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## **An Interview\* with Peter Jaszi, Professor of Law, Faculty Director of the Glushko-Samuelson Intellectual Property Clinic**

Interview\* conducted on March 6, 2017  
by the *Journal of Copyright in Education and Librarianship* Editors:  
Carla S. Myers, Tucker Taylor, & Andrew Wesolek

**Thank you so much for agreeing to do this interview with us Peter.**

Absolutely! I'm surprised and flattered and a little apprehensive as I'm not sure what I have to say that will be of any interest, but let's try.

**How did you get your start in working with copyright law?**

This general area of law was something that had interested me, in part because during my student years I was very much involved with different forms of motion picture exhibition, which is a domain that has its own interesting copyright complications. As an undergraduate, I helped to run student films societies and then I worked my way through law school as a programmer and general manager of an arts cinema. I went back home to Washington D.C. to practice law. I had the very good luck that I was contacted fairly soon after I joined [a] small firm by someone who I had done business with during my days as a theater manager. He called me and asked if I would work for him on copyright cases, which happened to be local to D.C. I said yes and within a few years, I ended up doing a lot of specialized, technical, and interesting copyright work for this client, arguing several appeals in the Second Circuit Court of Appeals, and meeting a lot of people in the field. Then when I went to work a few years later in a law school, I expressed an interest in teaching a copyright class. I think it was just the best of good luck. It may have been fated, but it was not a sure thing I can tell you.

**So a little bit of luck but probably also a little bit of foresight too?**

I would like to think so, but I have to say that the things that have made this interesting over the nearly 50 years that I've been doing it are not the things that I imagined would be interesting when I began.

\*This interview has been edited for content and flow

My expectation was this was going to be fun primarily because it was going to involve some sort of interesting, technical, legal puzzles and because it was going to bring my work into some kind of intellectual contact with the world of the fine arts and the creative arts. Because that's what copyright was 50 years ago. It was all about movies and music and books and not about anything else. If at, in this moment, anyone had mentioned the things that were going to happen in the world and be felt as a result in copyright law, like digitization or globalization to name just two, I probably would have run for the exit. What I imagined would be a sort of rich, kind of academic existence, has been for 40 years or so incredibly sort of chaotic and unpredictable. Of course that's a good thing. I probably would have been bored if it had turned out the way that I had expected!

**Did anyone influence you to choose a career in copyright? If yes, would you be willing to tell us about him or her?**

We're all influenced by others and I was in particular influenced by my copyright teacher in law school, Benjamin Kaplan. What he communicated was first the "joy" that comes from doing this subject at a technical level. I think Kaplan's teaching and then his writings were very, very powerful in terms of forming my own attitudes about the subject. Ray Patterson was an early and important influence on me. Some wonderful technical copyright lawyers, in particular Ed Sargoy, who I had the opportunity of working with early in my career, were extremely important influences. Martha Woodmansee, with whom I collaborated extensively with for many years on the work that we did around the cultural critique of the authorship concept. And, of course, Pat [Patricia] Aufderheide. She has been my collaborator for the last 12 years or so on the Best Practices work. They have been enormous influences on me and I should acknowledge them by name.

**It sounds like you've had quite a lot of opportunities to work with people.**

If you are inclined to open yourself up to it, there's no shortage of collaborative opportunities in this field.

**What do you feel have been some of your greatest accomplishments in copyright education and advocacy?**

In 1993, but it may be 1992, I was a member of something called The Librarian of Congress' Advisory Commission on Copyright Deposit for Recordation and Deposit. [It] was an expert panel that convened to consider the pros and cons of a suggestion that was then

pending in Congress, to substantially revise section 412 of the Copyright Act that now provides, special remedies in copyright infringement cases, [e.g.] statutory damages, attorney's fees. The idea was that as a matter of simple justice to creative people everywhere, everyone should have access to these remedies. There were two factions in this commission. I was a member of the anti faction. The final report of the Commission is inconclusive [and] that was enough to stall and ultimately defeat this legislation in Congress. Looking back and recognizing the growing stain that statutory damages has become, I'm very proud of that. I think it would have been a disaster to generalize statutory damages. Had that battle been lost I think the cause would have been lost, and we'd be looking at a very, very different copyright environment now. I think probably the thing I'm proudest of.

One of the things I did in the latter part of my career which gives me a huge amount of pleasure, is organizing and teaching in the Glushko-Samuelson Intellectual Property Law Clinic<sup>1</sup> at my law school [American University Washington College of Law]. I think we were probably one of the first of two, simultaneously-founded clinics. Pam Samuelson, and her husband, Bob Glushko, gave us the money that made it possible to start the clinic. Just as they generously made the founding gift for the Berkley Clinic,<sup>2</sup> and they have in turn endowed a number of other clinics. When we started that clinic back in 2001 it was a fairly new idea. Legal education was not a new idea, but the idea of applying the methodology of clinical legal education to intellectual property subject matter really was.

**You were a key player in the development of the Code of Best Practices.<sup>3</sup> What do you think has been the most important thing that's come out of the Code?**

Now we've got 12, or however many it is, communities of practice that are in fact better and more reliably informed about their fair use rights than they previously were and we have evidence that it's making a difference. [In] the library sector for example, we see institutions that have rewritten their internal policies for copyright for things like e-reserves [electronic reserves] based on the Best Practices. There

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1. Glushko-Samuelson Intellectual Property Law Clinic, Washington School of Law, American University; see <https://ipclinic.org>.
  2. Samuelson Law, Technology & Public Policy Clinic, UC Berkeley School of Law, University of California; see <https://www.law.berkeley.edu/experiential/clinics/samuelson-law-technology-public-policy-clinic/>.
  3. The Center for Media & Social Impact website includes links to all of the Codes of Best Practices currently in use; see <http://cmsimpact.org/codes-of-best-practices/>.

have been no negatives. We've been doing this now for 12 years. We've worked with approximately that number of different groups, and in every group people have adopted and put into practice the insights that their specific codes contain, and no one has ever been challenged in court with respect to an exercise of their fair use rights that occurred within the framework established by any of the Codes of Best Practices. I should repeat that assertion, because it's important. I'm not saying that no one has ever been defeated in a litigation. I'm saying that no exercise of fair use occurring within any of the Code of Best Practices has ever been called into question in a court of law. Now, what do you make of that? I think that the answer is that content owners have pretty good lawyers, and those lawyers know perfectly well and are happy to tell their clients that what's in those Codes of Best Practices isn't radical or excessive or wild-eyed. It's centrist stuff and no well advised content owner, in my view, would benefit from going to court to test the interpretation of fair use that those documents provide because, honestly, they'd lose!

The other good thing about the Codes is that they've had a tremendously positive role in spreading fair use consciousness. People in communities who haven't ever participated in a Code of Best Practices formulation exercise know more about fair use, think more seriously about their fair use rights, and reason frequently by analogy to one of the existing Codes of Best Practices. We don't have Codes of Best Practices for all academic disciplines. But if you look at the Code that we've got for cinema studies<sup>4</sup> and if you look at the Code we've got for communications,<sup>5</sup> and if you look at the Code that covers art history<sup>6</sup> you see that there is some very, very strong overlaps or lines of correspondence between them. So it's pretty easy for someone who's doing history as such, for instance, to look at those Codes and say, "well, maybe I should think again about whether fair use allows me to quote the material I need from a critical document that illustrates the thesis of my article." I don't know what to call it, a halo effect, or a penumbra effect, whatever. The Codes seem to have influenced thinking about fair use in a good way, substantially beyond the list of communities that have actually participated in a Code-making exercise.

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4. Society for Cinema and Media Studies. (2009). *Statement of fair use best practices for media studies publishing*. Norman, OK.
  5. International Communication Association (2010). *Code of best practices in fair use for scholarly research in communication*. Washington, D.C.
  6. College Art Association. (2015). *Code of best practices in fair use for the visual arts*. New York, NY.

### **Where do you think we should go from here in regards to the Code?**

Should there be more Codes? I think the answer is sure, that if there are communities of practice out in the world that don't feel that they get the guidance they need from the existing Codes they should certainly consider going through the exercise themselves. It's not that formidable of a process, although it takes care and it takes time. Pat Aufderheide and I have written [a] book called *Reclaiming Fair Use*,<sup>7</sup> and one of the things that book is supposed to do is to function as a tool kit for professional groups and organizations that would like to do this. It's a pretty straight-forward process and I hope that others will do it.

Another thing is to continue to support and publicize the Codes we have, and for that those of us who have been helping to create the Codes are really dependent on the kindness of others. We have no budget, we have no staff, [and] we have no mechanism for keeping [the Codes] in the public eye, other than putting it up on some websites and inviting people to link. If that knowledge is going to be spread others need to do it. So I would hope that anyone who has a chance, including anyone in the library and education world, would take it upon themselves to make sure that the communities to whom they are communicating, the communities know about the Codes.

The third thing is the thing about which I don't know the answer, and that is, will these codes need to be revised anytime soon? The extended Code family seem not to be showing their age terribly, but I'm sure that at some point there will have to be a reconsideration. Right now we don't have a mechanism for that. I don't know how that works, I don't know who does it, or how it is done. So far so good, but a time will come when that issue presents. I just retired and [I] am not quite sure what the next thing is, but it will be another set of adventures and it may well fall to someone other than myself to be the person who engages with the question of how eventually the Codes of Best Practices and fair use are to be updated.

### **So, Peter, what advice would you give to librarians and educators looking to educate themselves about copyright?**

I would say to librarians and educators about copyright law that you should be very cautious about taking legal advice from anyone who graduated from law school before 1995. I'm half facetious of course because there are many, many copyright lawyers of my era who have

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7. Aufderheide, P. & Jaszli, P. (2011). *Reclaiming fair use: How to put balance back in copyright*. Chicago, IL: University of Chicago Press.

been very good about keeping up and following the changes in the law, and who know as much or more than I do about those changes. But the truth is a lot has changed, and nowhere has that change become more evident than in the law relating to fair use. So I do encounter, and sometimes in unexpected and regrettable places, lawyers, both in house and on the outside, who haven't really adjusted their own thinking to take into account everything that has happened in U.S. copyright law in the last 20 years. Especially with respect to fair use. So, when you're looking for a legal advisor make sure he or she is "with it" as far as the law is concerned.

Second, be hypercareful of anything you find on the web. Most of it takes the form of someone's effort to make it [copyright law] simple. It will lead you, best case, to make decisions that are radically over conservative and, worst case, it will actually lead you to make decisions which may be wrong enough to actually get you into trouble. So, leave it behind and look for sources of guidance that talk to you about the reasoning process that goes into making your own good and robust decisions about what is and isn't acceptable practice, rather than taking the guidance of somebody who has labored to make it easy for you. That's, of course, what the Codes of Best Practices<sup>8</sup> were designed to do. They aren't designed to proscribe, they aren't designed to provide rules of thumb. They are designed to help people to internalize a reasoning process which is both broadly accepted within their community on the one hand and consistent with what we know about prevailing law on the other.

I would [add] a third thing too. Whenever you read something that begins by talking about how much trouble you could get in to if you get it [copyright law] wrong, that begins by saying you could be subject to so much damages for this, or lose your car or your firstborn or whatever it is, put that down and look for something else to read. The truth of the matter is that the main reason libraries and librarians want to be good copyright citizens is because they want to be good "everything" citizens. Not because they are at some terrible individual risk of making a mistake that will haunt them, echoing down through the corridors of time. So when you see that, if it's in the title of the essay, or the book, or if it's in the first couple of paragraphs, just toss it and find something else to read.

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8. Association of Research Libraries. (2012). *Code of best practices in fair use for academic and research libraries*. Washington DC.

### **So what advice would you give to librarians that find themselves designated as the copyright librarian?**

If this responsibility is visited on you then the thing to do is say “I need training.” There are an awful lot of opportunities for training that are available. The other thing, of course, is to network. There are more and more networks for people who are doing copyright jobs in libraries to take advantage of, and you really should do that. You will learn an enormous amount from your peers. Take advantage of the useful and reliable materials that are available to you. Take advantage of the technical copyright literature and certainly take advantage of efforts to communicate important copyright principles to general professional audiences, like the Best Practices.

I'd also offer an admonition, and [that] is “remember your mission.” It's very easy when somebody pushes you into a role of being a gate-keeper and tells you honestly, or not so honestly, that your own economic livelihood and that of the institution depends on your making the “right” conservative choices. It's very easy to be seduced by that presentation and to forget the institutional mission of the library which is, which is more than anything, a mission of furthering the circulation of information. If a librarian who is dealing with copyright administration loses sight of that, he or she risks having a very unhappy life, and bringing copyright and the institution's copyright into unnecessary dispute.

### **What do you think are some emerging trends and issues in regards to libraries, education and copyright?**

One of the trends that I've noticed and celebrated is that the library and educational community has become increasingly confident about the exercise of its fair use rights. There's simply no question that, textually as well as functionally, when we are making decisions in our offices or in our libraries day to day, fair use functions as a right [in] the same way that free speech functions as a right. Even in the very unlikely event that our exercise of that right is challenged in court, we might formally present our response to the challenge as a defense. Freedom of expression, the first amendment, is a defense too in a procedural context. If you're sued for libel, you defend on the grounds that your expression, whatever it may have been, was protected by freedom of speech. So fair use is a right, and over the last 20–25 years libraries have become more and more comfortable in exercising that right. That has meant a couple of really interesting things to me, and one of them is that increasingly libraries are relying on their fair use rights to jus-

tify and provide a legal foundation for their important mission-related projects, rather than attempting to secure new, specialized legislative exceptions that are specific to them.

**What changes do you hope to see made to the law in the future?  
What potential changes are you concerned about?**

I forget how long they've been talking about revising Section 108. Well, it's not going to happen, or if it does happen we're going to regret the way that it does happen. The notion that the future of library exceptions should be subject to a process of political horse trading is an objectionable one. It's objectionable on principle and in practice it's likely to lead to very, very bad results. Close to a decade ago, libraries were in the forefront of trying to achieve a special legislative solution to the so-called orphan works problem. I was involved in that and observed the incredible amount of effort that was invested by many participants, in good faith, trying to strike a compromise, and I observed how at the end of the day, the content community torpedoed that compromise. I'm not hopeful about the ability to achieve additional special tweaks to copyright legislation that will address concerns. I think investing more on the part of libraries in the development and popularization of fair use rights may be a better place to put time and energy.

There is, however, one area in which new legislation is, it seems to me, both possible and badly needed, and that goes back to what I was talking about a while ago in that respects the reform to statutory damages. We badly need changes in the law that will off, change the way in which the situation, the rules of statutory damages, operate to allow to reserve statutory damages for cases of significant commercial or commercial scale improvement. To limit the application of those damages or exempt entirely educational and other non-profit cultural institutions. To make sure, while we're at it, that noncommercial, individual activities are not subject to these potentially horrifying, disproportionate penalties. It is the single most important thing that could be done today to restore or to implement a greater degree of balance in the copyright law, and that is something that I think is potentially within reach. I think it's a long legislative campaign I think I can imagine ways in which it can be done.

**Thank you so much for this interview. It has been wonderful!**

Thank you again. This is so complimentary, so flattering, such nice questions, and I'm grateful to you.