

The Truly Electronic Law Journal

Obiter

September 2004 ■ VOL. 2 ISSUE 3

Patrick Stiehm examines the Hague Convention in relation to international kidnapping of children in the USA



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As you will see from the pages of this issue we have been hard at work to provide you with a quality publication and we only hope to build on this and better ourselves in the future. If you therefore have any comments about this issue then please do not hesitate to contact us at the address at the bottom of the next page.

We sincerely hope that you will enjoy reading this second issue of Obiter and that you find something useful within these pages. If you have any ideas for future development of obiter then again we would very much like to hear from you.



Lawfile

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The Editor

Dr. Penelope Richards

Dear Reader,

The change of seasons is upon us again and for those of us in the Southern Hemisphere the coming summer promises hot sunny days, evening thunderstorms and bountiful crops. However, in order to reap these crops a great deal of carefully planned preparation, sowing, nurturing and watchful care is required. And so it is with Obiter too. The newly constituted editorial board, under the watchful guidance of the chief editor have been busy reviewing the structure, content and focus of your journal. In order to ensure that you, the reader, have access to information, which is topical, relevant and of practical use, the decision has been taken to manage the content of the journal on a focused-edition basis. In other words each edition in future will focus on a specific legal topic. The journal will source its articles in two ways, firstly by invitations extended to known experts in the field and secondly from a call for submissions from yourselves. The success of your journal is largely dependant on your active participation in its life and growth and thus we request that when you see the call for papers that you respond by encouraging those who are able to contribute to do so.

The editorial board of the journal takes the issue of intellectual property rights extremely seriously and so adheres to the internal standards for editorial conduct. This includes making use of peer review of submissions, ensuring that plagiarism is eliminated and that copyright is upheld. In this edition of Obiter, the last in its current format, the issue of copyright is explored in some detail and will assist the reader in coming to grips with what is a complex and emotive issue.

This edition also features an article on legal aspects related to the kidnapping of children and the Hague Convention. Children's rights are an issue of growing international focus and considering recent events in Russia, the Sudan and Iraq it is critical that children be afforded appropriate legal protection. In the near future one of the editions of Obiter shall be dedicated to legal issues pertaining to the protection of those who so often cannot protect themselves.

We trust that as the journal starts its metamorphosis into its new form that you will enjoy the journey with us. Good reading!



The Hague Convention and Dealing with International Child Kidnapping in the United States

Patrick H. Stiehm

INTRODUCTION

The phenomenon of globalization, has not only, reshaped our economy but has resulted in easy of travel and people living for long periods of time outside their native countries. This has reshaped how we think and talk in many areas of the law, including family law. For example, what can be done when a parent living in the United States kidnaps a child to the U.S., or retains a child in the U.S. after a period of visitation?

Consider the following two scenarios.

1. John and Barbara have been married ten years and live in London. They have a son Robert age seven. They begin having marital difficulties. Barbara is originally from the United States and decides to return to her family in the state of Maryland. One evening while John is away on business she packs all of her things, as well those of Robert. She then travels to the home of her sister in Baltimore. Thereafter she refuses to return Robert to England, in spite of repeated requests by John that she do so.
2. Lucy and Spencer were living in Chicago. When things started to get difficult in their relationship they separated. Lucy moved back to Canada and her hometown, Calgary, in the province of Alberta, with their only child, Bethany. Being somewhat short sighted, Lucy never bothered to get a court order in Alberta giving her sole legal custody of Bethany. Spencer returned to his hometown in the United States, Minneapolis, Minnesota. Bethany would visit him there during her school holidays. This arrangement worked well for a few years. However, at the end of one summer holiday, instead of sending Bethany back to Calgary, Spencer decided to keep her with him. He enrolled her in school in Minneapolis. Despite repeated phone calls from Lucy, Spencer refused to return Bethany.

The effects of a parental kidnapping or wrongful retention can be devastating on the child involved. Yet, in our highly mobile world, with increasing numbers of marriages and relationships between people of different nationalities, situations like those described above are becoming common.

HAGUE CONVENTION AND IMPLEMENTING STATUTE

Many countries, including the United States have signed a treaty known as The Hague Convention on the Civil Aspects of International Child Abduction [1] (the "Hague Convention"). This treaty deals with international parental kidnapping. In the United States this treaty was implemented by U. S. Congress when it passed the, International Child Abduction Remedies Act ("ICARA").

The kidnapping of a child usually happens in one of two ways: I. A parent may simply take the child out of his or her home country, as in the case of Robert (known as "wrongful removal"); or II. A parent may refuse to return the child once the child is out of his or her home country, as in the case of Bethany (known as "wrongful retention").

The Hague Convention and ICARA help people in situations such as those Lucy and John find themselves in. The treaty and the statute allows the left behind parent, i.e., Lucy and John to commence legal proceedings in either state or federal court in Minnesota (Lucy) and/or Maryland (John) to secure the prompt return of their children to them. It is important to note that under Article 16 of the Hague Convention, a court handling these proceedings is prohibited from making any decisions regarding the child's custody. Thus, if Lucy starts legal proceedings under the Hague Convention, Spencer cannot successfully argue that he should have custody of Bethany. Similarly, even if Spencer starts a separate proceeding for custody of Bethany, the court should not grant him custody because of the proceedings under the Convention and the provisions of ICARA. The idea behind Article 16 of the Hague Convention is that it is in Bethany's best interests that child custody decisions be made by the court where she lived prior to being wrongfully retained in the United States. It would be Lucy's position, that that would be the appropriate court in the Canadian Province of Alberta, not a Minnesota court. When Bethany is returned to Calgary the Alberta courts can deal with the matter of custody, visitation and any related issues.

INITIAL LEGAL ISSUES AND PROCEDURES

If John brings legal proceedings under the Hague Convention and ICARA, the first issue is whether the Hague Convention applies to his case. Under Article 4 of the Hague Convention, it (the Hague Convention) does not apply if Robert is 16 years or older or if he was kidnapped from or to a country that has not signed the Hague Convention [2]. To date, more than 50 countries have signed the Hague Convention, including Canada, the United States and the United Kingdom. In addition, the Hague Convention is not applied retroactively. The two countries involved must each have signed the Hague Convention prior to the kidnapping. Thus, since Robert is not yet 16, John is able to use the Hague Convention and ICARA to help get Robert returned to England.

Under Article 6 of the Hague Convention, each country designates a Central Authority that handles the international parental kidnapping cases for that country. In the United States, the Central Authority is the State Department, who has contracted out administration of this function with regard to incoming cases, i.e., where the child sought to be returned is in the United States, to the National Conference for Missing and Exploited Children ("NCMEC"). That organization is headquartered in Alexandria, Virginia. Other countries have their own Central Authority scheme. Where a parent in the U.S. is seeking to have a child returned the United States, the State Department handles those cases themselves, in referring the matter out.

The official role of each Central Authorities is to aid people in the situation that Lucy and John, find themselves. In reality, the role of the Central Authorities is often limited, due to under-funding and under-staffing. On the other hand, they can be helpful in locating a kidnapped child, locating a foreign lawyer and obtaining a statement of what the law is in the country from which the child has been abducted. John may choose to seek the assistance of either the U.S. or U.K. Central Authority if he needs it. Alternatively, Article 29 of the Hague Convention and ICARA allows him to bypass the Central Authorities and start proceedings on his own.

The Hague Convention, ICARA and the State Department regulations issued under ICARA among other things, sets forth the procedural and substantive mechanisms put in place by Congress and the State Department to assure that children subject to lawful custody orders in countries other than the United States, are protected from abduction to the United States and/or wrongful retention in the United States

by the non-custodial parent. The point is to assure that the child's physical removal from the place of his or her "habitual residence" and from the jurisdiction of the local family courts with primary responsibility for the child's welfare is not permitted to become a *de facto* way for the non-custodial parent to circumvent local custody decisions.

The applicable State Department regulations provide expressly for the role of NCMEC in processing all incoming Hague Convention applications under the direction of the U. S. Central Authority, i.e., the State Department. See 22 C.F.R. § 94.6. NCMEC, the State Department and the Department of Justice, pursuant to the express authority of 22 C.F.R. § 94.6(l) have entered into a "Cooperative Agreement" setting forth the day-to-day processing functions to be carried out by the NCMEC as an independent contractor.

The administrative and judicial structure put in place for such "Hague Petition cases" also provides for trial in either state or federal court. See 42 U.S.C. § 11603. When brought in a United States District Court, a Hague Petition case is a civil case, in large measure subject to the Federal Rules of Civil Procedure. A trial occurs before a federal judge before any final action is taken to return a child to its home outside the United States. Federal Rules of Civil Procedure. A trial occurs before a federal judge before any final action is taken to return a child to its home outside the United States.

Article 3, defines when a parent has wrongfully taken or kept a child. Basically, this occurs when there has been a breach of a custodial parent's rights under the law of the jurisdiction in which that person lived. Additionally, the custodial parent must actually have been exercising his or her custodial rights. In Bethany's case, the question is whether Lucy's custody rights have been breached under the law of Alberta. Although Lucy never obtained a judgment granting her custody, she still may custody, since Article 3 of the Hague Convention makes it clear that custody can arise either by a legal decision, an agreement between the parties, or "by operation of law." If Lucy has custody either by implicit agreement of the parties and/or by operation of law, under Alberta law, then, Spencer's failure to allow Bethany to return is a breach of Lucy's custody rights.

In a Hague action when the left behind parent proves in his or her case in chief that the conditions of a wrongful taking or keeping of a child are satisfied, Article 12 of the Hague Convention mandates that the court order the child returned to the left behind parent. However, there are defenses that either Barbara or Spencer could raise. If a defense is successful, the Hague Convention leaves it to the court's discre-

tion whether to order the child returned to the left behind parent.

DEFENSES

The first group of defenses is found in Article 13 of the Hague Convention. They are:

1. The left behind parent acquiesced in the removal or retention of the child. Thus, Barbara might argue that John, the left behind parent, had agreed to Robert's removal. Likewise Spencer might argue that Lucy, the other left behind parent had agreed to let Bethany child stay with him not just for the summer, but permanently. In such a situation, the actual evidence presented to the court, such as return airline tickets and school registrations, will be important in determining the outcome.

2. A second Article 13 defense is that the child's return would expose the child to a grave risk of harm or an intolerable situation. Possible abuse of the child is often raised in this context. The place the child is to be returned to can also be raised under this defense. Is it dangerous? Should we hesitate to return children to Israel for example, because of the dangerous conditions there?

3. The third Article 13 defense is if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. Thus, if Bethany says that she would like to continue living with Spencer, and she is old enough to make such a decision, then a court need not order her return to Canada. This defense has not met with a great deal of success in the United States.

Article 12 of the Hague Convention also creates a potential defense. Under this Article, if the left behind parent waits more than one year to start an action, and the other parent demonstrates that the child is "settled" in his or her new environment, then a court need not order the child's return. When you know where a child is, starting an action within a year is not much of a problem. Often, however, the left behind parent may spend more than a year trying to locate the child. Where that is the case, it is less likely that the child will be returned, if the court determines that the child is settled in his or her new location.

The final defense created by the Hague Convention is in Article 20. It provides that a court may refuse to order a child's return if the child's return would violate the fundamental free-

doms or human rights of the country in which the court is located. It is really not clear what this means. It is difficult to see where it would apply to either case outlined above.

Canada and the U.K. are both democratic countries, whose citizens enjoy the same kind of liberties that we do in this country. However, as an example, it might be raised to attempt to block the return of a female child to a country which practices the rite of female circumcision or where children are routinely used a slave labor. There are undoubtedly other circumstances as well.

Article 11, of the Hague Convention sets a goal of completing a case brought under the treaty within six weeks. In the United States, even in federal courts this is often more of an inspirational goal than realistic one.

FURTHER CONSIDERATIONS

One problem with the Hague Convention for a left behind parent is cost. Attorney's fees, travel costs, expert witnesses where necessary and translators where necessary can when added together be substantial.

Article 26 of the Hague Convention permits a country to impose a "loser pays" rule on this type of litigation. In the United States when Congress implemented the Hague Treaty by passing, ICARA (International Child Abduction Remedies Act) it provided for the awarding of fees where the left behind parent is successful. Thus, the left behind parent may recoup his or her attorneys fees and other legal costs if they are successful in having the child returned to their home in the county from which they were abducted or to which they were not returned. The left behind parent may also be eligible for legal aid in their home country for purposes of generating the paper work necessary on the Central Authority level. The left behind parent is usually not going to be eligible for legal aid in this country. In fact, the legal services organization in the local area to which the child has been abducted will often show up on the side representing the abducting parent who qualifies for legal aid in the United States.

CONCLUSION

In summary, the Hague Convention and ICARA provide a mechanism in the United States where a kidnapped child may be returned to his or her left behind parent. It is hoped that this is done quickly so as to reduce the ill effects on the child of a parental kidnapping or parental wrong doing in failing to return the child home. The Hague Convention is a

very helpful tool and can accomplish the return of a child in the teeth of furious opposition. Remember the opposing party has usually already demonstrated a lack of good faith and respect for the law. The process may not work as smoothly as we would like. The kidnapping party has the defenses in the Hague Convention to use to attempt to frustrate the return of the child, while at the same time dramatically increase the left behind parent's legal costs and the amount of time before the child is returned. Despite these difficulties, where the left behind parent persists, the Hague Convention can be has been a success. True it is not perfect, but what creation of man is? The Hague Convention is a tool to get the job done. Certainly, in a situation like the ones described above, it is the best chance the left behind parents have for getting their child returned to them quickly.

FOOTNOTES

- [1] A list of countries that are party to the Hague Convention, may be found on the web at http://travel.state.gov/hague_list.html.
- [2] If the child was resident in a country that is not a signatory to the Hague Convention then the left behind parent would have to rely on the Uniform Child Custody Jurisdiction and Enforcement Act, (the "UCCJEA") which has been adopted in all 50 states and the District of Columbia. Proceedings under the UCCJEA will be considered in a separate article.
- [3] For example, in Canada, because child custody is considered a provincial responsibility, each province and territory has designated a Central Authority (normally the Provincial Ministry of Justice or the Provincial Attorney General). In addition, the Canadian federal government has designated the Department of Justice as a Central Authority to help the other Central Authorities. The federal Central Authority is particularly useful if a child is thought to have been abducted to Canada, but it is unknown to which province in Canada.

In our example the Central Authority would be the Child Abduction Unit of the Lord Chancellor's Department in England.

Except in very unusual circumstances one should always seek the aid to the Central Authority of the nation from which the child is taken or to which he or she has not been returned as well as to which the child has been taken or in which he or she has been retained.

The State Department has issued regulations under the Hague Convention and ICARA at 22 C.F.R. Part 94. The regulations set forth the role of the State Department as the designated U.S. Central Authority under the Hague Convention and provides that the Central Authority is "to secure the prompt location and return of children wrongfully removed to or retained in any Contracting State, to ensure that rights of custody and access under the laws of one Contracting State are effectively respected in the other contracting states . . ." 22 C.F.R. § 94.3.

See NCMEC Cooperative Agreement Adjustment Notice ("Cooperative Agreement"). A Cooperative Agreement is a particular type of legal instrument entered into by the United States Government with a State, local government or other recipient. 31 U.S.C. § 6305(1). A Cooperative Agreement does not necessitate the sort of day-to-day supervision or

direct physical control required to convert an independent contractor into an agent of the United States. *Cf. Sant v. United States*, 896 F. Supp. 639, 641 (W.D. La. 1995) (finding the FTCA independent contractor exception to apply to cooperative agreement between federal government and county). The pertinent State Department regulation authorizes such an Agreement to be entered with the NCMEC "to perform such additional functions as set out" in the Agreement, in addition to those enumerated in the regulation itself. 22 C.F.R. § 94.6(l).

Though the Rules of Civil Procedure in large measure apply to Hague cases courts have realized that the purpose of an action brought under the Convention is to return a child who has been wrongfully removed from his or her habitual residence promptly. Convention, preamble & art. 1. Thus, proceedings brought under the Convention are to be resolved in a summary and expeditious fashion. *See, e.g., Fawcett v. McRoberts*, 168 F. Supp. 2d 595, 596-97 (W.D.Va. 2001) (following emergency hearing on September 25, 2001 the court proceeded to evidentiary hearing one week later on October 2, 2001); *see also*, 51 Fed. Reg. 10494, 10508 (1986) (indicating that the petitioned court should act expeditiously in proceedings for the return of children and keep matters on the fast track).

It follows that discovery, especially extensive discovery in Hague Convention cases is at odds with the goal of expedited decision-making as required by the treaty. The courts have so found.

In *Zajaczkowski v. Zajaczkowska*, 932 F. Supp. 128 (D. Md. 1996), the court stated:

Unquestionably at the heart of the Convention is prompt action by courts. . . . This comports with the obvious desideratum that any dispute involving custody of a child be decided quickly so as to minimize the anxiety and unsettlement of the child and to avoid assimilation of the child into strange environs which could lead to subsequent difficulties in separation.

* * *

The rules of procedure applicable to ordinary civil cases would seem to be at odds with the Convention and ICARA's premium on expedited decision-making. Twenty days to answer a petition, utilization of various discovery devices, and extended trial time work are at cross-purposes to the objective of prompt disposition. *Id.* at 130 (citations omitted).

Similarly in *March v. Levine*, 249 F.3d 462, 474 (6th Cir. 2001), the appeal court cited with approval the lower court's observations that "[t]here is no requirement under the Hague Convention or under the ICARA that discovery be allowed or that an evidentiary hearing be conducted." *Id.*

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This article uses the term "left behind parent," rather than "custodial parent." Though usually the left behind parent is also the custodial parent, there are cases where the abduct-

ing or wrongfully retaining parent also has custody, i.e., a joint custody arrangement. This would in no way defeat the Hague claim of the left behind parent, if the Hague requirement were met.

See Silverman v. Silverman, 267 F.3d 788, 792 Silverman v. Silverman, 267 F.3d 788, 792 (8th Cir. 2001)

This part of Article 13, is controversial. Countries different in the standards to apply as to at what age a child is old to make such a decision. In the United States courts will often take into account the views of teenagers but not younger children. (See Escaf v. Rodriguez, 200 F. Supp. 2d 603, (Eastern District of Virginia, 2002)) On the other hand, in Germany courts have given deference to the views of children six and seven years old. Is a six or seven year old overly vulnerable to manipulation by his or her parent whom he or she may be living at the time?

On the other hand, in the United Kingdom they have set up a special court in which Hague cases are heard. They successfully complete their cases within six weeks goal.

Conversely, under Article 42 of the Hague Convention, countries are allowed to opt out of this fee shifting provision. Some countries, i.e., Canada have done so.

The converse does not seem to be true however. The statute does not appear to provide for fees where the parent in this country is successful in defending a Hague action.

Statistics from the United States, the United Kingdom and Australia show that the rate of return for children kidnapped to Hague Convention countries is significantly higher than for non-Hague Convention Countries.



Future Issues of "Obiter"—Call for Papers

By Alan Lowe, Editor-in-Chief "Obiter"

As Penelope has pointed out earlier in her Editorial moves are afoot to change the format of "Obiter" radically. Whilst the layout will probably not change significantly we will be using each issue to focus on a topical issue.

To this end we have agreed on the next two issues covering the following topics, and are thus looking for articles to publish on these subjects.

E-RECORDS (December 2004)

This will be a special issue dedicated to the challenges lawyers face in confronting the shift to electronic records – advising clients on document retention policies and practices, monitoring of email and other electronic communications, obligations to preserve electronic evidence, discovery of electronic evidence, computer forensics, reconstructing and proving online transaction records, the practical implementation of digital signatures laws, trends in e-government and electronic filing and access to court and government records, etc. This could be a comparative piece of work between several countries views and laws on E-records.

INTERNATIONAL TRENDS IN LEGAL ISSUES RELATING TO PROTECTION OF CHILDREN (March 2005)

As the title suggests this issue will cover all aspects of protection of children in various jurisdictions of the world.

If you feel that you would like to contribute an article for any

of the forthcoming issues of "Obiter" you are advised to send your article on to the Editorial Board at administrator@lawfile.org.uk so that your article may be submitted to our assessors for consideration and in order to allow us to respond to your article and advise on any changes which may be thought to be required of the article. Should you wish to discuss an article with me prior to submission then please either e-mail be at ajjlow@lawfile.org.uk or you may telephone me on +44 (0) 1942 678705. Whilst I can not always guarantee to be able to take your call I would like to ask you to leave a message including your name, telephone number, country of residence and an appropriate time when you may be contacted.

Some of the more astute readers of *Obiter* will have noticed that this issue does not contain the regular article "IN JUDGEMENT - Comment on Law & Culture" by Michael Sweig. We hope that by December we will be in a position to resume this column and look forward to working more closely with Michael for a long time to come.

Presently we are considering the possibility of having a regular Education section in "Obiter" which will contain information on Legal Education in its broadest sense. It is hoped that this section will be edited each issue by Jenny Geary our Education Specialist.

We look forward to a long association with you all.



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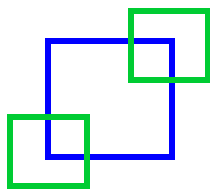
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Copyright v. Fair Use: How to strike the balance?

By Hasina Haque, Strathclyde University

ABSTRACT

Copyright law is facing great challenge due to the expand of new technologies. It is facing a challenge than ever before as to what constitutes an adequate balance between proprietary intellectual property rights and the public domain. Copyright law has been compared to a simple bargain in which the interest of the individual and that of the public coincide. The individual derives an economic benefit from holding exclusive rights over his or her expression, and the public benefits from its used of the ideas and information the copyrighted expression conveys. With the recent astonishing growth of digital networked technology this balance has seriously been called into question as copyright was failing to confer adequate protection to the copyrighted works. Copyright industries are investing hugely of the copyright based products. However, certain copyright industries, most notably prerecorded records and tapes, have experienced slower growth in legitimate foreign sales, and even decline, due, in part, to the proliferation of new technologies that facilitate the distribution of pirated music. From piano roll to rio portable player copyright law faced a transition period on how to safeguard the author's interest and fair use which is the main goal of copyright. New laws have come into force in order to combat the problem. However, it seems that new laws are failing to maintain a delicate balance between the author's right and fair use. They are strengthening the author's right rendering the fair users' to suffer. Some have suggesting that the answer to the machine is in the machine. However the problem with technology is that it is not the right tool to strike the balance between the authors right and public domain. The question remains how to strike the balance?

Introduction

Copyright law is facing great challenge due to the expand of new technologies. It is facing particular determining as to what constitutes an adequate balance between proprietary intellectual property rights and the public domain. The 1990's witnessed a revolution in copyright and related rights. The effects of this revolution is also manifested in the increasing sophistication of computer programs, multimedia and audiovisual works, databases, and new technologies as a whole. The increasing speed of social and technological

interaction in our era has effected our intellectual thinking and every day life. In this new context, the most evident concern for copyright law is that works do not need to be distributed as hard copies. The Internet functions in one sense, as a worldwide duplicating machine enabling anyone to make perfect copies at low cost and to distribute that all over the world. With the advent of new technologies copyright is facing the trouble to give an adequate protection to the copyrighted works. New laws have been implemented to answer the problems. But the new laws are not very convincing though. Some are suggesting that the answer to the machine is in the machine. The idea behind this is copyright would finally enter into a new era of management and enforcement, where technology could be envisioned to provide an answer to safeguard the intellectual property rights. However the problem with technology is that it is not the right tool to strike the balance between the authors right and public domain. The question remains how to strike the balance?

OBJECTIVE OF COPYRIGHT

The essence of coyright can be deduced from the name itself. The owner of copyright in a work possesses the right to copy and, by inference, the right to prevent others from copying. Copyright law is a creation of the print era. Before the time of Gutenberg and his printing press, there was no need for copyright laws because copying was prohibitively difficult and, without a practical means of mass production, there was no economic interest which might have encouraged legal protection. Furthermore, literature was held to be part of a comon fund of knowledge.

Copyright law has been compared to a simple bargain in which the interest of the individual and that of the public coincide. The individual derives an economic benefit from holding exclusive rights over his or her expression, and the public benefits from its used of the ideas and information the copyrighted expression conveys. Although one sole prupose of copyright law is to provide incentive for patent or copyright, only when doing so has conferred a benefit on the public as well as the individual. In fact, both legislative and judicial history clarify that the public is to be considered the

primary beneficiary of the social bargain. The Joint Conference Committee of the House and Senate has stated with respect to copyright protection. Although a copyright belongs to an author during its term, the ultimate purpose of this bargain is not to protect the authors but rather to enrich the public domain. In *Sayre v. Moore* Lord Mansfield stated:

“We must take care to guard against two extremes equally prejudicial; the one; that men of ability, who have employed their time for the service of the community, may not be deprived of improvements, not the progress of the arts be retarded.” Since the creation of copyright law it has maintained a balance between the owners right and right for the others which belongs to the public domain.

The evidence of which can be seen in *Napster* the most conspicuous internet cases so far. The ninth circuit tried to maintain a balance between the author's right and public domain. The court wanted to tame the new technology into copyright friendliness, rather than as an endeavor to suppress it altogether. The remedy tacitly acknowledges the concern expressed in many amicus briefs that copyright not to stifle the advance of technology. While not all these briefs asserted the lawfulness of *Napster's* particular operation of Peer to peer file sharing technology, all concurred that peer to peer file sharing technology offers a valuable means of communication who's dissemination should not be jeopardised by copyright enforcement. Thus, the Ninth Circuit cautioned, “We are compelled to make a clear distinction between the architecture of the *Napster* system and *Napster's* conduct in relation to the operational capacity of the system.

With the recent astonishing growth of digital networked technology this balance has seriously been challenged. Recently copyright law is compromising in a great deal regarding its fair use. Its fair use is shrinking and fading away with the revolutionary advances of technology. Hence the balance between the owners right and public domain is no more maintained.

FAIR USE

Today the notion of permitting some use of a copyright work which is considered to be 'fair' is common in many jurisdictions. For example, what in US is known as 'fair use' in UK it is known as 'fair dealing'. The source of 'fair dealing' was the first English copyright statute, the Statute of Anne. Parliament in 1709, when enacted the Statute of Anne,

*created a very sophisticated copyright allocating rights to the public as well as to the author and to the copyright holder. The statute states “An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the time therein mentioned.” When Congress undertook the revision of the 1909 Copyright Act in the 1950's it commissioned a series of studies on copyright. There were some thirty-five studies, but the only study that dealt with the Copyright Clause was Study No. 3. ‘The Meaning of “Writings” in the Copyright Clause of the Constitution.’ An analysis of the Copyright Clause reveals a surprising fact. One of the basic purposes of copyright is to protect and enlarge the public domain Congress is Constitutionally bound to protect the three policies in the Copyright Clause: (1) the promotion of learning, because that's what the clause says; (2) the protection of the public domain, because copyright is available only for original writings, only for a limited time; and (3) The right of public access. The core ideas: learning, authors, writings and limited time are the same in both the Constitution and the Statute of Anne. In the UK, ‘fair dealing’ is allowed in relation to a copyright work. It must be noted that this has nothing to do with a ‘dealing’ in a trade sense. It can be roughly equated to ‘use’. Thus, fair dealing covers research or private study, criticism, review and reporting current events. The fair dealing provisions allow the copying or other use of the work which would otherwise be an infringement, and in many circumstances the amount of the original work used is very relevant. Fair use, a judicially crafted exception to copyright infringement, was first enunciated as a doctrine that recognized that copyright infringement may, in some circumstances, be justifiable. In *Fulsom v. Marsh*, Justice Story stated that a court should consider whether use of copyrighted material is justifiable depending “upon the nature of the new work, the value and extent of the copies, and the degree in which the original authors may be injured thereby.” This language was codified in amendments to the Copyright Act of 1976, with Justice Story's suggestions expressed in four nonexclusive factors: “ (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for a value of the copyrighted work.” In applying the fair use factors, courts agree that on one factor is determinative; rather all of the factors must be weighed together and determinations made on a case by case basis.*

Short coming of the new laws (DMCA, EUCD)

While copyright was facing to give adequate protection to the rightholders new laws came into force. The problems with the new laws are they failed to maintain a delicate balance between author's right and copyright.

DMCA

Digital Millennium Copyright Act (DMCA) was implemented in U.S. in 1998. DMCA sought to bring copyright law into the digital age by providing , among other things, for civil and criminal penalties for the circumvention of copyright protection systems and granting a safe harbor against liability for internet service providers. The U.S. DMCA has a strong concern with regard to fair use the outcome is not very convincing though. DMCA has been strongly criticised in the context of encryption research. The anti circumvention provisions of the DMCA went into effect in October 2000 and since then a number of cases have taken place. The first case on the encryption research is *Universal v. Reimerdes*, involved a DMCA claim against the publication and distribution of DeCSS, a program that permitted individuals to decrypt DVDs. DeCSS was created by a Norwegian programmer that could strip the content scrambling system (CSS) from DVD disks. Mr. Johansen said he created the DeCSS software to let him watch DVDs he purchased on a Linux computer rather than an expensive DVD player. Mr Johansen maintained that he should have the right to watch films he had legally bought on a device of his choosing. The Norwegian Court backed Mr. Johansen and said there was "no evidence" that what he did was aiding DVD piracy. One of the argument raised by the defendants was that DeCSS represented legitimate encryption research. The court, applying the exemption, rejected this argument pointing in particular to the defendant's failure to provide the results of the research to the copyright owners or to seek permission from the copyright owners for their research. However, with no evidence the Mr Johansen was engaged in piracy or that he was aiding other to illegally copy discs the Norwegian Court had no choice but to acquit the programmer. The decision is a serious blow to US entertainment industry ambitions to extend control over what people can do with the movie, music and software they have bought.

If we take a look into the *Sega v. Accolade* (1992) in that case the Ninth Circuit found that a video-game maker could copy a competitor's computer code in order to develop compatible product. The unanimous panel's decision came as an explanation for its earlier order dissolving a preliminary injunction against Accolade inc. for trademark and copyright infringement in its development of games for the genesis

video-game system of Sega Enterprises.

After considering the aspects of the "purpose and character of the use" the court stated that the use at issue was an intermediate one only and thus any commercial "exploitation" was indirect or derivative. The court concluded that Accolade copied Sega's code for a legitimate non exploitive purpose, and that the commercial aspect of its use can be best described as of minimal significance.

The court further noted that "we are free to consider to public benefit resulting from a particular use notwithstanding the fact that the alleged infringer may gain commercially . Public benefit need not be direct or tangible, but may arise because the challenged use serves a public interest. In the case before us, the courts noted, Accolade's identification of the functional requirements for Genesis compatibility has led to an increase in the number of independently designed video game programs offered for use with the Genesis console. It is precisely this growth in creative expression, based on the dissemination of other creative works and the unprotected ideas contained in those works, that the Copyright Act was intended to promote. The fact that Genesis compatible video games are not scholarly works, but works offered for sale on the market, does not alter our judgment in this regard. We conclude that given the purpose and character of Accolade's use of Sega's video game programs, that presumption of unfairness has been overcome and the first statutory factor weighs in favour of Accolade. The court went on saying " in any event, an attempt to monopolize the market by making it impossible for other to compete runs counter to the statutory purpose of promoting creative expression and cannot constitute a strong equitable basis for resisting the invocation of the fair use doctrine. Thus the court concluded, the fourth statutory factor weighs in Accolade's, not Sega's favour, notwithstanding the minor economic loss Sega may suffer."

In UK under 50B and 296A of the existing Copyright, Design and Patents Act 1988, reverse engineering of copyrighted software programs is permitted in order to produce an interoperable product. However, with the advent of EUCD the fair use is under threat. Under EUCD it does not appear that either of these sections will apply to works to which technological measures have been applied (or in as much as they do apply, they do not trump the anti-circumvention provisions of the Proposals section 296, 296ZA, and 296ZC).

It is impossible to reverse engineer a technical protection

measure without circumventing it. The consequences of a broad restriction on reverse engineering in the contest of digital information markets are far-reaching. The rules in Article 6 of the Directive will allow the designer of a product to render it a crime or at least a tort for a company to develop a complementary product. Thus allowing abusive control over related markets.

Felten v. RIAA occurred recently in the context of DMCA exemption. Researchers who intended to expose the shortcomings of a security system to protect music on the net were being asked to tell no-one about their findings. The case involved the activities of a number of academic encryption researchers who cracked a watermarking technology called SDMI, which the recording industry was thinking about implementing in order to protect recorded music from being copied. The recording industry had issued a public challenge, inviting individuals to try to crack the technology. The plaintiffs in the case were a team of researchers from various institutions, including Princeton and Rice, who took up the challenge and eventually cracked the technology. When they attempted to publish an academic paper detailing their research, they received a threatening letter from the RIAA, which claimed that publication of the paper could result in liability under the DMCA. In response to the threat, the researchers initially withdrew their paper from an academic conference, and then later filed suit against the RIAA, seeking a declaration that their activities did not violate the DMCA. The RIAA eventually acceded to the publication of the paper, and the case was dismissed.

Another case which occurred in the context of DMCA circumvention was directed against Dmitri Sklyarov, a Russian programmer. Sklyarov had cracked the technological protection measure used by Adobe to control access to copyrighted content distributed in its eBook format. Sklyarov worked for a Russian company that distributed software over the internet that would circumvent the protection, permitting the copyrighted works to be freely accessed and copied. When Sklyarov travelled to the United States to present a paper on his research at a conference, he was arrested and charged with criminal violations of the DMCA. Eventually, Sklyarov reached an agreement with the government. The prosecution, however, continued against Sklyarov's company and, after trial, the jury acquitted based on a finding that the corporation did not satisfy the statutory intent requirement for criminal liability.

EUCD

On April 9, 2001, the Directive on the harmonisation of certain aspects of copyright and related rights in the information society (the Copyright Directive) was adopted.

The Directive however, raised concern among the users regarding the 'Technical Protection Measures'. Article 6 of the Directive aims to prevent any technology that is designed to try to make an unauthorised use of digital copyrighted works which is otherwise protected by law.

Much concern has been expressed about the fact that article 6 of the Directive has replaced copyright law with technology. Nothing in the wording of Article 6 of the EUCD could be construed considering the protection not to cover the exercise of exemptions. The problem with technology is that it is not the right tool for protecting copyright. Technology is not capable of distinguishing among the accomplished acts which are done for legitimate purposes covered by an exemption to copyright. The technology is unable to state whether the act of reproduction it inhibits is done for research purposes or criticism. The effect is that one can access protected digital works only through software and hardware approved by the creator of the digital format. It seems unlikely that circumvention devices will be primarily designed for copyright exemptions. Lawrence Lessig, a US law professor commented as "Code is Law". Software controls what can and can't be done in the digital world, and therefore software is a kind of law. Some commentators believe that by enacting article 6 the governments in EU have signed away much of the power that they possessed earlier in order to maintain fair use in the copyright law and they are driving that power away to the large companies that have the resources to develop these technologies and push them into the market place.

WHY THE PRESENT LAWS ARE GIVING OVER PROTECTION TO AUTHOR'S RIGHT?

In 1990, IIPA commissioned economists incorporated to issue seeking for the first time, to measure the economic impact and trade role of a collection of otherwise disparate industries whose principal connection with each other was their reliance on copyright protection. The study found that the copyright based industries comprise one of the fastest growing sectors of the economy, and make significant contributions to domestic job and revenue growth as well as to international trade. By copyright industries it is meant those industries which produce some copyrighted material or distribute copyright material or provide goods and services

that are consumed principally in combination with copyrighted material. Both in developed and developing countries, these countries have generally reported contributions to GDP in the 3-6% range of their total national economies. The U.S. Copyright-based industries include those represented in the IIPA, namely the producers of all types of computer software, including business software and entertainment software (such as videogame CD-ROMs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, DVDs and home video and digital representations of audiovisual works; music, records, CDs and audiocassettes; and textbooks, trade books, reference and professional publications and journals (in electronic and print media). They all have one crucial common element—they all depend on strong copyright laws and effective enforcement of those laws for their livelihood, indeed survival. In 1984, the U.S. trade associations representing these industries, now consisting of over 1,100 U.S. companies, came together in the International Intellectual Property Alliance (IIPA) to speak with one voice on the importance of strong copyright protection and enforcement to the growth of creative industries, not only in the U.S. but in virtually every country in the world.

The 2002 edition of Economists Incorporated's far-reaching report (covering data through 2001) shows once again how significantly the U.S. copyright industries contribute to U.S. job and revenue growth and to U.S. international trade. The facts about the "core" copyright industries speak for themselves:

- uIn 2001, the U.S. copyright industries accounted for 5.24% of U.S. Gross Domestic Product (GDP), or \$535.1 billion— an increase of over \$75 billion from 1999 and exceeding 5.0% of the economy and one-half trillion dollars for the first time;
- uOver the last 24 years (1977-2001), the U.S. copyright industries' share of the GDP grew more than twice as fast as the remainder of the U.S. economy (7.0% vs. 3.0%);
- uBetween 1977 and 2001, employment in the U.S. copyright industries more than doubled to 4.7 million workers, which is now 3.5% of total U.S. employment;
- uBetween 1977 and 2001, employment in the U.S. copyright industries average annual employment grew more than three times as fast as the remainder of the U.S. economy (5.0% vs. 1.5%)

In 2001, the U.S. copyright industries achieved estimated foreign sales and exports of \$88.97 billion, again leading all major industry sectors including chemicals and allied

products, motor vehicles; equipment and parts; aircraft parts; and the agricultural sector.

Copyright's failure to cope up with the new technologies

As has been mentioned earlier copyright failed to give adequate protection to the rightholders. With the emergence of file sharing technology copyright faced a problem with the P2P technology. Copyright Industries faced a major threat with the copyright based products and there is a major slowdown all over the world in the legitimate foreign sales of the CDs and DVDs. Here are some recent reports from BBC:

Hence copyright industries faced a major blow with the advent of new technologies and new laws were implemented to safeguard the copyright holder's interest. The new laws however does not seem to be able to maintain the balance of the interest of the author and the public.

Copyright law strives to maintain the balance

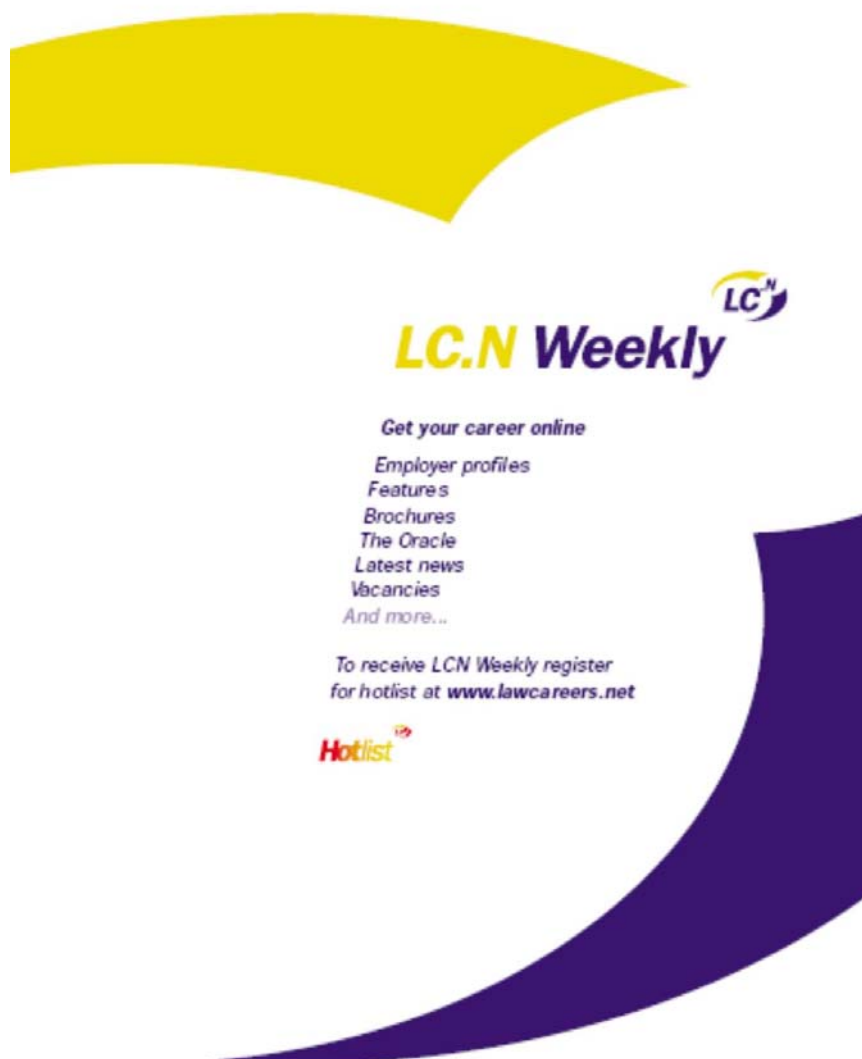
From piano roll to portable player copyright has experienced a significant transition period in deciding exactly how to handle this new technology. In 1959, Xerox Corporation brought for the first photocopier, commercially, the so called 914. It weighed 2,800 pounds. It cost \$7,400, which in '59 terms was a lot of money. But it did something that could not have been done before. It made it possible to take and reasonably cheaply copy that which previously had only been produceable by presses, the hard iron. The invention of photocopiers had added additional threat to the copyrighted industries. With the advent of Radio, TV, VCR, VTR, copyrighted industries experienced a transition period on how to cope up with the Technology. But copyright law managed to cope with them by maintaining an adequate balance between the author's right and public domain. From piano roll to portable MP3 players, copyright owner tried to regulate the new technology. In fact there are three categories here. As far as radio, vcr, vtr these new technologies are concerned copyright owner was paid of. In these cases copyright owners seek not to obliterate the technology but to be paid of the new means of exploitation. In the second case for example in portable MP3 players copyright owners tried to regulate but failed. Copyright law proved not to be sufficient enough to provide an adequate protection to the copyright owners. In the third category with the advent of P2P architecture the legal protection by copyright has seriously been called into question. This is the class of cases in which copyright owners have consistently fared ill. As John Gibault has commented the unprecedented scale of reproduction allowed by increasingly sophisticated

computer software that makes the one-dreaded photocopier as benign as a chisel and stone tablet.

Conclusion

Copyright is a tax on the readers. It is an incentive for the creators. Although a copyright belongs to an author during its term, the ultimate purpose of this bargain is not to protect the authors but rather to enrich the public domain. Copyright law has always been striving to maintain a balance between the author's right and public domain. Copyright industries are investing in a large scale for copyrighted product. With the advent of new technologies the industries are facing great challenges as copyright law is failing to provide adequate protection to the rightholders. New laws have been implemented to give an adequate protection to the

rightholder's interest adequately. The new laws however are providing too much protection to the rightholders rendering stifling the new technology. The new technologies might be bringing lots of challenges but they are bringing lots of opportunities as well for all concerned and a continued exploitation need to be allowed, but ofcourse with remuneration to the copyright owner. Too much protection given to the owner may give rise to many negative consequences. New technologies may cause economic dislocations however, the aim of copyright is not to stifle the advance of technology. The fear is if we try to stifle the technology and try to drive them underground the natural advantages of technology will cause the underground to rapidly overtake the rest of the society. Hence an adequate balance need to be ensured. But how to strike the right balance is yet to be seen.



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TRAINING COURSE
Health Records on Trial
 24th January 2005
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**Healthcare
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 Will your records
 stand
 up to scrutiny?**

The Training

A one day course designed by Andrew Andrews, a leading Health Services Lawyer with over 30 years experience and Director of Bond Solon's medico legal group teaching the essential skills for producing first class healthcare records - records that stand up to scrutiny in the witness box.

Overview

All healthcare professionals produce records in the course of their work. These records may be used as evidence in legal cases. If they do not stand up to scrutiny, the maker of the record and the employer can be in great difficulty. Records will be reviewed in courts, at inquests, tribunals and professional committees. All too often they fall short of required professional and evidential standards.

Course Objectives

The objective of the training is to illustrate the importance of records in legal proceedings, and how to keep them to the correct professional and evidential standards. With strong, accurate records claims can be challenged effectively. If a claim continues they will provide first class evidence in all legal fora and the training will provide guidance on dealing with fierce cross-examination and questioning. This training will have an impact on clinical and non-clinical issues and is designed with a view to minimising risk of exposure to claims.

The Training

Healthcare Records on Trial will help you to pro-

duce professional records which will enhance your credibility as a witness. The trainer will lead practical courtroom exercises to show you how important good records are in the witness box. The day includes lectures on good record keeping and accountability. There are led discussions on effective witness presentation, practical exercises on producing records and then realistic cross examination in the witness box on the records produced on the day. There is much practical information together with handouts to take away and use. The training day is designed as a one day course to be held in-house.

Key learning points:

- ✎ The importance of good record keeping
- ✎ How records stand up to cross examination
- ✎ How opposing lawyers look at your records
- ✎ Accountability
- ✎ Cross examination techniques
- ✎ How to be confident in the witness box
- ✎ How good records can save you going to court
- ✎ Preparing for court and going to court

Places on this course are very limited and so you are encouraged to book as early as possible by telephone, e-mail or facsimile.

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Telephone +44 (0) 1942 678705

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This course is usually only run as a per organisation course, however we are now able to offer the course to individuals from multiple organisations.

Course fees for the day are £175 per person. As this course is a new service of Lawfile there is no VAT for the first couple of courses we are running.

If you are interested in making a group booking or running the course for your own organisation then please contact us for special rates. All fees must be paid prior to commencement of the course.

**This Course in both CPD & CME Approved
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