

Are Legal Texts Grey Literature? Toward a definition of Grey Literature that invites the Preservation of Authentic and Complete Originals.

By Michael Lines, University of Victoria. January 2010.

Law books in the popular imagination

Legal texts, though they exist in a wide variety of forms, are most typically thought of as Law Books. Law books, hardbound volumes in expensive bindings of browns and blacks, are heavy, difficult, and technical. They are a prop to popular conceptions of the law itself, and resemble more closely than most other earthly books the Platonic form of the ‘weighty tome.’

In fact, some law libraries do a regular, if not exactly brisk, trade in renting their law books to TV and film productions. And the more dour the entertainment, the more likely it is to include law books in the background. Perry Mason was too active a man to spend much time in his law office, so we did not see the floor-to-ceiling oak shelves of reserved and wise volumes which undoubtedly offered him nightly counsel. In the ‘80s, LA Law was too concerned with exciting power suits and hairdos to have much need of our serious friends. The ‘90s brought us Law and Order, the dourest thing Americans have thus far been able to stomach on a regular basis. Much like marmite in the UK, or beef jerky in Canada, this distinctive fare seems to have become a regular and much-loved part of the daily American diet. As a result, US citizens, and those of us in the provinces of the empire as well, are treated to regular glimpses of the formidable law book in law office scenes. I would guess that Law and Order also offers the very occasional library scene, though I’m not enough of a devotee to attest to this “so help me God” on a stack of Bibles.

To the extent that there actually is a popular conception of law books, it is undoubtedly one of authority, tradition and power. Of course, it is naturally allied to the reputation of lawyers and of the justice systems generally, which are not unalloyed gold. Between the Innocence Project, which has had many successes exonerating those wrongly convicted and awaiting execution, and vagaries of international ‘law’ which were brought to public notice regarding the Guantanamo detainees, there exists much evidence of the failings of our systems of justice. In these dramas, law books are sources of traditions that can communicate both rights and wrongs.

The mixed character of law books can be summarized in two additional qualities, which it is safe to say escape entirely the purview of the casual onlooker: Law books are both official and public. In their official character they reveal their intimate connection with bureaucracy. Law books are perhaps the most official and authoritative printed result of any bureaucratic process, and in this they are a pinnacle in our doomed efforts to exert systematic control over the wildness of everyday life. Technical and convoluted, law books also remind us of the grim possibility of state-sanctioned force overriding our human rights: law books can send you to jail, and it is this powerful capacity, their official nature, that most distinctly sets them apart from grey literature, which, to say the least, has credibility issues.

Law books are also public, or at least they are in less paternalistic societies. In this aspect law books, and the legal texts they contain, represent trust in the good sense of our fellow citizens, and in the traditions of conversation and consensus building that create individual freedoms and which have led to the discovery, recognition, and protection of human rights in the first place. The public character of law,

the legal texts which articulate them and law books where they are physically expressed is one of the most promising characteristics of any literature.

Characteristics of Primary Legal Texts

Legal texts are either statements of the law or statements about the law. Statements of the law are known as primary legal sources, and statements about the law are known as secondary legal sources. Primary legal sources carry much more authority in court than do secondary. Inasmuch as a court of law can be viewed as a laboratory in which the facts of everyday experience are examined with a view to discovering, refining, and elaborating our understanding of the laws under which we naturally operate, the primary legal texts represent the established body of knowledge, and they are for the most part accepted without incident as 'fact', that is, as a reality. The exceptions, of course, are where new facts bring into question the completeness of the established understanding. In this regard, primary legal texts are authoritative, but not unchallengeable.

From an insider's point of view, and over many years of close association, law books and the legal texts they embody, like spouses, shed much of their original mystique, and reveal more complex characters. It is rewarding to believe that these continually uncovered qualities are even more fascinating than the diverting features that encouraged the initial love affair. This process of discovery reminds us that, in spite of their strongly conceptual nature, legal texts and law books are not abstractions; they take part in and reflect the evolving complexity of the real world.

Primary legal texts find their physical expression in a variety of formats, but they are almost exclusively of a serial nature. In accord with their reputation as imposing and their origins in bureaucracy, they are substantial hardbound volumes bearing the signs of serious intent: elaborate insignia, overlong and syntactically obscure titles, and the prominent reproduction of the names of officials. Generally, and with the notable exception of the US, they are produced by government printing houses, not by commercial publishers, a fact that nominally though not definitively brings them within the domain of Grey Literature. These works also contain few indexing tools, no cataloguing in publication information, and little bibliographic data.

Good Canadian examples of primary legal texts are the *Acts of the Parliament of Canada*, and the decisions of the Supreme Court of Canada. The *Acts*, which are the laws created by Canada's House of Commons and Senate, offer no tables of contents, no cataloguing information, and the barest of publisher information. Thankfully, there are a couple of officially produced indexing tools for this series which help researchers navigate the cross-currents of amendments, repeals, coming into force information, and numerous other complicating factors. Figure 1, the verso of the title page of volume 1 of the 1993 set, captures the full extent of the publisher data provided.

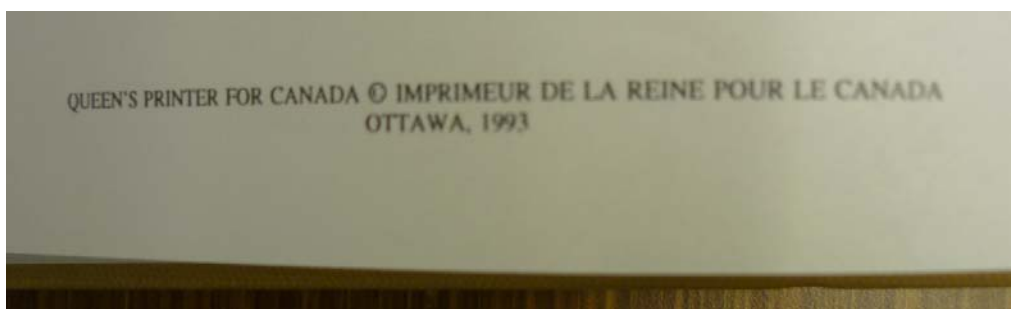


Figure 1

The *Canada Supreme Court Reports* is similar, with a different publication attribution, and minus the index. As shown in Figure 2, the publisher data in volume 1 of the 2001 set is concise, if not cryptic:



Figure 2

Where access to the information is not adequately supplied in an official source, the work is left to commercial publishers, should they choose to provide it. Thus, in paper at least, and relying on official sources alone, the decisions of the Supreme Court of Canada must be read diligently from start to finish in order to adequately gain access to the content. Naturally, the success of that project relies entirely on the capacity of the reader. This lack of tools for access to the text is characteristic more of Grey Literature than it is of commercial publications

In another respect these law books do resemble commercial publications: their method of distribution; like commercial publishers, Canadian government printing operations make their materials available on standing order, and thus they arrive bound and shelf-ready at libraries across the country. And they certainly *appear* to be ‘books’ as opposed to Grey Literature. Plus, their status as official statements of the law separates them from Grey Literature.

However, not every legal text has this official status. A good example is the proceedings of the Canadian Houses of Parliament, known here as The Hansards. These ‘verbatim’ accounts of the public debates in our nation’s capital are the ‘official’ record, and as such they do have a special importance in courts. However, they are not statements of the law in the same sense as the statutes, to which they are a precursor. The Hansards arrive weekly in subscribing libraries as stapled supplements. We then bind them in-house in a very traditional style. If we chose, we could bind them in pink with Hello Kitty knockoffs on the flyleaves. They do not include indexes, tables of contents, or cataloging in publication information.

By some accounts, the Hansards are Government Documents and not legal literature more closely defined. If we accept this definition, the result is that an important and officially sanctioned resource often used in courts to resolve legal disputes is a species of Grey Literature. Thus to the extent that the Hansards step over the line between Government Documents and Legal Literature, we can claim ground from legal texts for Grey literature.

In the same way that the Hansards are official legal texts that provide background to legislation, the courts also produce a variety of documents that have an official character, and which are primary legal textual sources, but which are of a more specific or narrow character. Here we find the factums of the parties (formal statements of the arguments of the parties to an action), injunctions issued by the court on behalf of parties, and a welter of other documents, such as statements of claim, expert reports, and other forms of evidence.

What all these documents have in common is their resemblance to business records. They are documents produced for the accomplishment of a practical activity, and are very typical of bureaucracies.

These documents share with primary legal documents a special status before the courts which is important to examine.

Standards for the Verification of Authenticity

As evidence in courts, documents are generally understood to be an exception to the hearsay rule. The hearsay rule asserts that statements made by third parties cannot be referred to by witnesses as evidence, because the reporting of them is liable to be inaccurate. In the case of documents, an exception is made because it is understood that a document tends to record matters in a manner and especially at an earlier time when the selfish motivations and other factors influencing parties are naturally minimized. Despite the ease with which a false receipt or handwritten IOU can be produced, it is recognized by courts that the forethought required of parties to produce such documents months or years in advance of an appearance in court on a particular action is, for the most part, beyond the capacities of the average sorry sod who finds himself enmeshed in the desperately slow and expensive machine of justice. What is true for the most informal of documents is that much truer for business documents produced by an office, or even better, a bureaucracy, in the regular course of its operations. Thus emails showing the transactions between a client and his agent, communications describing progress on a file, and the contracts the parties produce are all accepted with regularity into courts of law.

It is for the individual judge to assign an evidentiary value to these documents, and part of that assessment will be a consideration of the likelihood of the texts being accurate, i.e. not tampered with or otherwise compromised. In the particular case of court documents, there is an understandable if not entirely excusable presumption of accuracy when they arrive before a court. A simple ink stamp from the court registry, even if it be from an entirely unconnected court system, goes a long way, at least in Canadian courts. The fact that there is no systematic and reliable method of independently verifying the accuracy of the contents of court documents says a lot about the general level of assurances a court requires against fraud and error.

The reliability of the text of legal and quasi-legal sources is not, as seems to be assumed, secure. Without an inside view of government publishing processes, not much can be said. Still, the Hansards provide a suggestive sidelight. The Hansards are ‘verbatim’ accounts of the speeches delivered by the Members of Parliament. However, any researcher who has collected and transcribed interviews can tell at a glance that these are heavily edited versions. They have no ums, no ahs, few false starts, and minimal repetition. Behind the scenes there must exist multiple stages of textual preparation. In some respects this process may resemble those of commercial publishers, and in other respects it is likely to rely on records management systems, since these documents are produced on a continual basis. As the New Bibliographers demonstrated in the early 1900s, with each new transition of the text differences, both intentional and not, are introduced. As Derrida put it (and I paraphrase): “iteration occurs: something new appears.”¹

Summary: Are Legal Texts Grey Literature?

No:

- Legal texts look and are official

¹ This issue has been recognized by the American Association of Law Libraries, which prepared a report on it in 2007 and continues to work on the question. It is particularly important regarding online versions of primary legal texts. See Access to Electronic Legal Information Committee and Washington Affairs Office, *State-by-State Report on Authentication of Online Legal Resources* (Chicago: AALL, 2007).

- Their special status as statements of the law distinguishes them
- They are produced and distributed in a commercial-like manner

Yes, in most other respects:

- Not commercially published
- Opaque textual controls
- Lack of bibliographic and content tools
- Bureaucratic in character: “records produced in the normal course of business”

What Legal Texts Can Tell Us about Grey Literature

What the preceding demonstrates is that primary legal sources and many quasi-legal documents fall on a scale between commercial publications and bureaucratic records. The same can be said for many varieties of Grey Literature. Primary legal sources likely partake of a mix of traditional records management and commercial publishing methods of textual control. That is also likely true for many kinds of Grey Literature.

Archival Studies is the discipline that explores how to maintain collections of records in a series, be they current or historical. In archival terms, the definition of a record is “A document made or received in the course of the conduct of affairs and preserved.”² The characteristic of a record that most clearly distinguishes it from a commercial publication is the ‘archival bond’ that exists between records in a series, and which implies or flows from the purpose of the creating body, as expressed in its activities³. That is, there is an intrinsic connection between records and the purpose of their creating body. This connection is everywhere apparently in Grey Literature. These two qualities have been summarized in the following graphic:

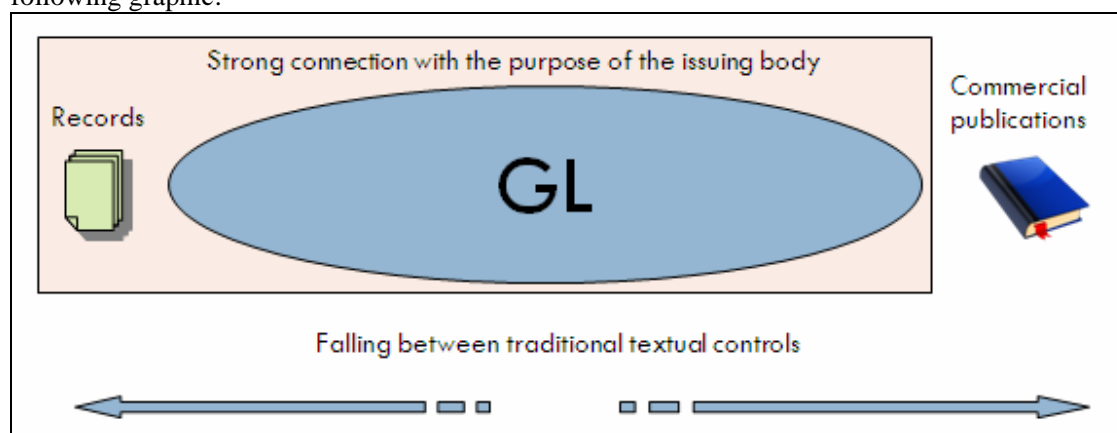


Figure 3

² Planning Committee on Descriptive Standards, *Rules for Archival Description* (Bureau of Canadian Archivists: Ottawa, 1990, revised 2008, p. D-7) http://www.cdncouncilarchives.ca/RAD/RADComplete_July2008.pdf.

³ “The relationship that links each record, incrementally, to the previous and subsequent ones and to all those which participate in the same activity. It is ordinary (i.e., it comes into existence when a record is made or received and set aside), necessary (i.e., it exists for every record), and determined (i.e., it is characterized by the purpose of the record).

Reliability of the Text: Concepts Relevant to Legal Texts from Archival Studies that Can Bring Better Control and Access to Grey Literature

The strong intrinsic connection between works of Grey Literature and the purpose of their issuing bodies should be considered a candidate for inclusion in the definition of Grey Literature. Doing so would encourage the Grey Literature community to take advantage of numerous archival research initiatives that provide direction to the establishing and preserving the accuracy and context of the GL text. As a start, designers of Grey Literature repositories could take advantage of three foundational archival concepts: originality, authenticity, and completeness:

- Originality: The quality of being the first complete and effective record.
- Authenticity: The quality of being authentic, or entitled to acceptance. As being authoritative or duly authorized, as being what it professes in origin or authorship, as being genuine.
- Completeness: The characteristic of a record that refers to the presence within it of all the elements required by the creator and the juridical system for it to be capable of generating consequences.⁴

Without entering into a detailed description of these terms and their implications, I invite you to explore the InterPARES Project, a multi-year project that is determining the basic qualities of electronic documents and the ways in which they can be preserved.

Relevance of These Concerns to the Online Environment

To demonstrate some of the issues that can be addressed by taking the security of the text more seriously, I return to the area of legal texts as they exist in the online environment. I will concentrate on a single example, though there are numerous issues that deserve attention.

In recent years with the acceleration of the Open Access movement, there has been a growing awareness, especially in US circles, that access to the law as expressed in primary legal texts has lagged. Though Open Access to the law initiatives were among the very earliest following on the advent of the internet, at this point the law remains in many respects difficult to access, and sometimes it is entirely sequestered by commercial interests. Carl Malamud established Bulk.resource.org for the purpose of remedying this situation. With the help of commercial law publisher West and others, he obtained the text of hundreds of thousands of US court decisions, and made them available for free on the internet as easily-downloaded files, either individually or in groups.

The texts he provides come marked up in XML; they are available in a sophisticated form that allows processing on a large scale with specificity. Thus they provide easy access to programmers who wish to present them in any number of forms. Bulk.resource.org is an invitation to innovate. Now anyone has access to the materials and can offer them to the world with new features for exploring them. This is a positive development, but it also gives us pause. The opportunity for mischief and error is very great.

⁴ Luciana Duranti et al. The Long-term Preservation of Authentic Electronic Records: Findings of the InterPARES Project (UBC: Vancouver, 2001) http://www.interpares.org/book/interpares_book_q_gloss.pdf

For instance, in the Fall of 2009, Google made use of this resource to offer a new service to users of the Google Scholar portal. Called “Legal opinions and journals”, this service comes with a disclaimer:

Legal opinions in Google Scholar are provided for informational purposes only and should not be relied on as a substitute for legal advice from a licensed lawyer. Google does not warrant that the information is complete or accurate.⁵

And rightly so, since in the past Google’s efforts to provide complete access to specific bodies of work have not always been entirely successful⁶. That fact has not escaped Mr. Malamud and his colleagues. Recently they initiated Law.Gov, which is “an effort to create a report documenting exactly what it would take to create a distributed registry and repository of all primary legal materials in the United States.”⁷ As part of the report, they anticipate addressing the issue of authenticity, and also of preserving authenticity.

⁵ Google Scholar Help: <http://scholar.google.ca/intl/en/scholar/help.html>.

⁶ See HeinOnline or Google Scholar? Why You Should Start Your Research in HeinOnline First (<http://heinonline.blogspot.com/2009/11/heinonline-or-google-scholar-why-you.html>) and HeinOnline or Google Scholar? Why You Should Start Your Research in HeinOnline First - Part II (<http://heinonline.blogspot.com/2009/12/heinonline-or-google-scholar-why-you.html>)

⁷ Law.Gov. <http://public.resource.org/law.gov/>