

# Enabling Free On-line Access to UK Law Reports: The Copyright Problem

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## Abstract

The history of publishing legal decisions (law reporting) in the UK has been that of a privatised system since its inception, and that history has encompassed several hundred years. The privatised nature of this has meant that the product (the law report) has been, except in limited cases, viewed as the property of the publisher, rather than the property of the court or public. BAILII is an open access legal database that came about in part because of the copyrighted, privatised nature of this legal information.

In this paper, we will outline the problem of access to pre-2000 judgments in the UK and consider whether there are legal or other remedies which might enable BAILII to both develop a richer historic database and also to work in harmony, rather than in competition, with legal publishers. We argue that public access to case law is an essential requirement in a democratic common law system, and that BAILII should be seen as a potential step towards a National Law Library.

**Keywords:** BAILII, copyright in judgments, database right, legal education, National Law Library, benefits of deep linking.

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# 1 What is a Law Report?

In simple terms, a law report is a document which provides an analysis of a court case, most often accompanied by the text of a judge's decision. This law report will have been produced by a lawyer, but one who did not participate in the case itself. It is, in effect, a third party view but a view which arises from the legal perspective. Thus the general reporting of a case in a newspaper is reportage, but lacks the critical legal skills and qualities which comprise a law report.

Law reports in what is now the UK were being produced in the 13th century.<sup>1</sup> Legal historians have suggested various reasons for their existence – precedent, educational, record keeping and entertainment value.<sup>2</sup> These reasons continue to be relevant, but the formal reason is that of precedent. Precedent can be generally defined as the legal principles identified and developed through judicial decision-making – i.e. what has occurred in a prior case may have value in deciding a current case, and thus access to the reasoning and decision in prior cases is important. The UK is a “common law” jurisdiction with much law based on judicial precedent in contrast to “civil law” jurisdictions that are based exclusively upon statutory laws promulgated by a legislature. In the UK the courts not only interpret and clarify statutory law, they also create law in areas not covered by statute, e.g. tort, civil liberties, etc. Thus, access to the law reports is essential not only to lawyers and judges, but also to the teaching and study of the common law.

The quality of law reports has varied over the centuries, not only in terms of the skill of the lawyer who produced them, but also because those which were informal would have lesser effort spent upon them than those which were being produced for formal publication. Also, the intrusion of the writer's own sense of what was happening may mean that several reports of the same case conflicted.<sup>3</sup> By the mid-19<sup>th</sup> century, a need was seen to improve the quality of reporting and institutions such as the Incorporated Council of Law Reporting for England and Wales (ICLR) came into being. The ICLR, as a non-governmental organisation, continued the tradition from the 13<sup>th</sup> century of law reporting

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<sup>1</sup> Regular reporting began with the *Year Books*, transcribed from the Plea Rolls begun in 1189. The *Year Books* (1268 to 1535) contained notes of cases written up in Anglo-Norman by apprentices to the law. Early commentators on the law produced authority for their propositions which was often decidedly hearsay or anecdotal. But by the 16th century individual reporters were publishing volumes or series of case reports under their own names. <http://www.justis.com/data-coverage/iclr-si.aspx>

<sup>2</sup> This has been a topic for legal historians for some time. See Abbott (1973) and Stebbings (1995), for example. Abbott L.W. (1973) *Law Reporting in England 1485-1585* (The Athlone Press, London). Stebbings C. (ed.) (1995) *Law Reporting in Britain* (The Hambledon Press, London).

<sup>3</sup> Tiersma (2007). Tiersma P., 'The Textualization of Precedent' (2007) 82 Notre Dame Law Review 1187, 1201.

being carried out as a private enterprise, albeit in a more charitable framework:

In 1870 the Council was incorporated under the Companies Act with the object of...

*“The preparation and publication, in a convenient form, at a moderate price, and under gratuitous professional control, of reports of judicial decisions of the superior and appellate courts in England.”*

While The Law Reports were to be run as a private enterprise without state aid or interference it was not intended to be profit making except in so far as it was necessary to make it self-supporting. In fact in 1970 the Council was registered as a Charity.<sup>4</sup>

With the ICLR, the quality of reporting improved, selection of reports for publication became more considered, and generally these became more accessible. Access to law reports was most important to the bar who were most usually centred around legal centres and legal libraries – the solicitor’s profession being less research oriented than that of the barrister’s.<sup>5</sup>

During the nineteenth century in America, a parallel universe of law reporting emerged, but there the publication of law reports was encouraged by the Government rather than the private bar. As early as 1789 the courts in many states were required to issue written opinions, and in many others that practice had been adopted voluntarily. In fact, having official law reports was an established part of the statehood package for states admitted to the Union after the Civil War.<sup>6</sup> But as the number of reported cases increased exponentially during the mid to late 19<sup>th</sup> century,<sup>7</sup> ultimately it was the private publishing enterprises that were producing reports in a uniform and timely manner. Public law reports faced funding difficulties, they did not offer as timely access, nor were they indexed in a uniform manner, if at all.

<sup>4</sup> <http://www.lawreports.co.uk/AboutICLR/history.htm>

<sup>5</sup> It is only in the latter decades of the 20<sup>th</sup> century that this division in legal knowledge began to break down in the UK. Colin Campbell looked at research needs of lawyers in the 1970’s for example, which compares with research undertaken for the Northern Ireland Judicial Appointments Commission. The latter demonstrated a much more legally expert solicitor’s community even in provincial Northern Ireland. See Campbell (1975) & Leith et al. (2008). Campbell C.M., (1976) ‘Lawyers and their public’, in MacCormick D.N., *Lawyers in their Social Setting*, (W. Green and Son Ltd., Edinburgh). Leith P., Lynch P. Glennon L., Dickson B., (October, 2008) et al. ‘Propensity to Apply for Judicial Office under the new Northern Ireland Judicial Appointments System’, Queen’s University, Belfast. Available online : [http://www.nijac.org/publications/documents/research/QUB%20Research%20\(Full%20Version\)%20October%202008.pdf](http://www.nijac.org/publications/documents/research/QUB%20Research%20(Full%20Version)%20October%202008.pdf)

<sup>6</sup> Martin (2008). Martin P.W. ‘Reconfiguring Law Reports and the Concept of Precedent for a Digital Age’ (2008) 53 Villanova Law Review 1, 4.

<sup>7</sup> In 1810, there were a mere 18 volumes of American reports. By 1839 there were 545 volumes and in 1885 there were nearly 3,800 volumes.

It should be noted as well that in America there was little consideration given by the government reports to selectively limit the number of cases published. Early American lawyers sought access to all decisions from the courts in their 'desperate search for precedent'.<sup>8</sup> In 1889, commercial publishers were invited to debate the competing philosophies of selective reporting versus publishing all decisions,<sup>9</sup> and for a brief period there was fierce local and regional competition among commercial rivals. But by the early 20th century West Publishing Company's National Reporter System emerged not only as the most powerful alternative to the public law reports, but also prevailed in the debate over comprehensive versus selective publishing of judicial opinions, although selective reporting continues to this day.<sup>10</sup>

The UK courts have traditionally been underfunded and, unlike in the US, the court did not see its role as legal publisher,<sup>11</sup> thus the symbiotic relationship between the ICLR - or its Scots equivalent, the SCLR - and judges worked well.<sup>12</sup> The corpus of available reports was kept small - as judges appear to resent having large numbers of precedents put before them, many of which they consider to be irrelevant<sup>13</sup> - and a formalised system arose to provide a quality product to a relatively small community of barristers and legal educators.

But during the 1980s and 90s, the system began to be less attractive to lawyers. The expansion of the profession and the development of many sub-specialisations, e.g. administrative law with increasing tribunal hearings, created a demand for more comprehensive access to legal information. Lawyers were spending a substantial amount of money each year on print and electronic law reports. And as technical legal expertise moved out from the bar, lawyers in other parts of the UK where there were limited legal resources found it difficult and/or expensive to access judgments which they felt may be important for their clients. The rise of new law schools and their need for access to case reports for a growing student body also became a problem in a

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<sup>8</sup> Young, page 302. Young, T. J., 'A Look at American Law Reporting in the 19th Century' (1975) 68 *Law Library Journal* 294.

<sup>9</sup> The editor of the *American Law Review* initiated the debate, inviting representatives from Bancroft-Whitney, Lawyers Cooperative and West Publishing. See - 'A Symposium of Law Publishers' (1889) 23 *American Law Review* 396.

<sup>10</sup> *American Law Reports Annotated* (ALR) - published by Lawyers Cooperative until its acquisition by Thomson Legal Publishing in 1989. Thomson subsequently acquired West Publishing in 1996, so ironically West now publishes ALR.

<sup>11</sup> Only the Judicial Committee of the House of Lords published their own decisions. In 1996 they also produced internet available versions. The annual output of the Law Lords is approximately 100 cases a year.

<sup>12</sup> Northern Ireland had almost no formal reporting system excepting a bundle in the bar library.

<sup>13</sup> 'The almost universal view among judges in England is that too much, rather than too little, is reported.' Paul Magrath, *Special Issue - 135 Years of The Law Reports and The Weekly Law Reports* WLR Daily ICLR 2001 <http://www.justis.com/data-coverage/iclr-si.aspx>

system where law schools were as underfunded by their universities as the courts were by the government.

Legal publishers, by using a segmentation business model to cut the reports up into more profitable product types, were able to expand their products and charge more for their services and were seen to be parasitic upon the ‘poor lawyer’. Furthermore, electronic publication did not reduce the price of their products, but was viewed simply as a means of increasing their profits upon the back of the financially struggling legal profession.

As Laurie West-Knights explains:

Inevitably, there is the question of money. Law reports (and statutes) cost a fortune. The more separate reports one needs the more one spends. One could very easily spend £20,000 on CD-ROMs and still not have anything like ‘the law’ (even if there were any comprehensive ‘front end’ for searching the material, which there is not). The publishers say the prices are fair, and that this is demonstrated by the fact that the market pays the prices they ask. That is all very well: the ‘market’ has no choice, and furthermore the result is that all over the country there are thousands of mini-law libraries, each being incomplete, out of date, cumbersome and expensive.<sup>14</sup>

In 1979, a report published by the Society for Computers and Law called for a ‘National Law Library’<sup>15</sup> as a resource for both case law and legislation in electronic format. Since the government declined to provide one, in 1997 Laurie West-Knights, an early proponent of BAILII, asserted that the National Law Library approach should be reconsidered. BAILII came into existence to undertake that task and provide a database that is public property and free. The impact that BAILII has had to date is to move the provision of legal information closer to West-Knights’ ideal. However, this is only the case with law reports from around 2000 when BAILII became an active legal publisher.

## 2 The Publication of a Law Report – the Headnote

The current UK law report is a formalised entity. It comprises a part produced by the judge or from a transcript of a recording of the judge’s verbal decision, plus material produced by the law reporter generally referred to as ‘headnotes’. See, for example, the case of *Siggery v Bell*<sup>16</sup> which appears

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<sup>14</sup> West-Knights L.J. (1997). West-Knights L. J. ‘The AustLIJ Paradigm’, Commentary, 1997 (3) Journal of Information, Law and Technology (JILT).

<sup>15</sup> Society for Computers and Law (1979). *Society for Computers and Law A national law library, the way ahead: a proposal for a computer assisted legal information retrieval system for the United Kingdom* (Milton: The Society 1979).

<sup>16</sup> *Siggery v Bell* [2007] EWHC 2167 (Ch).

in electronic format in at least two published locations – Lexis and Westlaw. Both versions comprise headnotes which contain details about the case - a statement of facts in an abstract, subject keywords, legal counsel, and note the significant cases cited in the judgment. We can see the usefulness of the abstract, and also its individual nature, by looking at two different headnotes of the same case.

On LexisNexis (Butterworths) produced from the ICLR version and also appearing in hardcopy as the All England Report series:

**Siggery and another v Bell and others**

**Chancery division**  
**Lewison J**

**3 July 2007**

*Easement – Right of way – Disturbance – Actionable interference – Claimants having right of way along trackway – Defendants proposing erection of gates along trackway to prevent joyriders and other anti-social behaviour – Whether erection of gates constituting actionable interference with claimants’ right of way.*

The case concerned an overgrown and largely disused trackway which was approximately 13 feet wide and 50 metres in length. The claimants owned a parcel of woodland at the northern end, and the defendants lived in a number of properties situated at the southern end. The claimants had a right of way along the trackway by means of a prescriptive long user. That right of way gave them both vehicular and pedestrian access. Without knowledge of the claimants’ right of way, the defendants erected four lockable gates; two at each end of the trackway, and two intervening gates, in an attempt to prevent its use by joyriders and other forms of anti-social behaviour. The claimants objected, arguing that the erection of the gates amounted to an actionable interference with their right of way. Before the claim was heard, a two-gate scheme was proposed by the defendants as an alternative solution. The claimants rejected that proposal.

The court ruled:

On the evidence, neither the four-gate nor the two-gate scheme offered appropriate solutions. Both schemes amounted to a significant and substantial inconvenience to the claimants’ ability to access their land. In that connection, therefore, the schemes constituted actionable interferences of the claimants’ right of way.

Accordingly, judgment would be entered for the claimants.

*B&Q plc v Liverpool and Lancashire Properties Ltd* [2000] All ER (D) 1059 applied; *Petty v Parsons* [1914] 2 Ch 653 considered.

Edward Denehan (instructed by Gaby Hardwicke Solicitors) for the claimants. Stuart Cutting, solicitor advocate, (instructed by Menneer Shuttleworth Solicitors) for the defendants

And on Westlaw (UK):

**Siggery v Bell**  
Chancery Division  
03 July 2007  
**Case Analysis**

## Where Reported

[2007] EWHC 2167 (Ch); Official Transcript

## Case Digest

**Subject:** Real property

**Keywords:** Access; Interference; Rights of way

**Summary:** Rights of way; Interference; Entitlement to fence own boundary

**Abstract:** The claimants (S) claimed that the erection of two gates by the defendants (B) at either end of a strip of land owned by B substantially interfered with their right of way over the strip. S owned the land to the north of the strip and were entitled to a right of way by foot and with vehicles over it. B bought the strip, and in ignorance of the existence of S's right of way erected two solid fences along either boundary, which, following objection, were later replaced by four gates along the strip. B further proposed a two-gate solution that S accepted, but with the proviso that a section of fencing that lined the northern edge of the strip was to be removed so that S could gain access from the strip to their land without having to go through both the gates. B maintained that they wished to keep the fence on the northern side of the strip as it was their boundary and therefore they were entitled to fence it and that they had spent money on buying and erecting the fence.

Judgment for claimant. Where a right of way benefited a piece of land it benefited the whole of the land and each part of the land and therefore meant that the owner of the land with the benefit was entitled to choose from which part of his land to access his way, *Cooke v Ingram* (1893) 68 LT and *Petty v Parsons* [1914] 2 Ch. 653 CA applied. B did not have an absolute right to fence the boundary, as their boundary of ownership coincided with S's boundary of right of way, while the cost

and supply of the erection of the fence was not a sufficiently weighty matter in the circumstances. The two gates would be a substantial interference with S's right of way over the strip and the only means of saving them would be for a portion of the northern fence to be demolished, as requested by S.

**Judge:** Lewison, J.

**Counsel:** For the claimants: Edward Denehan. For the defendants: Stuart Cutting

**Solicitor:** For the claimants: Gaby Hardwicke. For the defendants: Menneer Shuttleworth

**Significant Cases Cited:** *Pettey v Parsons* [1914] 2 Ch. 653; (CA)

The headnote is a valuable tool for the lawyer. With a speedy reading one can review the facts and holdings extracted from the longer judgment (though this specific *Siggery* case is not particularly long) and then decide whether further reading of the judgment is needed. The utility of headnotes used to be further highlighted by their theft from the bound, printed versions in law school libraries prior to when students began accessing digital versions. However, once having read a headnote and deciding that the decision is of value, one usually requires access to the full text of the decision.<sup>17</sup> And, in court, the original judgment is required.

There exists copyright in the text of the headnote, with the term of protection being life of the author plus 70 years. It is not always obvious who authored the headnote – he or she will be a barrister but will be somewhere between 25 to 75 years old, a fact which is clearly important to determining term of protection. It is a valuable intellectual property, requiring skill and substantial effort to produce and is thus rightly protected from copying. BAILII has never seen itself as the provider of headnotes: the automated processing/publishing which is at the heart of BAILII's philosophy cannot provide competition to the intellectual property of the law reporters or publishers.

Judges have not traditionally produced headnotes, but we find that Tribunal chairmen will sometimes do so. For example, in *St Martins Healthcare Ltd. v Revenue & Customs*<sup>18</sup> the chairman of the VAT tribunal produced the following concise headnote:

Value Added Tax - failed scheme for the pre-payment of drugs and prostheses - whether assessments made to recover input tax that had

<sup>17</sup> The rise of early information retrieval systems in law demonstrated this, with 'abstract only' systems being seen as much less useful than full text ones. See Leith & Hoey (1991) *The Computerized Lawyer* (2nd ed. Springer 1991).

<sup>18</sup> [2008] UKVAT V20778. This decision was picked at random. It is up to the Chair of the Tribunal to decide whether they wish to add this.



initially been allowed were made in time - when the Commissioners had all the evidence of facts, sufficient in their opinion to justify the making of the assessments - Application to change the grounds of appeal - both Appeals allowed - Application granted in part.

Such a headnote appears to be something between an abstract and a set of keywords. Any judge could similarly add such an abstract and/or set of keywords, but at present there appears to be little interest in so doing.

Are lists of keywords protected? Probably, if they meet the requirements of UK copyright law.<sup>19</sup> One can see that BAILII could in future incorporate some system to analyse the text of a judgment and produce keywords in an automated manner. Whether this would be as useful as one produced by a skilled editor is a moot point, but it would probably be protectable too under the computer-generated provisions of the Copyright Designs and Patents Act 1988.<sup>20</sup>

With the move towards more electronic publishing of case law, the presentational format of this information is also valuable, but the 'look and feel' of a computer system is not typically protectable. Also, it is possible for competitors to build systems which emulate exactly the operation of another system (see *Navitaire Inc v Easyjet Airline Co.*<sup>21</sup>) but they cannot utilise the headnote produced to abstract the contents of a judge's decision.

### 3 The Publication of a Law Report – the Judgment

BAILII has no interest in impinging upon the intellectual property rights of the law reporter. What it does have is an interest in making available the text of a judgment, which has legal status and precedential value. Unfortunately, law reporters and publishers take the view that the copy of the judge's text which they hold is their intellectual property.

The difficulty for systems such as BAILII then becomes one of how to access the judge's decision in order to upload and make it available. Law Lords decisions are available as are Court of Appeal decisions.<sup>22</sup> But for the High Court, County Court and the various Tribunals, informal means of harvesting of judgments is necessary. Even in the High Court, not all decisions will be made available to BAILII and not all will be in transcribed form. Although one might have expected to find *Siggery v Bell* on BAILII, it did not appear there at the time this paper was begun. Why not? Because

<sup>19</sup> Essentially, originality composed of skill, labour and judgment rather than creativity.

<sup>20</sup> S178: 'computer-generated', in relation to a work, means that the work is generated by computer in circumstances such that there is no human author of the work.

<sup>21</sup> [2004] EWHC 1725 (Ch) (30 July 2004).

<sup>22</sup> Through an agreement between the Court Service and the transcribers.

it is up to the individual judge (or his clerk) to forward a copy of the judgment to BAILII. There is no automatic system for this to occur with most of the UK courts and tribunals and there are reasons why a judge may fail to do so – forgetfulness, belief that it is not an important decision, or even that he is not willing to make the reasoning behind a decision public, etc. The case clearly slipped through the net which BAILII uses to catch judgments. Further by way of example, in the Royal Court of Justice when a judge reads a decision in the court (rather than ‘handing it down’ in printed form) it will have been recorded automatically and require transcription into readable format. BAILII does not have the funds to carry this out, so requires access to a transcribed version.<sup>23</sup>

There are two main copyright problems for BAILII in this process:

1. Who owns the underlying text and/or the transcription of a judgment?
2. What can BAILII do with judgments which have been processed by a commercial agent, whether of recent origin or from decades before?

These are not abstract questions. In a recent project to develop a more useful BAILII corpus for teaching of law, substantial problems were found in accessing sufficient well known and relevant judgments which form the basis of UK law.<sup>24</sup>

## 4 Who owns the text and/or transcription of a judgment?

Under UK copyright law, the author is the first owner of copyright unless he or she is an employee. For most European observers, the assumption would be that the author is the judge and as an employee, copyright passes to the employer (in the UK, this is the Crown). Recently the UK Court Service has begun to assert this ownership of copyright by placing a copyright notice on the first page of judgments which it provides.<sup>25</sup> Judgments being Crown Copyright is advantageous to BAILII, because in the late 1990s the decision was taken to allow free access and republishing of legislation and various legal materials.<sup>26</sup>

However, the matter of who owns judgments is not entirely clear. For example, a view from some of the UK intellectual property judges is that they are not employees, and thus the judgments are not Crown

<sup>23</sup> Transcribed versions are usually given to the judge to correct (and thus become ‘approved versions’).

<sup>24</sup> The JISC-funded Open Law Project, <http://www.bailii.org/openlaw/introduction.html>

<sup>25</sup> “Crown Copyright ©”.

<sup>26</sup> Through what was known as the ‘Dear Publisher’ communication. See <http://www.opsi.gov.uk/advice/crown-copyright/copyright-guidance/index.htm> for current information on what waivers exist and other forms of availability.

Copyright.<sup>27</sup> Every now and again, BAILII receives a letter from the author of a judgment requesting that the copyright notice be removed from his decision. In 1996 Picciotto outlined the situation, which still remains unclear:

There remains a fog of ambiguity and disagreement as to copyright in court judgments. They may be Crown copyright, if judges are ‘servants or officers of the Crown’. Cornish says with some diffidence that: While no judge would hold himself to be a servant of the Crown, he or she is appointed by royal authority and is therefore probably an officer of the Crown ... Not surprisingly, the Treasury Solicitor agrees with this view. Although no action has yet been taken to enforce it, HMSO states that it intends to issue a policy statement soon.<sup>28</sup>

Unfortunately, thirteen years later, no policy statement has yet appeared. Also, one very senior judge has been heard by one of the authors to suggest that there may be no copyright in judgments, a position which clearly undermines the traditional conceptions of copyright.

Another confusion is that the judgments – particularly those which are not produced in word processed format for the judge – will have undergone some form of transcribing, editing and/or revision by a commercial agent. The editors of these judgments assert that they have put sufficient effort and skill into this to gain copyright in the transformed judgment. Since recordings of judgments have been typically destroyed after around 5 years (the tapes were reused), it is not possible to use these as evidence to argue in any particular case that the amount of effort and skill applied was less than required to gain copyright protection, and BAILII must accept the view of the publisher that they own the copyright in the available text of the judgment; and since no other versions of these older judgments exist, the judgment is effectively privatised.

The relationship between commercial publishers and the Court Service in prior years also confuses the matter, since agreements were made with transcribers and/or publishers concerning judgments where the copyright question was ignored or, apparently, decided in the favour of the transcriber/publisher. These contracts were viewed as being commercially confidential and were not made public. The Court Service

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<sup>27</sup> Laddie, Prescott and Vitoria (1995, but also in later editions) first put the contrary view, and pointed out that in all the debates leading to the passage of the 1988 Act no mention was made that it might have this effect (para 22.39). They also pointed out that in legislation such as the Supreme Court Act the term court ‘officers’ is used only for various clerks, masters, registrars etc., and not for judges. They conclude that ‘while it is plain that a judge holds an “office”, this does not thereby make him an “officer of the Crown”’. Laddie H., Prescott. P & Vitoria M. (1995) *The Modern Law of Copyright and Designs* (2nd ed., Butterworths).

<sup>28</sup> Picciotto (1996). Picciotto S. ‘Towards Open Access to British Official Documents’ 1996 (2) *Journal of Information, Law & Technology (JILT)*, citing Cornish W (1989) *Intellectual Property: Patents, Copyright, Trade Marks, and Allied Rights* (2nd ed., Sweet & Maxwell) 367.

would now be highly unlikely to undertake these types of contracts, but with materials prior to around 2002/3 there remains a lack of clarity as to ownership.

From the 1960s, the House of Lords produced written judgments as the norm. The Court of Appeal has similarly produced written judgments via commercial transcribers contracted by the Court Service. However, most High Court judgments prior to the mid 1990s would not have been produced in hard copy or digital format by the judge. Rather, they would have been recorded<sup>29</sup> and then transcribed from tape by a commercial transcription service on payment by the parties. In UK law, making a recording will give copyright in that recording which means that the transcription (usually the only available version) is the copyright of the transcriber.

Judgments in hard copy also have a copyright in their formatting – this is copyright in the typographical arrangement under S1 of the Copyright Designs and Patents Act 1988, which lasts for 25 years.

Finally, in UK law, when speech is recorded, there exists a further copyright – the property of the speaker – in the original words.<sup>30</sup>

The result is that there may be a number of versions of a judgment, each of which has copyright protection – the taped recording by the court, the transcribed version by the transcriber, the edited version by the publisher, and the approved version after the judge has commented upon the publisher's version.

BAILII's ideal source of a judgment is an approved version, either produced by the judge or read and corrected by the judge where the copyright clearly allows reproduction – ideally a judgment with a 'Crown Copyright' statement affixed. None of the available versions – apart from those which are now being made available via the Court Service – from prior to approximately 2000 are thus suitable for uploading. To expand the corpus of judgments on BAILII requires a significant amount of effort to gain permissions from transcribers and to hunt down available copies (perhaps from the lawyers involved in the original case who may have a copy of a decision produced by a judge), etc. BAILII simply does not have the resources to undertake this in any meaningful way.

## 5 The Difficulty of Resolving Ownership

It is actually very difficult to resolve questions of ownership in the available text of judgments. Publishers may well intimate that they are the owners of the judgments which appear in their past publications, but in order for

<sup>29</sup> By the Mechanical Recording Department of the Royal Courts of Justice.

<sup>30</sup> The words are considered a literary work. It is only the recording of the spoken works (through fixation) which brings protection. If the words are not recorded, there is no copyright in them. See Copyright, Designs & Patents Act 1988, S3(1) "literary work" means any work, other than a dramatic or musical work, which is written, spoken or sung ..."

this to have been so there must have been some assignment of copyright from the author to the publisher, either through employment or express agreement. If the ‘author’ (in terms of the person who corrected the judicial transcript) was a barrister who was not employed by the publisher but contributed on a consultancy basis, then ownership resides with the barrister. Copyright law has seen a number of cases over the past century or more dealing with such issues as to the ownership of work by non-employees (e.g. *Byrne v Statist*<sup>31</sup> where the employee did translating work in his spare time for the employer but the work was adjudged to be his). A publisher who claimed copyright in the text of the judgments would have to prove assignment of copyright had been made. It is unlikely that documentary proof would exist for two reasons: companies usually dispense with paperwork after a period of years due to the cost of storage, and/or there may have been no formal assignment. It may even be that they do not know who the particular barrister was. If they do, they may not know his date of death from which to calculate the term of copyright. In this case, it is likely that judgments are actually ‘orphan works’ rather than the property of the legal publishers.<sup>32</sup>

There is no sanction against UK publishers who – without evidence to support their view – lay claim to the intellectual property of others (whether known or not). In the US, it is a criminal offense to attach an unwarranted copyright claim to a work.<sup>33</sup>

## 6 Why does BAILII want to add pre-2000 judgments to its database?

In many ways, it would be simpler if BAILII ignored pre-2000 judgments. As time progresses, a large percentage of judgments lose value as precedent unless they are particularly striking (if they have lesser value they are discussed in newer cases and if not, they are quietly or explicitly dropped). Although it can be argued that BAILII can manage without many of these pre-2000 cases, the fact remains that older cases which are considered ‘leading cases’ – those which establish and distinguish the judicial precedents which are the foundational pillars of the common law – are of vital importance. As previously noted, for example, the decision in *Siggery* relies upon two earlier decisions: *Cooke v Ingram* from 1893 and *Petty v Parsons* from

<sup>31</sup> *Byrne v Statist Co.* [1914] 1 KB 622.

<sup>32</sup> Orphan works were viewed as a problem requiring a European solution in the *Gowers Review of Intellectual Property* 2006. See [http://www.hm-treasury.gov.uk/d/pbr06\\_gowers\\_report\\_755.pdf](http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf)

<sup>33</sup> 17 U.S.C. 506(c): Fraudulent Copyright Notice. — Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that such person knows to be false, shall be fined not more than \$2,500.”

1914. And the 1914 judgment in *Byrne v Statist*, referenced in the preceding section, is still relevant law in discussions of ownership of copyright.

The strongest reason for wishing to add older judgments to databases is, we suggest, the educational one – and the rational behind the JISC-funded Open Law project which BAILII recently undertook.<sup>34</sup>

One core problem for legal educators in the UK is that students often do not read cases. They are given reading lists with citations but they rarely – unless a research project is involved – go to the sources of law themselves. It is particularly difficult to get them to do so when the materials are not directly to hand: that is, they have to seek a printed report in a library, or find a workstation that has online access to proprietary databases, then log on and search, etc. This hardly prepares them for the world of law and leads to bad habits in professional life. If, on the other hand, their reading lists are in electronic format and have hyperlinks directly to the cases cited, we can have a more realistic expectation that students will actually read the cases.

The aim of the Open Law project was thus to increase student usage of legal information systems generally because using them – we suggest – makes a better lawyer, and the more information literate a student is, the more likely they are to become a user of primary sources of digitised legal information as opposed to one who goes no further than a textbook during their studies.

Adding pre-2000 judgments to the BAILII database is thus important. The huge advantage of BAILII to law lecturers is that it is an open access system there is no cost and no password requirement. Teaching materials can link directly to the full judgments from reading lists, or even link directly to a paragraph within a judgment, and we can integrate our teaching without requiring more effort from students. The same kind of approach took place in IOLISplus<sup>35</sup> to try to make the earlier IOLIS more usable within a teaching framework since the weakness of the original system was that it was stand-alone rather than web-based.

The Open Law project was thus interested in targeting a specific group of decisions – those important for teaching core areas of law (contract, for example) and those in additional areas being taught where the law school community would benefit from easy access to pre-2000 judgments.

As law teaching moves into an e-learning phase, it is imperative to develop tools which enable free and easy access to the core elements of the common law. BAILII offers this access in a way that no commercial publisher can match – that is, unprotected by password or complicated front end.

<sup>34</sup> <http://www.bailii.org/openlaww/introduction.html>

<sup>35</sup> Grantham (2000). Grantham D. 'IOLISplus - The Second Chapter' 2000 (1) Journal of Information, Law and Technology (JILT).

## 7 What can BAILII do to add pre-2000 judgments?

We must presume that the vast majority of available judgments from the period prior to 2000 are subject to commercial copyrights. This will not always be the case – but for the most part – it will be true. There are two main options open to BAILII.

First, ‘the nuclear option’: in this option BAILII takes the strident view that the underlying text of judgments (excluding headnotes) which have been published are Crown Copyright and now in the public domain (under current Office of Public Sector Information - OPSI - republishing agreements) and thus free to be republished at will.

The database right would not enable BAILII to extract from the electronic versions, but hard copy of the judgments would be available for scanning and OCR processing or the judgments could be re-keyed in. The copyright directive might have been seen to allow BAILII to temporarily process the formatted text of a judgment (even if it was within the 25 years of typographical protection):

### 28A Making of temporary copies

Copyright in a literary work, other than a computer program or a database, or in a dramatic, musical or artistic work, the typographical arrangement of a published edition, a sound recording or a film, is not infringed by the making of a temporary copy which is transient or incidental, which is an integral and essential part of a technological process and the sole purpose of which is to enable -

- (a) a transmission of the work in a network between third parties by an intermediary; or
- (b) a lawful use of the work; and which has no independent economic significance.<sup>36</sup>

In one view of this section, the scanned copy of the judgment would have no independent economic significance (it would be discarded when a digital version was produced) and if the underlying judgment is subject to the Crown Copyright republishing agreement, then this would be towards a ‘lawful use of the work’. Unfortunately, the recent decision by the European Court of Justice has very narrowly limited what is a temporary copy (to basically only true cached materials).<sup>37</sup>

Publishers, using this decision, would certainly defend a continuing source of revenue which they feel should be protected. The argument is

<sup>36</sup> SI No. 2498 The Copyright and Related Rights Regulations 2003.

<sup>37</sup> *Infopaq International (Intellectual property)* [2009] EUECJ C-5/08 (16 July 2009).



certainly that they have put significant effort into collecting and publishing judgments and they should not bear the brunt of the lack of public expenditure in making judgments available in a non-commercial way. The counter view is that they have effectively privatised the common law.

In the United States, the interests of public policy appear to be more important than the legalities of ownership and a series of US Supreme Court copyright decisions blocked state efforts to reserve or grant exclusive publication rights:<sup>38</sup>

The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process.<sup>39</sup>

And further:

[T]here has always been a judicial *consensus*, from the time of the decision in the case of *Wheaton v. Peters*, 8 Pet. 591, that no copyright could, under the statutes passed by congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties. 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, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute.<sup>40</sup>

The problem was more recently addressed in US litigation (the *Hyperlaw* cases<sup>41</sup>) where the publishers asserted copyrights due to the effort and skill they put into correcting and editing case reports. However, the court found that this was not sufficient to gain copyright protection. Hyperlaw had entered the electronic legal publishing market-place late – in 1991 – and began to produce CD-ROM opinions of U.S. Supreme Court and Courts of Appeal judgments. By stripping the added value of the headnote information from previously published law reports – particularly those of West Publishing – Hyperlaw attempted to build up its database of judgments. It was suggested that, eventually, some 75 per cent of its corpus may have derived from the West database. The argument before the court was to what extent West had copyright interests in these reports which were derived from what were considered to be public domain judgments. Following

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<sup>38</sup> See generally L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. Rev. 719, 731-39 (1989) (summarizing early Supreme Court cases and copyright doctrines developed in each).

<sup>39</sup> *State of Georgia v. Harrison Co.*, 548 F Supp 100, 114 (ND Ga 1982).

<sup>40</sup> *Banks v Manchester*, 128 US 244, 253(1888).

<sup>41</sup> *Matthew Bender v. West*, 158 F. 3d 674 (2nd Cir. 1998); *Matthew Bender v. West Publishing Co.*, 158 F.3d 693 (2d Cir. 1998), *cert. denied*, 526 U.S. 1154 (1999).



*Feist*,<sup>42</sup> Hyperlaw argued that it was not copying any order or structure or indexing format, only individual opinions stripped of the editorial “added value” information.

The Canadian Supreme Court has taken a similar approach to that of the US:

This said, the judicial reasons in and of themselves, without the headnotes, are not original works in which the publishers could claim copyright. The changes made to judicial reasons are relatively trivial; the publishers add only basic factual information about the date of the judgment, the court and the panel hearing the case, counsel for each party, lists of cases, statutes and parallel citations. The publishers also correct minor grammatical errors and spelling mistakes. Any skill and judgment that might be involved in making these minor changes and additions to the judicial reasons are too trivial to warrant copyright protection. The changes and additions are more properly characterized as a mere mechanical exercise. As such, the reported reasons, when disentangled from the rest of the compilation – namely the headnote – are not covered by copyright. It would not be copyright infringement for someone to reproduce only the judicial reasons.<sup>43</sup>

The second option for BAILII, and the one which was undertaken by the Open Law project, was to assume that judgments prior to around 1890 were most probably in the public domain and view these as suitable for processing. Consequently, in collaboration with academics, librarians, and special interest groups such as the Society of Legal Scholars, and through review of subject syllabi, BAILII compiled lists of leading cases in core areas of law. Judgments prior to 1890 from this list were digitised first. BAILII then sought various sources of copyright-free materials for the remaining cases. BAILII successfully scanned and converted to html original transcripts, found in the Supreme Court Library of judgments where permission from the transcribers could be obtained. Additionally, BAILII was able to get word processor versions of judgments (52) directly from one cooperative transcriber. BAILII scanned and converted to html the original copies or archived film copies of judgments from the House of Lords and Privy Council. BAILII negotiated permission from the ICLR (50) and SCLR (600) and from the Estates Gazette law reports (50) for permission to publish these limited numbers of important pre 1996-7 judgments (some of which were House of Lords judgments which were only available directly from the House of Lords in film copies of handwritten judgments). The bar library in Belfast was able to provide copies of Northern Ireland cases.

<sup>42</sup> *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282 (1991).

<sup>43</sup> *Para 35, CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13 (CanLII).

As one can see, the Open Law project involved considerable effort in tracking down and getting permissions for the publishing of what should be effectively part of our 'common law heritage'.

As of March 2009, the Open Law Project on BAILII offers over 2400 judgments from among those identified on its Leading Cases subject lists. These judgments can be accessed directly from links on the subject lists, or by citation, case name and subject searches. There are hyperlinks to these judgments in all cases on BAILII that cite them.

The Open Law Project involved not only adding leading older cases to BAILII, but also a study aimed at improving usability. A new BAILII interface was developed over a six month period during which the legal academic community actively participated in evaluating and testing the revisions. There were two major components of the subsequently adopted re-design: (1) new versions of the home page, search pages, navigation links, and help pages; and (2) refinements to the search engine (citation search; date range search; highlighting search terms; sorting search results by relevance, jurisdiction, title, and date; user-friendly Boolean connectors; truncation and wild card characters.

Direct feedback from BAILII users reinforces that through the Open Law project BAILII has made meaningful improvements to the website interface and database content that are being well received by students, faculty, law librarians, practitioners and other professionals. As one user put it, 'As the older decisions are located and loaded into BAILII, an already very useful resource is going to become even more indispensable for legal researchers in all common law countries'. And another: 'I'm particularly happy with the new coverage of classic House of Lords cases. Everybody thinks they know what cases such as *Armory v Delamirie*, *Blyth v Birmingham Waterworks* and *Bolton v Stone* say, but one always wonders. I didn't think I'd ever see them online, except possibly as some grim PDF'.

## 8 But BAILII wants protection, too.

The perspective here is that of building BAILII into a more useful system. However, while extending BAILII is certainly useful to the wider community as an open system, it too wants protection for its contents. As a relatively easy to access system, BAILII can be targeted by web crawlers or others who simply wish to extract cases for republishing or re-use on their own systems. BAILII denies Google, for example, direct search access to the full text of decisions - although Google and other search engines can access BAILII's case titles - and disables IP addresses which download too much material. BAILII thus utilises the database right, denying those who wish to extract materials despite these being crown copyright and - in theory - accessible to all. Is this being hypocritical?

The reasons for this protection of BAILII materials lie partly in economics and partly in obligations towards the data.

First, to continue to gather funding as a charity, BAILII must prove that it is well used and functions as its goals suggest. Statistics of linkages and usage are required to demonstrate this. If BAILII usage decreases as a result of judgments and other materials being replicated and accessed on other sites, then funding for BAILII will fall and BAILII will fold.

Second, BAILII must be responsive to the obligations to the court and ensure that if a judgment has been wrongly made public, it should be removed immediately and should not be cached on someone else's server. With the rise of data protection perspectives BAILII is obliged to take reasonable care that its data is held responsibly. Although cases contain information about individuals, the judgments are public documents. Thus it is reasonable to pursue a careful approach midway between, on the one hand, making the data available to the public – as is its right, if the judgment has not been anonymized by the judge – but not, on the other, broadcasting it widely via Google. It has been the case that judgments have been passed to BAILII in error by the Court Service and BAILII has been required to take these down immediately the once mistake has been found.

## 9 A new National Law Library?

The increasing dominance of electronic information services has significant implications for public access to legal materials. Open access systems such as BAILII play an important role in enabling free public access in a formalised and structured way and at the same time taking reasonable care over the nature of that data, evidencing the approach which was suggested as the heart of the 'National Law Library' proposal. This view of BAILII as a national resource appears to be growing: judges will email in and complain that a paragraph indentation or numbering is wrong (this is usually corrected immediately and the Court Service informed), or that BAILII doesn't have such and such a judgment of theirs on the system. Several High Court judges will also send BAILII embargoed judgments and then they can inform those at court that copies of the transcript are available on BAILII.

This protection is not total – BAILII is only concerned about large scale extraction and re-use and positively encourages deep linking (hyperlinks to specific BAILII pages) to its materials. Although allowing deep linking can enable attempts to gain commercial advantage from another's copyrighted works,<sup>44</sup> for BAILII deep linking is totally advantageous – it

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<sup>44</sup> There have been no cases decided on deep-linking in the UK. The earliest litigation from 1996, *Shetland Times, Ltd. v. Jonathan Wills and Another*, 1997 F.S.R. 604, 1997 SC 316, (Ct. Sess. O.H.), 24 October 1996 ended without a full judgment on the matter.

ensures accurate pointing to the relevant decision, does away with the overheads of search processing, and generally encourages the use of the materials to the benefit of users. The deep-linked judgments all clearly demonstrate their origin, so BAILII's role is not hidden. Deep linking to a National Law Library would allow any re-use of any individual judgment by publishers, students, teachers, legal practitioners and other professionals who need or desire access to primary sources of legal information.

Commercial publishers have historically served an important and useful function as intermediaries in the development of the legal information industry,<sup>45</sup> but at a price many cannot afford to pay. In a digital era, open access systems providing legal information free from the constraints of commercial publication can actually facilitate the efforts of publishers, commercial firms, researchers and others who wish to develop search software and methodologies which utilise the underlying legal information corpus.<sup>46</sup> It would be possible under a National Law Library approach to provide the data in a form which allowed creative usage, without the need to expend costs on the actual collection of the primary source data. The role of intermediaries – those who provide added value through tools such as headnotes, subject keyword analysis, sophisticated search engines, citation systems, and textbook analysis – would be encouraged through enabling more access rather than less access.

## 10 Is this the end of the story?

BAILII is interested in adding older judgments to its database – not in a random manner, but in order to fulfil its obligation of providing a service to those who want to understand current UK law. Any other approach – large scale scanning and processing, for example – would necessitate funding and time which was not available. Yet, even this limited approach is not possible. It is not possible because although there is a strong argument that there is Crown Copyright protection in the text of a judgment (and thus, access is enabled to all) the costs of UK litigation could destroy BAILII.

BAILII views itself as a public resource, open to non-lawyers and lawyers alike, and believes that access to law for the general public is an important element in a modern democracy. Such a view has gathered support from various authors including Wise and Schauer who consider law as 'social capital'. They hypothesize that the increased provision to ordinary citizens of primary legal information can serve socially valuable purposes and that

<sup>45</sup> Arewa (2006), p. 838. Arewa O.B. (2006) 'Open Access in a Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market' 10 Lewis & Clark Law Review 797.

<sup>46</sup> See for example <http://www.casecheck.co.uk/> <http://www.lawindexpro.co.uk/cgi-bin/recent.pl>, <http://www.emplaw.co.uk/emplaw/expert/home/information.aspx>

[d]irect public access to primary legal information might serve important social-capital-creating functions by providing a common focal point for political and policy debate, thus encouraging citizens to see themselves more as part of a common and public-value-producing enterprise and less as partisan adherents to one or another warring faction. To the extent that this is so, then the provision of primary legal information may consequently foster the development of those networks of coordination, cooperation, and reciprocity that lie at the heart of the idea of social capital. And insofar as this is so, then we might expect, all other things being equal, that societies that have more direct citizen access to primary legal (and governmental) information will have more social capital available for general welfare-enhancing purposes than societies that have less direct citizen access to (and use of) such material.<sup>47</sup>

Such a perspective echoes the underlying ethos of the EU's Information Society Programme, where access to the basic data of public life can be seen to produce information products which both encourage commercial development and participation of the citizen in government.<sup>48</sup> Unfortunately, with much of the common law tied up through lack of clarity over copyright ownership, both social capital and information products suffer.

Is this the end, therefore, of attempts to enable BAILII to offer a more cohesive view of UK law? Perhaps not – because BAILII has become such a success that it must affect the commercial environment of the traditional legal publishers. Their current problem was foreseen by Dick Greener of Sweet and Maxwell back in the mid-1990s. He suggested the days of making relatively easy money from judgments would end, but Greener also pointed the way forward for publishers who wanted to work in a digital context:

Ready availability elsewhere will tend to devalue the mere provision of such [raw] data to the end user: it may become “commoditised” and other services will become more central to the customer's perception of value for money. Updating and compilation are of course only part of the range of services: I believe that publishers will have plenty of added value still to provide.

The key factor will be our ability speedily and effectively to provide the market with primary material in value-added form in a range of formats, *along with timely commentary by quality expert authors in each field*. The emphasis on commentary draws heavily on our “traditional” publishing skills – knowledge of what the market wants (and will want), fitting

<sup>47</sup> Wise (2008). Wise V. and Schauer F. ‘Legal Information as Social Capital’ (2008) 99 Law Library Journal 267.

<sup>48</sup> See [http://ec.europa.eu/information\\_society](http://ec.europa.eu/information_society)

products to its needs, commissioning and selection, and the layout, design, structure and quality and process control of products.<sup>49</sup>

Greener's view was thus of the publisher being less interested in the value of the raw data (though he still saw a need for this, understandable at that point in time) and being more involved in providing good quality legal commentary upon the raw data. This is essentially what is beginning to happen: BAILII is producing a solid corpus of material, and reducing the economic value of such data to the publishers. It seems likely that the publishers who wish to produce profits in future will have to follow Greener's suggested path and use the skills of interpretation and legal expertise to make that data more usable by the end user – for it seems unlikely that provision of the raw data will be as profitable in future years.

BAILII will continue, constantly building up its database of new judgments and the expanding the scope of the database (for example, adding more tribunal decisions and Law Commission reports) and providing free access to the user. It will, as a side effect, help foster a revolution in legal publishing as it divorces the provision of raw data from the publishing of added value about that raw data. It will allow all publishers – from single individuals to large firms – to provide competing products in the legal marketplace which deep link to the BAILII corpus. The realisation that the revolution is underway may encourage these publishers to share their raw data with BAILII and save the costs associated with handling it themselves.

Furthermore, traditionally law publishers have been concerned with providing legal information only to the lawyer. But the nature of legal information suggests that open access models will need to consider and potentially meet the needs of a broad range of potential consumers, including practicing lawyers, legal academics, professionals in other disciplines (e.g. environmentalists and accountants), and the public.<sup>50</sup> The BAILII project is explicitly intended to provide an open access resource to potential users of legal information who might otherwise be excluded from such access to information.<sup>51</sup> In so doing, BAILII serves as a 'National Law Library' and such a resource can only help increase the understanding of law in UK society.

<sup>49</sup> Greener (1996) *Author's own emphasis*. Greener R. 'Arranging Deckchairs on the Titanic' 1996 (3) Journal of Information, Law and Technology (JILT).

<sup>50</sup> See, for example, Leith (2004). Leith P. & McCullagh K., 'Developing European Legal Information Markets based on Government Information' (2004) International Journal of Law and Information Technology 12(3) pp. 247-281.

<sup>51</sup> Arewa (2006), p. 837. Arewa O.B. (2006) 'Open Access in a Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market' 10 Lewis & Clark Law Review 797.