Symposium: Digital Archives: Navigating the Legal Shoals

Questions and Answers

Francis X. Blouin, Jr.: I was curious about websites because we're now beginning to accumulate websites and we were thinking about using a website service so it makes it very simple just to find it, click it, ship it and we have archival access to it. But the problem of course is these websites are so complicated and you don't actually know what you're fully accessing because there are lots of links; there are lots of portions that may go unexamined. Have you had any experiences with websites that are essentially transnational, that are essentially built in this country but linked to things that are governed by laws outside of U.S. control?

Jane C. Ginsburg: OK, let me make sure I understood the question. If you have a website which is hosted here but offers links to websites elsewhere do you face liability in those countries to which your website links? Is that the question?

Francis X. Blouin, Jr.: Yes, that's the question.

Jane C. Ginsburg: OK. Well, in the U.S., and it appears also in the European Union, there really isn't liability for linking as such. It's only if you link to a website which itself is infringing, you can be asked to take down the link and then if you don't take it down then you might be liable; but the linking itself, unless it's done with knowledge ahead of time, does not give rise to liability. And I do want to say, by the way, I didn't want to paint a really horrifying picture of prospects for multiple liability in foreign countries. Notice and takedown I think is pretty widely practiced, and the other thing is that I think that the concept of targeting is important. If your website is essentially U.S. oriented, although it might have one or a few articles that are by non-U.S. authors or involve non-U.S. individuals, that doesn't mean necessarily that you're going to find that you are either subject to suit or at least subject to the law of that other country. There's a European convention on choice of law called Rome II, whose basic rule is in the case of what they call a "complex tort," which is what we got where the act originates in one country and impacts in another country.[1] You apply the law of the country of impact, which sounds bad, unless some other country has a more significant relationship with the whole problem. So, where it doesn't look like you're targeting that other jurisdiction it might well be that that other jurisdiction's law wouldn't be found to apply.

Question: Just a quick question about the email archive, and I know you're not

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1.   Council Regulation 864/2007, 2007 O.J. (L 199/40) (EC).

a lawyer and you're looking for legal advice; but I wonder whether one of your concerns was copyright as well, or is it the presumption that everything is a work for hire and so it all already belongs to the institution already?

Francis X. Blouin, Jr.: That's a really good question, and, as I say, we're not that far down the road to worry about it. I think certainly with email attachments we don't know what gets attached to an email, so there absolutely will be copyright issues. At this point we're trying to encourage people to save, and then once at least we feel people are saving, then we'll worry about what they are saving. So, we haven't gotten to that, but you're right, it's down the road and a concern.

Question: Speaking of ephemera, I'd like the panel to comment on a decision by the Library of Congress to save tweets off of Twitter. Good idea? Bad idea?

Francis X. Blouin, Jr.: In twenty-five words or less? Is that the question?

Peter B. Hirtle: Oh, it's a great thing. And depending on how it plays out, it could be very interesting. LC seems to be proposing a different approach than what you've argued, Fran. They seem to be saying, "Let's save everything and try to work on search interfaces and software to find out the stuff that is significant and important from it." It will have to be pretty intelligent software to find anything useful in tweets. I would love to hear—and maybe Hope will tell us later—about the copyright issues that are associated with all of this.

Question: The Twitter comment makes me have one question for the email archive, which is that a lot of what may be interesting about the email archive are the network properties. Where do the various individuals sit with respect to the other people in their social network, and actually deselecting and not at least capturing some measure of the total information exchange may actually limit the value of the collections down the road. So, I don't know how you get around that problem, but maybe you can get header information or try and get something that also situates the messages that you think are valuable inside the contextual information of that person's social network.

Francis X. Blouin, Jr.: That's a very multidimensional question and I appreciate it. We are working in constructing the email archive to link it to various directories, so at least we will know where it's coming from and be able to attach it to its institutional origin. In terms of reconstructing networks, a lot will depend on email trails: whether the email has a whole trail in it or whatever. So, I think we'll get at some of it, but we won't get at all of it.