Comments on Paper of Professor Peter Jaszi
"Public Interest Exceptions in Copyright: a Comparative and International Perspective"

Correcting Course: Rebalancing Copyright for Libraries in the National and International Arenas

Columbia University, New York
May 5-7, 2005

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In this paper, Professor Jaszi fine tunes the reasoning for taking a broad view of public interest exceptions to embrace the range of possibilities in national copyright laws worldwide. His suggestion for a hybrid approach is intriguing, and it offers a constructive way to rebalance public and private interests in this age of increasingly aggressive privatization of information resources and profit-based strategies for control of information. I would like to comment by offering a few thoughts on specific points raised in this paper. I should first clearly state that I am not a lawyer. I am a librarian with a strong interest and a research agenda in copyright for Slavic and East European countries, and I share with all of you an intense interest in ensuring that the free exchange of information remains a feature of our civilization. My comments are based on my knowledge of the part of the world that I study, and are meant to support several of Professor Jaszi's main points, which could not be articulated any more beautifully or expertly.

The first point and the main theme of this paper—that the U.S. is perhaps not superior in its formulation of public interest exceptions in the international context. It's very nice that this idea has been stated in this way. The wide array of limitations and exceptions existing in national laws is something to marvel at, considering that, of the seventeen limitations and exceptions identified as originating in Berne Convention in the 2003 *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*,[1] only two are actually mandatory. The remaining limitations and exceptions are optional for nations to introduce as they wish, and they *have* been widely adopted internationally, *even* in East European countries and *even* before eight East European countries joined the European Union last year. Still other limitations and exceptions do not originate in Berne at all, but appear as common practice across the laws of many nations, Berne member nations being free to develop exceptions as they see fit, as long as they fulfill the conditions of Article 9(2), the so-called three-step test.

It is also very important to realize, as Professor Jaszi points out, that even the so-called specific, or categorical, exceptions, can function in a very open way. To add to the examples that Professor Jaszi discusses, Estonia's law[2] contains quite an open provision for libraries and archives. Article 20.2(3) states: "Libraries, archives, and museums have the right to reproduce works or parts thereof which belong to their funds or collections upon request from natural persons for private use." This provision references the private use provision, stating that a lawfully published work may be reproduced for private use without the authorization of its author and without payment. Some types of works are excluded, as is the norm with provisions of this type: works of architecture, visual art, electronic databases, and computer programs. The use must not be

commercial, and in the language of the three-step test, the use must not conflict with a normal exploitation of the work or prejudice the legitimate interests of the author.

As another example, Poland's provision for lawful use of protected works by libraries, archives, and schools includes, in Article 28(2), permission to make single copies of published works or cause them to be made, in order to complete, protect, and preserve their collections, activities that are more restricted by conditions in the U.S. Poland also allows, in Article 33(3), for free reproduction of published three-dimensional works and photographs when the purpose is for inclusion in encyclopedias and atlases, and when "approaches made to the author to secure his consent encounter obstacles that are difficult to overcome."[3] In this case the author is entitled to remuneration. This sounds like an "orphan works" situation to me, to deal with photographs and illustrations whose copyright holders cannot be identified or located, an extremely common situation these days worldwide.

As a general statement, the nations of the former Soviet Union comprising the Commonwealth of Independent States (CIS) have adopted generous limitations and exceptions to the rights of copyright holders. All of these nations have adopted nearly all of the optional free-use provisions of Berne in addition to the mandatory ones. Some did this even before joining Berne, Uzbekistan being a notable example, as it just joined Berne this year. There is a range of some twenty-four free-use exceptions found across the laws of those twelve nations, which were formulated to some extent with reference to each other. The point here is to emphasize that nations have indeed found very different and productive ways of serving the public interest needs of culture and education.

A second point in this paper that deserves emphasis is that, while fair use in particular is often viewed as a cornerstone of free use of information, it is only one of many approaches. And in the broader picture, U.S. exceptions are relatively few, and they are relatively narrow and complex, often convoluted and technical, sometimes leading to problems in real-life application, such as with Section 110, revised by the TEACH Act.

It has been said that fair use bears an indistinct relationship to the other exceptions in U.S. law, in part because it is so unlike them. U.S. limitations and exceptions, including fair use, in turn bear an indistinct relationship to those of most other nations, because they are so unlike them. And they also bear an unclear relationship to the limitations and exceptions in the Berne Convention,

no doubt in part because most were formulated before the U.S. bore a relationship to Berne, and also because Berne is an instrument based on the continental perspective.

The lack of connection between U.S. copyright law and other nations' laws in the area of public interest exceptions is something that emerges from Professor Jaszi's paper, and is something to keep in mind during our discussions at this conference. This becomes noticeable in comparing with fair use something like the very common "personal or private use" exception in civil law countries, that Professor Jaszi discusses at the beginning of his paper. It has amazed me that the U.S. lacks a personal use exception. Section 107 doesn't list "personal use" among the purposes favored by the fair use analysis. We understand that it can be factored in, thanks to the efforts of legal specialists, some of whom are in this room today. Personal use is drawn out in interpretations of fair use, in development of fair use guidelines and checklists. But in a country that places such a high value on the individual, personal use of intellectual property, if anything, has a negative value in the fair use assessment. It is frequently equated with entertainment, and set against transformative or productive use. So it's good to study a book or write a book, but it's bad just to want to read or enjoy one.

By contrast, all CIS nations have a private use exception and most European nations do as well. Usually this means that one copy may be made, but some nations allow for more, such as Slovenia which, in Article 50, allows for three copies.[4] And so, despite the fact that, as Professor Jaszi indicates, fair use has been seen as a flagship exception, or as he puts it, regarded as an "international gold standard" in copyright, there is really no international standard for public interest exceptions. As he suggests, it would be helpful for us to become more familiar with the typology of public interest exceptions on a broader scale. Attempts to categorize limitations and exceptions have led in the past to different schemes—perhaps there is work to be done in this area.

The third point in Professor Jaszi's paper that is worth reinforcing is that the lack of attention until recently in the U.S. to public interest limitations and exceptions, coupled with increasingly *well*-developed anti-circumvention restrictions, have tipped the balance unfavorably, but that change is possible.

There does appear to be some movement on this abroad, and happily it involves a library. By way of another example, in January 2005 the German National Library announced that it had

negotiated a license with rightholders to circumvent legally copyright protection mechanisms on CD-Roms, videos, software, and e-books, by adopting a voluntary agreement, as allowed by the 2001 European Union Directive, to ensure that rightholders make available to the beneficiary of an exception or limitation the means of benefiting from that exception or limitation. The German Federation of the Phonographic Industry and the German Booksellers and Publishers Association have apparently agreed to permit the library to circumvent technology for archiving purposes and to break digital locks on books and music for scientific purposes of users, for educational purposes, for instruction and research, as well as on books that are out of print. True, these reproductions are subject to a fee and possibly a digital watermark, but this is a development worth noting.[5]

I will stop here by saying that I wholeheartedly agree with Professor Jaszi that nations of the world have much to learn from each other. It seems to me that we will do well to consider the underlying philosophy that has shaped copyright law in various nations. Changes to copyright law in this country have often been driven by technological change. Other nations seem more comfortable formulating public interest exceptions that respond to immediate and tangible cultural needs, within the longstanding Humanist traditions and Enlightenment principles that still define those nations' sensibilities. Perhaps it is time to realize that if copyright continues to "trip" on the heels of science and technology, it will fall, and perhaps we can right the balance by regrounding ourselves within a framework that embraces humanistic ideals, from which our international counterparts have not stepped so far.

NOTES

1. World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Ninth Session, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, prepared by Mr. Sam Ricketson, Professor of Law, University of Melbourne and Barrister, Victoria, Australia, SCCR/9/7 (Geneva, 2003). http://www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_9_7.pdf (accessed May 4, 2005).

2. Copyright Act of November 11, 1992, as amended through November 18, 2002, available in English translation at http://portal.unesco.org/culture/en/file_download.php/2a1979bd2157860912fdac016dd053a6copyright_law+.pdf (accessed May 4, 2005).

3. Law of February 4, 1994 on Copyright and Related Rights, as amended through February 5, 2005, http://www.kopipol.kielce.pl/ (accessed May 4, 2005).

4. Copyright and Related Rights Act of March 30, 1995, as amended through April 9, 2004, available in English translation at http://www.uil-sipo.si/GLAVAGB.htm (accessed May 4, 2005).

5. A press release dated January 18, 2005, and the full text of the agreement are available at: http://www.sub.uni-goettingen.de/frankfurtgroup/drms/drms.html (accessed May 4, 2005).