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Topic: Digital Content in Civil Court Proceedings –
A Proposed Framework of Regulation
with a View to Promoting Access to Justice

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Abstract

The Hong Kong Civil Justice System faces challenges of high costs, delay and complex procedure and these problems pose obstacle to access to justice. Cornerstones for access to justice include lawyers, free dissemination of law and the judiciary. Now, lawyers are not practically accessible to all individuals in the society owing to structural failure of the legal system. Law develops its complexity with the society; nonetheless, dissemination technology of law is not as developed as sufficiently to satisfy demands of the society. The court is in a limbo in which impartiality and fairness to all parties constrain its role to assist unrepresented litigants.

Disruptive legal information technology and emerging Electronic Legal Information (ELI) may arise as the 4th cornerstone in face of the challenges. Electronic Legal Information (ELI) refers to (i) an integrated Electronic Law governing civil procedures and other areas of substantive law, (ii) electronic legal document filings and evidence and (iii) electronic court case status information. ELI is transforming the existing cornerstones to their virtual existences, which take on new capability to face the challenges of high costs, delay and complexity.

To promote access to civil justice, disruptive legal information technology should be adopted and a positive right to access ELI be established. **For unrepresented litigants**, the use of ELI will put them in a better position to assess if legal assistance should be sought or it would be better to remain unrepresented. Should they choose to be unrepresented, ELI provides ease of reference to law and integrates law from their perspective. **For represented litigants**, they will have a greater access to information concerning activity of court proceedings and they will be in a better position to push progress with the availability of case status information and electronic court document filings.

Court should not be obstructed by the fair to all prejudice in its efforts to provide ELI for parties to the proceedings. Court should also provide and maintain options of court services for those who have difficulty in using ELI.

To prevent misuse of ELI, court should formulate an access policy. Secure authentication procedures, which will only grant access to authorized users

only, and audit procedures, which can trace accountability of misuse, should be established. The ELI (Digital Content) protection technology should be adopted to avoid the risk of intentional or accidental disclosure of information to the non-parties of the proceedings. Access agreement should be used to limit use purposes.

Introduction

Hong Kong Civil Justice System operates in a constitutional cornerstone, which provides for the enshrined right to access to law, court and a fair trial in pursuance to Article 35 of the Basic Law ¹: -

“Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies. Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.”

The Hong Kong Civil Justice System, like other common law jurisdictions, faces challenges of increasing costs², delay³, and complexity⁴, which give rise to challenges to access to justice. Access to justice in common law jurisdictions has been built upon cornerstones which support effective operation of legal system and resolution of disputes of the society. These cornerstones include lawyer, judiciary and free dissemination of law.

¹ THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA (ADOPTED AT THE THIRD SESSION OF THE SEVENTH NATIONAL PEOPLE'S CONGRESS ON 4 APRIL 1990) - ARTICLE 35, accessible on Hong Kong Legal Information Institute at <http://www.hklii.org.hk/hk/legis/ord/2101/s35.html>

² The Interim Report and Consultative Paper issued by the Chief Justice's Working Party on Civil Justice Reform, November 2001, Chapter D, Hong Kong Judiciary at <http://www.civiljustice.gov.hk/ir/index.html>

³ The Interim Report and Consultative Paper issued by the Chief Justice's Working Party on Civil Justice Reform, November 2001, Chapter E, Hong Kong Judiciary at <http://www.civiljustice.gov.hk/ir/index.html>

⁴ The Interim Report and Consultative Paper issued by the Chief Justice's Working Party on Civil Justice Reform, November 2001, Chapter F, Hong Kong Judiciary at <http://www.civiljustice.gov.hk/ir/index.html>

In an information society, when services in other walks of life such as commerce and government are migrating from a physical presence to their virtual platform at a lower operational cost and greater convenience. In Hong Kong, the said cornerstones face the same tidal changes consisting of opportunities and risks. With the advent of Internet, the emerging legal technology may arise as the 4th cornerstone. It transforms the mode of operation of other cornerstones to their virtual existences, which take on new capability to face the challenges of high costs, delay and complexity. Hence, the legal framework governing the process and services should support the legal information technology and recognize the right to access and use the same by court users. Access to justice will thus be fostered.

Cornerstones For Access to Justice

Lawyer

The prime cornerstone is the legal profession. From a historical perspective, when law started its remarkable growth as paper and print technology developed⁵, the legal profession emerged and lawyers were recognized as specialized in administering the formation and dissemination of law. Lawyers have been the essential information ‘middleman’ at the gateway to access to justice by the public as they master the sources, growth and operation of the law.

Universal to many common law jurisdictions, the legal profession may become practically inaccessible owing to structural failure of the legal system. Firstly, the sandwiched class of the society is not eligible for legal aid. At the same time, they could not afford service of private lawyers. Secondly, for minor claims, the value pursued does not justify the costs of

⁵ For a detailed account on the development of law with paper and print technology, please refer to MARTIN Peter W, ‘Pre-Digital Law: How Prior Information Technologies have Shaped Access to and the Nature of Law’, Montreal Conference on Crown Copyright in Cyberspace, May 1995, <http://www.lexum.umontreal.ca/conf/dac/en/martin/martin.html>

lawyer.⁶ The right to access to court is practically qualified by an assumption of an accessible legal profession which can represent lay clients to decipher through complex legal information and ensure procedural justice.

⁶ In Hong Kong, there is few empirical research conducted on how and why the society resolve legal problems and disputes by different means. In UK, Professor Hazel Genn published the findings of a sizeable survey in a book on the topic in 1999, namely "Paths to Justice: What People Do and Think About Going to Law", Hart Publishing, Oxford and Portland, Orgeon.

Dissemination of Law

The second cornerstone is the free and wide dissemination of law to each and every member of the society. It is an axiomatic convention that ignorance of law is no defence⁷ in the common law system. For the axiom to hold valid, it is balanced by an equally onerous convention of the legal system that access to law shall be free and accessible to the whole society. In a modern context, Hon Chief Justice Andrew Li reiterated the importance in the following terms⁸:-

“Justice needs to be done and justice needs to be seen to be done. Open justice is a fundamental feature of our system. To maintain and strengthen public confidence, it is important that the public has easy and convenient access to judgments of the courts. For this purpose, we have made court judgments available on our website and both local and overseas viewers now have easy access to them.”

Similarly, Lord Justice Brooke of UK said that it should be the concerns of

⁷ "the nobility and gentry of the realm...may understand ... seeing that ignorance of the law is no excuse.", preface to Coke on Littleton as per the research by MARTIN Peter W, 'Pre-Digital Law: How Prior Information Technologies have Shaped Access to and the Nature of Law', Montreal Conference on Crown Copyright in Cyberspace, May 1995, <http://www.lexum.umontreal.ca/conf/dac/en/martin/martin.html>

⁸ Keynote Opening Speech by the Hon Chief Justice Andrew Li at the Legal IT Conference for Legal Practitioners, on Tuesday, 11 December 2001, para.14 accessible at http://www.judiciary.gov.hk/en/other_info/speeches/keynote.htm

not only the Court but also the Government as a whole⁹:

“The extent to which taxpayers' money should be available for this new service of enabling everybody, rich or poor, to have free access to all the law on a website like this is a matter for Government as a whole and not really for the Court Service Agency or the Scottish Courts Administration.”

Albeit given access to the law, from an empirical view of its operation the society seldom exercises one's right personally given an accessible legal profession. As the law is operating with the presence of the highly specialized legal profession, in the modern context, people seldom exercise legal right personally unless one chooses to do so. It goes naturally that the notion of free dissemination of law is implemented more of a ritual rather than of substance for the society.

As law is not required to be used for mass on a daily basis, the paper and print technology does not develop to fit individuals' needs. Whereas law serves those who use it, law in the context of paper and print technology emerges in the form for specialized legal profession, who possesses a

⁹ Speech of Lord Justice Brooke (Lord Justice of Appeal and Judge in charge of Modernisation), The use of technology in the Courts Leeds University 28 May 2003 at <http://www.dca.gov.uk/judicial/speeches/ljb280503.htm#part22>

pre-existing knowledge on how the law interrelates. Law has traditionally been categorized in legal concept boundary, such as tort, contract law, equity and trust. The legal concept boundary is not meaningful to the society, who has to rely on lawyer to make good sense of the problem which requires a legal solution. Yet, it is still more meaningful than a numerical reference system, such as the number of chapters of Hong Kong Ordinance¹⁰ and case number of court decision reference¹¹.

From the society perspective, it is economical to expend a sufficiently minimum level of resources to maintain the free dissemination of law, such as in public library. The underdevelopment of dissemination technology of law in the mode, which is readily deployable by the mass, shifts the balance of reliance further to the legal profession. On the pathway of access to justice, given lawyer becomes practically inaccessible to the society, the demand landslides to the doorway of the court administering justice. The society is handicapped to resort to self-help, partly owing to the underdevelopment of the said dissemination of technology of law. It causes

¹⁰ Bilingual Laws Information System at <http://www.justice.gov.hk/eng/home.htm>

¹¹ Please refer to the case number of a judgment listed at the end of a citation accessible at Hong Kong Legal Information Institute at http://www.hklii.org.hk/hk/eng_jud/HKCFJA/2004/

lack of competence to deploy law to solve one's problem.

In general, the procedural law is published as court rules arranged in chapter numbers and section numbers. Court practice directions are arranged in numerical reference in chronological order. Court forms are referred to by number reference attaching to the relevant court rules. The disintegrated dissemination of procedural law precludes those without practical access to lawyer from resorting to self-help. The court is given added difficulty to integrate the various sources of procedural law for the benefits of the unrepresented litigants but, at the same time, the court shall need to use its time efficiently to resolve disputes with no delay.

Judiciary

As one of the most significant cornerstones in access to justice, the court operates in reliance of lawyer. Under adversarial convention, the court shall be impartial to all parties. At the same time, the level-playing field is maintained by the presence of an accessible lawyer to the parties. The civil justice system achieves the results of fairness by elaborated procedural mechanisms through which issues of disputes are defined and evidence are prepared for the court to decide. The said elaborated procedural mechanisms win the common law jurisdiction trust and confidence for its fairness to those who could afford practical access to lawyer. From the perspective of those with no practical access to lawyer, the elaborated procedural mechanisms constitute barrier to their access to justice. A bulk of procedural court rules, practice directions¹² and court judgments has accumulated. It takes a law graduate to spend 1 year of pre-practice study and initial years of apprenticeship to learn the overview of the procedural mechanisms.

¹² Practice Directions accessible at Hong Kong Legal Information Institute at <http://www.hklii.org.hk/hk/other/pd/>

Given an impractical access to lawyer as discussed above, the court is in a limbo in which impartiality and fairness to all parties constrain its role to assist individuals of no practical access to lawyer who appear as unrepresented litigants before the court. The Hong Kong Judiciary, in establishing a resource centre for unrepresented litigants, states the limits in the following terms¹³:

“the courts could explain the procedure and give guidance on matters such as the filling in of forms and the submission of court bundles. But, as a matter of fundamental principle, the courts cannot act as lawyer for the unrepresented litigant, giving legal advice or acting as advocate.”

For the very same mission of fairness, the court has to help out to tip the balance of level-playing field by making sure the unrepresented litigants are not put in a disadvantageous position merely because they are not represented by lawyers. It is submitted that common to many jurisdictions, the courts are not infrastructurally and resource-wise ready to face these challenges. Court time in public hearing is spent on explaining the court

¹³ Report of the Steering Committee on Resource Centre for Unrepresented Litigants, Hong Kong Judiciary, para.1.10 accessible at <http://rcul.judiciary.gov.hk/rc/eng/screport/RC%20Report.pdf>

procedures and preparation of document to assist the unrepresented litigants to follow the elaborated procedures mechanisms.

It is submitted that the unmet legal needs and the challenges posed by unrepresented litigants create a scene to evaluate the substantial meaning of free and wide dissemination of law against the background of the Internet and legal information technology. Should there be a positive right to access integrated dissemination of law in the governance framework, the right may shift the balance more to self-help and offload the demand to court by unrepresented litigants.

Disruptive Legal Information Technology & A Legal Right to Access and Utilize Electronic Legal Information (ELI)

Disruptive Legal Information Technology

Disruptive technology¹⁴ refers to the scientific methods and innovation and its emergence exerts disruptive impact to the society, the market landscape and the industrial players in the context of this paper. The commonly quoted examples include steam engine and computer. Speaking in the context of legal information technology, paper and print had been disruptive to the development of law and human civilization.

Access to justice is physically conditioned by personal visit to lawyer's office, attending public library to access law, filings of documents at court registries, attending various court hearings to give evidence and settling fines or payments at court's shroff's office, etc. In terms of the transaction costs in administering the court case and information costs in searching for the relevant substantive law and procedural law, it is luxurious for an ordinary citizen to engage in court proceedings with a view to exercising

¹⁴ The term was first used by Christensen C (1997) *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* (Boston: Harvard Business School Press) in a business context.

one's legal right.

Internet and the legal information technology are inherently disruptive in promoting access to justice, in particular to the larger number of unrepresented litigants. In a modern society whose development is ever fostered by information technology development, the long established cornerstones of lawyer, dissemination of law and court as well as their respective roles are challenged by the change in the underlying information dissemination technology. With the advent of Internet access of sufficient bandwidth and electronic commerce activity, the public is transformed from recipients of standardized information to participants disseminating customized information. Consequently, individuals are tremendously strengthened in handling information by making use of personal computer and the Internet.

In the jurisdictions which have adopted disruptive legal technology, parties to the proceedings and their legal representatives could now access integrated source of court information from the portal of the court accessible

on the Internet¹⁵. For those having implemented electronic filing or access to court records, parties and their legal representatives could file court document electronically and make inquiry regarding court order made or date of future hearings on the Internet¹⁶. In UK, the administration masterminds the set up of a legal information portal, which categorizes and integrates dissemination of legal information from the perspective of legal problems faced by the society by the “Just Ask” web site¹⁷, such as termination of employment, traffic accident claims and divorce arrangement¹⁸. The court service of UK has applied legal information technology to areas beyond information dissemination, namely the use smart court forms guided by layman questions to facilitate money claims online¹⁹.

¹⁵ A case in point is the e-services provided by the Hong Kong Judiciary, which provides an integrated search on hearing dates of all court levels, accessible at http://e-services.judiciary.gov.hk/hr_enq/index.jsp?lang=EN. A further example is the web page of the Federal Court of Australia accessible at http://www.fedcourt.gov.au/ecourt/ecourt_slide.html

¹⁶ For an example, please refer to the VCAT online implemented by Victorian Civil and Administrative Tribunal at <http://www.vcat.vic.gov.au/>

¹⁷ The Website of Community Legal Services of UK at <http://www.justask.org.uk/index.jsp>

¹⁸ The legal information in layman terms is searchable at <http://search.justask.org.uk/index.asp?lang=en>

¹⁹ “Money Claim Online” at <http://www.courtservice.gov.uk/mcol/>

Electronic Legal Information (ELI)

Disruptive legal technology will bring about tremendously useful electronic legal information. For the purpose of this research paper, **Electronic Legal Information (ELI)** refers to: -

- (i) An integrated Electronic Law governing civil procedure and other areas of substantive law;
- (ii) Electronic legal document filings, pleadings and evidence (written affirmation, witness statements and oral testimony in digital audio)
- (iii) Electronic court case status (case filings, fixture of court hearing, delivery of court orders and judgments)

ELI will emerge in different forms when legal information technology continues to develop. In the context of its impact on access to justice, the notion of ELI and its growing nature will be further discussed in subsequent sections.

A Legal Right to Access and Utilize ELI (Electronic Law) and Access to Justice

Obstacles in Formation of Electronic Law

In the digital age, use of Internet and legal information technology constitute a superior means to access to law. The court shall be free from interference in applying the legal information technology for the interests of justice. Assertion of copyrights had been an obstacle for some jurisdictions. The Supreme Court of Canada has recently delivered a judgment concerning copyright of judicial decision and concluded a long enduring litigation involving a legal publisher. In *CCH Canadian Ltd. v. Law Society of Upper Canada*²⁰, the Canadian Court held that

“judicial reasons in and of themselves, without the headnotes, are not original works in which the publishers could claim copyright.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.”

²⁰ 2004 SCC 13 accessible on Canadian Legal Information Institute at <http://www.canlii.org/ca/cas/scc/2004/2004scc13.html>

Similarly, Lord Justice Brooke of UK court said²¹: -

“The one thing that is certain is that we must never again allow private interests to obtain copyright entitlement over the publication of our judgments.”

Evolving Electronic Law

Electronic law (*Type I ELI*) keeps on its development in the capability to find, retrieve and use in various forms. Martin²² illustrated the nature of law was impacted by the communication and information technology (CIT) in that it was first supplemented by digital law and further it was to be substituted by the digital law. With the advent of the Internet, law was widely distributed via communication networks and the World Wide Web. Secondly, presentation and retrieval of law has been enhanced from “print” technology to digital technology via electronic database having functionality of key word search and hypertext link among various sources of law. Thirdly, Martin²³ further illustrated “law in action”²⁴ enabled by digital technology in

²¹ Speech of Lord Justice Brooke (Lord Justice of Appeal and Judge in charge of Modernisation), The use of technology in the Courts Leeds University 28 May 2003 at <http://www.dca.gov.uk/judicial/speeches/ljb280503.htm#part22>

²² MARTIN Peter W, ‘Pre-Digital Law: How Prior Information Technologies have Shaped Access to and the Nature of Law’, Montreal Conference on Crown Copyright in Cyberspace, May 1995, <http://www.lexum.umontreal.ca/conf/dac/en/martin/martin.html>

²³ Martin Peter W., ‘Digital Law: Some Speculations on the Future of Legal Information Technology’, NCAIR Sponsored Program on the Future of Legal Information Technology May 1995, <<http://www.law.cornell.edu/papers/fut95fnl.htm>>

²⁴ Martin has not provided a definitive statement to “Law in Action”; yet the notion is contrasted to “law on the books”.

Law in Action refers to “reading the law in outcomes not just in precedent” and “greater consistency through better

assisting the courts in the administration of justice.

Electronic law will continue to take on new representations when legal technology develops. One case in point is the one click note-up function²⁵ provided by the Hong Kong Legal Information Institute²⁶ enabling a search of cited legislation in judgments. The innovative legal information technology reduces the complexity of the operation of reference to law and integrates different sources of law from the searcher's perspective²⁷.

The development of innovative use has also moved from a “search & retrieve afresh” model to a “record & reuse” model. The Hong Kong Civil Justice Reform (CJR) Web site has made available an information-locating tool, namely CJR citator²⁸, which enables a user of the electronic CJR final report to create an electronic citation online embedded with a hypertext link

feedback”.

²⁵ HKLII Day Workshop Exercise, Section 5, Date: 14 Oct 2003 at <http://www.hklii.org.hk/workshop.html>

²⁶ <http://www.hklii.org.hk>

²⁷ A case in point is the electronic leaflet for unrepresented litigants published by the Hong Kong Judiciary accessible at <http://rcul.judiciary.gov.hk/rc/eng/jrl/JudicialReviewLeaflet.jsp>. A litigant in person could look up information from a layman's view, for example on judicial review and a reference to court rules and practice directions contains hypertext links to the referred legal information on Hong Kong Legal Information Institute.

²⁸ An overview of its use is accessible at <http://www.civiljustice.gov.hk/aboutejrcitator.html>

pointing to a paragraph of the report. The citation is generated by the web site and could be *recorded and reused* with others on the Internet. A citation generated from the web site online is appended as follows: [The Final Report of the Chief Justice's Working Party on Civil Justice Reform, Section 32: Material support for the reforms, Para918](#). Similarly, Hong Kong Judiciary has envisaged an innovative use of electronic law to support the development of a bilingual legal system. Hon Chief Justice Andrew Li said²⁹:-

“... .. we are now building up a bilingual database of judgments in Chinese and judgments translated into Chinese. When completed, it will provide Judges, at a click of the mouse, with a number of alternative Chinese versions to a legal term, together with the context in which the term has been used in previous judgments. This device will greatly assist our bilingual judges in discharging their judicial duties under a judicial system where both English and Chinese are official languages.”

²⁹ Keynote Opening Speech by the Hon Chief Justice Andrew Li at the Legal IT Conference for Legal Practitioners, on Tuesday, 11 December 2001, para.12 accessible at http://www.judiciary.gov.hk/en/other_info/speeches/keynote.htm

Impact of Electronic Law on Access to Justice

Richard Susskind³⁰ has described the phenomena of hyper-regulation in a modern society. It is said that as the society grows in complexity by its heterogeneous commercial activities, the law develop in multitude to cope with the society correspondingly. Lawyer faces voluminous law in various specialized areas and the law is no longer complex to layman only. Law is a mammoth task to lawyer.

With the flourishing Electronic Law by its various forms, from court's perspective the application of legal information technology has the potential capability to re-categorize the procedural law to suit the customized need of court users at affordable costs. Less time from lawyer and judges for bridging up access to law may mean lower costs and quicker disposal of proceedings. From the perspective of layman party to the proceedings, though in the absence of empirical findings on why court users choose to be unrepresented, a positive right to access and use electronic law will put them

³⁰ Susskind R, *The Future of Law* (Oxford: Oxford University Press, 1996), p.17.

in a better position to assess if legal assistance should be sought or it would be better to remain unrepresented for the purpose of securing a more economical and efficient resolution of their disputes. Should the parties to court proceedings choose to be unrepresented, they are empowered and elevated onto a new platform to crack the complexities of procedural law. It is submitted that it is upon the emergence of hyper-regulation that the society is entitled to assert a positive legal right to access to Electronic Law.

Emergence of A Separate Legal Right to Electronic Law

In distinguishing paper law and digital law, McMahon has referred to an application for access to electronic law before the Missouri Court of Appeals, by invoking a freedom of information law³¹:

“The Revised Statutes on computer disk have additional features not offered by the book form. The annual computerized version integrates previous supplements into the main body of the Revised Statutes. There is no need to compare the hardbound books with the soft cover supplements. The computerized version allows the user to search all volumes in seconds by key word, phrase or statute number. The user is no longer limited by the index or his knowledge of where to look in the Revised Statutes to find a particular topic.”

It is documented that digital law provides inter-linkage among different laws and search functions, which are not present in law on print, which uses annotation, indexing and subject categorizations. The citizens apparently recognized the distinguishing superiority to the accessibility of law via electronic means while he was enforcing his legal rights given by law.

³¹ *Deaton v. Kidd*, 932 S.W. 2d 804 (1996, upholding Circuit Court of Cole County, No. CV193-1426CC, Nov. 21, 1994) as per cited in McMahon (1999) 'Improving Access to the Law in Canada' [1999] COL 3, <http://www.hkii.org/au/other/ComplRes/1999/3/03.html>

Freedom of information law did not intend to create a positive right for the society to assert a right to access law by its searchable electronic format. Yet, the case shows that the legal information technology has created a new meaning to dissemination of law. The party to the case expects dissemination of law to take the form of ongoing availability of Electronic Law. **Having hyper-regulation at the backstage, the right to access law by its electronic manifestation is as fundamental as the right to access law in an information society. It is SUBMITTED that the society is entitled as of a legal right not only to the access to law but also to the electronic law by their ever-evolving manifestations.**

A Legal Right to Access and Utilize ELI (Legal Document Filings) and Access to Justice

Legal practice is assisted by the use of office automation software to compile legal documents in civil proceedings, such as pleadings, affirmations, witness statements, draft court orders and judgments. In Hong Kong, paper legal documents for filing in court registry seldom exist before their electronic counterparts. Albeit the stated fact, reliance on paper document is strengthened by the lack of law in enabling transmission, storage, access and preservation of the legal documents filed by all parties in civil proceedings. For example, the UK Civil Procedure Rules, rule 5.5³² provides for filing and sending documents to court by e-means: -

“5.5 (1) A practice direction may make provision for documents to be filed or sent to the court by –

- (a) facsimile; or
- (b) other electronic means.

(2) Any such practice direction may –

- (a) provide that only particular categories of documents may be filed or sent to the court by such means;
- (b) provide that particular provisions only apply in specific courts; and
- (c) specify the requirements that must be fulfilled for any

³² http://www.dca.gov.uk/civil/procrules_fin/contents/parts/part05.htm#rule5_5

document filed or sent to the court by such means.”

Thus, the lack of law denies parties to the proceedings and their legal representatives to the right to access legal document filings (Type II ELI), which is a pathway to enhanced access to justice.

From the court administration perspective, conventional reliance on paper documents prevents all parties from realizing economic savings arising from a more efficient means to transmit, store, access, retrieve legal information. Judges and lawyers are constrained by paper technology in deploying legal information from originating processes, pleadings, evidence in affidavits, witness statements and audio evidence in oral submissions and hearing. In the long processing cycle of civil cases, different Judges and lawyers struggle through identifying legal information in issues embodied in paper legal documents and resolves disputes on substantive or procedural matters. Unlike the use of legal information technology, the efforts of cross-referencing documents are duplicated in hearings at every stage of the proceedings. Conversely, by the use of legal information technology, the efforts of cross-referencing documents could be retained in electronic format

by the use of document links to connect legal information on an issue-by-issue basis.

In terms of document administration costs, to save the valuable time costs of courts, paper document filed are not reusable throughout the litigation cycle from commencement to enforcement of proceedings. At one point of time, copies of document filed and other relevant documents are copied and tidied up for the court's consideration for the sake of one single interlocutory application or hearing. The copying and submission practice repeat until the civil court case is finally disposed. It is submitted that this inefficient information processing cycle prevents the litigation costs from going down in that more time of lawyers and judges are spent to handle matters throughout the case processing cycle.

It is submitted that court rules and practice directions were formulated at times when paper workflow was envisaged in every court case transaction from lodging of originating process to application to setting down the case for trial.

Though legislation legalizing the use of electronic records and digital signatures has been enacted, namely the Electronic Transactions Ordinance (ETO)³³ in Hong Kong, the court has an onerous duty to exercise a high level of prudence in deploying appropriate use of legal information technology to migrate the current paper workflow to the new electronic workflow. Thus, all court proceedings are exempted from the major provisions of the ETO³⁴, such as those on electronic records and the use of digital signature. Hong Kong Judiciary has planned the future directions with a pilot run and consultation³⁵:-

³³ Accessible on Hong Kong Legal Information Institute at <http://www.hklii.org.hk/hk/legis/ord/553/>

³⁴ s.13, ETO accessible on Hong Kong Legal Information Institute at <http://www.hklii.org.hk/hk/legis/ord/553/s13.html>

³⁵ The Final Report of the Chief Justice's Working Party on Civil Justice Reform, Section 32: Material support for the reforms, Para916, accessible at <http://www.civiljustice.gov.hk/fr/paperhtml/fr556.html>

the possible introduction of electronic filing ("e-filing") is being studied with the aim of launching a pilot scheme involving selected court users. Initial research into the legal implications of such a system has been conducted and the experience of overseas jurisdictions has been studied. Consultations will in due course be held with the legal profession and other potentially interested parties on the introduction of a pilot scheme.”

Provision of legal service is usually monopolized by legal restraints on the qualifications to provide legal advice. Market force may not be present as per thought as competition is not keen to cultivate innovative mode of legal practice. Despite there may be a business model running at lower costs, it may never be adopted as economic rents are guaranteed by the law created monopolies for the existing incumbents. To promote the use of legal information technology, law should be present in the governing framework under which a more efficient processing system of transmission, storing, accessing and retrieving ELI is promoted.

Given the adversarial nature of civil litigation, the right to access and use ELI filed by parties to the proceedings may be subject to the challenge of copyrights law when it is advantageous for a party to the proceedings to

deploy it as weaponry for the sake of litigation tactics. It is submitted that law should be introduced to enable transmission, storage, access and preservation of legal documents filed by parties in civil proceedings and thus provides certainty as to the right to use ELI filed by parties for the administration of justice.

Access to justice, in the context of the structural deficiencies of the cornerstones of lawyer and dissemination of law, is to be promoted via access to ELI. It empowers the society to have the capability to steer the resolution of disputes in court proceedings and forms the new communication platform to build the professional and client relationships with the lawyer.

Electronic Legal Information (ELI) and Fair-to-All Prejudice

Based on the premises put forward in the above sections, it is submitted that the legal information technology has a role of substance to play in promoting access to justice. The legal information technology shall be acknowledged by law to ensure a stable public policy to foster its development. The policy of promoting legal technology may conflict with other competing policy in the transition. Its thriving development may be hindered by an insufficiently grown infrastructure. A case in point is the fair to all prejudice.

Critics say that the court should never create a differential treatment to the court users with access to the Internet and those without access. A lack of universal access may be a result of digital divide, which refers to the social injustice aggravated by an uneven allocation of resources to the development of information technology in a society. It is not an inherent weakness of the legal information technology. The Administration has a significant role to play in bridging up the digital divide by providing a universal community access to computer and Internet of sufficient bandwidth.

Regarding the policy of court, before the society has reached the universal community access to Internet or the provisions of community access has attained a socially acceptable level, the court shall provide options for those who may not afford electronic service. Access to court registry service shall be in hybrid mode in which there are options of physical service or electronic service. Court provided facilities to access electronic legal information and services should also be considered.

Promoting access to justice by legal information technology should be balanced against the risks of prejudice to the IT Have-Nots. Yet, fair-to-all treatment argument should not hinder the court to apply legal information technology to the court process, in which parties to proceedings and their legal representatives could have greater access and utilization to the **ELI**. Legal information technology amounts to the capability to access to, and more importantly, mastery of complex ELI upon which access to law; court and a fair trial are fostered. It is submitted that the right to access to ELI should be protected by law as a legal right for persons living in digital society.

Safeguards by Law Against Misuse of Electronic Legal Information (ELI)

Access Policy

In Hong Kong courts, everyone is entitled to a fair and public hearing before the court. At the same time, open justice should be balanced against scenarios in which publicity will prejudice the interest of justice³⁶. By the same token, should the law recognize the right to access and use the ELI by parties to the proceedings, the access and use should be subject to appropriate access policy formulated in accordance with the law. In the Australian context, Anne Wallace³⁷ has discussed the balance between greater access to court documents by non-parties with other competing interests. Quoting Santow J's remarks in *eisa Limited v Damien Brady & 2 Ors*³⁸ by Wallace: -

³⁶ s.8, Article 10, Hong Kong Bill of Rights Ordinance accessible at Hong Kong legal Information Institute at <http://www.hklii.org.hk/hk/legis/ord/383/s8.html>

³⁷ Wallace A, "Overview of Public Access and Privacy Issues", p.3, accessible at <http://www.law.qut.edu.au/files/wallace.pdf>, paper delivered to Conference of "[Courts for the 21st Century: Public Access, Privacy and Security](#)" presented by The Faculty of Law and The Supreme Court of Queensland on Thursday 6 November 2003 accessible at <http://www.law.qut.edu.au/about/past.jsp#courts>

³⁸ [2000] NSWSC 929 revised - 4/10/2000, quoted by Wallace at <http://www.lawlink.nsw.gov.au/scjudgments/2000nswsc.nsf/2000nswsc.nsf/WebView2/C5227BE9AF057A80CA256969002131AD?OpenDocument>

“There is a need to avoid injustice and unfair prejudice in the trial from disclosure of serious and as yet untested or incompletely tested allegations, ... Neither principle has a priori ascendancy. Both are subordinated to the interests of justice in which the community is vitally concerned as well as the parties”

Wallace discussed the access to court documents in the context of request from non-parties. In a wider context, the consequences of intentional or accidental disclosure of parties' information via electronic court documents to non-parties for purposes other than administration of justice could be severe. The access policy shall serve as a safeguard to such misuse triggered by the greater convenience to retrieve and publish by e-means. Wallace recommends authentication procedures should be implemented to grant access to authorized users only. Audit procedures should be set up for the sake of tracing accountability of misuse³⁹. Wallace has also researched on the possibility of (1) using an access agreement to limit the use of documents accessed for stated purpose only and (2) indemnity shall be provided to the court for any liability arising from misuse⁴⁰.

³⁹ Wallace A, “Overview of Public Access and Privacy Issues”, p.23, accessible at <http://www.law.qut.edu.au/files/wallace.pdf>, paper delivered to Conference of “[Courts for the 21st Century: Public Access, Privacy and Security](#)” presented by The Faculty of Law and The Supreme Court of Queensland on Thursday 6 November 2003 accessible at <http://www.law.qut.edu.au/about/past.jsp#courts>

⁴⁰ Susan Jennen, Jane Nelson and Debra Roberts, *Privacy and Public Access to Electronic Court Information-A Guide to Policy*

Similarly, transcripts of proceedings form the essential records for trials and appeals. With the advent of digital audio technology, written transcripts can be produced whenever it is needed upon payment⁴¹ and the digital audio transcripts are available to parties upon application to the court. Access to digital audio transcripts form part of the right to access ELI, which is the gateway to promote access to justice. Nevertheless, the enhanced right to access to digital audio should be counterbalanced by safeguards by law to protect the data privacy of persons giving evidence in court and the solemnity of court proceedings as per discussed above. It is submitted that the right of parties to access electronic court documents and audio transcripts shall be balanced against the potential misuse. Sharing the views of Wallace, such misuse may cause damaging disclosure of untested evidence and jeopardize the privacy of other parties and witnesses. Access policy shall be clearly stated and published to guard against misuse. The use of access agreement and secure authentication procedures shall be put in place before

Decisions for State Courts (1995), quoted by Wallace.

⁴¹ Order 68, Rules of the High Court accessible at Hong Kong Legal Information Institute at <http://www.hklii.org.hk/cgi-hk/ii/displ/hk/legis/reg/4A/s68.html?query=%7e+transcript>

implementation.

ELI (Digital Content) Protection Technology

Appropriate technology should also be adopted to manage the risk of accidental or intentional disclosure to non-parties of the proceedings, such as the use of public key cryptography to encrypt the legal documents for authorized users only or management of access and utilization by digital rights management solution or other digital content protection schemes.

Concluding Recommendations

Hong Kong Civil Justice System is facing the challenges of increasing costs, delay and complexities of procedures. In the context of the infrastructural deficiencies of the cornerstones, disruptive legal information technology and the Electronic Legal Information (ELI) is emerging as a new cornerstone in the information society and access to justice is to be promoted accordingly: -

- ♦ For unrepresented litigants, the complexity of the elaborated procedural mechanisms is to be alleviated by the disruptive legal technology applied in integrated procedural law. They would be empowered by its enhanced capability to deploy law for exercising its legal rights.
- ♦ For litigants, as clients to lawyers, they will have a greater access to information concerning activity of the court proceedings and more importantly they are in a better position to push progress with the easy availability of case status information and Electronic court documents filings.
- ♦ The transaction costs to deploy court processes for dispute resolution is to be reduced.

For the benefit of Hong Kong legal system, in particular for those without

practical access to lawyer, **it is recommended** that the governing framework of digital content in civil justice system should: -

1. establish a positive right to access and utilize Electronic Legal Information (ELI) by parties to the proceedings and their legal representatives; and
2. foster the application of disruptive legal technology.

To put in place the newly arising legal rights, **it is further recommended** that corresponding measures should be formulated to hedge against implementation risks: -

3. Court should not be obstructed by the fair to all prejudice in its efforts to provide ELI for parties to the proceedings. Court should provide and maintain options of court services for those, who have difficulty in using ELI.
4. Access policy should be formulated to safeguard against intentional or accidental misuse.
5. Access agreement to limit use purposes, indemnity clause and ELI protection technology should also be considered.

Bibliography

Legislations

THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA (ADOPTED AT THE THIRD SESSION OF THE SEVENTH NATIONAL PEOPLE'S CONGRESS ON 4 APRIL 1990) - ARTICLE 35 at

<http://www.hklii.org.hk/hk/legis/ord/2101/s35.html>

HONG KONG BILL OF RIGHTS ORDINANCE, Section 8

Hong Kong Bill of Rights at <http://www.hklii.org.hk/hk/legis/ord/383/s8.html>

Electronic Transactions Ordinance accessible on Hong Kong Legal Information Institute at

<http://www.hklii.org.hk/hk/legis/ord/553/s13.html>

The Rules of the High Court, Order 68, accessible at Hong Kong Legal Information Institute at

<http://www.hklii.org.hk/cgi-hklii/disp.pl/hk/legis/reg/4A/s68.html?query=%7e+transcript>

Practice Directions accessible at Hong Kong Legal Information Institute at

<http://www.hklii.org.hk/hk/other/pd/>

UK Civil Procedure Rules, rule 5.5 at

http://www.dca.gov.uk/civil/procrules_fin/contents/parts/part05.htm#rule5_5

Judgment

CCH Canadian Ltd. v. Law Society of Upper Canada 2004 SCC 13 accessible on Canadian Legal

Information Institute at <http://www.canlii.org/ca/cas/scc/2004/2004scc13.html>

Deaton v. Kidd, 932 S.W. 2d 804 (1996, upholding Circuit Court of Cole County, No. CV193-1426CC, Nov. 21, 1994)

eisa Limited v Damien Brady & 2 Ors [2000] NSWSC 929 revised - 4/10/2000 at

<http://www.lawlink.nsw.gov.au/scjudgments/2000nswsc.nsf/2000nswsc.nsf/WebView2/C5227BE9AF057A80CA256969002131AD?OpenDocument>

Publications of Court

Report of the Steering Committee on Resource Centre for Unrepresented Litigants, Hong Kong Judiciary, para.1.10 accessible at <http://rcul.judiciary.gov.hk/rc/eng/screport/RC%20Report.pdf>

Keynote Opening Speech by the Hon Chief Justice Andrew Li at the Legal IT Conference for Legal Practitioners, on Tuesday, 11 December 2001 accessible at http://www.judiciary.gov.hk/en/other_info/speeches/keynote.htm

Speech of Lord Justice Brooke (Lord Justice of Appeal and Judge in charge of Modernisation), The use of technology in the Courts Leeds University 28 May 2003 at <http://www.dca.gov.uk/judicial/speeches/ljb280503.htm#part22>

Web Site

Federal Court of Australia accessible at <http://www.fedcourt.gov.au/ecourt/ecourt.html>

‘Hong Kong Bilingual Laws Information System at <http://www.justice.gov.hk/eng/home.htm>

Hong Kong Judiciary website, e-services at http://e-services.judiciary.gov.hk/hr_enq/index.jsp?lang=EN

Hong Kong Judiciary website, Resource Centre for Unrepresented Litigants at <http://rcul.judiciary.gov.hk/rc/eng/jrl/JudicialReviewLeaflet.jsp>

HKLII Day Workshop Exercise, Section 5, Date: 14 Oct 2003 at <http://www.hklii.org.hk/workshop.html>

“Just Ask - The Website of Community Legal Services” of UK at <http://www.justask.org.uk/index.jsp>

“Money Claim Online” Homepage, Court Service of UK at <http://www.courtservice.gov.uk/mcol/>

VCAT online implemented by Victorian Civil and Administrative Tribunal at <http://www.vcat.vic.gov.au/>

Journal

Christensen C (1997) *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* (Boston: Harvard Business School Press).

Martin Peter W., 'Digital Law: Some Speculations on the Future of Legal Information Technology', NCAIR Sponsored Program on the Future of Legal Information Technology May 1995, <<http://www.law.cornell.edu/papers/fut95fml.htm>>

MARTIN Peter W, 'Pre-Digital Law: How Prior Information Technologies have Shaped Access to and the Nature of Law', Montreal Conference on Crown Copyright in Cyberspace, May 1995, <http://www.lexum.umontreal.ca/conf/dac/en/martin/martin.html>

Wallace A, "Overview of Public Access and Privacy Issues", accessible at <http://www.law.qut.edu.au/files/wallace.pdf>, paper delivered to Conference of "Courts for the 21st Century: Public Access, Privacy and Security" presented by The Faculty of Law and The Supreme Court of Queensland on Thursday 6 November 2003 accessible at <http://www.law.qut.edu.au/about/past.jsp#courts>

Books

Susskind R, *The Future of Law* (Oxford: Oxford University Press, 1996)

Susskind R, ["Transforming the Law"](#) (Oxford: Oxford University Press 2000)

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