Purdue University

Purdue e-Pubs

Charleston Library Conference

The Long Arm of the Law

Ruth Okediji
Harvard University

Jeremiah Smith Jr.
Harvard University

Bill Hannay
Schiff Hardin, LLP

Ruth Okediji, Jeremiah Smith Jr., and Bill Hannay, "The Long Arm of the Law" (2017). *Proceedings of the Charleston Library Conference.*
http://dx.doi.org/10.5703/1288284316712

The Long Arm of the Law

Presented by Ruth L. Okediji; Jeremiah Smith, Jr., Harvard Law School; and Bill Hannay, Schiff Hardin, LLP
Moderated by Ann Okerson, Center for Research Libraries

The following is a transcription of a live presentation at the 2017 Charleston Conference.

Ann Okerson: Good morning, everyone. Hello, hello, hello. What a good crowd. Thank you so much for coming. Welcome to the eighth annual "Long Arm of the Law" session. As with just about everything here, this idea originated with Katina, who many years ago said, "You know, there are so many interesting legal things going on that the information community wants to or should know about. So, let's have a session every year with a few people who work on that side of the industry or of our lives to talk to us about what they think has been important to them." How many of you have been to "Long Arm of the Law" sessions before? Excellent! That's really good. So, you know what we're going to do for the next minute, right? We're going to welcome our guest star Kenny Rogers. Sing with me! [Kenny Rogers's song "Long Arm of the Law" playing] "You can hide out for a while," he said with a smile, "but you can't outrun the long arm of the law."

Here's what we're going to do this morning as our two guest speakers talk about things that they think are important and would like us to know about. We have two speakers, they are both fabulous. We're going to hear from them in turn. The first speaker will be Ruth Okediji. She teaches contracts, international property, copyright, and other courses on law development at Harvard University. I first met Ruth when she gave a talk at the IFLA Presidents Meeting in The Hague a few years ago and it was absolutely brilliant. Ever since then I've been trying to get her to come to Charleston and we finally made it work schedule-wise. I'm really pleased about that. She is one of the world's foremost authorities on international property law and she is widely cited for her work on the design and implementation of IP norms in developing and least developed countries. She has advised governments in many countries. She was appointed in 2015 by UN Secretary-General Ban Ki-moon to the high-level panel on access to medicines. In that same year she was recognized by *Managing IP* as one of the world's 50 influential leaders in the field. She has received many awards for excellence in teaching, research, and mentoring, and her most recent

book on *Copyright Law in an Age of Limitations and Exceptions* was published by Cambridge University Press in 2017. Please go online and read Ruth's bio to find out a lot more important things about this wonderful speaker.

Now, Ruth will be followed immediately by Bill Hannay, who is known to us all. Bill is also a distinguished attorney. He represents corporations and individuals in civil and criminal matters involving federal and state antitrust law and related areas. He has for a number of years worked for the law firm Schiff Hardin in Chicago. I'm trying to remember when I first met Bill, but I'm going to say it was like 25 years ago when I worked for the Association for Research Libraries and he helped me with the scholarly communications program we were launching. So we have a long history. Bill has authored and edited a number of significant works in his field and for many years he has been listed as an Illinois Leading Lawyer. That's pretty impressive. He also has many other talents, which we will be fortunate to experience during his talk, and I think various of you know exactly what I mean, although I think Ruth is also going to amuse us in certain ways. So, each of them will have about 20 minutes. We'll take them in turn and after that hopefully we will have enough time for some commentary from the floor. So, I welcome our two speakers, starting with Ruth. Thank you so much.

Ruth Okediji: Well, good morning. So, let me just say that I already love this crowd. First of all, I just recently moved from Minnesota to Boston. Not much improvement in the weather except, of course, it is less cold in Boston. So, coming here yesterday I was looking forward to warm, sublime weather, only to arrive in the middle of a storm, but, growing up I loved Kenny Rogers and I was about to belt into full song when Ann stopped that. She has put me under very strict time limits. It's a pleasure to be here. Thank you, Ann, for inviting me and for staying tenacious all these years. My mother was a librarian. I grew up in libraries. I love libraries. I'm annoyed when I have to read an online book, and so you are really my people.

I'm going to zip through a number of things because the great act, Bill, is right after me, and in fact he was

just telling me that he is really important and that I shouldn't be on the table with him and I agree. So, I'm waiting for this. I thought what I would do this morning is share with you some recent developments, things that I think you should keep your eye on in the months and years ahead, but in particular I want to devote most of my time to what I am increasingly thinking about the future of libraries. As an academic and as a child of a librarian, this is something that I have been thinking about lately, and so my last five or seven minutes or so I will talk about artificial intelligence and the future of libraries, just to give you a couple of highlights there.

Okay, the first update that I wanted to share with you is actually not what you see as update number one on the slide. The first update is really a decision that came down yesterday from the Ninth Circuit Court of Appeals. It is called *United States versus Glassdoor* and it is a decision that you should watch closely because of its ramifications. We don't know yet what an appeal may look like if an appeal is filed and what the decision might be. But, basically Glassdoor is a website that allows you to post anonymous reviews of your employer. If you've ever been on Glassdoor in this room don't tell us, but it is a place where employees discuss work environments, salaries, treatment of employees, they post on it anonymously. In response to a subpoena to aid a criminal grand jury investigation, Glassdoor was asked to unmask the identities of over 100 users who had posted information on the website talking about work environment, etc. Glassdoor declined to do so, citing the First Amendment rights to speak anonymously and saying we're not trying to intervene or interfere with the criminal process and the legal process going on, but we believe that our users and our posters have a First Amendment right. That was declined yesterday. The U.S. Court of Appeals for the Ninth Circuit has asked that Glassdoor unmask the names of over 100 users. I share that, as I said, because you know as librarians oftentimes thinking about First Amendment concerns, the right to read, the right to read anonymously, the right to speak anonymously, the implications of this case, if not reversed on appeal, could be very significant, and the fact that it is a website that hosts so much information and so much data tells you that there is a very thin line in the digital environment between your right to speak anonymously and your privacy interest, which often become conflated online, and so a decision like this not only has implications for speech but potentially also for privacy, so something I think you should keep in mind.

All right, now to the slides that I actually prepared and what will really be update number two, but we will start with update number one. How many of you have heard of the small claim—Copyright Claims Tribunal? All right, so, a few of you in this room. This is an initiative of the U.S. Copyright Office and there has been quite some concern in the copyright industry about this and certainly among academics. Those of you who have ever watched or been a part of copyright lawsuits, you know that like most lawsuits copyright litigation is expensive, it is slow and sometimes what you want are really quick answers. Is this fair use, right? You'll need a really quick answer. Can I photocopy this? Can I download this? Can I distribute this? Would this be something that would be protected? So the idea behind, thank you, thank you, the idea behind the Small Claims Tribunal, which now is the subject of a proposed bill, is to facilitate litigation, to facilitate enforcement of copyright disputes. House Bill 3945 seeks to authorize the creation of a centralized tribunal system within the U.S. Copyright Office. There are lots of things going on that I don't have time to go into about the U.S. Copyright Office. Suffice it to say that you may also be aware that there is a bill wanting to enhance the powers of the Copyright Office, create it, move it from the Library of Congress, and make it an independent agency, very much more like the PTO. There are cynics who believe that this proposed bill is in fact an effort to reinforce this effort to enhance the powers of the Copyright Office. As you know, the Copyright Office, because it is housed within the Library of Congress and because of the particular administrative structure, often gets overlooked and often does not have the kind of policy power that the PTO, the Patent and Trademark Office, for example, might have. This bill appears to be an effort in addition to the other bill to try to move this along. The Librarian of Congress, of course, in one of the other bills would now be appointed by the president, so lots of things going on there.

The goal of the tribunal would be to adjudicate small claims, copyright infringement claims, to adjudicate abuses of the notice and take down system on the Digital Millennium Copyright Act and, of course, this was drafted largely by the Copyright Office itself. Lots of concerns that I will not have time to go into about this proposed bill. It has not actually been the subject of much discussion, which is itself problematic because it means that there is unlikely to be the kind of rigorous critique, but there are concerns about its constitutionality, the breath of its jurisdiction. There are process concerns. There are lots of concerns

about potential abuses, the fact that alternatives have not been explored, and then of course larger questions. I'm just going to mention a little bit about the constitutionality, some of the concerns about constitutionality, because these, I think, will at least give you a sense of the larger picture. The bill would purport to give this tribunal claims under Articles I and III of the Constitution. The question is whether or not copyrights are public rights that would warrant the attention of an Article I type tribunal in terms of adjudication. There are within this due process issues. This would be an assertion of nationwide personal jurisdiction and service of process on individuals around the country, because of course copyright is a federal question; there would be limitations on appeals from this tribunal. Questions about what the grounds for appeals might be. How transparent would these proceedings be? When someone files a lawsuit in federal court alleging copyright infringement, we are all aware of that, we can track it. It's not clear what mechanisms for transparency would be there. What about your right to a jury trial if you are a defendant in a copyright claim? And of course one of the things to be aware of is many, many, many cases go to court over fair use, right? Is this permitted? Or over one of the limitations and exceptions and the question of whether or not an administrative tribunal housed within an administrative agency, whose powers are yet undefined and unclear and whose future is uncertain, is one that raises significant concerns. There would be a cap on the kinds of claims, $30,000; it would only give you compensatory awards. There's lots of skepticism about whether or not our current statutory damages provisions should be what this tribunal is awarding, and of course what happens when you have corporations who are authors because of the work for hire doctrine or who may be assignees of copyrights.

So, lots and lots of concerns that I'm not going to get into. If there is a conference website and anybody's interested, I'll be happy to send you some more of these, but I'm looking at my time. The real concern is, of course, a concern for abuse. Right? That this is exactly what copyright owners are going to rush for. It is quick. It is fast. It's an administrative process. Lots of power for owners and assignees, automatic statutory damages, so you may not have to speak and then, of course, you are all aware of copyright trolls. And these are entities that are now amassing copyrights that are presumptively valid and note that because it is for infringement, one of the real questions is, you know that every time you get a certificate of registration from the copyright office,

it's presumptive only as to the copyright ability, and so the question of a tribunal that moves ahead with enforcement when there has been no prior adjudication of ownership or even if the work is copyrightable is also a problem.

There are lots of alternatives that have not been explored. I'm not going to go into them. There's a list on the slides, but the idea is that this move is one that I think we should be concerned about for those who are in the access and user interest public welfare community.

The larger questions are ones that I think librarians really ought to become involved with. We need to understand what are the costs and benefits, but really, importantly I think, we need to talk about the importance of separating adjudication from policymaking. It becomes very problematic when the Copyright Office becomes an adjudicator as opposed to an expert on copyright policy for the nation, and that, I think, is an issue that librarians in particular want to pay attention to. What should be the appropriate role of the Copyright Office and is adjudicating enforcement claims in a world in which the presumption by virtue of a copyright registration that is not itself legally conclusive, in that kind of world where the presumption is that you have a right to the copyright, should the Copyright Office be involved in this sort of thing?

Okay, Copyright Royalty Board proceedings, I'm running very fast out of time, I'm not going to go into them other than for you to keep an eye on this. This might be something that Bill, since he sings and might be guilty of infringement, but we will talk about that later, should note. But, in any event, the rates are being renegotiated, proposals for lower rates, proposals for higher rates, we're going to find out what happens in just about a month.

The case that I really want to mention to you is the "We Shall Overcome" case. This is, of course, a fairly important historical case or a case that has historical roots. "We Shall Overcome," one of the most powerful songs of the 20th century, what the Library of Congress has called it, a song that was widely used during the civil rights movement and it really is a spiritual. John, if you want to play that for me. Thank you very much. [Audio playing the song "We Shall Overcome"]

Okay, so. Many of you, of course, I assume many people are from Charleston or certainly saw the

services on TV; the original song was called "We Will Overcome," not "We Shall Overcome." It was printed in 1909 and of course this means it is in the public domain. The publisher registered the copyright for it and of course claimed that it had changed the lyrics, that it had changed the musical arrangement, and the melody. Many of you probably watched the film *The Butler*. You saw that that song was obviously in that movie. There had been a request for permission for use of the song in the movie, a synch right. They quoted them $100,000 to use the song, and ultimately there was a lawsuit from the We Shall Overcome Foundation and *Butler,* they sued because there was a refusal to pay that price. There was a lawsuit and the defense was that the song is in the public domain and that therefore there is no valid ownership in it. And one of the questions, of course, was whether or not the song lacks originality because they changed the "will" to the "shall" in the first verse. There was also a question about whether or not there was the claim that, "we shall overcome some day, oh deep in my heart"; "down in my heart" was the original. Now it's "deep in my heart," and the question was whether those two changes were enough to create a copyright in a song that had been in the public domain. The court basically said the first verse of the song belongs in the public domain and that the defendants of course did not own a valid copyright to the song. Now, this is important in light of what I talked about, about the tribunal. Because as you all know, copyright only requires "de minimis" originality. I think this song, in part because of its legacy and its history, moved the court to change or to rule the way that it did, but ultimately it's a toss of a coin whether changing "will" to "shall" and "deep" to "down" or "down" to "deep," whichever one it was, is in fact sufficient originality? But think about the implications of the amount of music we have in the public domain and much of the changes that are happening that would potentially satisfy for copyright ability. My view, frankly, is that part of what we need is a robust originality doctrine and that in a world of digital technology we just have too low of a standard that makes it too easy for people to claim copyright from things that are in the public domain.

All right, last three minutes. Artificial intelligence. Where are we going to be in the "Long Arm of the Law" conference 15 years from now? Will I be speaking to a room full of robots? I hope not. So, really important and I'm just going to rush through this because Ann, I can feel her tugging at my skirt, hype versus reality, statistics and reasoning, the 95% versus the 99%, substituted versus complementary. I just want to talk about these. These are four important distinctions. If you get nothing else from my last four rushed minutes I want you to get this. But it will help you understand the current status of the future of artificial intelligence. Lots of things. Four different words kind of make up the world of artificial intelligence: big data, artificial intelligence, deep learning, and machine learning. The world really—machine learning and AI are fundamentally the same thing. They are, at least currently, considered to be interchangeable. Big data is really just high-volume, high-velocity data. Librarians have a lot of this, so you are going to be the target of a lot of attention as the regulations concerning "big data" begin to unfold.

So, what's really happening here? How many of you saw, if you want to skip to the next slide, is that working for you? So, here was an April Fools' joke from the University of Wisconsin, Madison. "Library eliminates the need for humans with a new AI powered reference service." So, this is an example of hype. It has no real foundation in the technology. This is unlikely to happen. The whole idea of robots coming for our jobs is something that I think should not be feared and especially with libraries, and I want to explain why and hopefully give you some ideas about how to talk to your institutions.

Think about what happened to Google Books, right? Reality is just a bit different. The Google Books Digitization Project is effectively at a standstill today. There were just tremendous issues with the effort to digitize that many books and the litigation over copyright just made it very difficult for Google to do a pretty important thing. So this has been largely a public failure, but it raises the question of how we distinguish between hype and reality. So, the hype is what I have on here, this is another image you should probably just take note of, the idea that artificial intelligence is all powerful, it will take our jobs, it is a turnkey solution to everything, just not true. The fact is we're just beginning data collection. We're still trying to figure out what the effective technologies are, and there are lots of nontech hurdles that remain. What libraries need to do is think about how they can facilitate and advance data collection. How they can employ narrow technologies that eliminate nontechnical barriers. Humans and machines think in very different ways. So when an administrator at the university says to you, "Why don't we buy the software to do 'x'?" It is important for librarians to begin to learn how to explain why that machine cannot replace a particular staff person or a particular function of the university. Understanding the strengths

and weaknesses of machines versus humans I think is very important. Human thinking is intuitive. Ideas have meaning, limited attention span, limited input and output speeds. Machine thinking is unlimited. It's basically math, detects patterns across lots and lots of dimensions, and that is where I think it is important. Machine thinking doesn't mean that the machine doesn't understand meaning. Actually, to a degree there are algorithms that understand meanings. They can turn words into numerical values and all of that and that is what artificial intelligence really does, but, I think what you want to do is to recognize that artificial intelligence is just a continuation of the things that we already do. Humans reason and function with nuance, with empathy, with understanding. Machines just don't do that. They analyze data.

So, I think what I would like to say is that we have seen a surge in the last few years of speech to text and text to speech technologies. These products have been around a long time. The question is why are we seeing them shift industry, right? Industry usage, we've seen a 95% jump in terms of the accuracy of these technologies. Below 95%, a product is just not reliable. So a 95% increase in efficiency. AI's speech recognition in particular gets better every month. Less people are using it now. More will start to use it all the time in pretty much the way we use

our cell phones. So, visual recognition, the same thing. We're seeing that visual recognition software is increasing and becoming more and more clever.

So, what is the point? It has made tremendous progress in terms of AI and that is what is driving a lot of the hype. But what you want to do is really recognize that nontech organizations, and I put libraries in this capacity, have to employ their resources in helping technology progress and in reaping some of the benefits, but what you really want to do is to think about the way in which technological revolutions have fundamentally remade the economy, right? Technological change happens, but think about the fact that we still have farmers, right? The horse and buggy replaced ultimately by tractors, John Deere, yes, there are not as many farmers as we have today, but we still want farmers and we still want to produce them, and so one of the things that is important is to identify what roles are automatable and what roles are not. You've got to find within the librarian profession or the library profession the things that are difficult to automate so that new technology can basically complement you and not substitute you and so as the "We Shall Overcome" song, I told my library as I was talking to them about these changes in AI that I think librarians and libraries will overcome the tech revolution, too.