The Long Arm of the Law

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The following is a transcription of a live presentation at the 2013 Charleston Conference. Slides and video are available online at http://bit.ly/1hnPSqo.

Ann Okerson: Welcome back to the fourth session of "The Long Arm of the Law." Those of you who have been here for previous sessions know that our guest star has been Kenny Rogers; however, he has been very busy with the Country Western Awards in Nashville and could not join us today. But, he has sent a substitute, namely, Bobby Fuller. Now, this is no mean feat, because as some of you know, Bobby Fuller died in mysterious circumstances in 1966, I believe, and so to have him with us with this group is really an amazing kind of Charleston achievement that only Katina could pull off. So they are going to sing "I Fought the Law" to get us in the spirit of this session. This is "I Fought the Law" in Latin.

I actually had a moment when I thought maybe we could get Katina to get some of the Charleston librarians dancing on the stage to this, but, well, I was not sure how well that would go over. Anyway, our speakers in succession are as follows, and they are going to do their thing in order needing no introduction beyond what you already have in your program. First of all, Bill Hannay. Whoops. Well, Bill decided not to come to Charleston this year. He decided that instead he would go to a hospital in Chicago and spend the time there getting operated on. He sent this image, and he sends you his greetings. But, standing in for Bill, we have Bruce Strauch of Charleston fame. He is a professor at the Citadel, he is an attorney, and sometimes he even looks a little bit like Bill Hannay, so I think he is a very good stand in.

We then will move to Georgia Harper, who is the Scholarly Communication Advisor at the University Libraries of the University of Texas. Georgia and I met many years ago; she was an attorney for Systemwide Copyright, for the Texas system, and has done some marvelous work that many of you know about.

Our final speaker is Madelyn Wessel, who is Associate General Counsel at the University of Virginia. I have heard that she has done wonderful things to help the librarians with their various concerns in digital projects.

So, that is our lineup for today, and without further ado, let me introduce Bruce.

Bruce Strauch: I am married to Katina, and inter alia, to the Charleston Conference. I have a perfect attendance certificate to prove it. Some years ago, she found this incredible attorney in Chicago named Bill Hannay, who was a Yalie, and a Supreme Court clerk, which just mystifies me, that level of brain power. He commutes to work by train, which I think is an indus of a big deal attorney, to stand on a train platform with an overcoat and a briefcase. He is an antitrust lawyer and a tremendously talented guy. Then he tells us he has to have a heart bypass, and I was indignant. I said, "Bill this is not all about you. What about us?" He was strangely unmoved by the whole thing. He has come through it; it really is a fairly finely tuned operation now. He is at the dreadful phase where your ribs have been broken open and now stuck back together, and you have to blow into this tube with this little ball that goes up to get bad stuff out of your lungs. Do it 50 times, you know, and start thinking fondly of a death panel. I have his paper here, and it is not my subject; I am not an antitrust lawyer, so I am going to do this dreadful thing of reading it. Well, my students think the most dreadful thing I could do is to expect them to know something and ask them questions, but this is sheer boredom. I will try to make it through.

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Legal E-Books and Illegal E-Books, Written By William Hannay[1]

The general topic for my contribution to the "Long Arm of the Law" program this year is the continuation of two ongoing epic sagas in the world of digital books: the Apple e-books price-fixing conspiracy and the Google Books copyright litigation. Charleston Conference attendees will perhaps remember my earlier accounts of episodes in these sagas: "Of Books and Competition" in 2010; "Apples and Books or A Gaggle of Googles" in 2011; and "iPad Thai" in 2012. Since the last Charleston Conference, much has happened in the Apple and Google cases. Let us start with the trial and judgment in *United States v. Apple.*

United States v. Apple, Inc.

As you may recall, in April 2012, the United States Department of Justice filed a civil suit against Apple and five of the six largest U.S. publishers alleging violations of the Sherman Antitrust Act arising from an alleged conspiracy to fix the price of e-books. On the same day, the DOJ announced an already-negotiated settlement of the case against Hachette, HarperCollins, and Simon and Schuster. Not long thereafter, the attorneys general of 33 states filed their own cases against the defendants which were joined with the DOJ's suit for pretrial proceedings.

How did this happen? It all started with the explosive success of Amazon's Kindle e-reader. As more and more publishers started offering e-books in 2009, Amazon sought to dominate the business with a low-price marketing strategy: Amazon would retail all e-book bestsellers at $9.99 for use on its Kindle e-reader (even if the print version sold for a lot more). Publishers were not happy about this pricing point, and neither was Apple which had plans to include an e-reader program on its iPad (scheduled to be introduced in 2010) but needed prices to be higher than $9.99 in order to make a profit.

The publishers and Apple began meeting in December 2009, and by January 2010, Apple had executed individual "agency agreements" with each of the publishers under which Apple would act as an "agent" in selling e-books at a retail price set by the publishers (which were $3 to $5 higher than Amazon's $9.99 retail price). In order to make this pricing point work economically, Amazon had to be pushed to raise its own prices.

The motivator for this change was a price parity provision in the agency agreements called a Most-Favored-Nation clause (MFN). The provision not only protected Apple by guaranteeing it could match the lowest retail price listed on any competitor's e-bookstore, but also imposed a severe financial penalty upon the publishers if they did not force Amazon and other retailers to change their business models and cede control over e-book pricing to the publishers.

When the government sued, the publishers settled out, but Apple chose to go to trial. After a 3-week trial in June of this year, U.S. District Judge Denise Cote—hearing the case as the fact finder when the parties waived a jury—ruled that Apple had, in fact, conspired to restrain trade in violation of Section 1 of the Sherman Act and relevant state statutes. *United States v. Apple, Inc.*, Case 1:12-cv-02826-DLC, Dkt No. 326 (S.D.N.Y.), Opinion, filed July 10, 2013. Note that, since this was a civil case, rather than a criminal case, the correct terminology is that Apple was "found liable," not "convicted."

The court found that the publishers and Apple had "agreed to work together to eliminate retail price competition in the e-book market and raise the price of e-books above $9.99." Opinion at 11. According to the court, Apple was the lynchpin in the conspiracy between and among Apple and the publishers: "It provided the Publisher Defendants with the vision, the format, the timetable, and the coordination that they needed to raise e-book prices." *Id*.

[1] William Hannay is a partner in the Chicago-based law firm, Schiff Hardin LLP, and an Adjunct Professor at IIT/Chicago-Kent College of Law. He is a frequent speaker at the Charleston Conference and the author of nine books on antitrust and trade regulation. This paper has been previously published: Hannay, W. (2014, April). *Against the Grain*, *26*(2), 56.

Judge Court found that the MFN clause "eliminated any risk that Apple would ever have to compete on price when selling e-books, while as a practical matter forcing the Publishers to adopt the agency model across the board." Opinion at 48. The MFN clause "literally stiffened the spines of the Publisher Defendants to ensure that they would demand new terms from Amazon." *Id*. at 56. And during their negotiations with Amazon, the publishers shared their progress with one another. (The court's written opinion includes a chart of telephone calls between the CEOs of the publishing houses.)

The court concluded that the conspiracy significantly harmed consumers. Since "the laws of supply and demand were not suspended for e-books," when the publishers increased the prices of their e-books, they sold fewer books. Opinion at 97. Thus, consumers suffered in a variety of ways from this scheme to eliminate retail price competition and to raise e-book prices: some consumers had to pay more for e-books; others bought a cheaper e-book rather than the one they preferred to purchase; and still others deferred a purchase altogether rather than pay the higher price. *Id*. at 98.

Analyzing the trial record, Judge Cote found that there was "compelling evidence" that Apple "conspire[d] with the Publisher Defendants to eliminate retail price competition and to raise e-book prices" and "overwhelming evidence that the Publisher Defendants joined with each other in a horizontal price-fixing conspiracy." Opinion at 113. Apple was "a knowing and active member of that conspiracy…not only willingly join[ing] the conspiracy, but also forcefully facilitat[ing] it." *Id.*

In short, "[t]he totality of the evidence leads inextricably to the finding that Apple chose to join forces with the Publisher Defendants to raise e-book prices and equipped them with the means to do so." Opinion. at 134–35. Judge Cote even quoted Apple founder Steve Jobs's own words against his company, pointing out that, on the day of the launch of the iPad, Jobs told a reporter that "Amazon's $9.99 price for [a book newly offered on iPad for $14.99] would be irrelevant because soon all prices will 'be the same.'" *Id*. at 149.[2]

The court subsequently had proceedings to determine what remedy to impose on Apple. On September 5, 2013, Judge Cote entered a Final Judgment and injunction against Apple. The court's order requires Apple to modify its existing agreements with the five major publishers with which it conspired—Hachette Book Group (USA); HarperCollins Publishers LLC; Holtzbrinck Publishers LLC, which does business as Macmillan; Penguin Group (USA), Inc.; and Simon and Schuster, Inc.—to allow retail price competition and to eliminate the most favored nation pricing clauses that led to higher e-book prices. Apple is also prohibited from serving as a conduit of information among the publishers or from retaliating against publishers for refusing to sell e-books on agency terms. Apple is further prohibited from entering into agreements with e-books publishers that are likely to increase the prices at which Apple's competitor retailers may sell that content.

Importantly, Judge Cote also granted the government's request to appoint an external "monitor" to ensure that Apple's internal antitrust compliance policies will be sufficient to catch future anticompetitive activities before they result in harm to consumers. The monitor—whose salary and expenses will be paid by Apple—will work with an internal "antitrust compliance officer" who will be hired by and report exclusively to the outside directors comprising Apple's audit committee. (The Department of Justice had initially requested that the monitor have broad powers to block any agreements the company might make to sell any digital content—not just e-books, but also music, movies, and television shows—that might, in the monitor's view, be likely to increase consumer prices; however,

[2] For a fascinating collection of excerpts from Steve Jobs's e-mail introduced as evidence in the case, see Zachary Seward, http://www.theatlantic.com/business/archive/2013/05/the-steve-jobs-emails-that-show-how-to-win-a-hard-nosed-negotiation/276136/.

Judge Cote granted power only over e-books to the monitor.)

Two weeks ago, Judge Cote appointed Michael Bromwich as the external monitor of Apple. The 60-year old Bromwich is an experienced criminal prosecutor and investigator, sort of a "go to" guy for difficult, high profile assignments. He helped investigate the bombing of Pan Am Flight 103, probed the FBI's conduct in the Aldrich Ames spy case, and took over the regulation of offshore drilling after the BP Deepwater Horizon oil spill. Earlier in his career, he was on the prosecution of Col. Oliver North. To counterbalance Bromwich's lack of experience in antitrust matters, he will be assisted by Bernard Nigro, the chair of the antitrust department at the NY law firm, Fried Frank.

Apple, Inc. continues to maintain its innocence and has recently filed an appeal of Judge Cote's orders to the U.S. Court of Appeals for the Second Circuit in New York City. The appeal will probably take a year or more to work its way through the system, but it is not likely that the district court's order will be overturned. The liability finding is based on well-recognized principles of horizontal conspiracy theory and reasonably grounded in the evidence, and the remedy order seems carefully and narrowly drawn to address Apple's specific type of misconduct, without overreaching into other areas of Apple's business (as the government had wanted).

A more interesting question is whether the enforcement action against Apple and the publishers will meaningfully benefit either consumers or libraries. For consumers, the prices of bestsellers in e-book format appear to have stabilized at levels lower than those prevailing during the time of the conspiracy, but are about 15–20% higher than Amazon's $9.99 price point in 2009. For example, John Grisham's *Sycamore Row* sells for $11.99, regardless of whether you order it as a Nook Book, Kindle edition, or from the Apple iBookstore.[3] And there are potential damage claims to be paid by Apple and the publishers: the five publishers have already settled the states' claims against them for $166 Million in damages. Their settlement with the DOJ involved only injunctive relief. Judge Cote has scheduled a trial of Apple for May 2014 to determine the damages that it will have to pay the states and private plaintiffs as a result of its e-book price-fixing. The amount of overcharges—which would be trebled under the antitrust laws—could total hundreds of millions of dollars in damages.

For libraries, the question of whether the *Apple* case has been or will be of any benefit is more complex. As some of the programs offered at this year's Charleston Conference illustrate, publishers have made life difficult for libraries that wish to make e-books available to patrons or researchers. Some publishers refuse to publish a lendable e-book version of their titles, and those that do offer a lendable one impose high license fees (you cannot "buy" the book) and also various restrictions on circulation. If you buy *Sycamore Row* for your personal Nook or Kindle, it will cost you $11.99, but if you want a lendable version for the public library, you will probably pay eight times that amount (assuming that Doubleday will lease you one).

Why do publishers seem so determined to make it hard for libraries to lend e-books? I bet it has something to do with money, eh? Publishers probably think they will "sell" more e-books to individuals if folks cannot click on their local library's web site and download a copy of the book for free. Is it legal for publishers to impose high prices and burdensome lending rules on libraries? Probably, unless it turns out that publishers have been talking to each other about their e-book marketing strategies for libraries in the same way that they appear to have had consultations about working with Apple on prices to individuals. Personally, I do not know whether

[3] Changes in the marketplace itself may bring procompetitive effects as well. For example, just a week ago, Accenture announced that it has built and will operate an end-to-end e-commerce and direct to consumer distribution solution for HarperCollins Publishers e-books globally. The project commenced with the launch of HarperCollins' www.CSLewis.com and www.Narnia.com. See http://newsroom.accenture.com/news/accenture-to-create-global-e-book-fulfillment-platform-for-harpercollins.htm.

any such conversations between publishers ever took place regarding libraries, but it would present a potential antitrust violation if they did. Otherwise it becomes a matter of either Congressional action (not likely) or jawboning between publishers and their library customers (more likely).[4]

Google Books

Turning to the long-running battle between authors and Google over the Google Books Project, the marathon has entered its eighth year of combat. As Charleston Conference attendees will recall from my prior reports, in 2005, a number of authors and publishers brought a class action and related litigation in Federal court in New York City, charging Google with copyright infringement arising from Google's agreements with several major research libraries to digitally copy books and other writings in their collections. (Since 2004, Google has reportedly scanned some 20 million books.) It has delivered digital copies to the participating libraries, created an electronic database of books, and made text available for online searching. The Google Books Project and its "digital library" has been hailed as a boon to schools, scholars, and students, making all books —especially out-of-print works—available to the world.

The authors and publishers had a rather different view of Google Books and sought both damages and injunctive relief from the court. Google's principal defense was "fair use" under §107 of the Copyright Act. The district court, however, has not yet ruled on the fair use issue; instead, the case has been sidetracked in two separate (unsuccessful) settlement efforts and various procedural disputes.

[4] For example, in response to member concerns, the Digital Content & Libraries Working Group of the American Library Association has focused on influencing the so-called "Big 6" trade publishers to sell e-books to libraries on reasonable terms. *See* E-book Business Models for Public Libraries (August 2012), http://www.americanlibrariesmagazine.org/blog/ala-releases-%E2%80%9Ce-book-business-models-public-libraries%E2%80%9D.

Google and the parties suing it (particularly the Authors Guild) tried to settle the case in 2008 and again in 2010. However, after numerous objections, extensive briefing, and lengthy oral arguments, the District Court held that the amended settlement agreement was not "fair, adequate, and reasonable" and rejected it. See *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y., filed March 14, 2011).

In an effort to put the case back on track, attorneys for the Authors Guild filed a motion for class certification under Rule 23(b)(3) on December 12, 2011. After briefing and hearings, Judge Chin granted the motion on May 31, 2012. See 282 F.R.D. 384 (S.D.N.Y. 2012). Google appealed. On May 8, 2013, the U.S Court of Appeals for the Second Circuit heard oral argument and on July 1, 2013, issued an unusually brief opinion reversing Judge Chin's grant of class certification on the ground that certification was "premature" and should await further proceedings on Google's fair use defense. See *Google, Inc. v. Authors Guild, Inc.*, 721 F.3d 132 (2d Cir 2013). The Court of Appeals stated:

> Putting aside the merits of Google's claim that plaintiffs are not representative of the certified class—an argument which, in our view, may carry some force—we believe that the resolution of Google's fair use defense in the first instance will necessarily inform and perhaps moot our analysis of many class certification issues, including those regarding the commonality of plaintiffs' injuries, the typicality of their claims, and the predominance of common questions of law or fact. Moreover, we are persuaded that holding the issue of class certification in abeyance until Google's fair use defense has been resolved will not prejudice the interests of either party during the projected proceedings before the District Court following remand. 721 F.3d at 134.

Thus, the question of whether it is "fair use" to electronically copy millions of copyrighted works has now resumed center stage in the Google Books case.

Judge Chin wasted little time in moving forward with consideration of the fair use defense. After the parties submitted legal briefs, the court heard oral argument on September 23, 2013. While it is notoriously unreliable to divine which way the case will come out from the give and take of oral argument, at least one court watcher concluded that the judge was definitely leaning towards Google.[5] Judge Chin appeared to find the decision by his fellow judge Harold Baer in the *HathiTrust* case to be controlling.

In that case, Judge Baer of the U.S. District Court in New York City was faced with the obverse side of the *Google Books* case. It involves the same copying of millions of books by Google, but the case looked at that conduct from the viewpoint of the *libraries* that received from Google and, in turn, made available the digitized books to their patrons. The district court granted summary judgment in favor of the libraries in October 2012. See *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445 (S.D.N.Y. 2012). The court read Second Circuit law to hold that, where the use of the copied work is for scholarship and research, the analysis "tilt[s] in the defendants' favor." Moreover, the court viewed the copying as fair use because it was "transformative." Judge Baer held that:

> The use to which the works in the [HathiTrust Digital Library] are put is transformative because the copies serve an entirely different purpose than the original works: the purpose is superior search capabilities rather than actual access to copyrighted material. The search capabilities of the HDL have already given rise to new methods of academic inquiry such as text mining. [*Id.* at 460]

Judge Baer, therefore, dismissed the Authors Guild's complaint against the libraries.

During oral argument in the *Google* case, Judge Chin drew attention to Judge Baer's conclusion that the library copies in the *HathiTrust* case were fair use and asked counsel for the Authors Guild whether the court was not in fact bound by that ruling. Judge Chin pointed to ways in which Google Books has improved research and enabled new kinds of research, such as data mining. (He noted that his law clerks use Google Books to do cite checks.) He asked whether these uses are not "transformative." Counsel for the Authors Guild countered by focusing the court's attention on Google's motivations, which were commercial, not exploratory. He also pointed out that the Authors Guild has appealed the *HathiTrust* decision to the Second Circuit.

It is hard to predict whether the appellate court will agree with Judge Baer's admittedly unprecedented application of the concept of "transformation" in *HathiTrust* to permit copying of the complete text of millions of books. Judge Chin seemed to take a harder line when he rejected the proposed Google Books settlement in 2011. At that time, he flatly declared: "Google engaged in wholesale, blatant copying, without first obtaining copyright permissions." 770 F. Supp. at 679. Now he seems to have changed his tune.

It is hard to accept the proposition of Judge Baer (and perhaps of Judge Chin) that the ease of electronic searching of scanned documents is legally "transformative." Research for centuries has been done by human beings reviewing the text of books and documents, looking for words or names or ideas. The fact that a computer can perform that search process faster does not, it seems to me, transform the process into something so different as to allow an unauthorized party to ignore the copyrights of the original authors and publishers. Copying millions of books and storing them in a searchable database may indeed be a useful thing for the world, but defending that copying on the ground that it is for the public good strikes me as little more than a "Robin Hood" defense, in which stealing from "rich" authors is justified on the ground that the proceed are being given to "poor" academics. Is that really a "fair" use?

[5] See Albanese, A. (2013, September 24). Publishers Weekly. Retrieved from http://www.publishersweekly.com/pw/by-topic/digital/copyright/article/59222-after-quick-hearing-google-books-case-appears-ready-to-be-decided.html

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Georgia Harper: Well, I am going to talk about transformative use. I am not going to talk about Google, though, because that case has not really been decided yet. But we have had a bunch of really super cases this year that do go into why we think things are transformative or how we can be sure they are, and in academe that really matters to us. This trend with transformative use started in 1994 with a case that was a parody that Bill might have enjoyed standing up here and singing about. It was the "Oh Pretty Woman" case. I do not know if you are familiar with it, but it was a song by Roy Orbison that was parodied by a rap group and turned into a song about an old hairy woman, a prostitute walking down the street. They did quite a number on old Roy's song. The Supreme Court did a number on the people who sued, however, by saying that what the rap group did was transformative. They did not elaborate different types of transformative fair use, but the court decisions since 1994 are a lot easier to understand if we recognize that there are different types.

Pam Samuelson described an approach that I found really useful in an article from 2009 called "Unbundling Fair Use." It is important to understand, first of all, that these transformative uses are most likely to be fair use when they support free speech first amendment values. Second, one might create transformative works and one might also have transformative purposes in using another's work. And third, the three categories that Samuelson identifies within works and purposes can overlap.

Transformative works are the easiest to recognize: the parodies, the satires, the appropriation art. These photos (referring to slide) show how Jeff Koons adapted an advertisement for selling shoes into a collage that he calls *Niagara*. The court found that use to be transformative. When, as here, the work is used as raw materials in furtherance of distinct creative or communicative objectives, the use is transformative.

Transformative purposes include productive uses and/or orthogonal uses. HathiTrust, to whom Bruce referred, is a good example. But first, let me give you some ones that are more familiar perhaps. These would be uses that promote ongoing authorship. Research uses, including making copies that will be used to inform or critique or commentary, copies for new reporting, quotes to illustrate a point, to demonstrate, to explain. Another example might be making a photograph of a sculpture for an analytical piece. HathiTrust comes into the picture here with transformative uses where its digital copies of books are used to enable access by the blind and visually impaired. Again, one might wonder, as Bruce did, what is so transformative about making books available for the blind? But that is what we have these days, is a court decision that says it is. It is up on appeal, we do not know how for sure it will come out, and it is something to watch. It is certainly something that a lot of people are cheering.

Orthogonal uses are those wholly unrelated to the use made or envisaged by the original author. These are uses for a new audience, for a new purpose, and HathiTrust is, again, instructive on this point, the point that Bruce raised. Digitizing works to index them for full text search and to enable text mining are the examples we have today. Now, again, these are strongest when they support first amendment values.

Let me give you another example to illustrate the differences among these categories. One might critique or comment upon Margaret Mitchell's book *Gone with the Wind* by making a new creative transformative work, another novel, like *The Wind Done Gone*, or by writing a scholarly article. Both might be fair uses, but one would rely more on a transformative work creating a new work; the other on a transformative purpose, a productive use. One might also use her work for an orthogonal purpose by including it in a text mining project, perhaps to discover new information about authors of her era or her genre, which information itself might become the subject of another study. My use of these images is also orthogonal. I use them to provide a visual reference for what many would say are rather subtle nuances that define different aspects of transformative fair use. As an instructor, I like to rely on fair use of visual images to promote

understanding of the law among those who want to keep their activities within its sometimes evanescent boundaries.

Now, keep in mind that even if a use or a purpose is transformative, the user still must comply with the rest of the requirements for fair use. She must use only so much of the other's work as she needs to achieve her transformative work or purpose, and the benefit of the use to the public must exceed the harm to the copyright owner's normal expectation of commercial exploitation of his work. With this framework in mind, let us look at what happened in 2013. I chose three cases from what was a rich array of results this year with very interesting challenges. First, Ed Sullivan challenged the Jersey Boys, Faulkner challenged Midnight in Paris, and street artist Derrick Seltzer challenged Green Day.

First, we will do Ed Sullivan. Sofa Entertainment is the owner of the copyrights to the Ed Sullivan Show. They sued Dodger Productions, the producers of a play about the '60s rock band the Four Seasons. Dodger used a 7 second clip of Ed Sullivan introducing the band. In the view of the Ninth Circuit, the use was for historical significance. The court noted that the defendants had imbued the clip with new meaning and had done so without usurping whatever demand there was for the original clip. The lower court awarded Dodger attorney fees of $155,000 because it viewed Sofa's infringement claim as objectively unreasonable and determined that awarding the fees would deter future lawsuits that might chill the creative endeavors of others. The Ninth Circuit affirmed that award at the same time that it affirmed the fair use defense. Now this exemplifies a productive purpose. The Jersey Boys uses a 7 second clip to show, to illustrate, to demonstrate a point in the Boys's historical trajectory. Making it on the Ed Sullivan Show was a major accomplishment. In fact, at the time, the Four Seasons viewed it as their best hope for reviving their popularity in the midst of the British invasion. The clip also illustrates an orthogonal use. The new audience, the different expressing purpose, the recontextualizing: all of these give the older content new meaning. The use of this image serves as a visual reference for me to aid you in understanding and retaining the information that this case embodies, the information I am trying to convey. These actors and their director and producers are taking a risk, and they are making a statement about their right to reference the culture of the twentieth century, our culture, for purposes other than the original expressive purpose of the creator of the materials and for a different audience, and that is what I am trying to do as well.

Now, Faulkner. Has anyone seen this movie? In *Midnight in Paris*, Owen Wilson's character Gil Pender at one point says, "The past is not dead. Actually, it is not even past," which he attributes to Faulkner, even though it is slightly off, and he goes on to recount a conversation he has just had with the long-dead Faulker as proof of his assertion. Now, this movie is a comedy. It is filled with literary and artistic allusion. This particular quote describes Pender's problem. It is "Golden Age" thinking, the erroneous notion that a different time period is better than the one one is living in. You know, it is a flaw in the romantic imagination of those people who find it difficult to cope with the present. This Golden Age thinking pervades the film, both in its plot and its theme. Faulker's point was altogether different; it was about the past catching up with you. This suggests that the use was orthogonal. It is a productive use, as well; in other words, *Midnight's* director had a transformative purpose. The quote is used to illustrate a point about our attachment to the life of the past. To explain, and this is, as you all know, a rather traditional use of a quote, a short quote. The Court elaborates on the orthogonal purpose, however, but going on to say that the speaker, time, place, and purpose of the quote in these two works are diametrically dissimilar. The quote even takes on an aspect of transformative use, in the creative sense, in the Court's view, and this is where they quote back to the "Oh Pretty Woman" case, Campbell. The use of these nine words in Midnight undoubtedly adds something new with a further purpose or different character altering the first with new expression, meaning, or message. So the quote has been entirely recontextualized, and that itself is what is transformative.

Now the third case relies on a creative use, not the purpose we have been talking about so far: *Selter v. Green Day*. Photographer Richard Staub had earlier taken a photograph of a wall that was just plastered with Derrick Seltzer's street art. And when he was later hired by Green Day to create a video for the group that would play during a live performance, he built a set that included an image that was inspired by Seltzer's work. The video actually filmed a series of artists coming onto the set, adding art to the wall, and then exiting. The film was the creation of the wall. Finally, the video played as the backdrop for a single song in a Green Day performance, and these three photographs illustrate the process of that transformation. Interestingly in this case, the plaintiff actually helped the defendant make his case. Seltzer complained about how much Green Day had changed his work. How horribly they had deformed it, and how they had changed its meaning to be almost the opposite of what he had intended. Well, of course, these qualities are precisely what made it transformative and a fair use, even though Green Day used the whole of his image. Further, it was clear that Seltzer would never have given permission for this, so Green Day had no option but to rely on fair use. And importantly, the use supports a free speech value, and finally, the harm to Seltzer was, by his own admission, minimal, and that he never would have licensed the work, so the value to the public far outweighed the harm to Seltzer.

Now, what does this mean for us in academe? Well, of course, being from academe myself I see very positive implications for scholars, but also for their publishers, for artists, and their distributors, for actors, poets, their directors, and their producers, and, of course, for instructors. These cases are very good news for all of us who are involved in the creation, dissemination, and discussion of works. They give us all room to move, and this is what fair use is supposed to do. As the court in the Jersey Boys case said, it was quoting an earlier phrased decision, "An overzealous monopolist can use his copyright to stamp out the very creativity that the act seeks to ignite. To avoid that perverse result, Congress codified the doctrine of fair use." So fair use requires of us, as copyright owners, that we not hold so tightly to our views about what we can or should control. Copyright is porous on purpose. The law gives us all these freedoms, and our society is a lot better off when creators are not afraid to take full advantage of them.

Madelyn Wessel: Good morning. I am here as a practicing attorney at a fairly large research university. Ann had emphasized the importance of this session being at least a little provocative and tackling issues of current relevance, so I thought I would take us away from cases in the last portion of the talk this morning and actually talk about some hands-on issues with respect to online ed[ucation], MOOCs, and some threads that I see emerging in that space in my own work for my institution and in talking with colleagues at others: issues that really are not about copyright, but I think are very important to librarians: issues like privacy and issues around data use and data rights.

I will spend about 5–10 minutes talking about some of the intrinsic copyright issues and concerns and IP ownership issues with respect to Massively Open Online Courses, and then you will see that we are going to move into some related issues. When we are talking about MOOCs or online materials, there are a number of big overwhelming topics. One is, of course, course production and copyright issues; some of you may have attended Ann Okerson's "hot issues" preconference where Kevin Smith spoke about copyright issues and MOOCs, which I am sure was really wonderful. There are intellectual property and ownership rights, as between faculty and institutions, and this is a topic that is heating up quite a bit right now. The AAUP, the faculty organization, is putting out a call to arms around academic freedom rights and ownership of faculty course materials, which they see threatened by the advent of university-sponsored agreements for Massively Open Online courses. We have got FERPA and ADA compliance, which I do want to talk about today; we have got EULAs and privacy policies inherent in participation in open online courses; and we have got some issues that I will close with today: just because a course is "free" does not mean it's actually free. What is happening around data mining and data usage in

this new space? And finally, the issues of compelled transfer of IP, and when I say compelled transfer, I mean compelled transfer for our faculty and students when they engage with cloud services around learning and teaching.

It goes without saying that course materials are heterogeneous, and as someone who has staffed my institution's project with Coursera, this really was brought home to me. My thought was, "Well, we are going to have to get a release from that talking head up front who is getting filmed for that course." When you start to really think about what is involved in a course presentation, especially one that is going to succeed online, you are talking about a lot of other materials—all the fun little gimmicks. By the way, this talk today has been denuded of all the fun slides that I take off the web like everyone else does to make people wake up and to say hello, because unlike Georgia, I am not making images the subject of this talk. Like many, many faculty, when I give a talk in a classroom or face-to-face that is not being recorded, I use images to have fun. And faculty are used to doing those kind of things in their teaching; they are not used to thinking about rights concerns at all in that process. But those kinds of issues can become very live and vivid. And then, of course, there are issues around delivery of materials to students or participants in these open courses. All of these are different threads in the copyright equation. All of them explode the safety of the traditional classroom and face-to-face teaching, in which, as librarians and others involved in the teaching and learning enterprise know, we have a lot of liberty—that liberty that comes from the copyright statute and from the realities of fair use in the classroom. But when you are interacting with a MOOC platform provider, they are going to treat you as an institution if you are an institutional participant. The institution has to take the role of warranting rights *vis a vis* a publisher.

We are now producing courses in an online environment where all of the conventional permissions and rights issues that publishers apply to our faculty when they publish books, or a film studio's going to apply when its releasing a movie, really come into play in some kind of way. Georgia and I were talking last night about how faculty who create these courses are not thinking about these issues. The enterprise of trying to work with faculty for institutional delivery of a MOOC course that may be, at least to some reasonable extent, not totally illegal, has been really been challenging for us.

Here are the traditional copyright exceptions (referring to slide) that we love, that we use all the time in institutions of higher education. They are built to support a progressive and opportunity-rich teaching and learning enterprise. The issue is that, most of them, at least within the structure of the Statute, are not written in terms of Massively Open Online Courses that will be generally available on the web. They are written in terms of specific hierarchies and structure within higher education itself. What we are finding is that, in this space, fair use is again very important. Fair use has a place within the copyright advisory space for MOOCs, but what are the rules? And these are questions that have not quite been answered yet.

For example, what are the rules when it comes to delivering these recorded course materials to thousands of individuals worldwide? Does it matter if the platform provider is explicitly for profit? We all know that we have seen the Supreme Court reject an analysis going back at least as far as *Campbell v. Acuff-Rose Music*, the 2Live Crew/Roy Orbison case that Georgia mentioned; we know the fact that there may be a profitable interest, motive, or result that does not disallow fair use. That is an old argument that was hurled at artists and others under the fair use test, and the Supreme Court said that it can be a factor, but if your use is truly transformative—even if you are making money, you may still have a perfectly valid fair use case. But how does that concept apply in this particular environment, that is, if our institutions (as we are all reading practically every day in the *Chronicle of Higher Education* or the *New York Times*), are really looking towards ways to obtain revenue from these programs in the long term. So how does that affect the fair use analysis? Does our not-for-profit status help to outweigh the for-profit status of a for-profit platform provider? Does it matter if the content is

being beamed worldwide to countries that do not have any fair use concept in their copyright regime? These are lots and lots of issues, and as one of my children said coming home from school one day, "Mom, I am perplexed by the 157 questions for which God has no answers." These are on that list too.

Here are some pivots that I feel fairly strongly about, and I think a lot of my colleagues within the academy are advising on. Third-party content that is integrated into, whether online courses, videos, or content that is uploaded for broad public access, is obviously going to work better if it is transformative. Georgia has just described a number of very recent cases where courts are agreeing with that. It is always important to remember the good, wonderful Ninth Circuit cases around the use of technology being our friend. Wherever it is possible to use content in a way that is not rivalrous with perfectly legitimate needs of content owners, that is a good way to go. If you can use thumbnails or low resolution images, that is great. Links that are going to support a publisher's opportunity when you are using tiny bits of content can also be a helpful way to at least make content owners our friends and can potentially help with a fair use analysis. I would say, though, that it is not viable to say I am going to upload a whole lot of book chapters so 100,000 students worldwide can read chapters of books. I think that is a licensing issue, and people have got to tackle that one.

IP ownership, just for a minute or two: this is an issue that I have found perplexing in its public parlance or discussion recently because the reality is that this all boils down to the Copyright Act and institutional policy. For those of you in the room who are at educational institutions, which I suspect are quite a few people: institutional policies around faculty ownership of intellectual property almost invariably distinguish between types of faculty output. Most institutions at this point stipulate that faculty own their own scholarly articles and books. So faculty can produce scholarly articles and books that are the products of their research, they can do it at least in part on university time, they can sit in their office laboring over that. We want them to do so; it is part of the criteria of tenure and promotion, and we give the authorial rights to faculty; we either restore them based on how our policy operates, or we never take them away in the first place. We explicitly carve that out. This is then where institutions diverge a little bit. Some institutions, my own included, do assert an ownership right at the institutional level to course materials, even regular old course materials. That does not mean that we would say to Professor X who moves to another university, "You cannot take your syllabus and your lecture notes with you," but we would at least assert a right to hold onto that content at our own institution. In fact, from a technical perspective, my policy says we own those goods.

Other institutional IP policies tend to afford a broader swath of rights. Some institutions say faculty own all typical faculty outputs, whether course materials, books, or articles. But all institutions put up stop-gaps when it comes to the creation of intellectual property artifacts that employ significant university resources. Where you are getting a ton of support and investment from the university, the university asserts an ownership right. This comes in part out of patent law areas, where faculty and institutions need to have strong and clear rights to be able to disseminate IP in a patent licensing process and get royalties back, both for the inventors and for the institution. Distance and online education courses almost invariably involve a ton of investment. I have heard that the average Massive Open Online Course right now is costing institutions $100,000–200,000 per course to produce; when you are talking about video recording, addressing all the rights issues, support from grad students and others, that is a very significant institutional investment. Institutions, under their universal policies around this, really do own the IP rights, or at least have a claim to them, and these may be shared with the faculty. The concept that university participation in these projects is robbing faculty of rights is one that I remain puzzled by. You will be hearing more about that; some of where that is coming from is a perfectly understandable concern about displacement. The issue around academic prerogatives to choose and create courses, the

concern about displacement of teaching opportunities, those are realities. We are in a very disruptive space right now in higher education. Those concerns are clearly being brought to bear around this issue. Regardless of how all this settles out, platform providers need clarity in their rights because when an institution signs up and delivers a course to a MOOC platform, the platform provider wants to know that the rights are clear and okay.

Accessibility is a huge and growing issue, one where the Department of Justice and the Office of Civil Rights are really slamming us, probably for some good reasons around accessibility of new technologies and new content opportunities. We all need to expect that any form of licensing, whether we are securing content from a publisher for journal access through libraries or whether we are delivering content online, is going to be subject to ever more rigorous accessibility expectations under the ADA and under Section 504. Institutions that receive federal funds, that is, all of us, absolutely have to think about these issues. We are being used, quite frankly, by advocacy groups to be the tail that wags the content-producing and technology dogs. Under the ADA, the Department of Justice cannot tell, let us say, Google or Elsevier, "Thy content must be accessible," but they can tell institution X, Y, and Z that if we license content that is not accessible, we are out of compliance. There is an explicit strategy to ensure that higher ed is fully aware of our obligations and so that we push technology providers and content creators to render the content accessible and compliant. That is another horizon issue I want to flag. It is coming up in the context of MOOCs, but it goes far beyond MOOCs.

Now, let us downshift to a different gear. I am going to move away from ADA to talk for a few minutes about privacy and data use issues, and then we can start a conversation. What is it that is really happening, first, in the MOOC space? Well, it has been pretty important to the for-profit company Coursera in their terms of use (one of those many, long, unread, 17-page documents that we all click through and do not read thoroughly), to say that "Hey, you are not our student." We talk about students taking online courses, but Coursera, for example, says you are not our student and we are not subject to the Family Education Rights and Privacy Act, FERPA, which drives an awful lot of compliance efforts at institutions of higher education. You are not our student, and, because of that, institutions that are working with an entity like Coursera (and there are a lot of other companies out there) are also wanting to be very careful because we do not want to be in a position where it looks like we are enabling a formal student relationship with the institution that would give rise to rights and responsibilities, not only under FERPA, but around accreditation and all kinds of other compliance environments, which would put the institution in a very bad place with respect to its delivery of content.

The paradigm is, we are giving you content, we are not enrolling students at the institution. Here is where things can get very interesting. Anyone here currently at an institution where you have created courses and uploaded them and where your faculty are "flipping" the courses? Me too. One of the things that I realized late in the game was that we had faculty who had created great courses, and they really wanted to flip the classroom and experiment with that model, which is an interesting thing, one of the important drivers of this experiment with MOOCs. But they were having students just enroll with Provider X in order to take the course at the institution. That brings FERPA right back into the picture. If the students, in enrolling for that course, have got to waive their FERPA rights and agree to have their data commercially used, then actually I have forced a student at my institution to waive their privacy rights in order to take a course at my institution. It is not just some participant, some nonstudent out there in the universe who is agreeing to that trade in exchange for free access to education, it is my institution; it is something to think about. You want to make sure that that is not happening and that students have a legitimate choice around privacy waivers.

The issues around privacy and compliance are, by the way, going to be ever broader because the European Union has an even more rigorous structure around privacy than the United States

does, and I think we can expect open online course providers to be grappling as we see Google, for example, constantly getting sued in European countries around privacy practices. This stuff is going to be part of the online space as well.

This leads me to a final couple of slides, and not just about MOOC providers. The EULA, the online license, the end user license that is getting thrown in front of us every time our browsers touch the web, is a really important thing for us to care about. It is something important for librarians to care about, increasingly. I know how ubiquitous this is, and I know how hard it is. Every single person in this room who signed up for Internet access clicked right past a EULA. You do not know what that said. You probably agreed to indemnify some company, whoever the service is from, and you probably agreed to be sued in whatever home state jurisdiction they have. You might have agreed to share data in ways that would not be very appropriate from the perspective of your institutions policies. You just do not know because nobody reads them. I am here to say that when we are employing cloud products, products that involve a faculty or student's browser touching a web space, we must care about those issues. We should care about them a lot because fundamental issues of privacy, of IP ownership, and of use and access to data are implicated there. When you start to read EULAs, you find some very tricky and unpleasant things. For example, think about cloud products that are being tested by faculty in the classroom to measure learning analytics, which is one of those hot new terms. If you read through the license, you may realize that your faculty and students have agreed that all of the IP that is created in that course testing space has also been given nonexclusively to the host and can be used and reused by that company. And when the license does not comply with FERPA in the first place, and your students in taking your class have to agree to these kinds of terms, that is an issue of concern, at least to me. I think it is the kind of issue that is also of concern to the libraries.

New copyright strategies of platform providers, whether they are MOOCs or others, also bring us back into this cycle. Platform providers are trying to make deals with publishers and content owners who are perfectly reasonable in their intentions, but if you are an institution and you have launched a course and the course is being linked through content deals to publisher opportunities, you are not a party to that agreement. If the platform provider is giving away the farm around privacy and IP ownership rights, and your faculty are not reading this language, and your university is not interpreting it, and not realizing that by agreeing to utilize certain content or certain textbooks as part of a course, anyone who enrolls in the course is going to be dragged into a space—again, that has privacy or IP ownership and data rights implications. That is not good stewardship.

Cloud companies, in general, are seeing this space as opportunity rich. Frankly, they are counting on something that is true, which is that we cannot all read these licenses. For example, when it comes to institutional programs, I have two grown-up kids, and I know that they have very little of this sense of privacy that I might have as an older person. They have thrown their lives up on Facebook, and they Twitter, and they really do not care very much about these issues. And that is fine in the private and personal space of all of us. But when it comes to the stewardship we have as institutions and libraries towards our students and faculty, we need to up the ante in our game.

Here is, for example, something that just struck me in the last two weeks, in the middle of a negotiation I am handling for many institutions in my state: it is a very big deal for a content license. All of sudden pops up a deal we have historically renegotiated every 5 years or so. In reviewing the renewal license, I realized that the hard won compromise that our state's libraries had around usage statistics needed attention. The balance of patron privacy, library needs, and publisher legitimate needs had suddenly been tilted by a new little clause in the license that said, first of all, that all privacy was going to be safeguarded, except as described in the license itself, which was usage statistics based, or as described in the online privacy policy. And what does the online privacy policy say? Basically, the publisher can change its policy whenever as desired, which is

what we all know can happen with online policies. I strongly objected to this. This is not a situation where, frankly, we should have a EULA or an online license. We have faculty and students reading articles off this database. They are not uploading to the database; they are simply reading content that we are buying at enormous expense. I do not think their privacy rights ought to be breached when we are paying millions of dollars a year to deliver content to them. You need to watch out for these things, because if you do not, you are basically setting up a dynamic where the library-licensed resources have become another tool to harvest data in ways that you may not think are appropriate.

I am happy that we already got an introduction to the wonderful Woody Allen, because I am ending with Woody Allen here. "Just because you're paranoid doesn't mean they're not out to get you." Lest you think I have jumped off the deep end as a lawyer for my institution, know that many factors must be appropriately balanced. We are living in a dynamic world of new technology, data analytics are here to stay, and I am not someone who is objecting to content owners having opportunities to interact with institutions around data sharing and analysis. That is going to happen. The issue is whether it is happening in a place where the fulcrum of ethics and of stewardship is reasonable and where we are paying attention enough to these issues to not, frankly, get dragged right off the boat into the deep end of the sea without knowing what is happening. My admonition here is that we need to be alert to these matters; we need to not check our skepticism at the door. We do not want to be so excited about winning these wonderful copyright battles in federal courts, which has been an increasing trend, that we lose our critical judgment around other things that could be happening that could be undermining some of those victories at the very same moment. Thanks so much.