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Introduction

Imagine an international instrument that does not merely oblige contracting parties to confer rights on copyright holders (permitting only optional, narrowly circumscribed, exceptions) but also mandates limitations. *Imagine*, too, that such an instrument requires parties to permit use of material that has been taken from existing works, irrespective of the purpose of so doing, but only on the condition that the use is in accordance with fair practice. *Imagine* that such a mandatory limitation allows the reuse of transformed versions of works, including parodies, and even the whole of a protected work. *Imagine*, indeed, a regime of global mandatory fair use. Surely such a fantasy, or 'thought experiment', is a pointless, 'academic' exercise, given the political economy of international copyright and the dominant place within it occupied by the so-called three-step test, which has long been thought to cast a cloud over the legitimacy of the US fair use defence?[1] Yes and no. Yes, it is pointless to imagine, but no, this is not because it is impossible to achieve; it is pointless to imagine because there is no need to imagine it. *It already exists*.[2] This is precisely the effect of Article 10(1) of the Berne Convention.[3]

[1] For continuing discussion, see Justin Hughes, 'Fair Use and Its Politics – at Home and Abroad' in Ruth L Okediji (ed.), *Copyright Law in an Age of Exceptions and Limitations* (Cambridge University Press 2017), ch. 8, 234–74.

[2] See also S Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* (2003) SCCR 9/7, 13: 'It is possible, therefore, that Article 10(1) could cover much of the ground that is covered by "fair use" provisions in such national laws as that of the United States of America (USA)' and Graham Greenleaf and David Lindsay, *Public Rights: Copyright's Public Domain* (Cambridge University Press 2018), 363: 'there is scope for greater use of the flexibility allowed by international copyright law for national laws to introduce relatively broad quotation exceptions … which can extend to some transformative uses.' Cf. Ruth L Okediji, 'Towards an International Fair Use Doctrine' (2000) 39 *Colum J Transnat'l L* 75, 89, arguing that the US conception of fair use is not reflected in international copyright law. Interestingly, in her review of exceptions under Berne, Article 10 is mentioned only in passing – see 99–105 and fns. 133 and 149. Okediji later observes at 113: 'Other exceptions contained in the Berne Convention, such as the right under Article 10 to quote from a protected work, also reinforce core values, such as freedom of speech, that inform the scope of the American fair use doctrine.'

[3] Berne Convention on the Protection of Literary and Artistic Works 1886 (rev. Paris 1971) ('Berne'). For the current text of Berne, see https://wipolex.wipo.int/en/treaties/textdetails/12214 (accessed 20 January 2020).

This much-neglected provision already mandates global fair use.[4] This is a proposition that will seem shocking to some, on both sides of copyright's polarised political spectrum. To so-called 'maximalists', global mandatory fair use is unthinkable because US fair use is itself legally dubious, in the light of the international requirement that exceptions must be confined to certain, special cases. Section 107 of the US Copyright Act 1976 is only maintainable because there is a body of jurisprudence that transforms the open norm of 'fair use' into a series of reasonably clearly understood and well-defined instances. Adoption of such an open norm by other jurisdictions, without such jurisprudence, fails to offer certainty as to the limited scope of the limitation that international law appears to demand. At the opposite end, that of the 'copy-left' movement, the proposition cannot be correct, because, were it so, the international *acquis* would not be as appalling as it is taken to be.

However, while the 'copy-left' movement may be right to highlight the limitations the Berne Convention imposes on the room left to adapt copyright to the digital environment, not every aspect of the Convention should be regarded as a source of dismay. Article 10(1) is just such a provision. On its face, it requires contracting parties to permit quotation from a work, and is subject to a series of conditions, the most important of which is that such quotation be in accordance with 'fair practice'. Importantly, such 'quotation' must be permitted whatever the purpose of the use, as long as the material taken is proportionate to the purpose of its user. We suggest that the term 'quotation', understood in terms of its ordinary use across the entire cultural sphere, describes a broad range of practices of reuse of copyright-protected material, including in some situations the whole of that material. For sure, the 'fair quotation' exception does not encompass every act that currently falls within the US 'fair use' doctrine – in particular, private copying and certain technological uses.[5] However, it does require that many transformative expressive uses be permitted if the use is fair, proportionate and appropriately attributed.

In this book, we explain and justify the proposition that Article 10(1) of Berne constitutes a global mandatory fair use provision. It is global because of the reach of Berne *qua* Berne and *qua* the Agreement on Trade Related Aspects of Intellectual

[4] This was recognised by one of its key proponents, the Swedish judge Torwald Hesser. He explained the proposal expanded the quotation to 'general application, but restates it in terms compatible with the American doctrine of fair use': see Torwald Hesser, 'Intellectual Property Conference of Stockholm, 1967: The Official Program for Revising the Substantive Copyright Provisions of the Berne Convention. The Fifth Annual Jean Geiringer Memorial Lecture on International Copyright Law' (1967) 14 *Bull Copyright Soc'y* 267, 275, fn. 22. For discussion as to why it has been neglected, see Lionel Bently and Tanya Aplin, 'Whatever Became of Global, Mandatory, Fair Use? A Case Study in Dysfunctional Pluralism' in Susy Frankel (ed.), *Is Intellectual Property Pluralism Functional?* (Edward Elgar 2019), ch. 1.

[5] In turn, therefore, these additional limitations do need to be justified under other parts of the Berne Convention, especially Article 9(2), as well as Article 13 of the Agreement on Trade Related Aspects of Intellectual Property Rights 1994 ('TRIPS') and Article 10(2) of the WIPO Copyright Treaty 1996 ('WCT').

Property Rights ('TRIPS').[6] It creates a mandatory exception because of the clear language of the provision and its *travaux*. It relates to 'use' that is not limited by type of work, type of act, or purpose. Finally, it is 'fair' use because the conditions of Article 10(1) and 10(3) Berne, namely, the work having been lawfully made available to the public, attribution, proportionality and fair practice, must be satisfied. In particular, the requirement of 'fair practice' embraces a range of normative considerations relating to economic and moral harm, distributive justice, and freedom of expression.

We begin in Chapter 2 with the history of Article 10(1) of Berne. This chapter details the evolution of the quotation exception, from its proposal at the 1928 Rome Revision, its incorporation at the 1948 Brussels Revision and key changes made at the 1967 Stockholm Revision, whereby the restriction on 'short' quotations was removed and the exception was extended to all types of works, without any restrictions on the purpose of the quotation. We note that the key to success at Stockholm (compared to prior initiatives) was the abandonment of proposed limitations as to the subject matter, extent or purpose of the re-use in favour of a notion of 'fair practice'. Chapter 3 considers a series of issues relating to the nature of Article 10(1) Berne. First, we examine the mandatory character of Article 10(1), an argument based primarily on the language of the provision and supported by the *travaux* to the 1967 Stockholm Conference. Second, we consider the place of Article 10(1) within the Berne Convention and its relationship to subsequent international treaties, the Agreement on Trade Related Aspects of Intellectual Property Rights ('TRIPS') and the WIPO Copyright Treaty 1996 ('WCT'), in particular, discussing the types of works and types of rights to which the quotation exception is applicable. Finally, this chapter addresses the reasons why the 'three-step test' is not applicable to the quotation exception, which largely stem from the status of Article 10(1) Berne as a mandatory obligation.

The following chapters offer a detailed exploration of Article 10(1) Berne. Chapter 4 examines some of the necessary requirements for Article 10(1) to apply. We start by demonstrating that quotation is not restricted by purpose, as shown by the *travaux* to the Stockholm Revision of Berne. We next consider how the requirement of 'made available to the public' should be understood and how the attribution requirement in Article 10(3) Berne may be satisfied. Finally, we explain that proportionality is an assessment that occurs before evaluating the condition of 'fair practice', which we argue should do the bulk of the work in assessing the permissibility of a quotation. We argue that the proportionality requirement is one of asking whether the length of the quotation is suitable for the purpose for which it is being used and whether a shorter quotation would have been as effective in achieving this purpose.

Chapter 5 examines in detail the meaning of 'quotation'. Drawing on a wide range of sources, legal and cultural, we suggest that 'quotation' is a broad concept, and, most importantly is not limited in ways that some have assumed. In particular, we

[6] A copy of this may be found at https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm (accessed 20 January 2020).

emphasise that the conception of quotation in the Berne Convention is not limited by the established conventions associated with textual or print quotation, in particular notions of 'dialogue'. Freed from this preconception, it becomes clear that 'quotation' describes a broad range of reuses of materials, and should not be restrictively understood nor limited by length, type of work, its unaltered nature or the purpose for which it is used. Rather, the key constraint on what Berne requires be permitted is the condition of 'fair practice'. Thus, in Chapter 6 we put forward a detailed understanding of 'fair practice' which reflects a pluralistic range of considerations encompassing harm to the author, distributive justice concerns and freedom of expression. Informed by these normative understandings of 'fairness', we argue that 'fair practice' requires an assessment of the nature or purpose of the quotation; the type of expressive use that is involved; the nature of the work that has been quoted; the size of the quotation and its proportion in relation to the source work; and harm to the market for the source work and the integrity interests of the author of the source work.

We then move to Chapter 7 to discuss the considerable significance of our interpretation of Article 10(1) Berne. In particular, we argue that Article 10(1) provides a fresh lens through which to view national copyright exceptions and has the potential to displace the dominance of the three-step test in this arena. We illustrate this point by reference to the US fair use exception and show how, according to Article 10(1), the open-ended, multi-factorial, royalty-free nature of US fair use may be justified as a matter of international copyright law. At the same time, however, to comply with Article 10(1), the US fair use exception may need to pay greater attention to the unpublished status of works that are used and the moral rights of authors. A second consequence is the need to amend national legislation that has not properly implemented the quotation exception. We demonstrate how specific quotation exceptions in several (mainly) civil law jurisdictions are contrary to Article 10(1), either by restricting the types of purposes of the quotation or imposing a quantitative limit of 'short' quotations. The fair dealing exceptions in common law jurisdictions are also problematic to the extent that they restrict quotation to the purposes of criticism or review. A third consequence is on judicial interpretation of quotation exceptions and we illustrate how the EU and UK quotation exceptions should be interpreted by the CJEU and national courts in light of Article 10(1), noting the flaws in the recent CJEU decisions in *Spiegel Online* and *Pelham*.[7] A fourth implication is that Article 10(1) Berne, rather than the three-step test, provides an international legal basis for the parody exception[8] that exists in many national laws and, as such, may require the scope and requirements of this type of exception to be revisited. Finally, we observe the potential for our interpretation of Article 10(1) to animate changes to industry guidelines or the development of codes of best practice. Existing guidelines on quotation usage tend to be risk averse,

[7] Case C-516/17 *Spiegel Online GmbH* v. *Volker Beck* EU:C:2019:625 (CJEU, Grand Chamber) and Case C-476/17 *Pelham GmbH* v. *Hütter* EU:C:2019:624 (CJEU, Grand Chamber).

[8] Contrast Sabine Jacques, *The Parody Exception in Copyright Law* (Oxford University Press 2019), ch. 2.

whereas Article 10(1) Berne, properly understood, provides the basis for less restrictive practices by user groups.

In short, we argue that national and regional copyright exceptions should be systematically revisited and interpreted in light of Article 10(1) Berne. Once this is done, we can expect changes to our legal frameworks and different sorts of permitted uses of copyright material to emerge as a result. Until now, global mandatory fair use has been a latent international legal norm: in this book, we expose its force and potential to shape permitted uses of copyright material.