The Long Arm of the Law

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The Long Arm of the Law

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Abstract

This presentation provides updates on three legal issues of pertinence to librarians: The “right to be forgotten,” the application of the Americans with Disabilities Act (ADA) to libraries and universities, and the application of copyright “fair use” doctrine to electronic reserves and electronic course packets.

An Update on the “Right to Be Forgotten”

As you may recall from prior “Long Arm of the Law” presentations, the European Union vigorously protects privacy rights. Twenty years ago, the European Parliament and the Council of Europe adopted the EU Data Protection Directive, that is, Directive 95/46/EC of 24 October 1995. It protects individuals with regard to the processing of personal data and the movement of such data.

What is personal data, you may ask? It is any information relating to an individual, whether it relates to his or her private, professional, or public life. It can be anything from a name, a photo, an e-mail address, and bank details to posts on social networking websites, medical information, or a computer IP address.

Two years ago, the European Court of Justice had down a landmark ruling in May 2014 that EU privacy law required Google to take down (or “de-index”) negative information about an individual citizen of Spain, Sr. Mario Costeja. See *Google v. Agencia Española de Protección de Datos*, Case C-131/12.

On May 13, 2014, the ECJ held that Google (as an operator of a search engine) is obliged to remove from the list of search results any web page links relating to an individual if such information is irrelevant in relation to the purposes for which the data was collected or processed and in the light of the time that has elapsed. In short, the ECJ required a balancing of the legitimate interest in access to information and the data subject’s fundamental rights.

The court’s decision opened a floodgate of privacy requests from other EU residents. In the past two years, Google has received a half million requests to remove information and has complied with 43.2% of

them. While many applaud this development, there has been some fear among historians and librarians that the role of libraries in preserving historical records is being impaired.

The 1995 EU Data Protection Directive will be replaced in 2018 by the General Data Protection Regulation, but the new rule will not cut back on the right to be forgotten. EU citizens will still be able to request data custodians such as Google to remove negative information about individuals, but there remain limits on it, as Viviane Reding, Vice President of the European Commission and EU Justice Commissioner has remarked:

The right to be forgotten is . . . not an absolute right. There are cases where there is a legitimate reason to keep data in a database. The archives of a newspaper are a good example. It is clear that the right to be forgotten cannot amount to a right to re-write or erase history. Neither must the right to be forgotten take precedence over freedom of expression or freedom of the media.

The latest controversy about the right to be forgotten is the ruling of the French data protection agency (CNIL) in September 21, 2015, now on appeal to the French courts. There, the CNIL ruled that Google must take down or delist results on all of its extensions, including its U.S. portal, Google.com. The ruling is not just limited to Google’s European ones. Thus, the French ruling would directly affect searches done in the United States.

The International Federation of Library Associations and Institutions (IFLA) is a strong voice urging restraint in applying this privacy right. Most recently, in an October 2016 letter, IFLA urged the French courts to reverse the state agency and not to expand the right beyond national borders.

Can the ADA Spell the End of MOOCs?

On August 30, 2016, the U.S. Department of Justice (DOJ) formally notified the University of California at Berkeley that it had violated Title II of the Americans with Disabilities Act (ADA) by making free audio and video content available to the public on YouTube and iTunes and in massive open online courses (MOOCs) but not making that content accessible to the deaf and the blind. The DOJ advised Berkeley that it must modify its free offerings and pay compensatory damages to aggrieved individuals.

In September, Berkeley issued a statement that it is, in effect, between a governmental rock and a fiscal hard place, unable to afford the cost of restructuring the programs. It may, therefore, have to remove the content from the public. Sadly, this is a no-win situation.

Berkeley is not alone among schools that have been sued by the DOJ for ADA accessibility violations: 25 others have too.

Where will it all end? It is hard to say at this point. Perhaps the Trump administration will take a different view of the situation.

Georgia State—e-Reserve Case

As you may recall, Georgia State University became the target of a copyright suit for allowing professors to designate portions of books and periodicals to be copied by the library, scanned, and put on electronic reserve or compiled into electronic course packets. Three publishers (Cambridge University, Oxford University, and Sage Publications) sued, alleging that substantial portions of 6,700 works had illegally been copied and transmitted to students for some 600 courses at the school.

After discovery, the case proceeded to trial, and in 2012, the district court largely ruled for Georgia State, holding that it was “fair use” for the university to electronically copy up to 10% of a book or even a whole chapter. *Georgia State University v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012) (Evans, J.).

In 2014, the U.S. Court of Appeals in Atlanta reversed and ordered the trial judge to take another look, using a more nuanced analysis. *Cambridge Univ. Press v. Patton*, 769 F.2d 1232 {11th Cir. 2014}. Significantly, the appeals court held that the nonprofit, educational nature of the university’s use of the material favored a fair use finding.

Publishers were horrified. They looked at this sort of wholesale copying as undercutting the entire ecosystem of academic publishing. They hoped for a better result on remand, but that did not work out for them. In March 2016, the trial court again ruled in favor of Georgia State after taking a second look. The court largely tracked the same logic as before.

Where will it all end? Spurred by the apparent success of Georgia State, other colleges and universities have adopted similar eReserve and/or eCoursepacket approaches. Publishers have fought back, filing similar cases against U.S. universities, including UCLA, and against foreign institutions, including York University, Delhi University, and in New Zealand. The jury is still out, but the publishers have so far not done well in the Indian case.

Delhi University Photocopying Case

In September, a trial court in India ruled against publishers in an even more blatant case of copying, one where the university worked directly with a photocopy service to make hardcopy course packets for sale to students. See *University of Oxford et al. v. Rameshwari Photocopy Services et al.*, CS(OS) No. 2439/2012, High Court of Delhi, Decision dated 16 September 2016. The trial judge stated:

That, in my view, by no stretch of imagination, can make the [photocopy shop] a competitor of the [publishers]. Imparting of education by the defendant . . . University is heavily subsidized with the students still being charged tuition fee only of Rs. 400 to 1,200/- per month. The students can never be expected to buy all the books, different portions whereof are prescribed as suggested reading and can never be said to be the potential customers of the plaintiffs. If the facility of photocopying were to be not available, they would instead of sitting in the comforts of their respective homes and reading from the photocopies would be spending long hours in the library and making notes thereof. When modern technology is available for comfort, it would be unfair to say that the students should not avail thereof and continue to study as in ancient era. No law can be interpreted so as to result in any regression of the evolution of the human being for the better. (p. 84).

Social advocates hailed the verdict, saying the court had correctly upheld the supremacy of social good over private property. Students had rallied behind the photocopier, saying most of the books were too expensive.

The publishers plan to appeal, arguing that the trial court's approach goes far beyond any reasonable

interpretation of the exception in the copyright act for educational copying.

Stay tuned for next year's updates of these fast-changing legal areas.