

COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS

Copyright Law in an Age of Limitations and Exceptions brings together leading copyright scholars and the field's foremost authorities to consider the role of copyright law in shaping the complex social, economic, and political interactions that are crucial for cultural productivity and human flourishing. The book addresses defining issues facing copyright law today, including justifications for copyright law's limitations and exceptions (L&Es), the role of authors in copyright, users' rights, fair use politics and reform, the three-step test in European copyright law, the idea/expression principle with respect to functional works, limits on the use of L&Es in scientific innovation, and L&Es as a tool for economic development in international copyright law. The book also presents case studies on the historical development of the concept of "neighboring rights" and on Harvard Law School's pioneering model of global copyright education, made possible by the exercise of L&Es across national borders.

Ruth L. Okediji is the William L. Prosser Professor of Law and McKnight Presidential Professor at the University of Minnesota Law School. A leading scholar in international intellectual property law, she has authored several books, United Nations studies, and numerous articles. She serves as a policy advisor to many governments and intergovernmental organizations on issues relating to intellectual property, innovation, and economic development. She was a member of the U.S. National Academies Board on Science, Technology and Economic Policy Committee on the Impact of Copyright Policy on Innovation in the Digital Era.

Cambridge University Press

978-1-107-13237-5 — Copyright Law in an Age of Limitations and Exceptions

Edited by Ruth L. Okediji

Frontmatter

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University of Minnesota Law School



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CAMBRIDGE UNIVERSITY PRESS

One Liberty Plaza, 20th Fl, New York, NY 10006, USA

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www.cambridge.org

Information on this title: www.cambridge.org/9781107132375

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First published 2017.

A catalogue record for this publication is available from the British Library.

ISBN 978-1-107-13237-5 Hardback

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Dedication

*To each of the authors in this volume—
your work continues to teach, challenge, provoke, and
inspire generations;
and to אֱלֹהֵי עֶלְיוֹן (El Elyon), God Almighty,
Who has blessed me with these.*

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Preface

This book did not begin as a volume about copyright limitations and exceptions. Having spent countless hours in research, writing, and policy work, and especially having served as one of the lead technical experts for the Africa Group during the long, winding road to the World Intellectual Property Organization's Marrakesh Treaty,¹ I most definitely did *not* want to contribute additional hours of my life to the study of copyright limitations and exceptions. My experience during the Marrakesh Treaty negotiations did, however, heighten my sensitivity to the trenchant tone of the global debate over the role of copyright law in promoting the public interest, more so in a pervasively digital world. The differences between those who believe that copyright law has run its course (or lost its way) and those who expect that copyright can live up to its goals (if we could only agree on what those are and how to achieve them) are most striking in the debate over copyright limitations and exceptions.

From the start, my principal interest was to consider whether copyright law could emerge intact given these intractable debates about what constitutes social welfare in our hyper-digital networked world. Do we need to strike a fundamentally different kind of social bargain? If so, what kind of values should undergird a well-informed copyright system—one that reflects how copyright can work more effectively for creators, users, and innovation? Importantly, my international policy work with developing and least-developed countries had left me dissatisfied with the conventional theories that have long nourished copyright's role in the production of cultural goods.

In a number of jurisdictions, copyright reform efforts had been stymied by competing claims, usually with little or inconclusive empirical support, about the appropriate design of copyright for the digital, globally networked economy. At the same

¹ The treaty is formally titled "Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities." It was signed in Marrakesh, Morocco, on June 28, 2013.

time, widespread skepticism about copyright's relevance seemed at an all-time high; and this in an era characterized by an abundance of creativity and new business models for the distribution and consumption of content. Copyright's international public disfavor reinforced a prevalent view of copyright law as the last guard of an old, if glorious, age in which traditional content industries bartered with legislatures for new rules designed primarily to advance their own narrow interests. But, no matter the challenge or issue regarding copyright in the digital age, the policy discussions seemed frustratingly to devolve into justifications for more rights or battles over appropriate limitations and exceptions.

I chose not to embark on the traditional private intellectual journey of a scholar, but to bring together those who have spent most of their academic lives pondering copyright's past, present, and future. This book thus reflects the collective and distinctive wisdom of some of copyright law's greatest intellectual leaders. Their life's work and chief passion have been the development of a copyright law that delivers on its explicit social covenant to facilitate the production of, and access to, knowledge, and in so doing to improve the odds for sustainable social, economic, cultural, and political progress. I asked each author to write about what is important to him or her. I said "write from your heart," believing that whatever topic each author chose would speak to the conditions needed for copyright law to flourish, help us understand aspects of copyright's history better, and demonstrate new ideas for how copyright law could be improved. I believed that each author's topic choice would serve as a "GPS" of sorts for her or his strongly felt instincts, ideas, and arguments about what is important to copyright law today, and how to prepare for the future of copyright in a difficult and continuously evolving technological landscape.

In November 2014, many of the contributing authors convened in St. Helena, California, for a two-day workshop to discuss the first drafts of the chapters. This peer review process fostered debate, helped refine key arguments, encouraged reflection, and enhanced the level of engagement between authors and across topics. The book strongly reflects the benefits of those two days in St. Helena; the chapters collectively bring fresh perspective, new insight, and greater clarity to the unnecessary complexity of copyright law. Copyright law is fraught with tension, bloated in many respects and under great political pressure. Yet, as each author's contribution illustrates, it remains a subject important enough to demand fidelity to what makes copyright law important – the stewardship of human ingenuity for reward and progress.

I owe a large debt of gratitude to Bria Goldman who was my assistant at the University of Minnesota Law School until close to the finish of the book. Bria stewarded the manuscript through several versions, and oversaw all the logistics for the workshop with great skill and remarkable efficiency; that she did so in Minnesota's subzero temperatures while we enjoyed the sunny Napa countryside

truly reflects her remarkable grace. Special thanks also are due to Professor Pam Samuelson who graciously offered her home to host several workshop participants and the workshop itself. Those who have experienced Professor Samuelson's generosity as a mentor, teacher, or friend, will not be surprised to learn that her hospitality extends well beyond reading and offering honest criticism of draft articles. She is famous for keeping conference "trains" on time (and on track!). I could not have asked for a more ideal venue to gather for serious conversation, rigorous feedback, delightful commentary throughout the day, and easy banter at night – all enhanced by a constant supply of good food.

Every successful book project requires a small army, and this one was no different. A number of anonymous academic reviewers started the process by giving Cambridge University Press (CUP) very positive reviews of my book proposal – you know who you are and I send you each my thanks. My discussions with Professor Peter Jaszi, Professor David Lange, and David Nimmer helped to clarify important aspects regarding the scope and content of the book; to each of them I owe thanks for their participation at different stages along the way. My editor, Matt Galloway, is without question one of the very best there is. Together with the team at CUP, he provided steady leadership, candid advice, and truly exceptional support throughout the process. Abundant thanks go to Ariane Moss, my research assistant at Harvard Law School. Ariane's meticulous proofreading, cite checking, and editing, were done with great enthusiasm and excellence. She supplied exactly what I needed to cross the finish line, earning her a place in the RA Hall of Fame. Finally, Tucker Chambers, a graduate of the University of Minnesota Law School, on the heels of completing a judicial clerkship, proofread the entire manuscript and added his usual touch of excellence.

There are no words to adequately thank my husband and best friend, Tade O. Okediji. He offered consistent encouragement and prayed for me through this project; he is my good and perfect gift from God (James 1:17).

Above all, my praise and thanksgiving go to the God of my Lord and Savior Jesus Christ; it is He who arms me with strength and makes my way perfect (Psalms 18:32).

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December 2016