

Chapter Title: The Long Arm of the Law

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Book Title: The Importance of Being Earnest

Book Subtitle: Charleston Conference Proceedings, 2014

Book Editor(s): Beth R. Bernhardt, Leah H. Hinds, Katina P. Strauch

Published by: Purdue University Press. (2015)

Stable URL: <https://www.jstor.org/stable/j.ctv15wxqrv.9>

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The Long Arm of the Law

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Moderated by Ann Okerson, Senior Advisor to CRL, Center for Research Libraries

The following is a lightly edited transcript of a live presentation at the 2014 Charleston Conference. Slides and videos are available at <http://2014charlestonconference.sched.org/>

Ann Okerson: Good afternoon. Thank you for being here when you could be outdoors on what is one of the loveliest days I've ever seen in Charleston, but you've instead chosen to spend your time with our panel. So thanks for that. We know that we are just a few people standing between you and dining around in Charleston and everything, so we're going to try to be both informative and entertaining to the extent that we can so that you won't regret coming here. We're also joined this afternoon by our annual friend, Kenny Rogers, who comes to the Long Arm of the Law session. [music] Okay.

UNKNOWN: Did you have public performance rights for that?

Ann Okerson: Oh. We each year we invoke fair use on this, you know? What can I say?

Bill Hannay: It's the library exemption.

Ann Okerson: Yeah, the library exemption. Thank you. Our lawyers have spoken. But this is a theme song and maybe, Katina, maybe next year we can get everyone to sing it. Yeah, that would be great.

Now, to be a little bit less entertaining but more informative, I made a word cloud out of the abstracts and the bullet points that the speakers sent us in advance, and what you're going to see is that we're going to focus a whole lot in this session on things like fair use trends, first sale, and privacy, all of which are, particularly privacy, I think, are increasingly important issues for the folks who come to Charleston, the Charleston family, the Charleston community. Now, I exercised some liberty and asked the speakers not to talk about the Georgia State case. The reason I did this was very personal. I feel that this case,

which I thought we were having a nap over for a while, I thought it had taken so much air and energy and money out of various rooms over the last few years that we might just kind of give it a snooze. But then there was this big reveal in the last two or three or four weeks, and we're kind of back where we started from. Well, not quite, but almost. They may choose to defy me and say something about Georgia State anyway. So there you have it.

I'm going to introduce the two speakers right at the outset, and they will proceed in an orderly or not orderly fashion, and after that we will have time for discussion questions and answers. Our first speaker is Laura Quilter, who describes herself on her blog as a "librarian, lawyer, teacher, and geek." Whatever all of that means, I don't know, but I liked it. She's the copyright and information policy attorney librarian at the University of Massachusetts in Amherst. She works with the UMass Amherst community on copyright and related matters, equipping faculty, students, and staff with the understanding that they need to navigate copyright, fair use, open access publishing, and related issues. Laura, while doing all of that, maintains a teaching appointment at Simmons College School of Library and Information Science, and she has previously taught at UC Berkeley School of Law with the Samuelson Law Technology and Public Policy Clinic. She has a library degree, masters in librarianship, University of Kentucky, and a JD, UC Berkeley School of Law. She's a frequent speaker. She's taught and lectured to a wide variety of audiences. I think I will not carry on. I don't know if there are bios in your programs, but Laura's website and her bio are worth your time.

Our second speaker, return offender, is Bill Hannay, whom we have had the fortune of hearing at this conference over the years and in other venues. He is a great friend to libraries, and we are so fortunate to have someone in private

commercial practice who really does have a passion for the kind of work that libraries are trying to do. He's a partner in the Chicago-based law firm, Schiff Hardin LLP. He regularly represents corporations and individuals in civil antitrust and complex litigation. He's an adjunct professor at IIT Chicago-Kent School of Law, where he teaches courses in antitrust law and international business transactions. He has held many leadership positions with the American Bar Association. And as I said, we regularly see him here. He's the author of numerous books on antitrust, fair competition, as well as other related aspects published by companies that we also see here, such as Thompson West, Thompson Reuters, ABA, and Bureau of National Affairs. His JD is from Georgetown University. His BA is from Yale. And I too will stop the introductions here. There's much more to say about Bill, but I think opportunities at the Charleston site will be abundant to give him the attention that he deserves as well. So I welcome our two speakers. Laura's up first.

Laura Quilter: Hi, I'm Laura Quilter. It's good to see you all, and I hope that my own voice doesn't give out. I've been wrestling with a cold all week, which is why I have this peculiar frog-like, or one of my friends kindly called it "Lauren Bacall-like" voice. I'm going to be talking about copyright, and I promise to be very brief when I mention the case that I otherwise won't mention right now.

In talking about copyright, I'm going to do it this way: two jokes and then one transformation in analysis. I don't promise the jokes to be funny, but there they are. The first topic will be first sale, because there've been quite a few things happening in first sale. Maybe it's been a little bit more subtle than our perennial favorite, fair use, but this is what I think of when I think of first sale. I think of first sale as something we all love, we don't think much about it because it is perhaps going away. Although we rely on it, it's receding in importance in many respects because of licensing. So *An Affair to Remember*, used bookstores rely on fair use. Here's the first joke, and this is a joke told by Aspen Casebooks of this year. What is a genius way, or maybe not genius, for getting around the used textbook market, right? We all

know that textbook publishers would like to get around the used textbook market, and the traditional way of getting around it is by revising your textbook every year or few years, just enough to change the pagination so that the professors have to change their assignments and a whole new textbook has to be bought. Aspen came up with a new model this year, which was to sell licensed access instead. And they did this with a program called the Connected Casebook. If you're familiar with law schools, how many of you heard about this whole little imbroglio that Aspen Connected Casebook? A few of you. Not so many. I'll tell you.

First of all, casebooks are textbooks in law school, and it's interesting because a casebook is basically largely, maybe 90% public domain material, it is cases, which are public domain. And the cases are annotated, so there's definitely intellectual work that goes into them. They're assembled, they're organized, they're annotated, and there is some smattering of other content, excerpts from articles and so forth. But primarily, they are public domain content, and so students, as you can imagine, are especially not really willing to buy them if they can avoid it. And because they're public domain, you can get your update just by downloading the case these days. And the other thing to know about casebooks is that although they are predominantly by far printed material text, they are just as expensive as those beautifully bound fully color illustrated biology textbooks that are hundreds and hundreds of dollars. So this market is ripe for disruption, and I think one of the ways it's been getting disrupted is students just not buying them and instead downloading cases. Aspen is trying to, on the other hand, disrupt it in another way. They're trying to say, "Well, how are we going to claim this market?" And the way they decided to reclaim it was through their program called Connected Casebook. Connected Casebook involved book rental, and the way they made it a book rental was they said, "We will sell you, we will still give you the print book, but you will return it at the end of the semester, and we will pulp it." They didn't say they would pulp it, but that was the obvious conclusion. "But in exchange, you will have lifetime e-book access to

this casebook!" Now, this is perhaps of limited value, right? I mean, some of us lawyers keep our casebooks. Many of us don't because we prefer to get the money and we sell them. A few of us keep them, but they're not really useful references for many people. Maybe for some people, right? So this was something that was perhaps of less value than you might expect. James Grimmelmenn, who responded to this whole program by starting a petition, James Grimmelmenn said the lifetime access to this site is, these kinds of sites have the lifetime of a gerbil, so not exactly something that people are going to want to have forever. The announcement was immediately followed, literally immediately followed. The announcement came out around the 4th or the 5th of May and was followed immediately, maybe that day or the next, by a boycott which ended up with like 330 law professors agreeing not to use these casebooks, and these are some of the big casebooks in the field. On the 8th, Grimmelmenn announced "Triumph! Victory!" because Aspen had issued a correction, a clarification, I believe it was, where they said, "Oh, well, students are not going to be forced into this program. Students will still have the option to buy the hard copy." I'm sure that everybody's thinking about what the next moves are, but I think this is just an illustrative thing case of what you can do with licensing and how the publishers are really trying to think about dealing with these hard issues.

Here's the second joke. When is an electronic good, by which I mean a thing, a copy? All right, if you thought the first joke was funny, then you'll really appreciate this one. When it is electronic. Because in the ReDigi case, how many of you heard of the ReDigi case? All right, a few of you. The ReDigi case was an electronic music market. If you buy your, usually if you buy MP3s through an electronics site, they're encumbered by licensing that says you can't resell them. And Apple did not encumber it in that way. They had various other restrictions, but they didn't say you can't resell. So ReDigi was a company that said, "Hey, let's set up a marketplace so that people can resell it on the marketplace." And that made sense, except to Capitol, who said, "No, you're infringing our rights." And ReDigi said, "No, I have first sale." And the court agreed with Capitol. Why? Not

because they said first sale doesn't exist, but because they said if it's an electronic good, you're necessarily making a copy, and they talked even about the bits. It's not the same bits that it was when you move it. I think there's lots of interesting philosophy here. There were also lots of interesting copyright approaches that could be taken because you could think about the intermediate copyings or different kinds of ways of getting round this. Nevertheless, we're sitting there with this precedent that says electronic goods do not have first sale rights because they are necessarily, inherently copies. This is not a precedent that I personally like. ReDigi rolled with it by rolling out their 2.0 version which, instead of buying it from Apple and then deleting your copy and putting it on ReDigi, instead, you buy it through ReDigi so the bits, the original bits, are on ReDigi's server. And now when you go to sell them, you're deleting your own copies of the bits, but they have the original bits. And they have smart copy control that actually makes sure these things are deleted.

So I said two jokes, and you might think that maybe ultimately, the joke is on us, the users, the people who used to own books, and I think that's kind of where we're going. So what is the future of first sale? More of these textbook and e-book experiments. We're all dealing with them when we are buying, when we're negotiating our contracts for e-book collections. The publishers are definitely trying to figure this out. The libraries are trying to figure it out, where it all goes. We don't know. But the secondary markets that we've all relied on as an important piece of our information marketplace are in jeopardy. I think it's worth thinking about. Licensing continues to be a piece. And the thing I want to flag about licensing here is that it's not just the negotiated licenses that we librarians deal with when we're dealing with our friends, the publishers, but it's also the EULAs that the users often have to deal with on top of those, because you're often seeing, either through software, the people doing the coding or the lawyers getting involved, or some unholy mesh of the two, that oftentimes once the user accesses the resource, they're still being asked to click a EULA which might have different rights or things that they don't know. That's

something to flag. I guess the ultimate joke is on us, as I said, because Congress is looking into this question. There're hearings that they're thinking about. We'll look at digital first sale, and I don't have a lot of optimism about that. All right, so that's first sale. And I can't leave the question of licensing and first sale without my favorite XKCD cartoon ever where Mephistopheles says, "I come offering a deal," and the guy says, "Read the sign." And it's like, "By entering this room, you agree to forfeit your own soul rather than negotiate with the mortal residing therein." "Wait! Wait! You can't!" And then he's like, "Too late. You already read it so you have agreed to the terms." And this is "Mephistopheles Encounters the EULA," which is creative commons licensed. So that's my very favorite cartoon on this whole issue.

Then the transformation tale, and I think, how am I doing on time? Am I still good? I'm good. Yeah. That's because I talk fast. Okay. The thing that I wanted to talk about fair use, and I promise to be very brief when I get to the dreaded case, is what's changing, what's transforming about the transformativeness narrative that we've been dealing with for a long time. And for a while, there was so much talk about transformativeness that some people were even saying, "Look, it's just like fair use. It's not a four-step thing. It's practically a two-step analysis. Is it transformative or not? And if it is transformative, then too much or too little or any other thing that you might want to think of." And we have a whole bunch of cases that are telling us that that is the story, that it's all transformative. The first *HathiTrust* case came out, they talked about transformativeness. Google, the most recent case. And this art program, this art thing called *Cariou v. Prince* is sort of like this classic example of art criticism that a court was engaging in and saying, "Well, we've transformed, the artist transformed these works," and then it's three pages of art criticism, and I urge you to read it if you like art or are amused by judges doing art. So the *Cariou v. Prince* case. everybody was saying transformativeness is the key. But I would say in the last year, we really have had a little bit of retrenchment where courts are falling back. And so this is the thing that I want to tell you about in terms of fair use. First of all, there's a lot of question about just what does it

mean to be transformative, anyway? Some people are suggesting that if everything is transformative, if changing the mere purpose or changing the way you use it or doing any of those things are transformative, then it really swallows the whole analysis. That came out pretty clearly in the Seventh Circuit in a case recently about somebody making a satirical t-shirt where this very esteemed judge said in this very snooty way, "We really disapprove of the Second Circuit's," you're nodding. You read this case too, right? "We really disapprove of this, we prefer to stick to the tried-and-true four-factor test." So I think this whole question of what is transformativeness and is it, is just making some courts a little bit uneasy.

What I think we're seeing is that even if it's not transformative, the purpose is really important. And this is very key because if you're in the educational sector or if you're dealing with educational materials or accessibility or any other kind of purpose that is not necessarily transformative, it's really important that we be able to have some power in the first factor as well. The first factor doesn't just stand alone, actually. It interacts with all the other factors. The market effect is still important. That's what the Seventh Circuit said, that's what the, sorry, that's what the recent big case, was that the market effect is still important. So this is my slide for the case which won't be mentioned and is the Fair Use Emotional Rollercoaster that was done in a newsletter that called "Five Useful Articles," which if you ever follow legal issues in IP is well worth reading. I'm clicking because I can't keep watching that. But it's very funny, I think, that GIF. And it was intended to describe how those of us who read this case felt when we were reading the case that I'm still not mentioning. But it kind of encapsulates some of the points that I was making, which is that even though things are not transformative, the purpose is still really important and can be a plus factor. That licensing is very important. We used to think it was just transformativeness that had replaced the whole value of the fourth factor, but no, the fourth factor, the market effects, are still really important. Then finally, the second and third factor actually are not dead letters. They are important. You have to pay attention to the

nature of the work and to how much is taken. Those things are there. And now we move on.

There are other cases that have been also really playing around with this same set of maybe organizing principles, which we could call the four factors, that I think are reviving the "four-ness" of the four factors. One case that came out just a few months ago is the *White v. West* case, and this is Westlaw and Lexis and this attorney who got dumped from a case got upset, copyrighted his briefs, and then used Lexis and Westlaw for including his briefs in his database, which I think was chutzpah. But the court said, lawyers do this. Every year or two there is another case with a similar set of facts. But this one was particularly notable because it generated this nice opinion. The court said, "Look, Lexis and Westlaw, although commercial entities, are transforming the work." How are they transforming it? This is the Second Circuit, so they have this broad view of transformativeness these days, and they said, "They're transforming it because they're using it for a different purpose." And they kind of transformed it a little bit with metadata and annotations. That will be very useful to us librarians to think about that as a transformation. But just the whole different purpose was a transformation. And then, they did pay attention to the other factors. They said the nature of these documents, they're publicly filed documents that were intended to be disclosed. And they talked a lot about the audience. Who is the audience for these briefs? The audience for the briefs originally is the client and the court, and the audience for these briefs in Lexis, Westlaw is a database, is a legal research database and these other purposes. And the important point here is that the purpose shifted the market. So the factors are playing together. We can't just say it's transformativeness; it's how they all work together.

And then there are a whole bunch of these other cases. There's the *Fox vs. TV Eyes* case, which was an indexing case, another indexing case where TV Eyes is this high, pricy subscription service that makes transcripts of TV news and then sells the transcripts and then gives little clips of the video attached to them if you get the keyword right. That was fair use. The *Swatch v. Bloomberg* case,

which was where Bloomberg News listen, joined kind of a closed press conference, took a recording of it, and then just sent it out to its subscribers. That was a fair use too. There were four cases filed by the American Institute of Physics and Wiley against law firms for using scientific articles in patent filings. The two that have resulted in decisions both said fair use. The *HathiTrust*, the Second Circuit said that indexing is a quintessential transformative use, but they said the disability access that you're providing, that's not transformative at all, but it is a highly favored purpose. So those are also more, what I would call indexing and awareness kinds of cases. We've got a whole slew of cases that I think are really, whether they're commercial entities or whether they're more public entities, they're all around the kinds of things that libraries do and educators do, which is providing access to information and organizing it. And all of them are saying, "Hey, even if you're not transforming the content significantly, as long as you're doing it with a different purpose or a different audience, it can still be fair." Notice the different purpose/audience showing up in the first factor, which is the purpose and character, it's showing up in the second factor, which is the nature of the use, and it's showing up in the fourth factor, which is the market substitution, the effect on the market. So it's showing up in all of these places, but it's the same concept. And the purpose on all of these is indexing or awareness, education, accessibility. And taking the whole thing is not a problem in any of them. They're paying attention to the markets. There's a problem in the *American Geophysical Union* case where people said, "Oh, well any avoided license could be a market harm, and so that is a very circular argument." And courts are really paying attention to avoid that problem.

All right, so this is my gist, and now I'm at my end. So the point is that transformativeness is not the be all and end all. We've been using transformativeness perhaps as a proxy for purpose. I think if we get back to that original concept and just sublimate transformativeness as one of the ways a purpose can be changed or as one of the types of purposes that will help us, I guess, keep transformativeness in its place. It's

the transformativeness plus the holistic analysis. The other pieces are actually all still important. Who is the audience? Is the nature of the work? The purpose affects how much is taken. The purpose can affect the market. The purpose can affect everything, whether they're transformative or not. And so that's my upshot. And that's what I have to do to cue up Mr. Hannay, which I'm very excited because I can't wait to hear what we have to say about the right to be forgotten. Thank you, and questions.

Bill Hannay: Well, I guess I have to add my own caveat that my voice is a little hoarse too. So you had Lauren Bacall because of hoarseness. Well, I guess I'm Humphrey Bogart, huh?

I'm going to talk about the right to be forgotten. I'm sure many of you if not all of you have heard of this famous case that occurred earlier this year in the European Union, and we're going to focus on that and then try to spin it a little further beyond that. The right to be forgotten is also known as the right to oblivion. So indeed, it is called the right to oblivion in some of the texts and some of the commentaries and some of the court opinions that talk about it as well. I kind of like that concept. What's the worldwide fuss? I'm going to actually read this out loud because I've got to get through it with the right emphasis on the syllables. So on May 13th, 2014, the European Court of Justice held that the operator of a search engine, Google, is obliged to remove from the list of results displayed, following a search made on the basis of a person's name, links to webpages, published by third parties and containing information relating to that person, if such information is, quote, "inadequate, irrelevant or no longer relevant, or excessive," unquote, in relation to the purposes for which the data was collected or processed and in the light of the time that has elapsed, even if the information is true. So that's what the fuss is about. It is generally perceived as a kind of David and Google-iath kind of a competition. Mario Costeja Gonzalez is the David, and Google is the Google-iath.

So the decision, and this is actually the full name of the case, because it was an appeal by Google in Spain and Google Inc. worldwide against the Spanish Data Protection Agency, which was the

regulatory agency that supported Mr. Costeja Gonzalez's case. And what the case is really about is not so much the privacy itself, because that was really a foregone conclusion from the Data Privacy Directive, which I'll tell you about in a second, but what the case really established as a precedent was that Google, as a search engine provider, was responsible for the results of the searches. And that's what the case was really, really, really about. It's not so much that a person in Europe has a right to get rid of certain information about that. That was kind of a foregone conclusion. But it's the fact that Google, and any other search engine provider, is stuck with the responsibilities that a controller of this information would have, the website provider. So it's big deal in that regard and shifts the responsibilities quite handily.

Quick factual background. In 2009 Mr. Costeja Gonzalez discovered that if you did a kind of internet selfie and ask, "Oh, what are people saying about me? What does my name appear in?" It pulled up two old newspaper articles about him, or really about the fact that he had been in debt for not having paid some governmental tax or something, and so they'd ordered his property put up for sale. Kind of a big deal. I'm sure it was disturbing to him. But he settled it. It all got taken care of 15 years ago. But the newspaper articles lived on in the internet, and if you did a search on his name, whatever else came up, you got these two newspaper articles. So he went to the newspaper and he said, "You know guys, this is old history. Would you please remove them from your archives. Take it down off the internet." They refused. He went to Google and he said the same thing. They refused. So he went to the data privacy agency in Spain, which every in the EU has set up a data privacy regulatory agency pursuant to this Data Directive, and he said, "You got to help me, guys." And they said, "Okay. Si." And they held two things. Interestingly, they said, "Well, the newspaper doesn't have to do anything because it's a legitimate reporter of things that happened." It's a record, a chronicle of what happened. And so it doesn't have to do anything. It properly reported that news. But when Google runs its machine and pulls those newspapers up, now it's got a different responsibility. It's not protected by the equivalent in Europe of the

newspaper First Amendment. It's parleying what's on the internet for money, and now they're putting it out there and the court says they're going to be liable for that. They did all this within the context of this Data Directive. In the EU, which you may know, a directive is the word they use instead of "legislation." It's a product of the co-responsible system in the EU, which is a little bit esoteric, but there's a parliament, and they have a council, and the two of them have to go back and forth and agree. It's kind of like the Senate and the House of Representatives. They go back and forth and eventually agree on, compromise legislation, and that's called a directive.

So there's two provisions of it: Articles 6(1) and 12(b). The first one is the one, and you'll recognize this language, that says that member states, member states of the EU, shall, must, provide that personal data must be adequate, relevant, and not excessive in relation to the purposes for which they're collected or further processed. And (d), they must be, (d), accurate and, where necessary, kept up to date. It's a responsibility that the states put upon anybody who is going to be deemed a controller of information. 12 gives the remedy. Member states shall guarantee every data subject, that's me or you, the right to obtain from the controller of this data, as appropriate, the rectification, erasure, or blocking of data the processing of which does not comply with the provisions of this directive, e.g. 6(1), in particular because of incomplete or inaccurate nature of the data. So if you find information about yourself and you are a European citizen, you can, if the data meets this test, this inadequate, irrelevant, excessive, inaccurate, un-up to date, if you can prove this data meets this test or tests, plural, then under 12, you can ask for the rectification, erasure, or blocking of the data.

What's the interplay between these? This is what the court says, is that this "processing of personal data carried out by the operator of a search engine is liable to affect significantly the fundamental rights of privacy and the protection of personal data since that processing enables any internet user to obtain information which potentially concerns a vast number of aspects of an individual's private life and which, without the

search engine, could not have been interconnected or could have been only with great difficulty." So the search engine is the enabler of the publication of the inaccurate, inadequate, ineffective, irrelevant information. And so therefore, the operator of this search engine has got special responsibilities. Now, the court emphasized that there is need for a balance in the process. So when you complain to a controller of data that it's not accurate or adequate or etc., then the operator has to go through a balancing test to figure out whether the data is so harmful to your rights as the subject of the data that it outweighs the public's interest in the information. Now, that's a kind of awesome responsibility, but that's the way the court has figured that this, this is the best way to do it. We're going to let the controller, in this case, Google, make these decisions. The subject of the data applies, says, "I've got this problem. Please take it down," Google thinks about it, they do this balancing tests and somehow, and then they make a ruling. And if they make, in the data user's mind, the wrong ruling and leave it up, then they can go to their local privacy agency, as did Mr. Costeja Gonzalez.

How do you do this balancing? Oh, this is a black box. It depends, "on the nature of the information in question and its sensitivity to the data subject's private life and, on the other hand, on the interest of the public in having that information." Do the public really need to have this information from 1998 about Mr. Costeja Gonzalez's property problem? The court said, "No, not really." And his interests override the economic interest of the search engine. What would that be? Well, that would be, it costs money to run this balancing test. It costs money for us to go and pull this information out and program our computers so it doesn't pop up when Mr. Costeja Gonzalez's name is plugged in. Well, that's too bad. You do this for a living, you got to live with this. And that's the economic interests of the search engine operator and the general public's interest in the data about him.

Where are we in Europe? On request of an individual to remove information about him, the controller must do this balancing test. And, trying

to live up to its court-ordered obligations, Google has dutifully published an online form that you can fill out and submit online to request removal of data links. The first day this went into operation, there were 12,000 requests. As of July, there were 70,000 requests. Okay, this, from Google's point of view, there's an economic interest here. There's been a lot, wonderfully a lot, of reactions. I mean, I spent time flipping through all these things and I'm thinking, "Oh, man. I could quote for an hour on either side of this." But here's just a few. Well, first off, Google sent a SWAT team out of scholars and lawyers and others to go around holding seminars in essentially every city in Europe, every major city in Europe, to explain why this was unnecessary, why it was a terrible burden, why it was just a disaster. Wikipedia cofounder Jimmy Wales, who constantly pops up on my screen asking for money, had an interview in a newspaper and he called the EU's decision "deeply immoral" and warned that the ruling will "result in an internet riddled with memory holes." Pretty good imagery. I like that part. Another legal commentator characterized the judgment as "profoundly harmful to the operation of the internet and a betrayal of Europe's legacy in protecting freedom of expression." Ooh. Harsh words. Another guy says it's a draconian attack on free speech. Someone else called it "retrograde," "akin to," and I know you'll like this, "marching into a library and forcing it to pulp books." Who would do that other than the local county board?

But there's lots of positive statements as well. A leader of the UK Parliament praised the decision, saying, "The presumption by internet companies that they can just use people's personal information in any way they see fit is wrong and can only happen because the legal framework in most states," he means countries, "is still in the last century when it comes to property rights in personal information." And a privacy advocate, I mean, I like this phrase too. "Without the freedom to be private, we have precious little freedom at all." I mean, Tom Paine could've said that if he lived in the internet age.

So what do I think? I know you really want to know what I think. I think it's a great decision! A

careful and correct application of the EU data privacy law, and it recognizes the need to balance all interests, not just, say, well, whatever the internet controller wants to do. More than that, I see it as a vital first step in trying to bring the insanity of the internet under control. It's already destroyed legitimate newspapers and is now gutting libraries. It's easier to find porn and libel on the internet than Shakespeare. And it's all well and good to worship free expression, but you cannot yell "fire" in a crowded movie theater just because you're expressing yourself. We need to get control of this Wild West now before it gets worse. But hey, it's just me talking.

Who cares about Europe? Europe, Schmeurope. What about the US? Could Google happen here? Maybe, maybe not. We don't have any broad-based law like the anti, excuse me, the Data Directive. We don't have anything in the Constitution that you can hang a hat on and say a data controller has to remove or take down data that's irrelevant or inaccurate. Now, sometimes our legislatures do step in. We do regulate data use and content in one notable area: credit reporting. The Fair Credit Reporting Act imposes certain rules on accuracy, relevance, and obsolescence. Maybe we need a Fair Credit Reporting Act that's much broader and goes well beyond credit reporting. Is there any other remedy right now? Well, in general in the United States, we recognize a hazy kind of invasion of privacy. Some states prohibit use of a name or likeness for advertising without consent. And there's defamation and slander laws, but those require proof of intent to harm and damages, elements that were not required under the Data Directive in the EU. There's even a tort called intrusion upon seclusion. That's so poetic. But it doesn't get used much because it's kind of a trespass theory. There is another one, and I think it may be the best shot if you were going to try to bring some kind of lawsuit: public disclosure of embarrassing private facts. Well, that would fit.

And how about Canada? You know, Canada's kind of like the US, right? I think it's part of the US. I'm not sure. But there was a judge in British Columbia that ordered Google, poor Google, it's a target again, to block a group of websites from its

worldwide search engine. Now the EU decision only relates to Google in Europe, that is to say, only sites in Europe. But this order from this Canadian judge applies to the entire world for Google, and it isn't even a privacy case; it's a trade secrets case where someone wanted an injunction to protect its trade secrets, and the judge perceived Google as in effect being an unwilling and unwitting facilitator of these trade secret violations.

You, my friends, are dedicated to preserving information, printed information in books and periodicals, information on CDs and DVDs as well as e-books. And of course, now every library is filled with computer terminals for patrons and scholars and students to access e-information online. And I know it tears your hearts out to have to discard old books and magazine into the dumpster to make room for the new. But what about bad or private info? What do you say when someone asks you to help them take down false, old, or embarrassing information? A weird guy comes in and asks you to delete a particularly embarrassing photo from the internet. He says he's a different person now. What do you do? Well, you might offer him a Lethe cocktail. Lethe, as you know, is the river in the Greek underworld that when drunk from made souls forget the

sufferings of life. Oblivion, there's that word again, or something to make you enter oblivion and forget. Well, that may not work. But you could try notice and takedown. And certainly all of you may have already had experience doing this. Most online hosts offer procedures for requesting that they voluntarily remove or take down material. You can go on their websites. Go on, for example, YouTube. If that photo was part of a YouTube and some music was playing behind it, I could probably get them to take it down because it's obviously pornography. And in fact, notice and takedown is part of the Digital Millennium Copyright Act for copyright-related violations. But the other thing you can do, and this is really what I'd recommend, is you get on the phone and you call Google, and you say to him (singing):

"Forget him 'cuz he doesn't want fame. Forget him 'cuz it isn't fair.

Don't let them search for his old data 'cuz they can't find the dirt that isn't there.

Google guy, I'm asking politely, remove those links so they can't see.

Oh, don't you cry now, just be a good guy now. Forget him and guard his privacy."