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The Long Arm of the Law

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The following is a transcription of a live presentation given at the 2018 Charleston Conference.

Ann Okerson: Good morning. How many of you have been to these “Long Arm” sessions before? Okay. So, you kind of know how it goes. We’re having this session thanks to two individuals. One, of course, is our founder, Katina Strauch, who believes that information professionals should be kept abreast of legal issues that may touch our lives, so Katina is the one who masterminded this thing about nine or ten years ago. The other person to whom we are indebted is Kenny Rogers, who wrote our theme song, and he is going to sing for us now and I suggest we join in [*Kenny Rogers’s “Long Arm of the Law” playing*].

Here we are for the ninth year in a row, and since many of you have been here before, you know that we usually have two or three excellent speakers who introduce us to various events of the past months that are of some value to us. This year we have two wonderful speakers again as always. Let me first mention Bill Hannay, who is no stranger to most of you who raised your hands. Bill is a partner in the Chicago-based law firm Schiff Hardin and he represents regularly corporations and individuals in simple antitrust and complex litigation. He is an adjunct professor at the Chicago-Kent College of Law and he teaches courses in antitrust law and international business transactions. He has held many leadership positions with the American Bar Association and he is a regular speaker at the Charleston Conference. I’ve been here for nine years. He was only out sick for one of them, and so Bill is a favorite return speaker and he speaks at other sessions as well. He’s author of numerous books on antitrust and unfair competition as well as related aspects and has had his books published by all the leading legal publishers in North America and beyond. He earned his JD from Georgetown University, his BA from Yale. He served with commendation in the U.S. Army in Vietnam, and after law school he was a law clerk to Justice Tom C. Clark of the U.S. Supreme Court and Judge Myron Bright of the U.S. Court of Appeals for the Eighth Circuit. He also did some time as an assistant district attorney for New York City.

Now, I introduced Bill first because I accidentally muddled my slides. Our first speaker, in fact, will be Kenneth Crews. Kenneth is an attorney, author, professor, and international copyright consultant. I think he is quite well known in the library community. He’s been doing work for our associations for probably at least 25 years. For over 30 years, his research, policymaking, and teaching have centered on copyright issues of importance to education and research. He too has written numerous books and articles. He established and directed this nation’s first university-based copyright office at Indiana University and he was later recruited to establish similar offices at Columbia. He is now based in Los Angeles. He earned his law degree at Washington University–St. Louis and also MLS and PhD degrees from UCLA. The World Intellectual Property Organization (WIPO) commissioned him a few years ago to analyze copyright statutes from 191 member countries of the UN to inform current discussions in Geneva about possible treaty language. We’ve had a hard time getting him here because he is always off to Geneva on some kind of WIPO conversation, but this year we managed to circumvent that. I don’t know how we did it, but we did. He has been an invited speaker on college and university campuses and conferences in 44 states and on six continents. So, those are our two speakers. The way we’re going to do it is we will start with Kenneth Crews and once Kenneth is done, since I’ve already introduced Bill, we’ll just move right into Bill’s presentation. They’ll have 20-plus minutes each and after that I hope we will have enough time to do some question and answer with the audience. I think there’s also a little bit of a break after this session before the next one, so you will have a chance to come up and talk with our speakers. Thank you very much and let’s get on with it.

Kenneth Crews: Okay. Well, thank you all very, very much. What a pleasure to be here. Ann, thank you. Bill, what a privilege to share the podium with you, and my thanks to all of you for being here so early in the morning, and grab your cup of coffee and find one of these last seats up in the front row. And of course, whenever we play music in the room like this my copyright antennas just—yeah, yeah, yeah, okay, all right. I’ll stifle. But it all goes off in a good way

because I immediately think of the exceptions. I think of fair use. I think of all those things, so I like to think we're going to be all just fine, but you know there is—and it's courtesy of long before the invention of iPods—there's always been this sort of like musical theme that's accompanied me as I walk down any street and participate in any group and as you talk about flying off to Geneva. And so it's "Secret Agent Man" that comes to mind, if it isn't "The Long Arm of the Law." Depending upon your generation, it's either the Clash or the Bobby Fuller Four, you know where I'm going, "I Fought the Law and the Law Won."

Ann Okerson: We did that one year.

Kenneth Crews: Did we do that one year? Okay, because there are times when we work with the law and we win, and sometimes the law wins, and sometimes it's something else that you can't quite figure out what the result is and we have some of those. So, I'm going to focus on three things with this Long Arm of the Law. I'm going to focus on just bringing you up to date with a few developments in these three categories: international agreements, developments there, call them treaties, call them something else. The U.S. statutes, and we have some very important developments that have come from Congress and were signed into law just during the month of October. And then a brief discussion of some copyright office regulations related to the circumvention of technological protection measures. I'm going to focus on those and then Bill will focus on some other points and it is with the Long Arm of the Law, but it's also the many arms of the law and we'll see if we actually get to eight of them before we adjourn this morning.

We're going to explore, I will walk you through at least three of these and we'll see if we can make good sense of them. The international agreements. Now, one of the things that I've learned in my work is to try to avoid the word "treaty" with a lot of these developments. Some of them truly are treaties in a constitutional sense where the Senate has ratified it and it becomes something that has some treaty level under constitutional terms, the force of law, but the fact is that even in the case of what we can call the Marrakesh Treaty, more about what it means coming right up, what's really important as far as the law is concerned, in this country and in many other countries, is the enactment of the provisions of this document into the statutes of our country. This is going to connect two of these arms of the law: the international and the statutes.

Let me talk about it from an international perspective and give you a vision of what's happening. The Marrakesh Treaty is a recent 2013—and in legal terms that's very recent—treaty document that has been ratified and adopted by many member states of WIPO. WIPO, Ann mentioned, is the World Intellectual Property Organization. Now, if you've had no acquaintance with WIPO before, let me sum it up this way. It is an agency of the United Nations. It is based in Geneva, Switzerland, and it now has 191 member countries. Depending upon how you count the countries of the world, and there's some dispute about that, there are different definitions of what is a country, but depending upon how you count them, realistically 191 is almost all countries of the world, and they are members of the organization we know as W-I-P-O or WIPO.

One of the main functions of WIPO is to develop new international instruments, to administer them, to help member countries adopt them and implement them. It is a slow, laborious process and so over the span of approximately 8 to 10 years of earnest effort, and that's actually fast by WIPO standards, has come the Marrakesh Treaty and we owe a lot of that to Ruth Okediji, whom you heard from earlier in this conference, advancing this text, advancing the mission of a document that carves out exceptions to the rights of copyright owners with respect to providing—making and providing—formats of works, particularly to meet the needs of persons who are blind, visually impaired, or otherwise impaired in a way that they are unable to use text works. Now, good news/bad news. We're going to see this in everything we look at, that there are many ways, that we will see many ways, that this is a helpful development, and we'll also understand the limits of what it actually accomplishes. For example, this is a document that specifically provides for exceptions—copyright limitations—related to published literary works and published musical compositions, and so it doesn't cover, for example, audiovisual works. It doesn't cover unpublished works and so on. Now, an individual country may well expand this text to cover other disabilities and other types of works. A country could do that, but that's not as far as WIPO and the international community were ready to go. On the other hand, whatever it does, there's something extraordinarily powerful and new that's part of this document, and that is the cross-border provision, so that if two countries—and we're now up around 60 countries have signed on and I think it's 40 countries have actually implemented it—that if two countries have adopted these provisions, an authorized entity,

which could be you, in one country can make the work according to the limits and conditions of the law and supply it to an authorized entity in another country. This is an extraordinary thing for an international document to do, a very logical thing for the international context, but it is an enormous accomplishment and it signals—this document signals not only the support for persons who have these needs, but it also signals very strongly that indeed WIPO is going into the exceptions business. WIPO has really always been principally about protecting works, and this is about protecting the public's interest in those works. It is also an enormous and important step forward with respect to the international transactions that we are all finding ourselves involved in.

Now, my role and my participation in developments in WIPO have been largely focused on this next subject for exceptions, possible exceptions for libraries and archives. Also on the list for possible exceptions are limitations for education, and they are slowly coming up behind. But the exceptions for libraries and archives are next. They are not all as far along as the Marrakesh Treaty in providing needed exceptions for persons who are visually impaired, but we're seeing some movement to determine some kind of instrument that may cover preservation, copies for research, and copies by libraries for many other reasons, maybe including data mining, text mining, and many other uses, all to be determined, and there are some procedural kind of concepts that are at least part of the discussion. Where it goes—to be determined. Also what's the relationship between a legal exception and a contract or license? Can the contract override and waive that exception? That's where we are right now in the law. Will that continue? To be determined. I think most important, at least in the international context, is we need to advance the use of digital technologies and in the laws for libraries around the world. Sometimes it's not clear whether you can use digital technologies, and sometimes it's explicitly left out. We need to be able to change these laws all around the world, actually, to be sure at a bottom line that digital technologies apply.

Let me talk about statutes, and this is what I promised would connect straight into the international. The United States has ratified the Marrakesh Treaty, but to make it the law of our country by the terms of that ratification it needs to be enacted in the statutes, and we have done that. We had an exception, which we have had since 1997, I believe it was, an exception for the benefit of persons who are blind or otherwise visually impaired, Section 121 of

the Copyright Act. The law that has been enacted by Congress, signed into law during October, just within the last month, modifies 121 and adds a new 121A to adopt all of the provisions related to the Marrakesh Treaty. Now, we have adopted it, strictly in accordance with the Marrakesh, in the sense that it applies only to certain classes of works: published literary works, published musical works, and only allowing formats to serve persons with defined disabilities. And one of the two statutes is, to generalize, largely about domestic U.S. uses while the other statute is about international and cross-border uses. The really good news is that the United States is there and that we have adopted these provisions, enacted them into our statutes, and they are available for us to use as libraries and as educational institutions for the benefit of the persons we serve who have the needs.

Another new statute also from just October of this year is called the Music Modernization Act. Now, if you look up the news articles about this bill, it is mostly about music industry specifics related to compulsory licenses and so on and so on and so on. These are all very, very important and enormous developments, but I'm guessing not your issues. But there is a big part of this Music Modernization Act called the Classics Act that is your issue, because it is a set of provisions that creates a whole new chapter in the Copyright Act, creating a body of law that Congress took the time to make sure we realize is not copyright law but is a quasi-copyright thing that looks like copyright law. It is part of the Copyright Act, but it is not to be called copyright protection. It is a new set of legal rights belonging to some not clearly determined rightsholders that have a kind of quasi-copyright protection that really does look a whole lot like what it would be for.

Wait, I skipped the most important part, it is about pre-1972 sound recordings. Now, this is a big deal. Now, I know what you're saying. "Wait, isn't that a new chapter right alongside that one that only applies"—and I'm not making this up—"only applies to the design of boat hulls?" And the answer is "yes." Except there are a lot more people in the pre-1972 sound recording business than there are in the boat hull business. This is a big deal because, to sum it up, the sound recordings, whether of music or a presentation at a conference, a political speech, a poetry reading, whatever it might be, sound recordings were not protected by U.S. copyright law until February 15, 1972. That's when the law changed. The Beatles had already come and gone by that time.

The best of the Beach Boys was recorded before that date. Don't tell me otherwise. And so what we had is what we had, as far as the federal law was concerned, no copyright protection for those pre-1972 recordings.

Now, a couple of things make that statement a little bit not quite true. One is that the last time I gave a talk I had to modify it to preface everything I said by saying, "You know, everything I'm going to tell you is almost true." Almost, because it's a complicated beast that we're dealing with here. But the upshot of it is that for pre-1972 sound recordings, there was a little bit of what we can call state common law, sometimes statutory, but essentially a state law protection, highly undeveloped, highly uneven, a dozen or 20 states had something that we knew about in the law. The other states we weren't sure about in the slightest. Then also there was this thing called "restoration" of foreign copyrights. Well, that's a long story. Got a couple hours? But the upshot of it was that you need to know that foreign sound recordings gained protection, so there was this really uneven body of law protecting sound recordings. Congress has now created a whole new, semi-quasi-copyright protection that has a lot of these copyright aspects to it, as if it were genuine copyright, including the specific explicit preservation of the exceptions, including fair use and exceptions for libraries and archives that continue to apply. The new law carves out a brand-new exception that we might be able to take advantage of in our collections and our digitizing and use of early sound recordings for noncommercial uses. It is a long story, but there's a mechanism in the new law that involves notices and filings and registering recordings, and so on and so on and so on, but it's there. It's there. It's something that we may be needing to take advantage of.

And my third point, which I'll sum up very briefly so we can get on with Bill's presentation, is copyright office regulations. Lined up alongside the quasi-copyright for sound recordings in Chapter 14, and another chapter about boat hulls, is yet another chapter from 1998 about circumvention of technological protection measures. The statutes originated in the DMCA, and this is a prohibition against circumventing technological protection measures, with some statutory exceptions, including one for libraries. Maybe you have had the opportunity to use the exceptions. Every three years the Library of Congress will issue regulations creating regulatory exceptions allowing the cracking of codes or otherwise circumventing of technological protection measures in order to access and use the copyrighted

content in that resource, and those regulations are due out every three years. The end of October was one of those three-year cycles, and we have new regulations.

The best part about this new set of regulations is that the Copyright Office, working with the Library of Congress, said let's experiment with a streamlined process to renew the previous regulations, subject to a proper review and a chance for the public to comment on them. This is a very, very important development, and that's what they did. The result is that the last cycle of regulations are continued forward into the next three-year cycle. Think about the law, you know, what we were dealing with was a set of regulations that were due to end every three years. What does that mean? Do we have to undo everything we did during the preceding three years if the regulations are not renewed? And this makes it cleaner, makes the process cleaner, and the result is, especially by virtue of continuing the existing exceptions, we have some very important opportunities. They may be meticulous and detailed, kind of like the warning "Don't try this at home." You need to go through the details very carefully, but ultimately if you're willing to make the effort and willing to work through it, like so much of the law, there is an opportunity here to be able to use it. This may be especially true for audiovisual works, where we may break that code, make copies of clips, and use them in conjunction with different kinds of educational platforms: MOOCs, classroom, online, library services, etc.

Those are my three points: regulations, statutes, and international documents. Not only is it the Long Arm of the Law, not only is it the many arms of the law, but it's really reminding us that the law of copyright comes at us from many different sources. The law we live under today, some of it comes from the courts, as Bill will tell us, and some of it comes from Congress. Some of it comes from regulatory agencies; in this case the Library of Congress as a regulatory agency. And some of it comes from our international negotiations in Geneva. So, thank you, and I'll hand it over to Ann and Bill. Thank you very much. Thank you.

Bill Hannay: Thank you, Kenny. That was pretty important stuff. Now I'm going to talk to you about a few more whimsical aspects of the law and recent cases that are developments, some of which we have touched on in prior lectures and some are new things. Okay, so here's the four topics:

1. The Right to Be Forgotten, Redux (I'm not actually sure what redux means but I think it means "again").
2. Pornography Is Not Education v. EBSCO.
3. ACS & Elsevier v. ResearchGate.
4. Georgia State Re-redux.

1. The Right to Be Forgotten, Redux

You will recall that every year or two since 2014, I've told you about the "right to be forgotten" in Europe. It is a result of a decision by the European Court of Justice in 2014 in a case involving a Spanish man who won the right to expunge, from his online biographies and references, the fact that he'd been in bankruptcy. Now this is, of course, a kind of Pyrrhic victory because this guy's name and everything about his bankruptcy case has been emblazoned all over the Internet and in every newspaper since then. But, in any event, that right was recognized by the European Court of Justice, and it has continued to spawn successor cases as the real dimensions of this right have been fleshed out. So, for example, in 2015 in a similar kind of case that took place in France, the French Privacy Agency ordered Google to expunge certain information about a French citizen, not only on the Google sites that were available in France, and not only in Europe, but around the world. This sent Google up the wall, and they proceeded to appeal this decision. It is now in front of the European Court of Justice.

This particular right to privacy issue is whether or not—as a remedy—a privacy agency can order Google to take down or to disconnect the links to the information about the Frenchman in all the Google sites around the world. The appeal was argued in September of this year before the court and sometime in the next six to nine months, we can expect to see an advisory opinion from the court's advocate general.

Note that, unlike U.S. courts, the European Court of Justice has its own lawyer who is called the advocate general and who is called upon to say—in effect—“Well, here's what I think about this. You don't have to agree with what I'm going to tell you, but this is what I think about it.”

After the ECJ hears from the advocate general, we can expect, a few months later, to see a decision from the court.

There were a lot of people who weighed in on this issue: civil rights groups and other groups intending to protect free speech. They filed amicus briefs. My bet is that the court is going to say to Google, “Well, if there is a free speech issue here, it's a free speech issue that would have existed if you'd just had an order involving France and you claim that you're not really fighting the order in France or even in the EU. You just don't want to make it beyond that, so we don't really see why there's a real free speech issue if there's not one in the home country.” That's my guess as to where that's going to go, but, you know, that and two dollars will get you on the subway.

In the meantime, the privacy mechanism that was established as a result of the first case in 2014 continues to grind forward. Since 2014, a mere four years, Google has had to deal with 2.7 million requests to “take down” information and reports that they have granted these requests 44% of the time, which means about 1.2 million times. But, even then, the battle may not be over. For example, in England, a British gentleman asked to have something taken down relating to a conviction that he had suffered as a result of intercepting communications by wiretapping, and he had gotten sentenced to jail about a decade ago and so he wanted to have this expunged by Google. A British court held, “Yes, Google should take it down.” But there was a companion case where a guy had a little more serious kind of offense and was sentenced to a little more time and the court held that, “No, Google doesn't have to take it down in that case because it is important to know about that case.” These situations are constantly developing.

2. Pornography Is Not Education v. EBSCO

Okay, now, I know that you've been waiting for this one. I won't actually say the first word. I'll just refer to it as the “P-word.” The case is “P-word Is Not Education versus EBSCO and the Colorado Library Consortium.”

Earlier, in the month of October 2018, a group of concerned parents in the Colorado school system brought a lawsuit against the Colorado Library Consortium and EBSCO claiming that EBSCO's database was filled with pornography. (That immediately increased their business but . . . no, this is serious stuff, so, please listen.)

The claim was that a student could go onto the EBSCO website or database and—if you did the

search right—you would be able to find articles that discussed all sorts of weird, “P-word” kind of things, and that this should not be permitted and that schoolchildren are exposed to this and isn’t this terrible. The very fact that these kinds of claims have been made has itself a sort of suppressive effect on free speech, and so a number of school districts around the country terminated their contracts with EBSCO without really ever getting into the merits of whether this is or isn’t true. And so I understand that 130 school districts around the country have terminated their arrangements with EBSCO.

Now, this is a little like the story that my dad used to tell about the woman who was in a motel and she called the manager to complain that there was a naked man prancing around, and so the manager came to this motel room with this lady and he said, “Where is this naked man?” And she said, “Well, if you get up on this stool and you open the window and you look into the room next door, you can see into the bathroom and there’s a guy in there who is prancing around naked.” So, applying that logic here, it appears that you’ve got to go to a lot of trouble in order to find any alleged pornography. An American Library Association spokesman basically said, “Wait a minute. Let’s call a spade a spade.” There isn’t any real evidence that this is what this database is used for and there’s no evidence that anybody uses it in that way. The ALA writer said what I thought was a brilliant insight, which is, if middle or high school students are looking for sex on the Internet, they wouldn’t start with the library database. In any event, this fight is going on and it’s a real lawsuit in a real court and we’ll see what happens.

3. ACS & Elsevier v. ResearchGate

The next case that I want to talk about is the lawsuit that the American Chemical Society and Elsevier brought against ResearchGate. ResearchGate is, as you probably know, a German-based entity that helps researchers obtain academic articles through file sharing. (The approach is a little like SciHub, which experienced a lot of litigation a couple of years ago.) The ACS and Elsevier claim that massive copyright infringement is going on through ResearchGate. The publishers had sued ResearchGate in Germany last year, but now this one is in the United States, probably on the theory that maybe our justice might move more quickly.

ResearchGate claims to have some 13,000,000 to 15,000,000 users who can upload and share

published papers, book chapters, and meeting presentations. A lot of publishers have written either as a group or individually to ResearchGate saying, “No, no, you’ve got to take down this list of 100 million articles.” And so ResearchGate has been trying to respond to that demand and claims to be cooperating, but they apparently told the publishers, “Actually, what you need to do is give us the takedown demand for each document and that way we can process it a little bit better.” ResearchGate’s request is a little bit hard to deal with and impractical, and that is why this lawsuit followed.

Is this lawsuit something that really challenges the whole open access movement? Some people claim, “Oh, yes, this is really an assault by publishers who are trying to halt the open access movement and to require people to pay, always pay for access to articles.” I don’t know whether that’s in fact their motivation or whether that’s in fact what they’re hoping will happen, but it’s an issue that is of concern and is probably one that will need to be watched closely, because how it comes out could be an overblown reaction to the situation. Publishers clearly think this is a problem.

4. Georgia State Re-redux

This next topic is Georgia State *Re-redux*, because this is now the third time that the district court judge in this case has been asked to rethink the matter over again.

Let’s go back a decade to the time when publishers sued Georgia State for its policies about “course packets” and copying course materials from journals and books and making them available to students at a discount. Things segued from printed packets into electronic database files where the university would basically have electronic versions of chapters and articles that teachers would assign to students. At least with respect to the electronic versions, the university was not paying anything to any publishers for using this material and eventually got sued for copyright violation. The university defended on the grounds that it was “fair use” to copy whole journal articles or chapters out of books and make them available.

The parties ended up in front of a judge named Orinda Evans, a very well-respected district court judge, who held lengthy hearings and eventually entered an order finding that almost all of the challenged uses were in fact “fair use.” The case then went on appeal to the Eleventh Circuit of

Atlanta, which is the circuit that covers her court. The Court of Appeals said to Judge Evans, in effect, “Well, you did some things right and you did some things wrong, but there are four tests that you need to apply to determine whether something is or is not fair use and basically, with all due respect, you bungled it.” The case was sent back to Judge Evans, and she again held another lengthy series of hearings about each and every one of these excerpts and where did it come from? And then she went through four factors as to each article or chapter and she came up with a different number of situations where she said it was either fair use or not fair use. Then the case goes up on appeal again to the Eleventh Circuit and last month they issued another opinion: *Georgia State II*. The appeals court said, “Sorry, you didn’t do it right again.” And so now it’s being sent back once again to Judge Evans for further proceedings. Each and every time the Eleventh Circuit has worked to develop and expand and elaborate on how a court should properly do a fair use analysis. And so now Judge Evans needs to take *Georgia State I* and add *Georgia State II*, sort of shuffle them together and come up with an elaborate set of standards for how to determine whether or not something is or is not fair use, at least in the context of this nationwide tendency of universities and libraries to create electronic files that can be used by students for their coursework.

This case stands, in my mind, for a very important effort to give some meaning to the two words “fair use” and the four factors test. One commentator opined that the case has become “trivial” and that the court continues to chew over issues that seem less and less relevant. In his view, the plaintiff publishers actually lost a long time ago and simply lack the wisdom to recognize that fact. (Oooh, snap.) But I, in my humble opinion, I think the case remains vital. It’s not trivial. I think it’s very important and

if you really get into this issue of what is and is not fair use, both of the opinions by the Eleventh Circuit present a really deep, thoughtful analysis of difficult, almost metaphysical issues about fair use. Thus, the American public will win, whoever wins this particular case.

Finale

We come now to the moment I know you’ve all been waiting for. This is the annual musical moment, which attempts to encapsulate something of what I’ve been talking about, and in this case this is a little musical tribute to one of the parties in this case. You may or may not recognize this song. (It’s the “Georgia State Fight Song.”) I am sure my rendition will do it an injustice. And, well, I’m going to go through it once and then you all get to join in. So, here we go:

*Course packets, we got ‘em here!
They’re going quick.
We know the copyright laws.
We don’t need a truce.
‘Cuz we got fair use.*

*Fight, Panthers, to victory!
Drive on through the courts.
Read! Write!
Georgia State won’t get uptight.
G-S-U!*

*(Chant)
G-S-U
G-S-U
G-S-U
F-A-I-R-U-S-E*

(Repeat both verses)

Yay!