The Long Arm of the Law

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Ann Okerson, William Hannay, Winston Tabb, and Nancy E. Weiss, "The Long Arm of the Law" (2012).
Proceedings of the Charleston Library Conference.
<http://dx.doi.org/10.5703/1288284315081>

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The following transcription is of a live presentation given at the 2012 Charleston Conference on Saturday, November 10, 2012. Video and slides for the session are available on the Charleston Conference website at http://katina.info/conference/video_2012_law.php.

Ann Okerson: Welcome to the third year of “The Long Arm of the Law,” a very popular session in which we all get to hear about some of the latest legal developments related to copyright and all that sails therein. I have a lot of fun each year looking for theme music, and this year we trolled high and low, looking at the songs from *Hawaii Five-0*, *Mission Impossible*, and several others, but in the end, Kenny Rogers is our guest star again, for the third year.

(Music clip plays: Kenny Rogers, “Long Arm of the Law.”)

You can't outrun the long arm of the law,

No, you can't outrun the long arm of the law,

You can hide out for a while,

He says with a smile,

But you can't outrun the long arm of the law.

Okay, our thanks to Kenny Rogers. Today we have, once again, some exceptional, excellent speakers to talk to us about copyright areas that we may not encounter in our everyday jobs. Nonetheless, copyright bears on everything we do in library services, collections, preservation, and much more.

Here are our topics for today: as usual, confusing and rich. I made a word cloud (Figure 1) out of the topics that our speakers provided; the word cloud portrays the rich confusion, and the topics are what the speakers are going to sort out for us. We're going to begin with a presentation by

Winston Tabb about the IFLA Treaty for Libraries TLIB. This is a little bit out of our usual path, but it's crucially important to remember that we're part of a global world, and we have to interconnect the different regimes of rights. IFLA, under Winston's leadership, is doing a very important—and sensational—job of advocating for library roles and user rights.

As we did last year, we'll get an update on *Kirtsaeng v. John Wiley & Sons*; we're going to hear about *United States v. Apple*; *Authors Guild v. Google*; *Cambridge University Press et al. v. Patton et al* (the Georgia State reserves case, as you know, has been ongoing for several years, and each year there is something new to say about it). We'll hear about *Golan v. Holder* for the first time at this Conference. A very big topic this time will be *Authors Guild v. HathiTrust*, and two of our speakers will talk about that. Finally, Nancy Weiss will speak to us about Federal Accessibility laws and the use of federal funds for the purchase of e-book readers. It's a very, very rich line up, and we think you will find it simulating.

I'm not going to repeat the speakers' bios because you have them in your program guides, but I will just list them in the order of their appearance. Winston Tabb will start us off; Winston is the Dean of University Libraries at the Johns Hopkins University and fills a number of other important roles as well. I keep telling him he has three jobs; we tried to entice him last year, but he was busy doing one of the other three jobs. Bill Hannay is our "repeat offender" and Partner at Schiff Hardin LLP. Bill is always a very provocative and entertaining speaker. New to us is Nancy Weiss, who is General Counsel for the IMLS. So without further ado, they'll proceed in sequence, and we will hold the Q&A session after they've all finished; there should be ample time for questions. Thank you.

Winston Tabb: I've spoken many, many times, but never have I followed Kenny Rogers; this will be a first for all of us, I think. I'm delighted to be here today to talk about library and archive users' rights, the treaty (TLIB) that a number of libraries and organizations have been working on for some time at WIPO.

I don't know about you, but this reflects the way I often feel in my life (referring to cartoon on slide). If you can see it, the caption is, "I'm not sure I can help you—all your issues seem to be copyright related." And this is true for, I think, many of us, or we wouldn't be here for this particular session. What I'm going to do today is basically tell a story, and give an overview in four different chapters. Why do we care about these issues of library users' rights? How have we prepared to deal with them? What are we actually requesting at the international level? And where are we in the process?

I have quite a number of slides; I've got to go quickly, but I wanted to have them all as a package so that people later would be able to come back if they got really interested in the topic.

Why do we care? I am speaking today primarily on behalf of IFLA, the International Federation of Library Associations, which has been the chief sponsor of this treaty. We care because this is all about access to information, and we feel that the current regimes that exist internationally, as well as nationally, are making it impossible for libraries to do their core mission. It is also a very important aspect of IFLA's view of this entire matter that we think about the necessity of balance. We believe strongly that that balance has so eroded that we must take significant steps to get it back into place. I need to make a big point about this: we feel so much that we are partners with both publishers and authors. We do not see this as being "copyleft" versus "copyright." Those are terms I dislike, because it's not really a polarization issue we should be dealing with. Rather, how do we take a good look at the rights of authors and the role of libraries and see them as being very much as part of one ecology; very important to both the owners of intellectual property and its users. We're not trying to go off

in one direction only; we're trying to resurrect a balance that was very much a part of copyright from the very beginning.

I'm not going to go into great detail about the Statute of Anne, but I think it's important to think back to the very beginning of copyright as we know it, at the beginning of the 18th century, about the legal deposit aspect as an example: In fact, we can think of deposit as the first copyright limitation. Again, I'm trying to make the point that what we're talking about isn't something that is new, crazy, off-the-wall, but something that is bringing us back to our core principles.

What are we doing? This is a long chronology of the last at least 8 years of library groups, both nationally and internationally, looking at how we might be able to deal with many global copyright issues. I will credit the American libraries, particularly the Library Copyright Alliance, which comprises ARL, ALA, and ACRL, for having taken on, in 2004, the responsibility for developing a set of principles that might guide our thinking about this. They were captured in these four general categories: the importance of public domain, the importance of libraries in advancing knowledge, the importance of individual research and overcoming some of the impediments to that research in a digital age, and then, a very important one, that copyright should not be superseded by trade agreements or contracts, an issue that I'll return to later.

Simultaneously with the work going on in the United States, there was a very active consortium of NGOs working across several continents, often convening in Geneva, developing what was called the A2K, or Access to Knowledge, Treaty. Among the most important aspects of this work were the notion that when we were thinking about intellectual property rights, there must be analysis and consideration of both the costs and the benefits. Again, we return to the balance idea. There are costs and benefits, and they should be always considered before we move forward to make changes, particularly with granting more rights. Intellectual property rights should be thought of as a means and not an end. Most particularly, I want to highlight for a moment the false notion of "one size fits all" thinking, because

the notion that “a copyright is a copyright,” no matter what, is really at the core of our problems. Clearly, all of us might see the need to protect the latest James Bond movie as something quite different from a scholarly article, yet in fact in all copyright regimes are treated exactly the same. This creates many, many of our problems, though no one has been ready to address this in any concerted way.

There was a great deal of interest among the member states of WIPO, which is the World Intellectual Property Organization, the U.N. organization in Geneva responsible for intellectual property: interest mainly sponsored by a number of states from Latin America, that WIPO should be much more concerned about what is happening with regard to exceptions for libraries. So WIPO commissioned several studies, including a very important one published in 2008. I want to spend just a few minutes on this, because I think it illustrates why and where we see problems. There are 184 member countries of WIPO. The study's principal investigator, Kenny Crews, Columbia University, whom many of you know, was able to locate copyright statutes from only 149 of these countries. What he discovered was that there were no exceptions whatsoever in copyright laws of 21 countries, and in 27 there were exceptions that were so general as to be virtually useless. So roughly one third of the countries had no provision that was helpful to libraries. This is just one example, as Kenny meticulously identified what kinds of exceptions existed in different countries. Many of us were not surprised to see that preservation existed in a number of them; quite surprised to see that there was a specific provision for interlibrary lending in only six of the countries.

Then, when some of these findings were mapped, the nature of the problem became very apparent: that this is a North–South issue. If you look to see where there are no library exceptions at all, it's mainly Latin America and Africa. So, in a sense, we began also to see this as a moral issue. I will pause for a moment to say: one of the things that I learned and appreciate in ways I never did before is that we as librarians have so much to be grateful for with regard to copyright in the United

States. While we're not satisfied, by any means, and we may never be satisfied, we are so far ahead of every other country in the world in the provisions that we've been able to gain for our libraries. We really should be grateful.

At the same time, there was a lot of interest in this topic within the legal academic community. I must call attention to the important work that was done by Ruth Okediji, a faculty member at the University of Minnesota, and her colleague Bernt Hugenholtz, University of Amsterdam, making the point that now is the time for a global approach to copyright limitations and exceptions, including those for libraries.

So having seen that WIPO was getting very interested in the question of what should be done for libraries, IFLA convened a group to develop our own set of principles, which I list for you on a slide. I'm not going to go over its entirety now, because all of these principles eventuated in the treaty that I'm going to describe in just a moment. Our working group comprised librarians primarily, although there were a few non-librarians in the group, from virtually every continent, to begin working on drafting a treaty for libraries and archives. By the way, this effort is all about libraries and archives; I'll just be saying libraries, but please fill in archives.

This is basically the outline of topics we developed and presented to a number of member states in April of 2011. I'm not going to talk about the preamble or the general provisions, but focus on what we're asking for. What is it exactly that we want to have happen?

1. The first of these, and you'll hear more in later discussion about some of the court cases that are pending in the United States, is the right to buy, import, or otherwise acquire copyrighted works. This is extremely important to libraries, because we buy items from all over the world, and we need to be able to use them in the same ways that we use items created and purchased within the United States.

2. Next is a whole series of points related to the way in which works move back and forth through library lending, or library document supply, as well

as the right to cross-border uses of those works: all the kinds of things that we're accustomed to doing now in our country.

3. A key matter to address, not surprisingly, is that of preservation: Libraries should be able to preserve the works that we own, and we should be able to do this in a digital world.

4. Crucial is the right to use works for the benefit of persons with disabilities. I should pause for a moment to say that, simultaneous to the work that we're engaged in, there is a treaty being considered at WIPO—it will be very much a focus of the meeting that's coming up in a couple of weeks—about provisions for people who have disabilities, particularly, but not only, with print. This is important also, because so many of the services that are provided to people with these disabilities come from our libraries. What we will do in the long run with the library treaty will depend on what happens with this separate treaty for people with disabilities.

5. We highlight the right for people to use works, whether for education, research, private study, or private purposes and the authority for libraries and archives to make copies for people for those purposes.

6. Of key importance is the right to access retracted and withdrawn works. This is, interestingly enough, not so controversial among many of the publishers with whom we've spoken. It's really a problem for some of the member states who believe very strongly that governments ought to be able to insist that works that are libelous and otherwise be withdrawn. We do not agree with that, but it's something that will be interesting as the conversation continues.

7. Of particular focus these days is the right to use orphan works. This is a big issue in the United States and everywhere else. Our position is that libraries should be able to make copies of orphan works, and then later publishers would either receive equitable remuneration or to request termination of the use.

8. Some of the more controversial issues, but ones that we feel are extremely important, include the

ability to not have contracts override provisions that we have within the law. All of you who are doing acquisitions, licensing, and so on know how important this is; that we should not be required to or even permitted to give away rights that we have under our own law just because a licensor wishes us to do that.

9. Also controversial is the proposal that libraries should be able to circumvent technological protection measures (TPMs) for non-infringing uses.

10. A substantive item is the limitation of liability for library staff, so that if you're doing your job as best you can—you've attempted to be educated about what you can and cannot do—you should not be held liable, nor should the library.

11. Finally, we see these provisions as a floor, not a ceiling; that is, that if this treaty were enacted, it would be fine for countries to give more options for libraries, but not to have fewer.

So where are we? Two years ago, at the meeting of the WIPO standing committee on copyright, a decision was taken to devote 3 full days to discussion of limitations and exceptions for librarians at the meeting that was then held last November, almost exactly a year ago. That did occur, and it was one of the most exciting times of our lives. Nancy Weiss is a member of the U.S. delegation, so she's often there, and we're so happy to have someone who knows about library users, but is also part of the government and is able to be at that table. There were some terrifying few moments—a few hours actually—at the beginning, because there were the normal speeches that just go on and on and don't say much, and then it came time for real discussion about libraries—and there was almost none. We thought, "Oh no, we've done all this work; what is going to happen next? What if we don't have people who want to talk for 3 days?" Then, suddenly discussion took off in ways that we had never imagined, and it could have easily gone beyond the 3 days with the numbers of questions that we got. In fact, something that's never happened to me before was for a member state representative to turn and ask us to start

answering questions in the public forums. It was a very rich discussion.

The focus of the actual proposals can be found in basically four different documents. One, coming from the entire African group, is very inclusive in that it contains provisions relating not only to libraries but also to education and research institutions. There was a proposal from Brazil. There was a submission by the United States of objectives and principles, not really talking about a treaty so much, but of certain issues that ought to be considered, and then finally another document from Brazil, Ecuador, and Uruguay. All of these together comprised the documents being discussed. It is very important in this international arena that there be text-based discussions. If there's no text, people can talk aimlessly forever. One of the results that came from those discussions was a listing and a reorganization of all the topics into new clusters. Added to our list were two new items that we had not had in our initial proposal. One is legal deposit, which was actually brought forward by the United States. The reason we had not initially included it was because copyright and legal deposit are not always intertwined, although we're very happy to have it there. Then, surprising to us, perhaps revealing the fact that we weren't as internationally knowledgeable as we should have been, was the right to translate works: among the people with whom we'd been consulting; we had not really been fully informed about the number of libraries that do translations on behalf of their users. This was brought forward in a very forceful way by the delegates from Egypt and particularly India, where there are so many languages, and libraries provide these kinds of translations.

So what next? The most important single document that exists on this topic at this moment is this: http://www.wipo.int/edocs/mdocs/copyright/en/sccr_23/sccr_23_8.pdf

It consolidates the proposals from all of the libraries and archives, from all of the 100-plus member countries that have decided to make proposals. It includes the Treaty's text as well as all the comments, and this will be the topic of the meeting of the WIPO Standing Committee on Copyright in April of 2013. We will be going to

Geneva in 2 weeks' time, but the main focus there will be to try to finalize the text of the treaty for the visually impaired.

Thank you very much.

William Hannay: I hope you have your voices in shape; we're going to be doing a little singing today. For those of you who can't quite put the gag together [refers to slide], Pad Thai is a kind of Thai food, but iPod Thai is a conglomeration of two different thoughts we're going to be sharing today, specifically about *U.S. v. Apple* and *Kirtsaeng v. John Wiley*. And, if we have time, there will be a couple more.

Here are the four topics that I'm going to try to cover, the first two in somewhat more detail than the last two: *U.S. v. Apple*, which is the case brought by the U.S. government against Apple and a group of publishers relating to the fixing of prices of e-books, that is, trade books in the consumer market; *Kirtsaeng v. John Wiley*, which refers to the First Sale Doctrine, which I'll analyze in considerable detail; and then I'll touch on the Georgia State University case, which relates to e-reserve practices, and the ongoing case of the Google Books Project.

The United States v. Apple case: The U.S. government brought this lawsuit against Apple. In 2009, according to the complaint, certain publishers in the United States were horrified to discover that Amazon was selling most e-books at a flat \$9.99. This was perceived to have a substantial effect on the pricing modalities of the publishers with respect to hard cover books, paperback books, and in general, it was a problem for them. So they were trying to think, "Well, how can we deal with this?" Allegedly, they hatched upon a scheme, suggested to them by Apple, of imposing an "agency agreement" model. In the United States under anti-trust laws, a manufacturer is not supposed to set the price at which its customers resell their products. This changed a little bit a couple of years ago through a Supreme Court decision, but in general it's still a problem for a manufacturer to tell a customer, like a wholesaler or distributor, "You have to resell at a certain price." But if they use an agency arrangement, where, in effect, they're not selling

the book to their first-line customer, but they are entrusting it to them to resell or to sell the first time, then they can set the price. So these publishers entered into an agency agreement whereby the publishers would, in effect, have an arrangement with Apple, or Barnes & Noble, or Amazon, that they would be agents of the publishers, so the publishers could tell them, “You can’t sell books below a certain price.”

This arrangement actually went forward. Apple was thrilled because they had been wanting to introduce electronic books into their iPads (hence the name of our little program today); they wanted to introduce these books through their e-book store, but they needed to have the prices a little bit higher than \$9.99 in order to get the program up off the ground. So this arrangement, again, according to the complaint, went forward, and when Apple opened up its e-book stores contemporaneously with the date of this agency agreement, the prices of e-books around the country jumped up 30 to 50%. People complained to the U.S. government; the U.S. Department of Justice investigated, and came to the conclusion that there had been a collusive arrangement between the publishers and Apple, and that this had had the effect of fixing the prices. Now, keep in mind, a manufacturer could make its own decision as to whether or not to introduce an agency agreement, but a group of manufacturers cannot agree among themselves as to how they’re going to sell their books or the price at which they’re going to sell. That’s what the government attacked, and so they brought the lawsuit in April of 2012, and simultaneous to the bringing of the lawsuit, there was an announcement that three of the publishers, Hachette, HarperCollins, and Simon & Schuster, agreed to enter into a settlement with the government. Note that this was not a criminal case. These publishers did not agree to plead guilty; this was a civil case, and so they agreed that they would stop doing what they had been doing.

To become effective, this settlement had to be approved by the Court. So the Court published the notice of this settlement and there was a ton of responses from the public. I’m not entirely sure about the public, but there were many responses

from people who were interested in the business of books. And these documents were filed, the Court read all of them dutifully, and came to the conclusion that, despite overwhelmingly negative comments (of the several hundred comments filed, there were only about 70 in favor of the agreement), the Court came to the conclusion that it made sense to allow this settlement to go forward—because the Court had already accepted the proposition that the complaint stated a cause of action. It was not that the Court had found that collusion had happened, but that all the legal requirements to bring a lawsuit had been met. If these publishers wanted to settle out, that was their right. The Court’s approval order said that by disallowing the settling defendants from using the agency model for at least 2 years, and from using price MFNs (Most Favored Nations) clauses for at least 5 years, the proposed final judgment appeared reasonably calculated to restore retail price competition, that is, competition among Apple, and Amazon, and Barnes & Noble, and other sellers of e-books; to restore this competition and return prices to a competitive level, benefitting e-book consumers and the public—at least as in the competitive harms alleged in the complaint. So the Court, in effect, said: “It’s okay, you guys can settle.” Now, as of this moment, Apple has not settled; two of the other publishers have not settled, and they’re supposed to go to trial next year. We’ll see what happens; they may be taking a settlement as well, but no one knows what’s going to happen right now.

So the question is, does the Apple case mean anything to libraries? Libraries are not buying trade e-books from Amazon, because if you buy them from Amazon, you can’t do anything with the books. You can’t lend the books, which will go on one copy of an e-book reader. But there are more and more opportunities for libraries to buy electronic books that they can lend out as well as a lot of restrictions. Apparently not all publishers will sell them to you, and when they do sell them, they sell them at two, three, four, five times the price that you could buy from Amazon if you were an individual consumer. So the question is whether all this litigation with Apple and the publishers is going to have any positive impact

upon e-books for libraries. It's hard to know right now, but obviously a lot more attention has been devoted to this area by the government (Department of Justice), and if there is some collusion, perhaps, that has gone on with respect to the pricing to libraries, or the policies regarding libraries, that may come to light if this trial goes forward. I don't know that there has been, and I'm not suggesting there has been, but it's something to follow because it may have an effect.

In order to lock this case into your memories, we're going to sing a musical summary. With apologies to Burl Ives and that famous American composer "Anony Mous," we're going to sing this song. You know how it goes, so when we get to the chorus, I hope you'll chime in.

I WISH I HAD AN APPLE

I wish I had an Apple a-sittin' on my knee
 And every time an eBook passed, I'd take a Byte for free.
 The first I seen a Kindle, the guy next door had one
 He loaded Times bestsellers up and turned it on to run
 (Chorus)
 Git along home, Kindle, Kindle
 Git along home, Kindle, Kindle
 Git along home, Kindle, Kindle
 Will you stay cheap for me?

I wanted so to own one but worried 'bout the price;
 I feared that 9-bucks-99 just might create a vice.
 The publishers agreed too, and so did Apple Inc.
 An Agency Agreement became the missing link.

The prices escalated; they jumped up overnight.
 The Antitrust Division felt that just wasn't right.
 Some publishers have settled; reactions though were mixed.
 The court upheld the lawsuit; said prices had been fixed.
 (Chorus)
 Git along home, Kindle, Kindle
 Git along home, Kindle, Kindle
 Git along home, Kindle, Kindle
 Will you stay cheap for me?

Book prices are adjusting; a few have now gone down.
 But Apple keeps denying and wearing quite a frown.
 Imagine you are Apple Inc. a-sittin' by a tree,
 And every time a Kindle passed, you feel you need to plea.

That was the iPad part of the presentation, and now for the Thai part.

That handsome gentleman on screen is from Mr. Kirtsaeng's website. He has his own website, and this segment is about the lawsuit between Mr. Kirtsaeng and John Wiley. Kirtsaeng moved from Thailand as a youth to go to school in the United States; he went to prep school, then he went to Cornell, graduated from Cornell, and went to USC for PhD studies in mathematics because he could add things up—he had a flair for this. What he noticed was that the books that were being used at his university were also books that were being sold in his home country of Thailand, and, in fact, they were being sold there for considerably less. And he locked in the concept: buy low, sell high. The fancy name for that, you know, is arbitrage. Right? He had his friends and family ship books to him, which he would then sell over eBay or a variety of other kinds of eBay-like outlets. He was selling these books in the US; he bought low and sold high. It was said that he had sold well over one million dollars worth of books between 2007 and 2008. This practice came to the notice of at least one publisher, John Wiley, and they brought a lawsuit against Kirtsaeng complaining of a thing that we call copyright violation.

The case went forward, and the judge entered an order saying that he couldn't raise the First Sale Doctrine, because the First Sale Doctrine, to the judge, only applied to books made in the US, and these books were all made overseas. These were Wiley books that Wiley had printed overseas for an overseas market, and had stamped all over them "Only to be used overseas." But Mr. Kirtsaeng and his friends had shipped these books over to the US. So once the First Sale Doctrine was out of the case, Mr. Kirtsaeng really had no defense. "Oh yes, it's fair use; I'm just going to buy these books and resell them!" No, no, that is not a fair use argument. So the case went forward, the jury found Kirtsaeng to be liable for copyright violation, and he was fined \$600,000. He appealed the case to the Court of Appeals for the Second Circuit, and the Second Circuit affirmed the District Court's opinion that this was not the First Sale Doctrine, which doesn't apply. Remember that what the First Sale Doctrine says is that copyright laws no longer apply to the book,

or the other work of art, that you have bought once it is sold to you for the first time; that is, after the first sale. The first sale exhausts the copyright rights of the owner of the copyright. But that's not applicable overseas according to the District Court and the Second Circuit. So the Supreme Court decided to consider this case. They took a writ of certiorari, and they held oral argument on it just last week. It was a very interesting oral argument. My take on it, from reading the transcript, was that a lot of the justices were troubled by the failure to apply the First Sale Doctrine. Now, you can't always tell from oral argument where some justice is going to come out on a case; they may ask really, really tough questions just to set in their minds an answer as to why they're going to go the other way.

The issue here is whether or not the First Sale Doctrine applies to a work made overseas, because, conceptually, once a work is made overseas, it also is covered by U.S. copyright. And if the law says that the owner of a copy lawfully made under this title is entitled, without the authority of the copyright owner, to sell or otherwise dispose of it, what does "lawfully made under this title" mean? It's a terrible piece of legislative work: who knows what that means? In a lot of ways, it's meaningless. And one has to think, right now, that Wiley may be really sorry that they brought this suit. It's not about the \$600,000, now it's about a whole concept! A number of amicus briefs were filed, by the American Library Association, the Association of Research Libraries, a whole bunch of museums, the Metropolitan Museum of Art: everybody came piling in on this in favor of Kirtsaeng. No one is saying what a nice guy Kirtsaeng is; he's making a fortune off of these sales, and so he's a kind of unsympathetic figure.

Many are saying, this is going to cause terrible problems, because if you say that in bringing in material made overseas into the United States, that copyright is still held by the copyright owner—well, does Picasso's heir still own the copyright to paintings that are now in the United States? That's what the museums were concerned about. Not particularly Picasso, but any modern

painting: When a museum buys a work of art, they're not getting the copyright; they're getting the physical object, which is just like buying a book. Libraries are concerned, they say, "We probably have 200 million volumes of books that were made overseas. Are you telling me that if they're still in copyright, I no longer can own this item? That I can't use it? That I can't lend it?" What a mess!

And then there were regular people coming along saying, "Yard sales! My God, I was going to sell some books! I was going to put my child through college by selling his/her old high school textbooks. They happened to all have been printed in Thailand, can I not sell those now?" And one of the justices, Justice Breyer, who's a very well respected Justice on the Supreme Court, says, "And Toyotas? What about Toyotas?" The lawyer replies, "Toyotas, I don't know. What about Toyotas?" The Court: "Well, they have all this computer stuff inside a Toyota, and it's copyrighted. If you purchased this car and brought it over from Japan, it was copyrighted in Japan. So now, can you resell the Toyota?" "Oh, I don't know Mr. Justice, that's an interesting question."

So what's the Supreme Court going to do? In my view, this is an example of where easy cases make bad law. It's not that the issue is hard; Mr. Kirtsaeng is not very sympathetic, so let's punish him for doing this. But, if you adopt that kind of rule, then it has numerous other unintended consequences. When you actually read the briefs that were filed by Wiley and supporters, they're backpedaling and saying, "Well, you know, libraries shouldn't worry about this; museums shouldn't worry about this; Kirtsaeng should worry, but not anybody else." Writing an opinion to take that into account is very difficult.

The majority of the Court has to decide whether to adopt, in effect, the so-called Universal Exhaustion Doctrine; meaning if you sell an item overseas, copyright is exhausted everywhere in the world. That's a little bit tough to swallow; there are not a lot of countries that could adopt that. It would make sense, it's a way of interpreting the language, but it's hard to know.

Let's have one more musical summary here. This is with apologies to Conrad Birdie and the rest of the cast of Bye-Bye Birdie.

OH, THAT FIRST SALE

Oh, that first sale
 Oh, give me that first sale.
 It's like the holy grail
 I'm on a happy trail
 You know I need the law ...
 Oh! Oh! Oh!
 To give me that first sale.

Oh, 1-0-9
 Oh, Section 1-0-9
 Libraries need a sign
 Oh, not a closed-up sign
 They're following the law
 Oh! Oh! Oh!
 Oh, give me that first sale.

Co-o-o-o-o-py-y-y-ri-i-ight confirms my first sale
 Co-o-o-o-o-py-y-y-ri-i-ight give me that first sale

Oh, one yard sale
 May land us all in jail.
 Museums may have to shut
 If they display King Tut.
 You know they need the law ...
 Oh! Oh! Oh!
 To recognize first sale.

One first sale ... one last book
 Oh, give me one first sale.

All right, let's go back to the law for a minute here, just quickly to give an update on two important cases: first of all, *Cambridge University Press v. Georgia State*. This was the case in which some publishers had brought suit against Georgia State University. The issue relates to GSU's e-reserve policies. Many courses at the school specified readings from case books, text books, other kinds of books, collections of essays, and they would have photocopied pages from a textbook, scanned them, and put them on electronic reserves so that a student can sit in a dorm room, open up their laptop, and download, or at least read, the selection from the electronic reserve without having to go to the library and actually take a book off the shelf, open it, and actually read the book. This way, they read conveniently and didn't have the problem which I encountered so often in college. I'd get to the reserve reading room and someone would have

cut the article out of the book. "Gee, Professor, I was going to do the work, but the article just wasn't there!"

The case involved this electronic reserve system, and the original complaint cited that 6,700 works had been made available to students for downloading, viewing, and printing for some 600 courses at the school. Over time, the case ended up, for various reasons, focusing on 99 of these readings. The case went to trial, and at the end of it, the plaintiffs, the publishers, dropped 25 of those; it was down to 74 readings, and the Court went through each and every one of these and did a fair use analysis, coming to the conclusion that all but 5 of the 74 readings were, in fact, fair use. The Court applied a kind of quantitative analysis and said that if less than 10% of the book had been excerpted and put on reserve, then that was fair use. It's an interesting way to do it, and not too unpersuasive a methodology. At any rate, that was the approach. It's still to be decided if there are going to be any remedies, or what those remedies might be, as to the five.

Finally, an update on Google. This case has been reported on several times at the Charleston Conference. The Google Book Project had been the subject of suit by authors and publishers, and there was going to be a huge settlement. Last year, the Court decided, "No, this settlement is not acceptable." There was a ton of criticism of the settlement, so the Court finally decided, "No, you guys go back to the drawing board."

So the first thing that happened was that the Authors Guild moved to certify the case as a class action. The judge agreed, so the case right now (*Authors Guild v. Google*) is going forward as a class action. The publishers, however, decided that they wanted out of this for a number of reasons, both practical and legal. But they ended up entering into a settlement agreement with Google, the terms of which are confidential. It's not clear, but basically Google is allowed to digitize all the books of the publishers that have settled, and in return for doing this, Google gives the publishers the option either to allow their book to be part of this digital system, or not; if they allow it, then they receive their own digital copy of their own book, which is of interest

because a lot of these items are actually out of print. But that's about all we know, and in this particular circumstance, the Court does not have to do anything about this settlement. It doesn't have to approve it, because it's not a class settlement. Whether the ongoing case with the authors may end up telling us more about what the publisher settlement is, I'm not sure, but it might. So that's the situation, except that the Court of Appeals has entered an order staying any further proceedings at the District Court level

because Google has appealed the certification of the class. The Second Circuit Court of Appeals is going to decide whether or not the Court was correct to certify a class and to deny Google's motion to dismiss. That's the status of that; in the interest of time, I won't share the songs that I had written for this. Well, maybe later at the bar. Thank you all very much.

[Note: Nancy E. Weiss did not grant permission for her presentation to be videoed or transcribed, and it is not included here.]