

Session IV: Fair Use and Other Exceptions*

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Eric Schwartz isn't here so I can pick on him; he made the mistake of making a comment then leaving.

So you know he talked about how the United States was joining Berne and so forth, and completed this two-hundred-year journey towards adopting French law as if that was a good thing—and I'm not sure it is—but that was the premise of his conception.¹ And I think certainly I agree with the basic concept of national treatment, but maybe that's where we should have stopped.

And there was a lot, I mean there was a lot of wisdom, I think, in the founders and in the addition of the initial Copyright Act, the first Copyright Act adopted in 1790, a fourteen-year copyright term, renewable for another fourteen years,² and I think that's plenty. I think formalities are a great idea; I mean the notion that the selfies that we take every day, that they get life plus seventy is at some level absurd.

But putting that aside, so you know you do have this issue. So we've decided, we bought into international treaties—Berne—fine. You then have the next issue: okay, we're not only part of these international treaties adopted by the Berne Convention of the World Intellectual Property Organization³ and so forth but we are also now a part of this, the WTO and TRIPS,⁴ and that's ultimately . . . the real subject of today's conference is not international agreements but international trade agreements, and IP and international trade agreements, and that's again been this underlying theme and that's a very different thing. Because you obviously have the United States and other large countries [who] have much more leverage in a trade negotiation because you have other countries who want market access and so in exchange for market access they need to make a lot of concessions, and so you could say, you could really question whether that's a good idea.

* 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. Eric Schwartz, *Session II: The Impact of Int'l Copyright Treaties*, 40 COLUM. J.L. & ARTS 339 (2017).

2. Copyright Act of 1790 §1, 1 Stat. 124 (1790).

3. See Berne Convention for the Protection of Literary and Artistic Works, 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).

4. See Agreement on Trade-Related Aspects of Intellectual Property Rights, 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>; see also OFFICE OF THE U.S. TRADE REPRESENTATIVE, *Council for Trade-Related Aspects of Intellectual Property Rights*, <https://perma.cc/DXQ2-NTJK>.

But the point is we've already, kind of that ship has sailed. We have TRIPS, we have the FTAs, and now we have TPP, although of course there is a question of whether we ultimately join TPP.⁵ But having, given that we are, given that we do have IP in trade agreements, we have to make the best of it. And I think frankly, in this, TPP does have a lot of good things from my perspective and as James suggested (someone who believes that exceptions and limitations are a good idea), and so I'm pleased to see that they have worked their way in TPP in a way that goes far beyond where it's been in other agreements, as we heard from David and Probir and others.⁶

And let me just underscore why this is important. So I represent library associations, I represent technology associations; so you can see why certainly my clients are interested in a balanced framework with limitations and so forth. But the truth is that creators rely on exceptions and limitations just as much if not more than libraries and technology associations. So, for example, we heard before about Bob Dylan getting the Nobel Prize for literature.⁷ Bob Dylan is famous for appropriating lyrics and melodies from other sources, right. I mean that's his whole thing, particularly American folk songs but from all kinds of other sources. He said, "you make everything yours, we all do it," meaning all songwriters do it.⁸ But "you make everything yours," meaning you take everything from the culture and you use it as the basis of new creativity. So, exceptions and limitations, whether it's making sure that you have a public domain, making sure that you have fair use, making sure that you have other exceptions, making sure that you have the idea-expression dichotomy, all of these balances and so forth. Without that you have no creativity. Okay, so that is, that is the threshold point, that it's not just, "oh, this is good for libraries or civil society, or for tech associations"; this is the essence of what creativity is. And it's always funny to be at conferences and to hear, you know, people representing large media companies talking about creativity and all, and you sort of say, "you guys don't know the first thing about the artistic process"—the artistic process is based on appropriation, building on what went before it. I mean none of these things spring forth, I mean no idea, no music, and no lyrics sprung out of Bob Dylan's head—you know Athena springing out the head of Zeus—I mean everything is based on what went before. And so unless you are able to use what went before in some way, you have no new creativity.

So you know, that's why there are these favorable provisions in TPP that I think start to recognize that. And I think previously, both in U.S. legislation and in previous trade agreements, we've sort of forgotten how art comes about and the

5. See Trans-Pacific Partnership, 2016, <https://perma.cc/NA68-FRGE> [hereinafter "TPP"]. President Trump signed an executive order withdrawing from the TPP.

6. David Carson, *Session IV: Fair Use and Other Exceptions*, 40 COLUM. J.L. & ARTS 389 (2017); Probir Mehta, *Session I: Keynote Panel, Describing the Legal Landscape*, 40 COLUM. J.L. & ARTS 311 (2017).

7. *The Nobel Prize in Literature 2016*, NOBELPRIZE.ORG, <https://perma.cc/XG8U-VJP8>.

8. Mikal Gilmore, *Bob Dylan Unleashed*, ROLLING STONE, Sept. 27, 2012, <https://perma.cc/GU4A-CBHR>.

artistic process and how everything you need to, be able to access what went beforehand.

So some of the positive features in the IP chapter,⁹ you know the safe harbors, we've heard about. We haven't heard about flexibility for parallel imports, I mean that's good, it could be better. I mean I think it would be better if we have a general international exhaustion rule. I think that would be a better approach, but at least TPP allows for the flexibility in parallel imports that's different from the initial U.S. proposed draft and different from some of the free trade agreements. Proportionality in remedies is a good thing that is included in TPP. Actually, that language was in ACTA so we can thank ACTA for that.¹⁰

And then, finally, balanced copyright. So we've heard from David and others, you know 18.65 provides the initial three-step test, and then we just heard from David about this language in 18.66, that I think is very important language.¹¹ Obviously it could have been stronger: we heard about earlier in the day, you could say what does it mean to "shall endeavor," shouldn't it have been better to say "shall achieve."

On the other hand, I think there's no question that the, some of the understanding articulated by the U.S. government and other governments is that it is a mandatory provision and that it's an ongoing obligation, that it's not just, you know, you have a one-time balance and you're done, but that the idea of "endeavoring" is that this is something that has to be done on an ongoing basis.

Just one other point that I'd like to point out about this article is the footnote. So, the first footnote references the Marrakesh Treaty,¹² but the second footnote talks about how use that has commercial aspects may be, in appropriate circumstances, a legitimate purpose.¹³ So that is I think also a critical feature that a lot of times, in many countries, people sort of interpreted exceptions and the three-step test and special case and so forth to be limited to noncommercial purposes. But certainly in the United States, we've recognized that you can have commercial purposes, and fair use can be for a commercial purpose, and that other exceptions are fine for commercial purposes. And so I think that that is also a very important feature of that text.

A final point with respect to TPP about lessons learned, because as I indicated at the outset, one could have a degree of skepticism about international agreements generally and international trade agreements generally, and IP and trade, but from the perspective of someone who represents civil society or represents people who have different stakeholders from the normal rights holder's perspective, I think there are three important points.

One is that trade agreements can be used to access, can be used to encourage access to knowledge. As we've seen in this agreement, I think good things—from

9. See TPP, at art. 18.

10. See Anti-Counterfeiting Trade Agreement, art. 6, Oct. 1, 2011, 50 I.L.M. 239, <https://perma.cc/W975-WCTF>.

11. See TPP, at art. 18.6.

12. *Id.* at art. 18-36 n.78.

13. *Id.* at art. 18-36 n.79.

my perspective—can come out of these trade agreements. But the key element is you need to have patience and a long-term commitment. You need, it is not one of these things where you can just show up once, make your point and then go home. It doesn't work that way. It's very much consistent with Woody Allen's statement that eighty percent of success is showing up.¹⁴ It could be in TPP, ninety-five percent of success is showing up. And in the TPP's context, showing up required a lot of time and effort, and also budget because the meetings took place—it wasn't like they just took place in Washington—they took place in Washington, but they also took place in Malaysia, and then Singapore, and Australia, and you need to go on a consistent basis to establish relationships, credibility with negotiators, and to be part of the process.

So, one can do it but it takes, again, a lot of patience, a lot of commitment, and ultimately, a client to have a budget for you to go. So I'll stop there to make sure that we have time in the Q&A to talk about fair use and the appropriateness of fair use being adopted into the countries. But I'll just give you a clue: I think it's a good idea.

14. Steve "Frosty" Weintraub, *Woody Allen Interview – Vicky Cristina Barcelona*, COLLIDER (Aug. 15, 2008), <https://perma.cc/2XQG-ANHG>.