declaration.

Approach (i) has the advantage that one document stating all principles supported by FALM will result, but the disadvantage that it will be more complex and time-consuming to negotiate a complete re-drafting of the Declaration. However, the current Declaration is a somewhat uneasy mix of principles of free access to legal information and conditions for membership of the Free Access to Law Movement, and it might be better to separate the two. If there was a separate declaration of principles, it could be based around two short definitions of the meaning of "free access" from the perspective of State obligations, and from the perspective of the role of a free access provider, with the detailed list of 30+ principles annexed but not obscuring a more concise statement, which would also be more likely to be adopted by others.

Approach (ii), while providing a less elegant Declaration, is simpler to

implement, and also has the advantage of specifically aligning the Declaration with two of the other important statements of principles, The Hague Guiding Principles and the Law.Gov principle (although not so easily the UELMA principle of reciprocal recognition). Other NGOs, such as Law.gov, could also consider endorsing a wider set of principles. It might be the best place to start.

The annual meeting of members of the Free Access to Law Movement at Cornell University in October 2013 decided to take the second option, and resolved to amend the Declaration by addition of the following:

> "The parties to this Declaration also support the principles stated in the "Guiding Principles" on State obligations concerning free access to legal information developed by an expert group convened by the Hague Conference on Private International Law in October 2008, and the "Law.Gov principles" for "the dissemination of primary legal materials in the United States" developed in 2010 by Public Resources.org".

6.2. National implementations of principles

At the national level, there are a number of desirable steps that can be taken, including the following:

(i) Official sources of legal information in a country need to adopt, endorse and implement such of the principles as are relevant to them. In Australia, a number of leading courts and tribunals have joined with AustLII in a three year project which includes such aims.[47]

(ii) Some of the principles may need to be implemented by legislation.

[47] An Australian Research Council Linkage grant from July 2013 for three years, in which the High Court, Family Court, Federal Circuit Court and Victorian Civil and Administrative Tribunal (VCAT) are partners.

This could (depending on the country) including legislation such as UELMA dealing with the authority, integrity and retention of official sources; legislation providing for "downstream authentication"; legislation abolishing copyright in legislation and case reports or expanding the scope of legal materials not protected by copyright; or legislation repealing or amending provisions concerning "authorised reports".

(iii) In multi-jurisdiction countries, such as Canada, the USA, Australia, India and Germany, a UELMA-like mechanism for inter-jurisdictional mutual recognition of online primary materials is also desirable.

(iv) There needs to be public advocacy by local LIIs and other NGOs, in support of the first two objectives. An initial step in such public advocacy could be the preparation of a report on the extent of the country's implementation of the 30+ free access principles, in rather more detail than the brief Australian example given here.

6.3. Toward a new international norm

The benefits of international reciprocity are one justification for mutual free access to legal information. This is stressed in both the 2002 FALM principles and the 2008 Hague Guiding Principles. Such considerations help justify the development of free access to legal information as a new norm of international conduct.

At the international level, there are at least two forms of implementation that can be taken:

(i) The Hague Conference on Private International Law is continuing its efforts to develop a Convention based on the 2008 Guiding Principles. Civil society needs to continue to be engaged in this

process and encourage its completion, and to encourage their national State representatives to support the process. If the process is successfully completed, then there will be a follow-on need to encourage countries to accede to the resulting Convention.

(ii) It usually takes a long while for a Hague Convention to influence a large number of countries. It would therefore be desirable to also pursue the adoption of these principles in a number of other relevant international *fora*. For example, it would be value to seek a Declaration by the UN General Assembly which encourages member States of the UN to adopt and implement the principles (or a simplified version of them such as suggested earlier). Similar declarations can be sought from regional organisations, such as the European Parliament, or the Commonwealth Heads of Government Meeting (CHOGM). The trade benefits of transparency of legal systems should also not be overlooked, and such increased transparency has been a condition of WTO accession for some countries such as China, so perhaps there are also prospects for adoption by international trade organisations.

7. Conclusions: Substantial consensus, unfinished achievement

Over the last twenty years, the idea of free access to legal information has come a long way, but neither the idea nor the implementation are yet complete. Neither idea nor implementation are faltering as yet, and in fact seem to be reaching a larger and more receptive audience than ever before. The principles of free access to legal information are relevant to a far wider range of organisations than are currently involved in the free access to law movement, and overlap principles common to those held by legal repository providers, the creative commons and open scholarship movements, and the practices of many

official bodies. If a set of principles which encompass the goals of all of these overlapping groups can be developed, it may increase their common influence both nationally and internationally.

However, despite this successful evolution of the norm of free access to legal information, various forms of monopoly practices have not yet been removed as a matter of either policy or practice, and could still reverse the gains that have been made. There is a particular danger in future that the otherwise desirable practice of legal materials on government websites being given official/ authorised status, with copies being delivered in a way which provides integrity /authenticity, may be abused to prevent these characteristics also being delivered by republishers of legal information, without technical or policy justification.

As always, there is nothing inevitable about progress, it all depends on human agency and determination, and policies based on evidence and rational discussion. "Free access to legal information" is in part a continuous process of both expanding and strengthening the rule of law on the one hand, and countering new attempts at monopolisation on the other.

Annexures

Annexure 1 – AustLII's proposed obligations for public bodies (1995)

Extract from Greenleaf, G, Mowbray, A. King, G and van Dijk, P. (1995), *Public access to law via internet: the Australasian Legal Information Institute* Journal of Law & Information Science, Vol 6, Issue 1.

Primary materials - legislation and case law

Legislatures and courts can be argued to have only completed their work in formulating the law in the public interest, and in making it available to the public who must comply with it, when the output of their deliberations (legislation and decisions) meets the following five criteria:

(i) It should be in a *completed* form, including such additional information as is best provided by the source. The additional information should include catchwords nominated by the judge (as recommended by the AIJA: [Olsson, 1992]), and the consolidation of amending legislation by Parliamentary Counsel (as implemented in NSW, the Commonwealth and some other Australian jurisdictions). Other parties (such as publishers) should not have any role in assisting Courts "tidy up" their judgments prior to the official release, because of the risk of copyright claims being asserted by them.

(ii) It should be in an *authoritative form*, in the sense that includes citations and numbering such that it can be cited to any court in an acceptable way. This means that Courts should assign their own sequential numbering systems to cases decided (e.g. HC 95/43), and should number paragraphs so as to make the medium of reproduction irrelevant. Each publisher of case law would be free to use its own numbering system, but would probably need to develop a correlator to the Court's own numbering system.

The demand for such "vendor neutral citation systems" is very contentious in

the United States, where it has become one of the main weapons being used by opponents to West Publishing's de-facto monopoly on case law in some jurisdictions (see [Love, 1995]). [Perritt, 1994] recommends US development of “a national legal document citation system that is non proprietory and is as suited for electronic as paper formats”. *[…A discussion of US approaches to citations follows …]*

(iii) It should be provided in a *form facilitating dissemination*, which means that it should at least be available on disk in ASCII (and preferably a choice of other formats and delivery media if possible). Where official bodies have created a created this data in computerised form as a by-product of their normal work, it is in the public interest that it should be available in that form.

(iv) It should be provided on a *cost-recovery basis* equally to anyone who wishes to obtain it (including other government agencies and commercial publishers). Public policy should support maximising public access to the law. Its dissemination should not be regarded as a “profit centre” supporting other aspects of the operation of the judicial system.

(v) There should be *no restriction on the re-use of it* for any purpose including the creation of value-added products for resale. Public policy should support the maximum dissemination of the law, and in the forms to make it most understandable. The methods by which legal data is best disseminated are still unsettled and changing rapidly, and there are markets for the same source information with different features and at different prices. The fostering of maximum competition in the provision of different types of legal products seems to be the only way to meet the public interest.

The NSW Government's approach to the dissemination of legislation is a model implementation of all of these elements.

This policy agenda does not require any preferential treatment for organisations like AustLII that are publicly funded - though their could be arguments for that

- but instead promotes effective access to the sources of law by all who wish to create value-added legal products, whether on a commercial basis or a publicly-funded basis.

Annexure 2 – Declaration on Free Access to Law (2002)

This declaration was made by legal information institutes meeting in Montreal in 2002, as amended at meetings in Sydney (2003), Paris (2004) and Montreal (2007). It is available at <http://www.fatlm.org/declaration/>. The italics below have been added by the author, to emphasize the principles that may be inferred.

Declaration on Free Access to Law

Legal information institutes of the world, meeting in Montreal, declare that:

- Public legal information from all countries and international institutions is part of the common heritage of humanity. Maximising access to this information promotes justice and the rule of law;
- *Public legal information is digital common property* and *should be accessible to all on a non-profit basis and free of charge*;
- Organisations such as legal information institutes have *the right to publish public legal information* and the *government bodies that create or control that information should provide access to it so that it can be published by other parties*.

Public legal information means legal information produced by public bodies that have a duty to produce law and make it public. It includes primary sources of law, such as legislation, case law and treaties, as well as various secondary (interpretative) public sources, such as reports on preparatory work and law

reform, and resulting from boards of inquiry. It also includes legal documents created as a result of public funding.

Publicly funded secondary (interpretative) legal materials should be accessible for free but permission to republish is not always appropriate or possible. In particular free access to legal scholarship may be provided by legal scholarship repositories, legal information institutes or other means.

Legal information institutes:

- Publish via the internet public legal information originating from more than one public body;

- Provide *free and anonymous public access* to that information;

- *Do not impede others* from obtaining public legal information from its sources and publishing it; and

- Support the objectives set out in this Declaration.

All legal information institutes are *encouraged to participate in regional or global free access to law networks*.

Therefore, the legal information institutes agree:

- To promote and support free access to public legal information throughout the world, principally via the Internet;

- To recognise *the primary role of local initiatives* in free access publishing of their own national legal information;

- To cooperate in order to achieve these goals and, in particular, to assist organisations in developing countries to achieve these goals, *recognising the reciprocal advantages that all obtain from access to*

each other's law;

- *To help each other and to support, within their means, other organisations that share these goals* with respect to:
    - Promotion, to governments and other organisations, of public policy conducive to the accessibility of public legal information;
    - Technical assistance, advice and training;
    - Development of open technical standards;
    - Academic exchange of research results.
- To meet at least annually, and to invite other organisations who are legal information institutes to subscribe to this declaration and join those meetings, according to procedures to be established by the parties to this Declaration;
- To provide to the end users of public legal information clear information concerning any conditions of re-use of that information, where this is feasible.

Annexure 3 – Hague Conference "Guiding Principles" (2008)

Principles developed by the experts which met on 19-21 October 2008 at the invitation of the Permanent Bureau of The Hague Conference on Private International Law as part of its feasibility study on the "access to foreign law" project.

Guiding Principles to be Considered in Developing a Future Instrument

Free access

1. State Parties shall ensure that their legal materials, in particular legislation, court and administrative tribunal decisions and international agreements, are available for free access in an electronic form by any persons, including those in foreign jurisdictions.

2. State Parties are also encouraged to make available for free access relevant historical materials, including preparatory work and legislation that has been amended or repealed, as well as relevant explanatory materials.

Reproducing and re-use

3. State Parties are encouraged to permit and facilitate the reproduction and re-use of legal materials, as referred to in paragraphs 1 and 2, by other bodies, in particular for the purpose of securing free public access to the materials, and to remove any impediments to such reproduction and re-use.

Integrity and authoritativeness

4. State Parties are encouraged to make available authoritative versions of their legal materials provided in electronic form.

5. State Parties are encouraged to take all reasonable measures available to them to ensure that authoritative legal materials can be reproduced or re-used by other bodies with clear indications of their origins and integrity (authoritativeness).

6. State Parties are encouraged to remove obstacles to the admissibility of these materials in their courts.

Preservation

7. State Parties are encouraged to ensure long-term preservation and accessibility of their legal materials referred to in paragraphs 1 and 2 above.

Open formats, metadata and knowledge-based systems

8. State Parties are encouraged to make their legal materials available in open and re-usable formats and with such metadata as available.

9. States Parties are encouraged to cooperate in the development of common standards for metadata applicable to legal materials, particularly those intended to enable and encourage interchange.

10. Where State Parties provide knowledge-based systems assisting in the application or interpretation of their legal materials, they are encouraged to make such systems available for free public access, reproducing and re-use. *Protection of personal data*

11. Online publication of court and administrative tribunal decisions and related material should be in accordance with protection of personal data laws of the State of origin. Where names of parties to decisions need to be protected, the texts of such decisions and related material can be anonymized in order to make them available for free access.

Citations

12. State Parties are encouraged to adopt neutral methods of citation of their legal materials, including methods that are medium-neutral, provider-neutral and internationally consistent.

Translations

13. State Parties are encouraged, where possible, to provide translations of their legislation and other materials, in other languages.

14. Where State Parties do provide such translations, they are encouraged to allow them to be reproduced or re-used by other parties, particularly for free public access.

15. State Parties are encouraged to develop multi-lingual access capacities and to co-operate in the development of such capacities.

Support and co-operation

16. State Parties and re-publishers of their legal materials are encouraged to make those legal materials more accessible through various means of interoperability and networking.

17. State Parties are encouraged to assist in sustaining those organisations that fulfil the above objectives and to assist other State Parties in fulfilling their obligations.

18. State Parties are encouraged to co-operate in fulfilling these obligations.

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References

AALL - American Association of Law Libraries (2013), *Uniform Electronic Legal Material Act: Summary and Frequently Asked Questions*, American Association of Law Libraries. Available at: http://www.aallnet.org/Documents/Government-Relations/UELMA/UELMAFAQs.pdf (accessed 10th December, 2013).

Bintliff, B. (2011), T*he Uniform Electronic Legal Material Act Is Ready for Legislative Action*. *Vox PopuLII* Blog, 15 October 2011. Available at: http://blog.law.cornell.edu/voxpop/2011/10/15/the-uniform-electronic-legal-material-act-is-ready-for-legislative-action/ (accessed 10th December, 2013).

Bruce, T. (1995), *Legal information, open models and current practice*. Speech at Crown Copyright in Cyberspace Conference, Centre de recherche en droit public, University of Montreal, 12 May 1995. Available at: http://www.droit.umontreal.ca/english.html (accessed 10th December, 2013).

Greenleaf G, Mowbray A. and Lewis D. (1988), *Australasian Computerised Legal Information Handbook*, Butterworths, in “Legal information retrieval in Australia” (Chapter 4). Available at: http://www2.austlii.edu.au/cal/guides/retrieval/handbook/index-4.html (accessed 10th December, 2013).

Greenleaf, G, Mowbray, A. King, G and van Dijk, P. (1995) *Public access to*

law via internet: the Australasian Legal Information Institute. *Journal of Law & Information Science,* Vol 6, No. 1. Available at: http://www.austlii.edu.au/au/journals/JlLawInfoSci/1995/5.html (accessed 10th December, 2013).

Greenleaf, G and Bond C. (2011) *Reuse rights and Australia's unfinished PSI revolution.* Informatica e diritto, Vol. 1, No. 2, pp. 341-69, 2011 Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1951625. (accessed 10th December, 2013).

Greenleaf, G. (2011). Free access to legal information, LIIs, and the Free Access to Law Movement in Danner, R and Winterton, J. (eds), "International Handbook of Legal Information Management", IALL Ashgate. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1960867 (accessed 10th December, 2013).

Greenleaf, G. (2004), J*on Bing and the History of Computerised Legal Research - Some Missing Links,* in Torvund, O and Bygrave, L (eds) "Et Tilbakeblikk På Fremtiden (Looking Back At The Future)", Unipub, Oslo, pp. 61-75.

Martin, P. (2011), *Abandoning Law Reports for Official Digital Case Law,* Cornell Legal Studies Research Paper No. 85. Available at: http://scholarship.law.cornell.edu/clsops_papers/85/ (accessed 10th December, 2013).

Martin, P (2000), L*egal Information - A Strong Case for Free Content, An Illustration of How Difficult "Free" May Be to Define, Realize, and Sustain.* Speech at the Conference on Free Information Ecology. March 2000. Available at: http://www.law.cornell.edu/working-papers/open/martin/free.html (accessed 10th December, 2013).

Martin, P. (1995), *Pre-digital law: How prior information technologies have shaped access to and the nature of Law.* Speech at Crown Copyright in Cyberspace Conference, Centre de recherche en droit public, University of Montreal, 12 May 1995.

NCCUSL - National Conference Of Commissioners on Uniform State Laws (2011), *Uniform Electronic Legal Material Act With Prefatory Note And*

Comments, NCCUSL.

Perritt, H. (1994), *Public Information in the National Information Infrastructure*. Report to the Regulatory Information Service Center, General Services Administration, and to the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, Available at: http://books.google.com.au/books/about/Public_information_in_the_national_infor.html?id=u99ayDu94_4C&redir_esc=y (accessed 10th December, 2013).

Perritt, H. (1990), *Market Structures for Electronic Publishing and Electronic Contracting on a National Research and Education Network.* Speech at the Conference on Information Infrastructure for the 1990s. Kennedy School of Government, Harvard University, November, 1990.

Poulin, D. (2004), *Open access to law in developing countries,* First Monday, Vol. 9, No. 12. Available at: http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1193/1113. (accessed 10th December, 2013).

Rubacki, M. (2013), *Legislation online from Australian governments: Achievements and issues*. Prepared for AustLII Research Seminar, 7 May 2013. Available at: http://www.austlii.edu.au/austlii/seminars/2013/1.pdf (accessed 10th December, 2013).

Sappa, C. (2011), *Public sector databases - the contentions between sui generis protection and re-use*. Computer and Telecommunications Law Review, pp. 217- 223.

Suber, P. (2013), *Open Access Overview* (web page, updated). Available at: http://legacy.earlham.edu/~peters/fos/overview.htm (accessed 10th December, 2013).

Wisconsin Bar (1994), *Proposed Citation System for Wisconsin.* Report to Board of Bar Governors Technology Resource Committee. Available at: http://www.law.cornell.edu/papers/wiscite.overview.htm (accessed 10th December, 2013).