

New Copyright Exceptions

The nonprofit organization Benetech operates many programs turning technology to social benefit. The biggest part of this work is Bookshare, an adaptive-format digital library for people with blindness and other print disabilities. CEO Jim Fruchterman spent more than a year fighting for international adoption of the Marrakesh Treaty to facilitate cross-border sharing between such libraries. He is keenly aware of how copyright law can limit the possibilities for addressing book hunger through innovative nonprofit efforts. “Many things are possible, but not permitted to exist,” Fruchterman explains. “We could push a different button and make Bookshare the free library for poor people in any country.” As the law currently stands,

however, doing so would create too much legal risk for Benetech.

Some U.S. publishers would see such a move as fair use. Others would view it as copyright infringement. Since any publisher whose books appear in the library would have standing to sue, chances are good that one or more would. Even assuming a judge would ultimately find in the charity's favor, there might still be negative consequences. The mere accusation of illegal activity could hurt the charity's fundraising and relationships with publishers. The organization would have to hire lawyers, and reimbursement of legal fees is not guaranteed, even if they ultimately won in court. Litigation would also be a time-consuming distraction from the central mission. Since fair use is an inherently uncertain defense, there is also the risk of losing the case.

For Benetech, this risk is dramatically increased by the way that damages would be calculated. Under U.S. copyright law, a publisher may insist on statutory damages ranging from \$750 to \$30,000, even without proving financial harm. A large charity like Benetech might decide it could afford to take this risk if the worst-case scenario was a \$30,000 fine. Unfortunately, that is not the relevant limit. Courts have repeatedly interpreted the statute to multiply this range by the number of copyrighted works.

Since the Bookshare library contains more than 600,000 books, the low end of this range would be \$750 multiplied by 600,000. That means the *lowest* possible award would be \$450 million. A jury could take the award as high as \$30,000 times 600,000, or \$18 *billion*. The absurdity of this result highlights the need to reform U.S. statutory damages rules. This type of multiplication was never intended by lawmakers, and flies in the face of long-standing doctrines of legal fairness, but it may take an act of Congress or a Supreme Court decision to reverse such a well-settled practice.

Even with bankruptcy on the line, however, Benetech can be confident in its ability to legally serve print-disabled readers. The Chafee Amendment of 1996 clearly establishes that “it is not an infringement of copyright” for a nonprofit organization serving disabled readers to copy and distribute books “in specialized formats exclusively for use by blind or other persons with disabilities.” This provides Benetech and other organizations like it with much greater certainty than relying on fair use. Publishers similarly know exactly where they stand, allowing them to avoid the expense of researching every author’s contract to see if they are permitted to share files with Benetech. The possibility of expensive litigation is avoided on all sides.

The Chafee Amendment is a highly successful example of a specific copyright exception passed to help address book hunger. Without it, Benetech might never have come into existence. Because of this legal safe harbor, a new model of delivering books to a book hungry population was made possible. We should build on this past success by enacting additional copyright exceptions to address book hunger beyond the blind and print-disabled population.

What Are Copyright Exceptions?

Publishers themselves wrote the first copyright exception into international copyright treaties. Realizing how impractical it could be to seek permission from fellow publishers when quoting brief excerpts of their work, they included a requirement in the Berne Convention for the Protection of Literary Works in 1886 that all countries enact a “quotation” exception. To date, quotation and disability accommodation are the only exceptions required by international law, but many more are permitted.

Specific copyright exceptions are sometimes enacted in response to public pressure. In 1996, journalist Elisabeth Bumiller reported that the American Society of Composers and Publishers had sent letters to thousands of summer camps, asking them to pay licensing fees of \$250

and up for performance rights to its songs. Exaggerated reports soon followed that ASCAP was threatening to sue the Girl Scouts for singing around the campfire. Congress amended the law to prevent any such result. The Girl Scouts can now sing for free, thanks to a specific copyright exception for musical performances by “scouting and fraternal groups,” 17 U.S. Code section 110(10).

Specific exceptions are a common and time-honored method of tailoring copyright law to preserve incentives for creativity while permitting harmless or socially beneficial uses. For example, section 109 of the U.S. copyright statute permits the resale of used copies, and section 110(3) permits unlicensed performances in religious services. French copyright law has an exception specifically permitting artistic expression through *pastiche*, an artistic work that mimics the style of another artist, period, or work of art; whereas parody uses imitation to poke fun or mock, pastiche celebrates the art or artist that it imitates. Brazil has an exception authorizing photographs and paintings of statues located in public places. Germany guarantees “freedom of panorama” with a specific exception authorizing photography of architectural works. Copyright exceptions to assist schools, universities, libraries, museums, and other cultural institutions are also common in many countries.

Copyright exceptions can be structured either as a “free pass” or as a paid license. American law tends to follow the first approach. Most uses falling within our exceptions—including resale of second-hand books, library lending, conversion to accessible formats, archiving, and brief quotation—do not require any payment. Music is an important exception to this general rule. Here, the U.S. Copyright Act empowers an administrative body to set standard compensation rates. Musicians may record any song, so long as they pay a predetermined rate. DJs similarly obtain permission to play music at weddings and other live events through the compulsory licensing exception. (Music streaming, as well as soundtracks for film and television, fall outside of this framework and must be specially negotiated.)

Some other countries make greater use of paid approaches. Germany’s copyright act has long obliged libraries, even those serving blind readers, to pay 11.50 euros per book on their shelves, in addition to the price of purchase. Another rule common in Europe requires painters to be paid a fair share when their artwork is resold. Paid exceptions like these can enhance creators’ income while avoiding the need for costly negotiations. In charitable settings, however, paying royalties inevitably takes funds away from the organization’s social mission. Recognizing

this, U.S. copyright law specifically exempts nonprofit musical and theater performances from the need to license the plays they perform, without any payment obligation. Paid exceptions also come with administrative costs. Special bodies must be staffed, economic studies commissioned, and negotiations conducted among interest groups. In weaker democracies, collection agencies have been prone to corruption, diverting the funds intended to benefit creators. With any paid exception, moreover, the user must apply for permission, pay fees, and keep records. In the United States, a nonprofit unaware of the requirement to pay would face litigation and the threat of statutory damages.

Whether free or paid, copyright exceptions are central to accommodating public interests in copyright law. Harvard copyright scholar Ruth Okediji identifies them as the most important legal tool to promote access to knowledge. At the World Intellectual Property Organization (WIPO), the global body for negotiation of new copyright treaties, representatives of developing countries also view exceptions as critical. The Marrakesh Treaty was the first to require countries to create copyright exceptions. With its passage, WIPO has taken up debate on a new treaty regarding library exceptions. Next, the organization is likely to focus on exceptions to promote education.

Exceptions to address book hunger could be incorporated into either of these treaties.

Safeguards for Authors and Publishers

Over the past decade, WIPO's efforts to expand copyright exceptions, as well as protections, have proven controversial. Industry groups that depend on copyright protection fear a slippery slope. Will narrow exceptions for compelling public interests, such as access to books for the print-disabled, gradually lead to broader exceptions that erode profits? One powerful safeguard against such an outcome is the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property (TRIPs). TRIPs limits copyright exceptions to "certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." In other words, exceptions must be carefully tailored to achieve their public interest goals without harming authors and publishers.

There are several ways to achieve this tailoring when looking at the problem of book hunger. The most secure way to protect authors and publishers, while addressing book hunger, is by treating different languages differently. The current copyright regime has worked extraordinarily well to produce works in English, French,

German, Spanish, and so on. No legal changes are needed in those language markets. Copyright exceptions should be targeted to facilitate and encourage translations into neglected languages. By definition, expanding charitable efforts in neglected languages does not endanger publishing profits; they are neglected precisely because they are unprofitable.

Pharmaceutical companies have strongly resisted patent exceptions that would lower prices on drugs in developing countries. They understandably worry that discounted medicines in poorer countries would find their way back to consumers in wealthier countries. They probably also fear public pressure for price-regulating legislation, if American patients realize they are paying thousands of dollars for the same medication that Thai patients can purchase for next to nothing. Government price controls are already the reality in Europe and Canada.

Similar concerns can also apply to books. In *Kirtsaeng v. John Wiley, Inc.*, the U.S. Supreme Court rejected a publisher's effort to bar its own cheaply printed mathematics textbooks sold in Thailand from being resold to American students. Importantly, both versions of these textbooks were in English; American students would have no interest in textbooks printed in the Central Thai language. Similarly, donating Ndebele-language children's

books to schools in South Africa will not undermine those titles' English-language sales. Language offers a way of perfectly segmenting the market for books, allowing one price to prevail here and another there. If only we had such a simple solution for patented medications!

Why Translation Exceptions?

Children's picture books play a key role in developing early literacy, yet most of the more than 560 languages used in primary education have a grossly inadequate supply. As I argue in the final chapter, the only hope of meeting this need is through a mass translation effort. The work of creating an illustrated children's book is overwhelmingly in the story's conception, illustration, and book design. A commercial publisher might spend \$10,000 to \$20,000 to develop a new premium children's book. Translators Without Borders can facilitate a charitable translation for around \$50.

The efficiency of the translation approach is greatly reduced, however, if charities have to clear copyright for each title they translate. Requesting, negotiating, paying for, and keeping track of copyright permissions takes significant time, and therefore money, even when the publisher receives no payment. Commercial publishers working in profitable language markets can afford these

significant transaction costs. Charities working in neglected languages cannot. A specific copyright exception to permit charitable translation of children's literature would eliminate this problem. Such an exception would also spare commercial publishers the burden of researching thousands of contracts to verify whether they even have these rights to give away.

A second compelling context for translation exceptions has to do with the rise of increasingly sophisticated automatic translation software. Machine-learning techniques developed by Google in 2016 can now translate between English, French, and Spanish with near-human accuracy. As the technology improves, functionality is being added for additional languages. Someday, entire libraries of informational and educational materials will be instantly translatable into a broad array of languages. But will it be legal to do so? A copyright exception for machine translation can eliminate legal risk that may otherwise hamper faster development and deployment of this technology.

A third approach to translation exceptions could help promote newly flourishing literatures in disadvantaged languages. This broader option would not be limited to children's books, but simply establish that "it is not an infringement of copyright to reproduce, distribute, adapt, perform, or stream a work in a neglected language, so

long as the contributions of the original creators are credited in good faith.” Each country would then specify which of their languages qualify for this special treatment. For example, South Africa might apply the exception to Ndebele, Tsonga, Venda, Xhosa, Zulu, and other indigenous languages. Copyright rules would remain unchanged for works published in English, or other languages with functioning publishing industries. A project that involved translating a Zulu text into English would require permission, expanding opportunities for minority-language authors and publishers to earn income through English translations. In neglected languages, however, textbooks, storybooks, poetry, news, and novels could be freely translated and copied.

A Bit of History

The problem a translation exception is designed to solve did not always exist. In the mid-nineteenth century, copyright law both in the United States and abroad regarded translations as independent new works. All rights in the translated work were held by the translator, who did not require permission from the original author or publisher. Over the next fifty years, European publishers pushed for international treaty provisions to forbid translation without a license. The proposal made sense in the European

context. An Italian publisher, for instance, could realize significant income by licensing translations into English, French, and German. Elsewhere in the world, however, the proposal made much less sense.

According to scholar Lionel Bentley, Indian authorities strenuously opposed limits on freedom of translation. They understood that translation of educational and scientific works into local languages was essential to economic progress. Such translations were not commercially viable, but were commonly facilitated by missionary and government efforts. India was still a colony of Britain at the time, however, and its representatives had very little influence on the treaty negotiations. The provisions negotiated among the European countries were made binding on India as well. The Indian Copyright Act of 1914 instituted a new requirement of permission and payment for all translations. This also applied retroactively to already published works.

India's development might have been greatly accelerated had copyright lawyers of that time considered treating different languages differently. Indian authors writing in local languages were rightly concerned with rights to authorize and profit from English translations of their works. Bentley notes that this included Rabindranath Tagore, recently awarded the Nobel Prize for his poetry,

sensitively translated from Bengali into English. Publishers also hoped that the Indian-language markets would someday become a source of profit for them, although that prospect has not been realized in the intervening century. To this day, educational opportunity in India remains sharply limited by the student's mastery of English.

A half century after the international translation right was adopted, newly independent nations in Africa and Asia also called for modifications to copyright law for developing economies. European, North American, and Australian publishers disapproved. Contentious negotiations through the 1960s produced the international Stockholm Protocol. On its face, the protocol appeared to facilitate translations for developing countries. In practice, it created a permissions process so complicated it was impossible to utilize. Not a single book was ever translated under its authority.

Fast-forward an additional fifty years, and the issue of translation rights came up again as the Marrakesh Treaty for Visually Impaired Persons was being negotiated. The final treaty, however, simply avoided dealing with this issue. It can arguably be interpreted to authorize translations for print-disabled readers, but this is far from clear. As written, the Marrakesh Treaty seems destined to primarily benefit print-disabled readers who speak English,

French, Spanish, or Portuguese—those languages with significant cross-border publishing industries. Yet blindness is much more common in developing countries, where readers require charitable translations.

Recommendations

Copyright law is fundamental to the livelihood of commercial publishers. Even with strong copyright protection and anti-piracy efforts, however, there are contexts in which publishers will never be able to make a profit. This is particularly true with niche markets, such as specialized formats for disabled readers and languages spoken predominantly by the poor. In the next decade, I would like to see copyright law become more carefully tailored to preserve financial incentives for profitable publishing, while encouraging charitable and government efforts to adapt existing works for underserved readers. Mass translation of children's literature into neglected languages is a powerful strategy to end book hunger, if it is clearly permitted. Some countries could go even further, specifying lists of neglected languages, in which works of any genre may freely be translated and reproduced. Machine translation technology should also be encouraged, including by providing a safe harbor from copyright liability.

In recent years, the Marrakesh Treaty provided important support for the global spread of copyright exceptions for the blind. Translation exceptions would also benefit from a coordinated international effort. WIPO's anticipated treaty negotiations on copyright exceptions for library and educational uses present golden opportunities to address book hunger. To avoid the international disagreements that have historically plagued copyright treaties, new exceptions for translation must explicitly recognize that different languages have different market realities. Where a flourishing publishing industry exists, current rules should remain unchanged. In the American saying: "If it ain't broke, don't fix it." Neglected languages are deserving of special treatment, however, to boost opportunities for their speakers.