Against the Grain

Volume 28 | Issue 6 Article 26

2016

Legally Speaking--Long Arm of the Law, A Charleston Conference Presentation, November 5, 2016

Bruce Strauch
The Citadel, strauchb@citadel.edu

Bryan M. Carson
Western Kentucky University, bryan.m.carson@gmail.com

Jack Montgomery
Western Kentucky University Libraries, jack.montgomery@wku.edu

Bill Hannay
Schiff Hardin, LLP, whannay@schiffhardin.com

DOI: https://doi.org/10.7771/2380-176X.7572

LEGAL ISSUES

Section Editors: **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>
Bryan M. Carson, J.D., M.I.L.S. (Western Kentucky University) <bryan.carson@wku.edu>
Jack Montgomery (Western Kentucky University) <jack.montgomery@wku.edu>

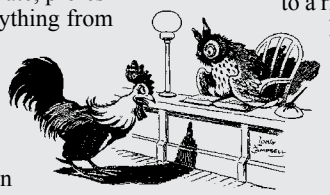
Legally Speaking — The Long Arm of the Law, A Charleston Conference Presentation, November 5, 2016

by **Bill Hannay** (Partner, Schiff Hardin LLP, Chicago, IL) <whannay@schiffhardin.com>

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 email address, bank details, to posts on social networking Websites, medical information, or a computer IP address.



Two years ago, the European Court of Justice handed down a landmark ruling 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 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 like 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 (e.g., .fr; .es; .co.uk). Thus, the French ruling would directly affect searches done in the U.S.

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 non-profit, educational nature of the university's use of the material favored a "fair use" finding.

Publishers were horrified. They look 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

continued on page 52

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:

> [Providing course packets], 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 evolvement of the human being for the better. [Page 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.

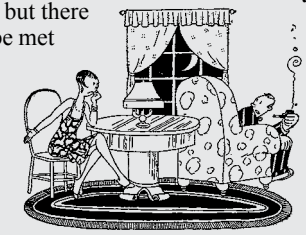
Bill Hannay *is a partner in the Chicago-based law firm,* ***Schiff Hardin LLP****, and is an Adjunct Professor of Law at* ***IIT/Chicago-Kent College of Law****. He is a frequent speaker at the* ***Charleston Conference****.*

Questions & Answers — Copyright Column

Column Editor: **Laura N. Gasaway** (Associate Dean for Academic Affairs, University of North Carolina-Chapel Hill School of Law, Chapel Hill, NC 27599; Phone: 919-962-2295; Fax: 919-962-1193) <laura_gasaway@unc.edu>
www.unc.edu/~unclng/gasaway.htm

QUESTION: A librarian at the National Library of Medicine notes that significant changes have taken place in hospital libraries over the past few years and asks about copyright concerns due to these changes. Today, many hospital libraries have neither a physical library space nor any staff with extensive library training. They have become borrow-only libraries, and borrow via DOCLINE interlibrary loan. (1) Can these "libraries" be considered libraries for the purposes of section 108? (2) Are cached and ephemeral digital copies delivered to borrow-only libraries from which that library then makes copies to deliver to their patrons counter to 108? (3) Should these libraries be moved away from DOCLINE and into Loansome Doc, more of a document delivery system but without the commercial prices?

ANSWER: (1) While much has changed in society and in the library world, section 108 has changed only in minor ways. The statute does not define library, but there are some criteria that have to be met in order to take advantage of the of the 108 exceptions. First, any reproduction must be made without direct or indirect commercial advantage. Second, the collection must be open to the public or to researchers doing research in the same or a similar field. Third, reproductions must contain a notice of copyright.



From the description, there is no collection that can be open to the public, so it appears that these hospital libraries do not meet one of the criteria to take advantage of the section 108 exceptions. The purpose of DOCLINE is "to provide efficient document delivery service among libraries in the National Network of Libraries of Medicine." So, it is reasonable to assume that if the national network defines those hospital libraries as libraries, then they are so. The hospital library would be covered by section 108(g)(2), the suggestion of five, for receiving copies through DOCLINE interlibrary loan.

(2) Just as other libraries are not permitted to retain cached copies for a time longer than reasonable for delivery to the patron, the same is true of these hospital libraries. The statute does not permit creation and use of a database of digital copies received via patron requests to be used repeatedly. Copies received from ILL must become the property of the user and not that of the hospital library, according to section 108(d)(2). Further, under section 108(g)(1) there may be no concerted or systematic distribution of copies as would occur if the library creates a database of digital copies requested through ILL.

(3) Moving these libraries out of DOCLINE interlibrary loan and into Loansome Doc is an administrative decision that NLM can make, and it may be a better choice for copyright purposes. Loansome Doc allows registered users in country and abroad to send a request to a medical library and receive full-text of a document. The ordering library may charge a fee. If there are any royalties due, the ordering library would forward those to the copyright owner.

QUESTION: A college music composition major seeks help in determining the copyright status of a short poem which he wants to set to music. His grandmother found a framed copy of the poem at a garage sale some years ago. The poem has no credited author; when searching the lines of the poem, there are few results. Each result credits "Unknown Author." Nor can the student locate information about when the poem was published. For poems of this nature, where no information can be found about its origin, what are the laws regarding public use?

ANSWER: It is certainly possible that the poem is in the public domain, for a variety of reasons. One reason might be the age of the poem, another reason could be that the copyright owner published the poem without notice under the ***1909 Copyright Act***, in effect until 1978. Or the poem may have been used so often, with no author attribution or copyright notice that the work has moved into the public domain.

So, the real question may be whether there is any risk in setting the poem to music and either publishing it or performing it publicly. If there is no commercial use of the poem, the risk is very slight due to the search the student has conducted and the fact that the poem was repeatedly cited as "Unknown Author."

QUESTION: A public librarian asks about the copyright status of documents from the United Nations.

ANSWER: Documents produced by the United Nations are protected by copyright. The UN Website (*http://www.un.org/en/aboutun/copyright/*) states that permission is required to use, reproduce or transmit by any means materials from its Website. There is an exception for news-related materials which may be

continued on page 53