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978-1-107-13237-5 — Copyright Law in an Age of Limitations and Exceptions
Edited by Ruth L. Okediji
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Introduction

Copyright law, particularly its Anglo-American variety, has never been about authors or users as ends in themselves. A law that encourages creativity by giving rights to creators is good for society if it is effectively reconciled with the public interest. Like all created objects, this law can fall short of its goals, and so it requires constant attention; yet, attention that produces no meaningful change is vain. Many of the efforts to improve copyright law certainly feel fruitless in retrospect. Discerning where along the spectrum from effective to irrelevant our present copyright system falls is no easy task, and the task grows harder when the criteria for judgment and the end goals have themselves become increasingly contentious. What seems clear to many observers is the level of worldwide dissatisfaction with the present state of copyright law.[1] Much of that dissatisfaction focuses on the role of limitations and exceptions (L&Es) in the perpetual search for balance among the goals of copyright law's various stakeholders, including the public. Some economic and business interests find themselves aligned with the public's desire for liberty of access, thus elevating the intensity of the debate about whether copyright works and, more importantly, about *how* copyright works as a driver of innovation.

This collection of chapters by leading copyright scholars reflects on various aspects of copyright law at a time when the subject of L&Es is arguably the most controversial in the field and is the focus of reform efforts nationally and internationally. Across jurisdictions, many of the economic, social, and cultural engagements characteristic of the digital era take place in the uncertain light of copyright L&Es. This reality has made it difficult to embrace the historically dominant narrative that holds out copyright's set of exclusive rights as the primary motivator of creative expression.

[1] *See e.g.*, Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. Copyright Soc'y U.S.A. 235 (2014) (addressing the "dismal state of copyright's public approval rating").

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Instead, L&Es have assumed a prominent role in copyright law as tools for defining zones in which use, experimentation, and innovation can occur.

In Chapter 1, Professor Samuelson sets the stage for a systematic approach to understanding the nature and purpose of copyright L&Es. In *Justifications for Copyright Limitations and Exceptions*, she identifies a set of policy justifications that underpin different kinds of L&Es in U.S. law and in other jurisdictions. Her chapter establishes a framework for rationalizing the vast realm of copyright L&Es in a global context. Professor Samuelson's approach offers important levers for adjusting copyright law's required balance of interests in a more disciplined fashion, and it provides a pathway toward reducing the extensive work that the fair use doctrine currently is forced to do in the United States. Importantly, her analysis suggests that the distinction between countries with designated L&Es and those with more flexible L&Es is less marked than traditionally understood,[2] a point that Professor Hugenholtz's chapter later confirms. Bridging the gap between differing national approaches to L&Es is thus not only feasible but, in my view, also desirable.

In Chapter 2, *The Role of the Author in Copyright*, Professor Jane Ginsburg challenges the notion that copyright law's conventional author, who needs and responds to incentives to create, has grown less distinctive and significant to the creative enterprise in today's digital environment. She argues that, even in an age in which a combination of pervasive interaction over digital networks and minimalist criteria for copyright protection has given everyone a claim to authorship, the traditional author is still alive and deserving of copyright's solicitude, perhaps more so than ever before. Instead of making this traditional author irrelevant, Professor Ginsburg suggests that copyright in an era of digital technologies serves precisely to direct forms of creativity into more stable enterprise models, while taking advantage of new remuneration criteria that could ensure that the author's full range of interests – economic and moral – remain viable in the digital era. She then outlines ways in which new business models and digital network platforms afford opportunities to remain true to the authorial role that is essential to copyright's future.

William (Bill) Patry, drawing from his impressive career as a copyright lawyer, policymaker, scholar, and now Senior Copyright Counsel at Google, has written an unapologetically personal assessment of the professional and legal environment in which copyright law operates. In Chapter 3, *A Few Observations about the State of*

[2] *See, e.g.*, Jerome H. Reichman & Ruth L. Okediji, *When Science and Copyright Collide: Empowering Digitally Integrated Research Methods on a Global Scale*, 96 Minn. L. Rev 1362, 1375–89 (2012) (analyzing the closed list model of the European approach to L&Es and the U.S. hybrid approach that combines specific L&Es with a flexible approach, such as the fair use doctrine).

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Copyright Law, Bill offers a piercing set of observations that challenge the utility of modern copyright law to accomplish any of its stated goals, be it the advancement of culture, the encouragement of creativity, or the safeguarding of the public interest. In reflecting on some of the major ailments of U.S. copyright law – its excessive breadth, long duration, statutory damages, and a complicated text that most citizens (including lawyers) strain to understand – today's copyright law, Bill argues, has inflicted damage on what should matter most, namely, creativity and learning. In his reflective and blunt critique, L&Es are not spared. He argues that they are no antidote to the challenge of a failed copyright law that is shaped increasingly by ideology and not facts. Bill's chapter emphasizes the need for a copyright law that actually advances the public good. Furthering the enterprise of learning should be the chief aim of copyright law, one that requires simplicity and flexibility for authors, users, and the public. He insists that the only legitimate question to which use of a copyrighted work should be subjected is "does th[at] use further learning?"

In Chapter 4, *Fetishizing Copies*, Professor Jessica Litman takes on one of copyright law's most sacred cows – the copy. Copy-fetish is "the idea that every appearance of any part of a work anywhere should be deemed a 'copy' of it, and that every single copy needs a license or excuse, whether or not anyone will ever see the copy, whether or not the copy has any independent economic significance, whether or not the so-called copy is incidental to some other use that is completely lawful." Professor Litman is unequivocal in her brilliant critique of the courts of appeals decisions that she identifies as giving rise to copy-fetish. She argues that any future copyright reform will require an explicit carve-out of readers', listeners', and viewers' rights because that is the only way to secure these liberties a place in today's political economy of copyright law.

In recent years, the concept of "users' rights" has become an important part of efforts to infuse normative content in various efforts to delineate the public's stake in the copyright system. The phrase encompasses the idea that freedom to engage in creative and learning practices, enabled by new technological platforms and fueled by the massive amount of online content, is central to the effective functioning of copyright law. Recognizing and identifying users' rights explicitly extends the boundaries of contemporary copyright policy by situating potential defendants as fundamentally important to the core purposes of copyright law.

In Chapter 5, *Copyright in a Digital Ecosystem: A User Rights Approach*, Professor Niva Elkin-Koren provides a formidable defense of users' rights. She argues that recognition of the role of users in promoting the purposes of copyright law could change our perspective about both the scope of copyright protection and what should be considered permissible uses. Professor Elkin-Koren argues for a users' rights approach that goes beyond a defense of users' right of access to cultural goods; her analysis forcefully reframes the object of copyright policy from authors'

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rights to the creative process itself, emphasizing the role of users as partners in promoting the objectives of copyright law.

Next, in Chapter 6, *The Canadian Copyright Story: How Canada Improbably Became the World Leader on Users' Rights in Copyright Law*, Professor Michael Geist gives an absorbing account of Canada's embrace of users' rights. Canada's experience reflects important aspects of the framework proposed by Professor Elkin-Koren. Canada is not the only country where copyright reform efforts have been intensely focused on users' rights and access to cultural goods, but it is one of the few to succeed in such an effort. Professor Geist attributes this success at least in part to the fact that copyright law is intertwined with the daily lives of most citizens. A growing awareness of how the exercise of exclusive rights could impact what had become routine activities for most citizens galvanized a movement that helped shift Canada's internal copyright calculus in recognition of the role of users in the digital economy.

In Chapter 7, *(When) Is Copyright Reform Possible?*, Professor James Boyle explores the distinctive reform effort that emerged in the United Kingdom via the Hargreaves Review of Intellectual Property. L&Es have formed an essential part of recent copyright reform efforts across the globe. Many of these reform efforts are sidelined, at impasse, or still embroiled in intense political debates, suggesting skewed outcomes consistent with the endemic dysfunction of copyright law-making with which scholars are all too familiar. Professor Boyles's chapter is an uncommon account of a successful reform effort explicitly driven by utilitarian considerations. It offers readers a compelling insider's view, demonstrating that there can be public-minded solutions that remain consistent with the economic considerations policy-makers often feel compelled to underscore. Professor Boyle identifies five factors he believes together account for the success of the United Kingdom. I will not spell out what those are here, but his analysis provides insight into the kind of copyright reform that works – both as a process that garners public trust and as a means for policy redirection embraced by people with widely diverging views. There is no suggestion in his chapter that this success story can happen for all countries or that it will ever happen again, even in the United Kingdom, in quite this way. But *something* made it attainable, and that something is an important aspect of how countries might imagine future reform processes and, in particular, the institutions and personalities that drive them.

The fair use doctrine, one can safely say, is a leading concern of copyright holders in the United States. Not only are its outer limits uncertain, but the discretion afforded courts has sometimes resulted in unjustified largesse to users at the expense of owners. This "most troublesome doctrine"[3] has long distinguished U.S. law in

[3] Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939).

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international copyright relations, even slowing down U.S. ratification of the Berne Convention. But despite its constitutional status, and the United States' aggressive stance on copyright harmonization, no administration has sought to promote fair use as an international copyright norm. Nonetheless, the fair use doctrine has become the centerpiece of copyright's ideological wars on a world stage.

In Chapter 8, *Fair Use and Its Politics – at Home and Abroad*, Professor Justin Hughes takes on the controversial question of whether the fair use doctrine is consistent with the three-step test that has become the "gold standard" for L&Es in international copyright law. I have previously argued that the two approaches are incompatible; his chapter has made me think differently. Professor Hughes proposes a new analytical prism: he argues that the fair use doctrine is best understood as a mechanism for establishing specific copyright exceptions. Once fair use has been properly applied, it is *those* permitted uses that should be analyzed for consistency with the three-step test and not the fair use standard as such.

This is a compelling approach to a long-standing debate in international copyright relations, a debate that is most certainly grounded in the troubling politics of fair use in the United States. Professor Hughes identifies two challenges to his proposal: the inherent ambiguity of fair use and the question of whether judges should be the ones exercising such extensive law-making power. I would add the following related considerations: (1) fair use in the United States has become increasingly pressured both by technological changes and, at times, a far-reaching "transformative use" jurisprudence that has produced some troubling outcomes, and (2) fair use is quintessentially tailored to local conditions, but we live in an increasingly culturally ambiguous world.

These elements can make fair use seem (or function) more like "guidance" and less like a "standard," something likely to trouble those who view harmonization as a key goal of the international copyright system. To be clear, the uses or cases that are "special" for three-step test purposes will (and should) vary across jurisdictions. As Professor Hughes notes, nothing in international copyright law forecloses such variation in outcomes. But to the extent debates about fair use mostly embody competing ideological views of what copyright law should accomplish in today's society, internationalizing fair use is a road that, as Professor Hughes cautions, should be tread cautiously. This is prudent counsel, not only because fair use mutations will inevitably emerge and produce incoherence at a time when clarity is much needed for cross-border economic activity, but also because uncritical exportation of the fair use doctrine can impose costly institutional design problems for countries not yet equipped to manage the open-ended nature of the fair use inquiry.

Professor Bernt Hugenholtz addresses the opposite problem in Chapter 9: Can the continental authors' right system be made as flexible as its Anglo-American law counterpart? In *Flexible Copyright: Can the EU Author's Right Accommodate Fair*

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Use?, Professor Hugenholtz describes an "unequivocal" recognition of the need for flexibility in the EU's copyright regulatory environment. One reason for flexibility is to equip courts for rapidly changing technological developments; another is to preserve the legitimacy and relevance of authors' right systems by aligning the law more realistically with new and growing societal expectations. In continental Europe and elsewhere, strict adherence to the exclusive rights that copyright law offers on paper is simply unworkable in today's networked environment where heavy reliance on copyrightable content is an essential part of daily life. Professor Hugenholtz's chapter, however, presents more than a pragmatic response to the technological pressures all jurisdictions face. He provides an astute assessment of the state of authors' right systems, describing a degree of flexibility inherent in these systems that was lost over time, in part due to the dictates of European harmonization. Professor Hugenholtz suggests that the political and cultural interests favoring greater flexibility in the EU authors' right system are reinforced by technological change, by proposals for revision of the 2001 Copyright Information Society Directive, and by the jurisprudence on fundamental freedoms emerging from the European Court of Justice, which gives EU states greater autonomy when copyright collides with these freedoms.

Professor Jerome Reichman questions the very effectiveness of L&Es to address new forms of creative collaboration and expression. He focuses on the scientific community where open-access movements and private, contractually designed semi-commons initiatives are proliferating in response to the needs of digital science. In Chapter 10, *The Limits of "Limitations and Exceptions" in Copyright Law*, Professor Reichman argues that both the "bean counter" methodology typically employed by countries adhering to the "designated exceptions" approach in the European Union and the more agile fair use exception rooted in U.S. law are equally overwhelmed by the needs of science. His chapter addresses three questions: (1) Can we really make a copyright law inherited from the Romantic view of authorship, and built around business models rooted in hardcopy print media, more friendly to the needs of both authors and users in the digital age? (2) If we managed to devise such a digitally friendly legal regime, is there even a remote chance of persuading legislatures to adopt it? and (3) If the answer to either of these questions is negative, what else can authors and users do to circumvent the existing legal barriers to construct regimes that foster innovation? Professor Reichman envisages only a limited role for copyright L&Es; he argues instead for open-access or semi-open access options, devised by scientists themselves and utilizing legal tools, such as standardized licenses or default liability rules, that facilitate access to knowledge goods. These default options also reduce transaction costs that currently stifle effective operation of even the most well-intentioned set of L&Es.

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In Chapter 11, Professor William Fisher describes a unique model of online education that harnesses the power of new technologies to a deep conviction that persons all over the world should have access to high-quality knowledge about copyright law and policy. It is called CopyrightX. Now in its fourth year, CopyrightX is a distinctive community of "learners" – teachers and students – engaged in the study of copyright law. With roughly 500 students spread across 93 countries, the course safeguards classic pedagogic principles in the challenging context of immense online participation. As *Lessons from CopyrightX* makes clear, the course is exacting. It infuses the traditional U.S.-focused copyright syllabus with a rigorous comparative dimension, case studies to provide practical applications of doctrines learned, and live lectures from authors and other actors (including policymakers) in the copyright system. Additional important dimensions of this incomparable model of online education are highlighted by Professor Fisher in *Lessons from CopyrightX*, including key insights about financial and organizational dimensions.

Professor Reichman's concerns about the limits of L&Es are well illustrated by CopyrightX. Consider the permissions thicket that might have crippled this effort if every recorded lecture, case study, or audio-visual teaching aid used in the course required permission from the copyright owner. Even partially digital knowledge communities, such as CopyrightX, require more than L&Es to function effectively; achieving the high objectives of the course is possible only by reliance on a combination of licenses, well-defined L&Es equally applicable to real-time and online environments, and a fair use doctrine that accommodates flexibility and innovation in teaching. A clear takeaway of *Lessons from CopyrightX* is the importance of flexibility in the design of L&Es. This is especially true in a technologically vibrant environment with innumerable opportunities to construct communities of learning that can, more than any legislative outcome, fundamentally change the conditions in which copyright norms are implemented.

In *Lessons from CopyrightX*, one sees the potential for real copyright reform – reform that rises from the "bottom up" by *teaching* copyright law to as many as possible, thus developing a cadre of people equipped to think critically in their respective contexts about what sensible copyright laws should look like. This possibility of education-driven reform, pioneered by Professor Fisher, is without doubt, in my mind, one of the most important and valuable contributions to overcoming the recurring malaise characterstic of contemporary copyright relations, both national and global.

Professor Sam Ricketson, the world's leading authority on the Berne Convention, focuses on the challenge of obtaining protection for so-called neighboring rights, such as rights for producers of phonograms, performers, and broadcasters. In Chapter 12, *Rights on the Border: The Berne Convention and*

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Neighbouring Rights, Professor Ricketson traces the evolution of the relationship between author's rights and neighboring rights, through the recommendations of the Samedan Committee. Both the Committee, convened by the Rome International Institute for the Unification of Private Law (UNIDROIT), and its work have remained largely ignored in the literature. As Professor Ricketson painstakingly shows, this work was influential in the development of the Rome Convention in 1961, and elements of that work continue to influence current negotiations at the World Intellectual Property Organization (WIPO), such as those for a Broadcasting Treaty.[4] A more critical observation is how copyright's key requirements of authorship and intellectual creativity served to police the scope of copyright protection in international copyright relations. Contrary to popular wisdom that depicts an inexorable ratcheting up of exclusive rights in the international system, the generous definition of "literary and artistic works" in the 1886 Act of the Berne Convention gradually became narrowly tailored to the list of works specified in the Convention. Limiting the scope of copyright to works produced by "authors" thus once served as the most significant limit to copyright protection.

Many important points emerge from Professor Ricketson's in-depth historical analysis, but I wish to highlight one that bears upon dominant themes in this volume: modern copyright law's broad definition of protected works facilitates end runs around the prudent limits originally imposed by the Berne Convention. Professor Ricketson notes, for example, that photographs did not make the cut for protected works in the period 1884–1886, nor did works of architecture, choreographic works, cinematographic works, sound recordings, and others. Of these early claimants for protection, some failed because the technologies that produced them had not yet come into existence (e.g., the phonograph), while others failed as a result of serious concern about whether the work was the result of intellectual skill by an author (e.g., photographs). In both cases, however, protection when it arrived did not apply unconditionally, given concerns about fidelity to the qualifying criteria. The gradual but conditional acceptance of photographs as copyrightable works in the Berne Convention, for example, reflects not only the rigor with which the fundamental copyright standards were applied and upheld, but also the importance of those standards in disciplining the scope of copyright and the pace of its expansion. Return to a similar discipline in the application of copyright standards would greatly help to curb the aggrandizement of contemporary copyright laws.

[4] *See Protection of Broadcasting Organizations – Background Brief*, World Intellectual Prop. Org., www.wipo.int/pressroom/en/briefs/broadcasting.html (last visited June 14, 2016).

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Today, there exists an inexorable pull to overcome copyright's external limits by creating sui generis forms of protection, such as for databases, or enacting new forms of protection with similar (if unstated) rationales for industries that are part of the production chain for cultural goods. I agree strongly with Professor Ricketson that the wisdom and carefully thought-out approach to neighboring rights reflected in the recommendations of the Samedan Committee remain vitally important in the digital economy – both to inform how we might construe the fluid notions of "author" and corresponding concept of "works," and also more fundamentally in reconsidering how copyright's expansion unduly impacts the interests of those engaged in other creative industries.

In Chapter 13, *How* Oracle *Erred: The Use/Explanation Distinction and the Future of Computer Copyright*, Professor Wendy Gordon provides an important and new analysis of the copyright struggles between cyber-titans Oracle and Google. Drawing on statutory language, legislative history, caselaw, and policy, Professor Gordon expertly demonstrates that copyright gives no rights to control how others can use software (or other products) for purposes of interoperability. She shows that the primary assertions of control advanced by Oracle fall outside the "scope of right" that any copyright owner could properly hold. Her "scope of right" argument is a novel application of traditional copyright categories. It expands the ability of courts to terminate quickly cases where litigants attempt to employ copyright law to control behavior that belongs to the patent realm. Admittedly, as Professor Gordon notes, the judiciary already has one tool to resolve such cases quickly in the software arena, namely, to find a product "uncopyrightable." But denying copyrightability is a blunt instrument that some judges fear might endanger Congress's decision that at least some computer programs are copyrightable. By contrast, Professor Gordon argues, "scope of right" is a precise and surgical tool, limited in application to particular kinds of behavior, and one that does not eliminate all possibility of copyright protection for the plaintiff's product.

The Oracle case ended with a jury deciding that Google had engaged in "fair use" (a verdict that arrived months after Professor Gordon's article was completed). However, that belated victory for interoperability was highly fact- specific and might not be followed when interoperability questions arise in other circumstances. Therefore, the verdict neither eliminates nor undermines Professor Gordon's key points. "Scope of right" provides judges a valuable lens for evaluating the propriety of claims along the patent/copyright border. To allow copyright to impede interoperability distorts the overall scheme of federal intellectual property protections. Further, fairly clear rules and fairly swift dispositions could follow if, as Professor Gordon recommends, plaintiffs were explicitly required to prove, as part of their *prima facie* case, that a defendant's alleged behavior fell within the "scope" of behavior that copyright law governs.

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Finally, in Chapter 14, *Reframing International Copyright Limitations and Exceptions as Development Policy*, I take on the longstanding but uncritical defense of copyright law as a sine qua non of economic development. In particular, I highlight the tension between the liberty-promoting goals of copyright law's well-established L&Es and the economic aspirations of developing and least-developed countries which, I argue, require different types of L&Es. Demands by these countries for new international instruments establishing mandatory L&Es for libraries, archives, and educational institutions at the World Intellectual Property Organization are examples of "development-facilitating" or "development-inducing" L&Es that have long been fiercely resisted in international copyright relations. Limitations and exceptions can promote the flourishing of creative individuals, facilitate cross-border access to diverse cultural goods, and advance the role of cultural institutions in ensuring access to knowledge. But this will not happen in the same way for all countries. Development-facilitating L&Es must be supported by institutional and cultural endowments that effectuate copyright's core commitment to human development. Drawing on insights from development and growth economics, I argue that all countries should have the policy space to enact L&Es in order to pursue a variety of both global and local goals. Developing countries may need even more space than others for this purpose because they lack the domestic institutions that can effectively maneuver within the ostensible rigidity of the international copyright system.

Technology has historically shaped the nature and scope of rights to which copyright holders feel entitled. As advancements in technologies that enable reproduction and distribution have become more pervasive and personal, copyright law as a regime directed at controlling creative content – how, when, and why it is used – is no longer unquestionably consistent with the public interest and is even less so with development. Technological change, while creating new opportunities to monetize content, also creates new conceptions of the social good and may require greater emphasis on copyright L&Es more than at any other time in modern history. New technologies have transformed how users and intermediaries imagine the future; these new user-creators intentionally rely on the opacity of L&Es to foster experimentation and creative processes. Rights granted by copyright law are necessary to consolidate some of the emerging business models; but creativity will not thrive without copyright L&Es. Neither will dynamic entrepreneurship or development policy.

The collective wisdom of the authors in this volume reveals at least three important themes. First, there is a call for copyright law to return to its foundations – promoting creativity and learning—and to do so with a statute that is practical, sensible, and accessible to the citizens whose interests it should represent. Second, there is an effort to identify workable ways to reconcile new forms of creativity, and new interests

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