The Long Arm of the Law

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The Long Arm of the Law

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The following is a transcription of a live presentation at the 2016 Charleston Conference.

Ann Okerson: Good morning, and welcome to the seventh, I can't believe this is the seventh annual session, of the Charleston Conference *Long Arm of the Law*. And we want to especially thank once again our guest star, Mr. Kenny Rogers (playing Kenny Rogers song). Next time we'll have everyone sing it, right?

So, with those words of caution, I wanted to say that two or three weeks ago I sent out a note on LIBLICENSE-L asking people to send me what they thought had been some of the key developments in legal issues related to libraries or publishing over the course of the year. I got a shorter list than I expected, but I'll read it to you. The Section 108 meetings happening in Washington, DC, the copyright office at the Library of Congress, and then, of course, the recent shakeup, Sci-Hub and article sharing, the Georgia State case which seems to have more lives than a cat, the American Disabilities Act and websites, and the right to be forgotten. Those are some of the items that came in. As you know, the legal issues that relate to us are profuse. They are numerous and ever-changing and never-ending. So, what we thought we would do this time would be a little bit different. We invited Mark Seeley, who is Lead Counsel at Elsevier, to be our first speaker here, and I asked him to talk about the day in the life of a legal attorney in a publishing company, a large publishing company, obviously, and he is going to do that, and then we move on from there. Mark is Senior Vice President and General Counsel of Elsevier. He splits his time between Cambridge, Massachusetts, and the Amsterdam headquarters. He leads an international team of publishing and sales lawyers, and the Global Rights and Permissions Team also reports to him. He is also on the Board of Directors of the Copyright Clearance Center. He chairs the Copyright and Legal Affairs Committee of the International Association of STM Publishers (Science, Technology, and Medicine), and he's a member of the AAP Copyright Committee. He regularly contributes to papers on copyright issues

and best practices. He is a frequent speaker on copyright. His education is Thomas Jefferson College, Grand Valley State University of Michigan, for the BPh in Literature; Suffolk University Law school in Boston for the JD, and he's a member of the Massachusetts and New York Bars.

Our second speaker Bill Hannay is known to us all. Bill is a lover of libraries; although he's an anti-trust attorney, he's long loved libraries. I met him back in the early '90s when I worked with ARL. He likes to come to Charleston, and he always composes a song for us, so I think he will not disappoint. Bill regularly represents corporations and individuals in civil and criminal matters involving federal and state anti-trust law and other trade regulations. He's an Adjunct Professor, teaching courses at IIT, Chicago Kent Law School in anti-trust, intellectual property, and is the author or editor of several books on anti-trust and IP property law, including *Corporate Counsel's Guide to Unfair Competition*, soon to be published by Thomson Reuters West Publishing. He is a frequent lecturer at the Charleston Conference. He's active in the American Bar Association. He's currently co-chair for the Joint Editorial Committee for International Law. He served as Assistant District Attorney in the New York DA's office, and was a law clerk for Justice Tom Clark on the U.S. Supreme Court. He's a graduate of Yale College and Georgetown University Law Center.

Now, the format that we're going to follow today will be a little bit different. Mark will speak first, and we will have then a few minutes after that for comments and questions for Mark, because his presentation is of a different sort than Bill's. And then after Bill's, we will have another chance for more comments and questions to Bill and to both of them.

Let me introduce Mark, and thank you very much for coming.

Mark Seeley: Thanks, and good morning everyone. Actually, it is not my first time in Charleston, but it is my first time at the conference, so it's great to be

here. I have been following things on Twitter, of course, so I've heard a few things talked about here and there in different sessions. Although I do agree with some of the comments on the Twitter feed, it is hard sometimes to figure out which session is which.

So, I do tend to think of myself as a publishing lawyer, and copyright issues are very much bread-and-butter for me. However, I am General Counsel of a large business, which is part of an even larger business, and so what I thought might be interesting was to talk, of course, about copyright issues because I can't do a presentation without talking about copyright, but also to talk about some of the other things that we have to worry about and think about in connection with a general legal function at a business or company. So, I am going to talk a little bit about the company and the business, mostly to give context for then what the legal function at such a business is responsible for, and then I'm going to talk about my own direct responsibilities and wind up discussing a day in the life, although I changed it to a week in the life to get a bit more variety of issues that I was talking about.

So, that is what we're going to talk about, and as I mentioned, so, Elsevier and RELX, as probably some of you will know, is the new name of the business that I knew for many years as Reed Elsevier. People have had some fun in pronouncing the new name, but RELX is generally the way we refer to it. Of course, it is a large company, that is the parent company that is a dual-listed entity largely in London and Amsterdam, or the EURONEXT Exchange, which is Paris and Amsterdam, with a little bit of stuff on the New York Stock Exchange. And it is a business that includes four divisions, of which Elsevier is one. On the legal side, it also publishes in the LexisNexis space and uses that brand, and that is a well-known brand for lawyers.

There is a large number of staff, so there are 30,000 around the world. About half of those staff are here in North America. If we drill down a little bit more into the Elsevier business, it is a business just thinking about the staff numbers of about 7,000 staff, and those staff are distributed across 26 countries around the world, a big chunk in North America, so it is about half of our staff are also in North America. Largely those staff are from the health side of the business. Then we have a sizable operations in of course Amsterdam, the UK, other parts of Europe, and then we've got a scattering in the rest of the world, if you will, particularly Asia as a developing area.

I think everyone in this room will know Elsevier as the publisher of many journals, and that is certainly an important part of our business, but even on the publishing side, we also publish a fair number of books and databases and the like, and then increasingly our businesses is focusing on questions about analytics and services. Some of that is based on the scientific or research-intensive side of our business, so building on the content that we are developing in terms of things like databases and how can we turn those into analytic services to help institutions look at their output of research activity. But also, we do a fair amount on the health side working with hospitals and healthcare providers and insurers to look at the effectiveness of their activities. There is a lot of writing which is not exactly scientific writing; it is more about practice and medical practice. We also train and test a large number of students. We do something like 750,000 tests are done online every year by the Elsevier business through the old Mosby business or HESI Business, as it is now known. So, you see there is traditional publishing, but there is a fair amount of new analytics.

And the implications of that are that we have to do a lot of different kinds of activities, some of which are quite traditional in terms of things like the publishing contracts of one kind or the other, but we are also increasingly doing distributor and agent agreements, technology and procurement contracts of one kind or another. So, there is a large scale of contracts here, but there's also a large scale of expertise that we are asked to provide, things about procurement problems, compliance issues like data protection and privacy or antibribery, and the like. So, my challenge is how to do that with the department that we have.

Now because of the RELX corporate structure, we do have a central corporate legal team at the RELX level, and they provide some centers of expertise for us in terms of mergers and acquisitions, some work in the patent area, labor and employment issues, which is incredibly important when you have 7,000 staff around the world, and things like compliance and data protection and privacy. The Elsevier legal team that I manage directly is 19 lawyers, and the numbers are reasonably split between the U.S., Europe, and APAC; that is, there is almost as many lawyers in Europe, including the U.K. for the moment, as there are in the U.S., and the U.S. has our litigation team. Otherwise, if we were just looking at the business supporting lawyers, the numbers would be much more equal, and then the

numbers are increasing in Asia as the business is developing there. Then we also have a sizable team of rights and permission folks, paralegals, administrators that are part of this.

The way that we have organized ourselves is we have four teams within the legal function. Two of those are very focused on traditional publishing, one on journals and one on books and databases. One is focused on sales issues. One is focused on technology and procurement, and we have our litigation team as well, so you could say that we have five teams altogether. We have regional General Counsel, so there's one regional GC that really supports the European and APAC business, and one in North America, and they've got a variety of responsibilities, including liaison with management teams in their general areas.

Generally, the way I think that any company has to look at the balance between business needs and, by the way, this is true at any institution or university also I believe. It's not really unique to businesses. How do you balance those needs with the resources that you have, and we think of this very much as all about triage. It's about managing the resources in an efficient and effective way and trying to think about those large numbers of contracts, for example. Are there ways to do more of that online? Is there more automation that is possible to be done, or generally speaking, can we provide more tools, more self-help procedures, if you will, for folks in the publishing and the sales side of the business? That is really how we look at the business and how we try to help the business both do things efficiently, but also through that, efficiency give us a bit of resource to help on the more strategic dimensions. So, on complex negotiations, on sort of looking ahead and down the line in terms of some of those questions about technology and analytics, being efficient means that you can do more of that work as well, which I think provides a better resource for the business and the company. That is a little bit about the business and a little bit about the legal department. Enough about that. Let's talk about me.

These are, I have a number of key objectives, don't we all, every year—I'm going to talk about three of mine for the year 2016, and I think some of them won't be surprising at all, so copyright and public policy as I said is my bread-and-butter, something I deal with on a regular basis. Compliance, of course, we have to comply with laws and regulations. Sadly, laws and

regulations are increasing rapidly all the time, and we cannot rely on the idea that the regulations are only relevant if they are in the US or the UK or the Netherlands. There are lots of regulations that are happening around the world, and some are just as difficult and just as intense as they may be in the States and Europe. And I'm also going to talk a bit about the collaboration and analytics question.

In the area of compliance, it is always about risk assessment, of course, and providing advice and support in terms of investigations. It is always a lot about training and identifying what are the rules of practice that we're going to follow. It is easy to say that you have to comply with law around the world. It's harder, I think, to provide a real set of procedures and controls that we think generally ensures that the business is operating lawfully. One example that I give here is the antibribery program. A few years ago, the UK joined the US in having quite stringent regulations on antibribery, and the difference between the US and the UK was that the US tends to focus on government agencies of one kind or another. UK law was much broader, and the U.K. law really required that you really know the people that you're dealing with in terms of distributors and agents and the like, and particularly that you have some responsibility for those entities out there that are actually acting on your behalf, so, from a legal perspective, acting as an agent. What we had to do several years ago was we had to stand up a program by which we assessed the more than 100 distributors and agents. And by the way, when we started the program, we discovered that we had something like 400 distributors or agents, so part of the program was surely we don't need to have 300 or 400 agents and distributors around the world. Let's focus on the key ones and really drill down. So, we did a lot of this initial assessment ourselves. What we decided, and this was a lot of work for us to do, the due diligence process, of course, involves a little bit of questionnaires of the agents but then doing some searching, using some LexisNexis tools and others, to see whether, in fact, the person or the party that you're dealing with seems to be ethical, seems to be dealing with their customers in an ethical way where there are no reports that that agent is somehow involved in bribery or other unethical issues. So, the requirements under the U.K. law is that you do that kind of an assessment on a periodic basis. Last year, as we were coming up on the renewal that we set ourselves to relook at all agents and distributors around the world, we decided that it would be clever

to do that efficiently, and we set up an industry, an independent industry bureau, to conduct due diligence, and we shared that cost across several publishing houses. The simple idea there is that if 30 publishing houses are asking one agent to fill out 30 questionnaires and going through a due diligence process, why not do it once and do it more effectively? So, that is an example at the kinds of issues we look at on the compliance side.

I think the copyright issues you won't be surprised that there is a strong focus for me, and frankly for the entire legal department, on these issues, and I think it takes, it is really about three dimensions. One is our internal policies. We've always tried to look very carefully and not to make sort of automatic leaps of judgment about what is right and what might not be right, and the issues there are particularly acute on the journal side of the business, where after all authors are looking for visibility and public claiming of their inventions and discoveries. Somehow the publishing world involved in journals has to find a way to live with that desire for visibility, while at the same time, particularly on the subscription side, preserving a business model. So, how do you balance these things? There's a lot of internal policy discussions that we have, but we continue to sort of manage the copyright issues, rights and permissions, clearing permissions and the like. Even in an OA world, there is a fair amount of issues about copyright, for example, Creative Commons licenses and all the flavors of those licenses and which is more appropriate.

We are also looking on the enforcement side, so we look at sites that are using content, and we try to identify the best way to reach out to them. We have been focusing a lot through the STM Association on a set of sharing principles. Again, it's the idea of what can we support in terms of visibility balanced with a need to maintain a subscription business, and then we are also looking to see what type of issues are going on legislatively, so what are the copyright revision efforts which are being looked at around the world? I think at the moment this is most acute in Brussels. The European Commission just released a few weeks ago a new document called "The Digital Single Market." Of course, it is very much at a proposal stage and will go through lots of changes legislatively and elsewhere, and the key issue that we've been looking at here is the question of text and data mining rights as an exception to copyright. And our key point here is to try to preserve the commercial market, which is

pretty viable and which is growing nicely. Think about the pharmaceutical industry, for example. They're very interested in the question of text and data mining, not only of published content but also of their own content as well, and they're looking for tools and services that help them do that.

The third thing that I thought I would talk about is this question about collaboration and technology. As we look at our business, what we think is that the future, of course, has a strong technology focus, and, to some extent, the future is about what kind of answers can you provide ultimately, so it's not just about doing research. It is also about finding ways to work with technology and big data, and I know there's been lots of discussions about big data over the past couple of days. How do you provide the kind of combination and collaboration of technology and content to provide better answers and better information for researchers and for medical practitioners? The questions that we have as we reach out to third parties to think about doing these kinds of collaboration projects, some of them are not unusual. In almost any partnership or collaboration, you're always going to have differences of view between the respective partners as to the value that they are bringing to the party, so it won't be a surprise that from a content perspective we think the content that we have worked on, both on the science side and the health side, is pretty valuable and pretty useful, and we think that if people are devising tools for research or for health care that you start with content. So, we think of content as sort of being king. Surprisingly, the technology vendors have a completely different view, and their view is all about delivery. It's all about solutions, and content is kind of a commodity, so it's easy to see how there can be collisions of interests and disagreements.

Part of the exercise here is to try and figure out what kind of approach works, what different types of technology collaborators, and also to be thoughtful about questions about what types of intellectual property rights, and actually, I don't think it is about IPR. I think it is about intellectual content that is being thrown off as a result of these kinds of projects because it is not the sort of traditional IP rights that we are used to. It's probably not copyright, and it is probably not patent, and it is definitely not trademarks, and it's not trade secrets, if you're going to talk about it a lot, so what is it and how do you protect it?

Those are some of the key personal responsibilities for this year that I am responsible for, and then here is the kind of the final part of the discussion and the last slide here which is “The Day in the Life” issue, and for me, this is actually an excerpt from the week of the 3rd of October. Now that is important because in the publishing world that means that is about two weeks away from the Frankfurt Book Fair. As probably many of you know, the Frankfurt Book Fair is one of the largest international gatherings of publishers and distributors and agents and even some librarians that happens around the world, although London Book Fair would complain about that characterization. So, the thing there is that because all the publishing houses and all the trade associations, well many of them, are meeting that week in Frankfurt, of course there’s a lot of preparation for those meetings. So, what are the key issues that are being discussed in terms of copyright issues, copyright cases, copyright revisions and the whole question about text and data mining rights and the digital single market was critical there. So, a lot of preparation and a lot of discussions within the trade associations and in individual one-on-one discussions with publishing houses. Some related discussions about technology because I think as actually have been discussed quite a bit here in sessions at Charleston this year, there’s a lot of issues about both better accessibility and better security, and are those two things completely in conflict, or are there ways to improve accessibility and ease of use while ensuring the security is also there? And publishing houses are looking at those issues as well.

On the collaboration side, we did an in-person workshop. I gathered together some senior managers at Elsevier with an external lawyer because, of course, we won’t have expertise in all of these areas and all these issues and will always rely on outside counsel to provide some particular expertise on particular points, for example anti-trust issues. We definitely would talk with outside counsel about those issues. So, we did an in-person workshop and tried to work through some of those questions about valuation and asked that in these combinations. I had a couple of compliance issues, so it surprised me to learn that if you operate an online job board from the UK that you are considered to be an employment agency. I had no idea that this was the case, and it struck me as completely wrong, and what I gathered is that most online job boards that operate in the UK do not regard themselves as employment agencies, so they

kind of tend to disregard it. But nonetheless, that was what the law said, so we had kind of work through what the implications of that were and how we could actually operate the system going forward.

We also had some clients’ investigations into APAC countries. One was a result of an internal whistleblower, and one was a result of a government agency, and here all you can say is that all the training in the world and all the best practices and a code of conduct, at the end of the day, people may be motivated by things other than the best business ethics, and you do need investigations, and you need, frankly, penalties to really ensure that a compliance program really operates and works well.

I had some administrative things going on as well, so we were looking at the Books Contract Automation Project, which we’ve been working on this year and which will be standing up next year in 2017, but we also had some corporate organization questions. We had some changes in directors. When needed to look at the slate of directors for the Dutch, UK, and US entities. These are not the publicly traded entities but the operating entities, and we had a discussion with our tax team about some assets that are owned by a European entity which is no longer terribly active. And then finally I actually did some publishing things, so I sat—I’m one of three members of the retractions panel inside the company that looks at the journals and books in retraction and removal proposals, and this often gets us involved in discussions with the external journal editors about what they’re proposing, how they’re proposing to do it, and make sure that we are well on. So, that was a day in the life. Thank you.

Bill Hannay submitted a written paper for his portion of the presentation, included below.

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,” i.e., 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, 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 pages 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 that 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 like Google to remove negative information about individuals, but there remain limits on it, as the European Parliament stated in approving the new regulation in 2014 and the Council of Ministers repeated in endorsing the regulation in 2015 FN/:

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 (e.g., .fr; .es; .co.uk). Thus, the French ruling would directly affect searches done in the US.

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 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 MOOCs . . . but not making that content accessible to the deaf and 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.

And 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 of 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 e-reserve and/or e-coursepacket 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. (Pg. 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.

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