

Session IV: Fair Use and Other Exceptions*

David Carson

Thank you Jane, and thanks for inviting me here. I am looking forward to our discussion. As Jane mentioned, I'm going to give an overview on where we are right now with respect to international copyright treaties and how they deal with exceptions and limitations, and maybe a little bit about how we got there, and I'll leave it to others to say where we ought to be going.

We start with the Berne Convention, which is the first international copyright treaty.¹ And if you look at why Berne came about, it was mainly because authors back in the mid-to-late nineteenth century were concerned that they weren't getting protection for their works in countries other than their home countries. French authors—and of course French authors were very much at the forefront of the Berne movement—were concerned that their works were being pirated in Belgium and in Holland.² And that sort of led to this movement to have an international treaty whereby if you were an author from country A, your rights would be recognized in country B to the same degree that authors in country B would have their rights. And that gets us to the basic proposition—not just a premise of international copyright law, but international IP law in general—the notion of national treatment.³ And of course Berne goes beyond that: the first Berne Convention talked about certain degrees of rights, and over years there have been revisions of Berne. There have been expansion of rights, and expansion of subject matter protected, largely as a result of technology, which has allowed new ways of expression and new ways of exploiting expression.⁴ And that's been the focus for most of the history of international copyright agreements.

This morning, June mentioned that international infringement really damages our economy. That is one reason, I think, why as we started working on TRIPS and FTAs, copyright and other intellectual property started being brought into that area, in terms of international agreements, because of the economic impact. For the United States, it was sort of a no-brainer: we're by a large degree a net exporter of

* These remarks are a transcript of a talk that was given on October 14, 2016, at the Kernochan Center Annual Symposium at Columbia Law School.

1. WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 3 (1978), <https://perma.cc/75RD-K9SE> (“The Berne Convention . . . is the oldest of the international copyright treaties.”).

2. Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 9, 12-21 (1988).

3. WORLD INTELLECTUAL PROPERTY ORGANIZATION, *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, <https://perma.cc/6P6P-865N>.

4. *Id.*

copyrighted works, so again, the focus was on protection.⁵ And let's face it, as Steve Tepp (the last speaker on the last panel) said, international piracy is still a major problem.⁶ So again, there has always been a focus on trying to make sure, from the U.S. perspective, that the rights of U.S. authors and copyright owners are respected abroad, and more broadly that rights of authors everywhere are respected. That's been the focus.

So what have we said about exceptions and limitations? Well, even the first Berne Convention had something about exceptions and limitations.⁷ It had the precursors to the provisions that are in the existing Berne Convention that relate to issues such as quotation and news of the day, and so on. But I'm not going to pretend that the Berne Convention has an extensive list of exceptions that countries may or should have. It's rather sparse with respect to its treatment of exceptions and limitations. But perhaps in part that's because of Article 9. Now, Article 9 is labeled, "The Right of Reproduction," but probably the most interesting part and the most quoted part of Article 9 is Article 9(2), which sets forth the three-step test, which we all know.⁸ And it basically says, it's a matter for legislation—which is Berne's way of saying, you may if you so choose—for the countries of the union to permit reproduction of works in certain special cases, provided such reproduction does not conflict with a normal exploitation of the work, and does not unreasonably prejudice the legitimate interests of the author.⁹ That leaves quite a bit of leeway for any party to the Berne Convention in terms of fashioning exceptions and limitations, so long as they don't cross over those three lines in the three-step test. And I guess the question is whether giving countries that much latitude in terms of fashioning exceptions and limitations is a good thing, or whether we need to be more prescriptive.

But this is what Berne started in 1967, when the three-step test first came into the Convention.¹⁰ And perhaps one reason why that's been the way we've dealt with exceptions can be found on the WIPO website.

The first paragraph of the explanation pretty much says what you'd expect it to say: in order to maintain an appropriate balance between the interests of right holders

5. BEA, "U.S. International Services: Trade in Services in 2015 and Services Supplied Through Affiliates in 2014," Table J (December, 2016), https://www.bea.gov/scb/pdf/2016/12%20December/1216_international_services.pdf. Cf. STEPHEN E. SIWEK, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY 1 (2014), <https://perma.cc/7HYM-PT3V> ("[T]he copyright industries make up an increasingly large percentage of value added to GDP; create more and better-paying jobs; grow faster than the rest of the U.S. economy; and contribute substantially to U.S. foreign sales and exports, outpacing many industry sectors. The contribution of the core copyright industries to the U.S. economy now well surpasses one trillion dollars in a single year.").

6. Steve Tepp, *Session III: Issues Concerning Enforcement and Dispute Resolution*, COLUM. J.L. & ARTS 379 (2017).

7. WORLD INTELLECTUAL PROPERTY ORGANIZATION, *supra* note 3.

8. Berne Convention for the Protection of Literary and Artistic Works, art. 9(2), Sept. 9, 1886, as revised July 24, 1971 and as amended Sept. 28, 1979, 102 Stat. 2853, 1161 U.N.T.S. 3 (entered into force in the United States Mar. 1, 1989).

9. *Id.*

10. See *The Three-Step Test*, ELECTRONIC FRONTIER FOUNDATION, <https://perma.cc/W7X6-BEFZ> ("The three-step test was first enacted in the 1967 revision of the Berne Convention.").

and users, copyright laws allow certain limits on economic rights, where protected works may be used without authorization of the right holder and with or without payment of compensation.¹¹ Sort of a classic description of what an exception is. But the second paragraph gives you perhaps a philosophical basis for understanding why we are where we are, whether you agree with it or not, which is: limitations and exceptions to copyright and related rights vary from country to country, and that's due to particular social, economic, and historical conditions.¹² International treaties acknowledge this diversity by providing general conditions for the application of exceptions and limitations, leaving it to national legislators to decide if a particular exception or limitation is to be applied, and if that is the case, [to] determine its exact scope.¹³

So that's where we have been historically with respect to exceptions and limitations, for the most part. That's been the model for exceptions in international copyright agreements and in FTAs.¹⁴ TRIPS has a provision very similar to Article 9(2), but TRIPS broadens it out so it's not just talking about the reproduction right but about any of the exclusive rights.¹⁵ We follow that model also in the WIPO Copyright Treaty.

The WIPO Copyright Treaty also has language that makes clear that, as we get into the digital age, we want to ensure that the provisions permitting exceptions and limitations also focus on extending those into the digital environment, which is a very important thing.¹⁶ That's obviously where the focus of exceptions and limitations has been for the last decade or two. That's what most people are talking about now—and quite rightly so. So members of that agreement and other agreements are encouraged to devise exceptions and limitations that are appropriate in that digital environment.

The WPPT also includes the three-step test¹⁷ and has an agreed statement, which, again, elaborates on that need for exceptions and limitations appropriate in the digital

11. *Limitations and Exceptions*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <https://perma.cc/S86V-B5J5>.

12. *Id.*

13. *Id.*

14. See RUTH OKEDIJI, *THE INTERNATIONAL COPYRIGHT SYSTEM: LIMITATIONS, EXCEPTIONS, AND PUBLIC INTEREST CONSIDERATIONS FOR DEVELOPING COUNTRIES* 23-24 (2006), <https://perma.cc/QK7Y-2AET>.

15. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round vol. 31, 33 I.L.M. 1197 (1994), <https://perma.cc/9KSL-Q7LJ>.

16. World Intellectual Property Organization Copyright Treaty, art. 14(1), adopted by Diplomatic Conference at Geneva, Dec. 20, 1996, 36 I.L.M. 65 (1997), <https://perma.cc/8PX7-574A>.

17. World Intellectual Property Organization Performances and Phonograms Treaty, Art 16(2), Apr. 12, 1997, S. TREATY DOC. NO. 105-17 (1997), <https://perma.cc/WYZ3-N54Y>.

environment.¹⁸ Again, the three-step test and a similar agreed statement¹⁹ can be found in the Beijing Treaty.²⁰

Beijing. So, fast forward a couple decades almost and we get to the Beijing Treaty and, again, it includes a three-step test²¹ and a similar agreed statement.²² That's been the standard, at least through the Beijing Treaty. And then we get to Marrakesh.²³ And [the] Marrakesh Treaty represents a change of course, and whether it is a change in direction for the long term or whether it's a one-off is something that people have debated about. It's something people debated about as we were heading up to Marrakesh, and some people said, "We're just doing this because we need to deal with the needs of the blind and the visually impaired," and other people said, "No, this is the first in a series of treaties on exceptions and limitations," and perhaps some of the people who said one thing before the treaty may be saying another thing after the treaty. But who knows?

I think it remains to be seen whether Marrakesh is a precursor for more activity in this area or whether it was indeed an attempt, hopefully a successful one, to deal with a particular problem, where there was consensus on the international level that something needed to be done to [prevent] what has been called the "book famine" (which has prevented people who are blind and visually impaired from being able to "read books" where there is a way to do so). And the model of course was in many respects the model that we had adopted here in 1996–97 in the Chaffee Amendment.²⁴ That was something that people were able to agree upon. And we had an agreement.

Now, interestingly enough, while the Marrakesh Treaty has a couple of articles that address what you may or may not do, the way it's fashioned—and I'm not going to go into the details—offers examples of how you can do it, examples modeled on the U.S., but they're only examples. And they give countries a fair amount of latitude, in fact, into how they carry out these goals.²⁵ The Marrakesh Treaty also talks about exportation and importation, which are perhaps one of the major reasons why we have the treaty.²⁶ Certainly in the United States we didn't need a treaty to have an exception for the blind, but we—at least arguably—need a treaty to permit

18. World Intellectual Property Organization Performances and Phonograms Treaty, *Agreed Statement Concerning Article 16*, Apr. 12, 1997, S. TREATY DOC. NO. 105-17 (1997), <https://perma.cc/WYZ3-N54Y>.

19. Beijing Treaty on Audiovisual Performances, *Agreed Statement Concerning Article 13*, June 24, 2012, WIPO Doc. AVP/DC/20, <https://perma.cc/QN8J-DL6B>.

20. *Id.*

21. Beijing Treaty on Audiovisual Performances, art. 13(2), June 24, 2012, WIPO Doc. AVP/DC/20, <https://perma.cc/QN8J-DL6B>.

22. Beijing Treaty on Audiovisual Performances, *Agreed Statement Concerning Article 13*, June 24, 2012, WIPO Doc. AVP/DC/20, <https://perma.cc/QN8J-DL6B>.

23. Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, VIP/DC/8 REV. [hereinafter "Marrakesh Treaty"], <https://perma.cc/D6KF-9WHG>.

24. 17 U.S.C. § 121 (2016).

25. Marrakesh Treaty, at art. 4.

26. *Id.* at arts. 5–6.

exportation, which, as one of the leading countries making authorized copies for the blind, is very important.

That leads us to the latest chapter, and we've heard some references to it earlier today: the Trans-Pacific Partnership. And in TPP we came up with a new provision, which is really quite different and represents a change in approach, I think it's fair to say. And to our credit it's a change in approach that the United States took the lead on. It actually encourages, and even makes it an obligation for parties to the agreement, to—in the words of the provision:

Endeavor to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exceptions that are consistent with [the three-step test], . . . including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to, criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired, or otherwise print disabled.²⁷

And I think it's worth focusing on certain aspects of the language for a moment, just taking it apart. The key object here is to attain an "appropriate balance," and I don't think anyone can disagree with that, although plenty of us I'm sure will disagree with each other as to what is an "appropriate balance." But how you obtain that appropriate balance is not only by means of exceptions and limitations; that's the first thing to take into account. An appropriate balance really means you look at your entire system of law. So you make sure that the rights that you are giving to right holders are appropriate in scope, that the remedies are appropriate as well. There are ways of obtaining a balance and it's not just . . . you shouldn't assume on the see-saw one side is a given and the other side just has to be at a certain level to bring it so that it is level. You've got to balance them both, and you can take a few things off one side and put them on the other side, perhaps. In other words, it's a more complicated matter. It's not just a matter of piling on exceptions so you have a balance. But of course exceptions are a very important way of doing that. So among other things we do it by means of limitations or exceptions. It still requires compliance with the three-step test and, again, focus on the digital environment, which is where we're focusing. But then we look at what the legitimate purposes are, it's interesting to see that those purposes are the purposes that are set forth in § 107 of the Copyright Act.²⁸ They are the precise purposes our courts look at when they're looking at fair use, apart from the last one, which was added on to take into account the Marrakesh Treaty.

What does this do? Well, what it does, really, is to give members of the TPP a big prod in the back to say you need to make sure that you have appropriate exceptions and limitations. We're not going to tell you precisely how to do it. You don't have to adopt fair use . . . there are some people here who I'm sure would like us to be pushing fair use as what should be the international standard for exceptions and limitations. Well, fair use is one way to do that. It's the way the United States

27. Trans-Pacific Partnership, § H, art. 18.66, 2016, <https://perma.cc/NA68-FRGE>.

28. 17 U.S.C. § 107 (2012).

does it largely. But you can do it just as well through specific exceptions and limitations, the way you might typically see in a civil law system where, rather than giving courts broad discretion to determine what is or is not permitted as an exception to an exclusive right, the legislators will prescribe, “You may do this, you may do that,” under certain circumstances with respect to certain kinds of works for certain kinds of purposes. Again, the treaty is agnostic with respect to whether you have to do it in one way or another. The point is to make sure that you have a balanced system, that you have appropriate exceptions, and limitations that permit people to do that which they ought to be able to do.

I think that’s a good step forward. I’m not going to predict where we go from here. The first step, obviously, is to see whether TPP goes through. We certainly hope it does. The next step, if it does go through, is implementation. But that brings us to where we are now. And as I said, I think what we’ve done in TPP is a major step forward, an appropriate step forward, and perhaps it is a model for the future.