Mission Impossible? Perfecting Free Access to Case Law in England and Wales

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Extended Abstract

In November 2012, the former president of the Supreme Court of the United Kingdom, Lord Neuberger, delivered the first British and Irish Legal Information Institute (BAILII) annual lecture to a crowded auditorium deep inside Freshfield's offices on London's Fleet Street. Citing Lord Hewart CJ's famous maxim that "justice should not only be done, but should manifestly and undoubtedly be seen to be done"[2], Lord Neuberger held:

> Without judgement there would be no justice. And without Judgments there would be no justice, because decisions without reasons are certainly not justice: indeed, they are scarcely decisions at all. It is therefore *an absolute necessity that Judgments are readily accessible*. Such accessibility is part and parcel of what it means for us to ensure that justice is seen to be done…[3]

That free and ready access to the decisions of judges supports the rule of law is beyond argument.[4] However, it is interesting to note that until BAILII's inception in 2000, free and ready access to the decisions of judges was all but non-existent. Prior to the moment

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[1] Barrister (Inner Temple), LLM

[2] *R v Sussex, Ex parte McCarthy* [1924] 1 KB 256, 259

[3] Link to speech (my emphasis)

[4] See Bingham *The Rule of Law* pp 37-47

BAILII's servers went live, access to case law in any comprehensive form was confined to those who had amassed vast collections of printed volumes or had paid handsomely for a subscription database.

The Internet, and only the Internet, was capable of supplying the mechanism through which Lords Hewart and Neuberger's ideals of judicial transparency and accessibility could be realised. The economic, physical and temporal constraints of print publishing could never come close to delivering the levels of accessibility that lawyers, judges, academics and students now take for granted.

The fusion of new technology with the talent and dedication of the open law movement gave rise to the free access services we use everyday to analyse, share and evaluate the decisions of judges. BAILII, along with its sister LIIs around the world, have transformed the way we consume and share primary legal information: in 2012, BAILII reported that it received something in the order of 45,000 requests per day.[5] It is safe to assume that the average rate of daily requests is even higher in 2017.

Notwithstanding BAILII's rapid ascension in popularity, the mission to provide comprehensive free access to the constituents of the English common law is not yet complete.

This paper aims to shine the spotlight on the obstacles facing BAILII and the provision of free and comprehensive access to case law in the English jurisdiction generally. Five specific obstacles hampering the attainment of universal free access to case law in England and Wales are identified: (i) the antiquity of the English common law tradition and the scale of the legacy case law archive; (ii) the peculiarities of the laws of copyright applicable to judgments and collections of judgments; (iii) the complexity of the case law supply chain; (iv) the reluctance of the private sector to open source more of the content under their control; and (v) lack of resources to expand and develop open law platforms.

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[5] http://www.bailii.org/bailii/BAILII_in_a_Nutshell.pdf

What does perfect free access to case law look like?

The premise of this paper is that there are several factors operating in England and Wales that prevent the attainment of a perfect free case law system. The question that falls to be dealt with is: what does perfect free access to case law look like?

A recent paper[6] by Sarah Glassmeyer and Peter Smith tackled this question head on. In their view, the ideal open law system would, inter alia, be properly funded and staffed, provide access to primary and secondary materials and be open not only in respect of the re-use of documents, but also in terms of software and approach.[7]

This paper broadly endorses that formulation, which is positively framed, but goes one step further by adding the following ingredient: The stock of primary case law material (the judgments) in the free to access space should be as comprehensive as that held by any and all private sector publishers covering the same geographic jurisdiction. In other words, the number of judgments only available behind a subscription paywall should be as close to zero as possible. Above all else, therefore, the perfect free system should provide comprehensive access to the raw text of all judgments available on any fee-paying service in digital form.

Comprehensive coverage, though critical, is only part of the overall picture. The perfect free case law system must also be sufficiently intuitive for individuals who lack experience handling legal information to confidently explore and interrogate.

What emerges, on the foregoing analysis, is that the quest to make English case law truly accessible rests on (i) amassing and maintaining a comprehensive collection of material and (ii) implementing and maintaining interfaces and search technologies that make retrieving information as straightforward as possible.

The remainder of this paper goes on to consider the specific obstacles that presently stand in the way of achieving a perfect system of open access. Section one considers barriers to

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[6] Glassmeyer and Smith (2014) *Open law: technology in service of the rule of law* Legal Information Management, 14(3), 181-187

[7] *ibid*, p xxx

amassing a comprehensive collection of English case material, section two addresses points of friction that serve to slow the development of platforms capable of catering for the needs of lay users.

Section One

Barriers to Amassing and Maintaining a Comprehensive Collection of English Case Law

The perfect free case law system, it is submitted, should provide comprehensive access to the raw text of all judgments available on any fee-paying service in digital form. It ought to be possible at some point in the not too distant future for citizens of England and Wales to be able to gain access to the raw text of any and all judgments that are currently only available behind a subscription paywall.

There are four specific obstacles preventing that level of access being from becoming a reality. First, the age of the English common law tradition creates a challenge of scale: the free case law movement needs to marshal an archive of material spanning many centuries. The second obstacle is presented by the uncertain question of copyright over individual judgments and collections of judgments: the free case law movement needs to be able to obtain, repurpose and republish judgments without running the risk of infringing third parties rights over the judgments. The third obstacle concerns the reluctance of traditional publishers, including the semi-official Incorporated Council of Law Reporting for England and Wales, to "open source" portions of their proprietary archives for fear of cannibalising sales revenue. Finally, the fourth obstacle concerns England's confused and opaque judgment supply chain, which makes it almost impossible to comprehensively capture judgments upstream for publication downstream.

(i) Antiquity of English common law

The first major obstacle facing any project to comprehensively cover English case law is presented by the sheer volume of material. As BAILII itself has noted,[8] the half-life of legal materials far exceeds historical learning in other disciplines. For example, in *Midland Bank Trust Co Ltd Ltd v Green (No 3)* [1982] Ch 529, counsel referred to four cases decided

[8] http://www.bailii.org/bailii/BAILII_in_a_Nutshell.pdf

during the reign of King Edward III and another case decided during the reign of King Henry VI. Such cases, however, are exceptional.

(ii) Copyright

Copyright over English judgments is a vexed issue that the legal information community in the UK appears to avoid like an elephant in the room.

The United States wasted no time making the position of copyright over judgments crustal clear. In *Wheaton v Peters*[9] the US Supreme Court held:

> … no reporter has or can have any copyright in the written opinions of delivered by this court; and the judges thereof cannot confer on any reporter any such right.

This *Wheaton v Peters* position was sealed towards the end off the nineteenth century in *Banks v Manchester*[10] where the Supreme Court stated:

> Judges … can themselves have no proprietorship, as against the public at large, in the fruits of their judicial labours… The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which binding every citizen, is free for publication to all…

In little more than half a century, the US courts solved a problem the English legal community appear to still be blind to. In the first instance, *Wheaton* shielded the raw text of the court's judgment from claims of copyright from individuals and other entities. Second, *Banks* firmly established that judgments are public documents and are owned by the public at large.

The position in English law is very different: any given judgment could potentially attract multiple claims of copyright, ranging potentially from the judge herself, the Crown, the court stenographer and a law reporter. The position, to this day, is unresolved. Sir Henry Brooke, one of the founders of BAILII has said:

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[9] (1834) 33 US 591, 668

[10] (1888) 128 US 244, 253

> Over the years I have spoken to judges and leading QCs who have had very great experience in the field of copyright law, and they are of the unanimous opinion that the copyright in a judge's words is vested in the judge. The LCD [the UK Ministry of Justice] once obtained an opinion from counsel to contrary effect, and we wish to disagree.[11]

The uncertain position over the copyright in judgments significantly limits the ability of the free case law movement to systematically extend coverage by capturing the text of judgments are only available from private sources.

(iii) Judgment supply chain

The movement to extend free access to case law in the England and Wales is hamstrung by the jurisdiction's needlessly convoluted judgment supply chain.

In most common law systems, the judgment handed down in written form by the court stands as the definitive version of that judgment. This, confusingly, is not always the case in England and Wales.

The vast bulk of judicial activity capable of modifying the content of English common law takes place in the High Court and the Civil and Criminal Divisions of the Court of Appeal. As a general rule, and in the spirit of efficiency is an overloaded system, judges in the High Court and the Court of Appeal attempt to deal with as many cases as possible by way of delivering judgment *extempore* at the close of argument, reserving handed down written judgments for more complex matters.

From the perspective of ensuring access to justice, this practice of *extempore* delivery of judgment is essential - it simply would not be sustainable for the court to reserve judgment and produce a full written opinion in every case. However, from the perspective of ensuring accessibility of the judgments themselves, the practice of giving *extempore* judgments is highly problematic.

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[11] Sir Henry Brooke interview

Since the early 2000s, the UK Ministry of Justice has been content to a pursue a policy of outsourcing responsibility for the conversion of *extempore* judgments (be it by sending a stenographer to take the judgment down in realtime or by transcribing an audio recording) to a form suitable for publication on a site like BAILII to the private sector. This engages the issue of copyright discussed above, because the resulting transcript of the *extempore* judgment will likely attract copyright inhering in the the transcription agency.[12]

This results in the unfortunate situation under which not only is BAILII unable to obtain a copy of the judgment for inclusion in its database, but would be compelled to itself pay to acquire a judgment purely for the purposes of open sourcing it.

(iv) Private sector reluctance to meaningfully support open law

A good deal could be achieved if commercial publishers were willing to open source access to the raw primary case law content under their control. Their reluctance to do so, however, is understandable. The legal publishing market is fiercely competitive and edges are frequently developed by acquiring exclusive access to content. Open sourcing legacy case law content would almost certainly entail the forfeiture of case collection edges

Section Two

Points of friction that serve to slow the development of platforms capable of catering for the needs of lay users.

[12] *Walter v Lane* [1900] AC 539, HL