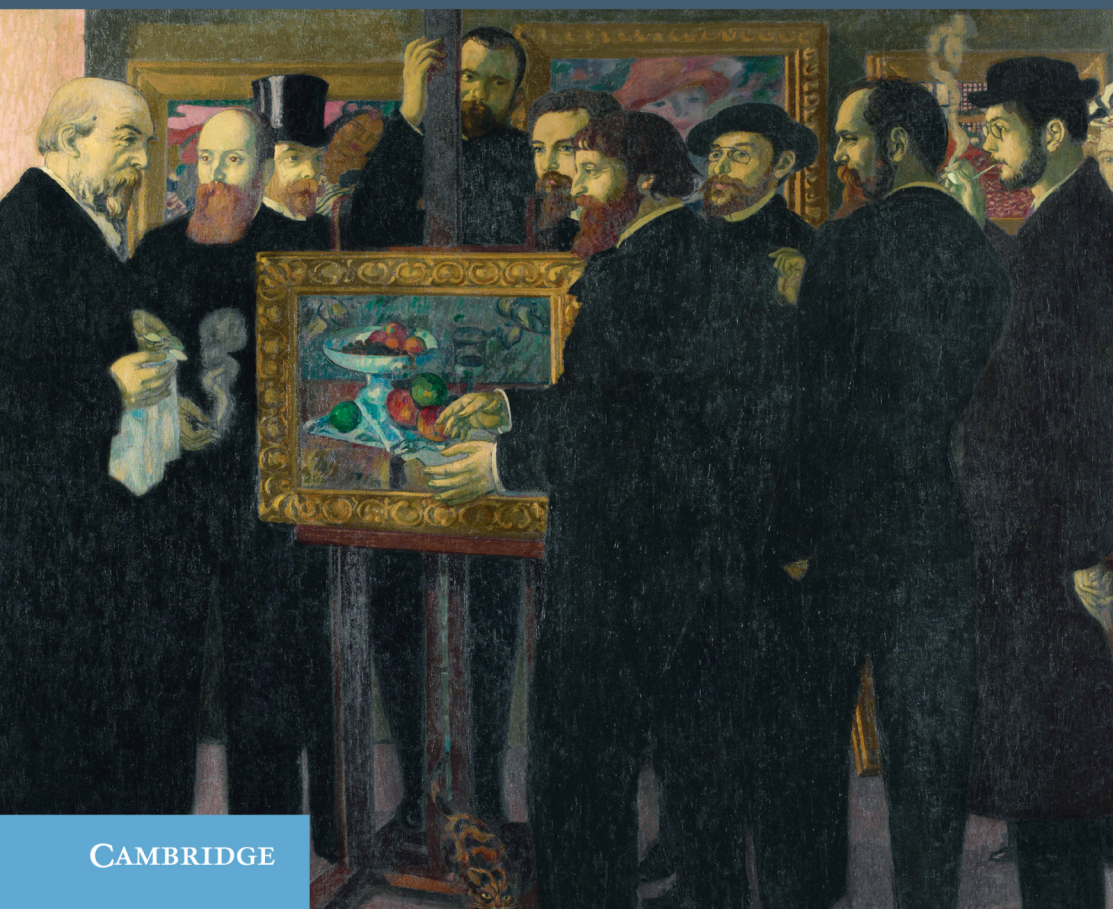


Cambridge Intellectual Property and Information Law

# Global Mandatory Fair Use

The Nature and Scope of the Right to Quote Copyright Works

Tanya Aplin and Lionel Bently



CAMBRIDGE



## GLOBAL MANDATORY FAIR USE

In a path-breaking work, Tanya Aplin and Lionel Bently make the case that the quotation exception in Article 10 of the Berne Convention constitutes a global mandatory fair use provision. It is global, they argue, because of the reach of Berne and TRIPS, and its mandatory nature is apparent from the clear language of Article 10 and its *travaux*. It relates to ‘use’ that is not limited by type of work, type of act or purpose, and it is ‘fair’ use because the work must be made available to the public, with attribution, and the use must be proportionate and consistent with fair practice. By explaining the contours of global mandatory fair use – and thus displacing the ‘three-step test’ as the dominant, international copyright norm governing copyright exceptions – this book creates new insights into how national exceptions should be framed and interpreted.

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# Global Mandatory Fair Use

THE NATURE AND SCOPE OF THE RIGHT TO QUOTE  
COPYRIGHT WORKS

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King's College London

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# Contents

<i>Acknowledgements</i>	<i>page viii</i>
<i>Table of Legislation</i>	<i>x</i>
<i>Table of Cases</i>	<i>xx</i>
<b>1 Introduction</b>	<b>1</b>
<b>2 The History of Article 10(1) Berne</b>	<b>6</b>
I Berne (1884–1886)	6
II Rome (1928)	8
III Brussels (1948)	12
IV Stockholm (1967)	16
A The Study Group	17
B Committee of (Non-official) Experts	20
C Second Report of the Study Group	21
D Interest Group Inputs	22
E Committee of Government Experts	25
F The Draft Treaty	26
G The Intergovernmental Conference	26
<b>3 Preliminary Considerations about the Nature of the Quotation Exception</b>	<b>29</b>
I The Mandatory Nature of the Quotation Exception	29
A Article 10(1) Berne as Mandatory	29
B Is Article 10(1) Berne Imperative?	38
II Types of Works That Are Subject to Article 10(1) Berne	43
A Berne Works	44
B Post-Berne Works	47
1 Computer Programs and Databases	47
2 Rome Convention Subject Matter (Performance, Phonograms and Broadcasts)	50

3	Miscellaneous Subject Matter	53
C	Quotation and the Intersection of Authorial Works and Related Rights	53
III	Types of Rights That Are Subject to Article 10(1) Berne	55
A	Economic Rights	55
1	Under Berne	55
2	Post-Berne	55
B	Moral Rights	57
IV	Non-applicability of the Three-Step Test to the Mandatory Quotation Right	60
A	Article 9(2) Berne	61
B	Article 13 TRIPS	63
C	Article 10 WIPO Copyright Treaty 1996	65
4	<b>Article 10(1) Berne: Requirements</b>	69
I	No Limitation by Purpose	69
II	Article 10(1) Berne: Work Already Lawfully Made Available to the Public	71
III	Article 10(3) Berne: Attribution Requirement	77
IV	Article 10(1) Berne: The Requirement of Proportionality	78
A	The Interrelationship between Proportionality and Fair Practice	78
B	The Proportionality Enquiry	80
5	<b>Article 10(1) Berne: The Meaning of Quotation</b>	83
I	Introduction	83
II	Characteristics of Quotation in Relation to the Source Material	90
A	Is Quotation Inherently Limited to Literary Works or Text?	90
1	Music	92
2	Film	93
3	Architecture	95
B	Is a Quotation Inherently Short?	101
C	Is It Possible to Quote an Entire Work?	104
D	Must the Quotation Be Taken from Another Author?	109
III	Characteristics of Quotation in Relation to the Destination Material	110
A	Must the Quotation Be Used in Another 'Work'?	110
B	Must the Quotation Be Proportionately Short?	113
C	Must the Quotation Be Unaltered?	114
D	Must the Quotation Be Identifiable?	125
IV	Characteristics of Quotation According to the Interrelationship between the Source and Destination Material	128
A	Must a Quotation Be Deliberately Used?	128



B	Must a Quotation Be Used to Further an Argument	131
V	Conclusion	138
<b>6</b>	<b>Article 10(1) Berne: Fair Practice</b>	<b>140</b>
I	Introduction	140
II	Rejecting Three Possible Approaches to Fair Practice	142
A	Fair Practice as Solely Determined by National Law	142
B	Fair Practice as a Matter of State Practice	148
C	Fair Practice as Synonymous with the Three-Step Test	150
III	Fair Practice as an Independent, Pluralistic Norm	151
A	Fair Practice – The Role of Harm	154
B	Fair Practice – The Role of Freedom of Expression	159
C	Fair Practice – The Role of Distributive Justice	163
D	Fair Practice – The Role of Custom	168
E	Fair Practice – The Role of Good or Bad Faith	176
F	Fair Practice – A Role for Honest Commercial Practices?	180
IV	Fair Practice – A Matter of Rules or Standards?	185
<b>7</b>	<b>The Consequences of Global Mandatory Fair Use</b>	<b>190</b>
I	Article 10(1) Berne in Contrast to the Three-Step Test	190
A	Acceptable Scope of the Exception	192
B	The Normative Value of the Exception	194
C	The Unpublished Nature of the Source Work	198
D	The Treatment of Moral Rights of Authors	199
E	The Cumulative Nature of the Requirement	201
F	Free-Use Exceptions	204
II	Changes to National Exceptions	204
A	Specific-Quotation Exceptions	204
B	Fair Dealing Exceptions	208
III	Judicial Interpretation	209
IV	Making Sense of the Parody Exception	216
V	Industry Guidelines and Practices	222
<b>8</b>	<b>Conclusion</b>	<b>225</b>
	<i>Bibliography</i>	230
	<i>Index</i>	249

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## Table of Legislation

### TABLE OF INTERNATIONAL CONVENTIONS AND AGREEMENTS

#### Agreement on Trade Related Aspects of Intellectual Property Rights 1994 (“TRIPS”)

Article 2(2) 64, 65

Article 9(1) 49

Article 10(1) 47–48

Article 10(2) 49

Article 11 55

Article 13 49, 51, 60, 61, 62, 63–65, 190

Article 14(1) 51

Article 14(6) 51–52

Article 30 195

Article 39 182, 184

#### Beijing Treaty on Audiovisual Performances 2012 (‘Beijing Treaty’)

Article 13(1) 52

Article 13(2) 52

Article 16(2) 52

#### Berne Convention for the Protection of Literary and Artistic Works

1928 Rome Revision of the Berne Convention 8–11

1948 Brussels Revision of the Berne Convention 12–16

Article 9(2) (now Article 10bis(2)) 19, 23, 28, 31

Article 10(1) 45

Article 24 18, 58

1967 Stockholm Revision of the Berne Convention 16–28

Berne Convention on the Protection of Literary and Artistic Works 1886 (rev. Paris 1971) (‘Berne’)

Article 1 45, 111, 142

Article 2 45, 47, 49, 53, 57, 142

- Article 2(1) 44, 48
- Article 2(3) 44
- Article 2(5) 44, 49, 53, 142
- Article 2(6) 44
- Article 3(3) 62, 63
- Article 5(1) 33
- Article 6*bis* 57, 58, 59, 60, 64, 77–78, 123, 158–9, 199, 200–201
- Article 7 187
- Article 7(3) 72, 73
- Article 7*bis* 142
- Article 8 45, 122
- Article 9(1) 45
- Article 9(2) 22, 24, 29, 55, 57, 60, 61, 62, 63, 71, 122, 124, 138, 150–1, 187, 199, 217
- Article 10(1) *passim*
- Article 10(2) 29, 45, 68, 69, 71, 79, 88, 136, 137, 138, 140
- Article 10(3) 3, 57, 60, 77–78, 199, 202
- Article 10*bis*(1) 28, 29, 59
- Article 10*bis*(2) 31, 68, 69, 71, 72, 79, 81, 88, 122
- Article 11 68, 122
- Article 11*bis*(1) 45, 57, 64, 77, 122
- Article 11*bis*(2) 56, 57, 64, 68, 71, 77
- Article 11*bis*(3) 26, 71
- Article 11 *ter* 122
- Article 12 45, 122
- Article 13 122
- Article 14 45
- Article 15 45
- Article 15(4) 74
- Article 16 45
- Article 17 72
- Article 18 45
- Article 19 32
- Article 20 32, 64, 67
- Article 37(3) 121
- Charter of Fundamental Rights of the European Union 2000 ('EU Charter')
  - Article 11 36, 37, 160, 163
  - Article 13 211, 213
  - Article 17(2) 163
- European Convention on Human Rights 1950 ('ECHR')
  - Article 10 160
- Geneva Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of Their Phonograms 1971 ('Geneva Convention')

- Article 6 52
- Article 7(1) 52
- International Covenant on Economic, Social and Cultural Rights 1966
  - Article 15(1)(c) 59
- International Covenant on Civil and Political Rights 1966
  - Article 19 160
- Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled 2013 ('Marrakesh Treaty')
  - Articles 1 35
  - Article 4(1)(a) 35
  - Article 5 35
  - Article 6 35
  - Article 7 42
- Paris Convention for the Protection of Industrial Property (as amended on 28 September 1979) ('Paris Convention')
  - Article 10bis 180–184
- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961 ('Rome Convention') 47, 50
  - Article 1 51
  - Article 15 36, 50
- Universal Declaration of Human Rights 1948
  - Article 19 89
  - Article 27(1) 59
  - Article 27(2) 89
- Vienna Convention on the Law of Treaties 1969 ('Vienna Convention')
  - Article 31 48, 84, 88, 148, 151, 153
  - Article 32 89, 153
- WIPO Copyright Treaty 1996 ('WCT')
  - Article 1(2) 66
  - Article 1(4) 50, 67
  - Article 4 47, 48, 50
  - Article 5 49, 50
  - Article 6 55, 67
  - Article 7 55, 67
  - Article 8 56, 67, 68
  - Article 10(1) 56, 67–68
  - Article 10(2) 60, 61, 65–68
- WIPO Performances and Phonograms Treaty 1996 ('WPPT')
  - Article 1(3) 52
  - Article 16(1) 52
  - Article 16(2) 52

EU DIRECTIVES AND REGULATIONS

First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States Relating to Trade Marks OJ L 40, 11.2.1989

Article 6 182

Directive 91/250/EEC [1991] OJ L122/42, subsequently codified as 2009/24/EC on the Legal Protection of Computer Programs [2009] OJ L 111/16 ('Software Directive')

Article 5(2) 39

Article 5(3) 39

Article 6 39

Article 7 40

Article 8 39

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases OJ L 77, 27.3.1996 ('Database Directive')

Article 6 40

Article 8 40

Article 11 53

Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society 22.6.2001, OJ L 167/10 ('Information Society Directive')

Article 2 36

Article 2(c) 211

Article 3(2) 108

Article 5 40, 110

Article 5(1) 35

Article 5(2) 35

Article 5(2)(a) 40

Article 5(2)(c) 40

Article 5(2)(d) 40

Article 5(2)(e) 40

Article 5(3) 35

Article 5(3)(a) 40, 136

Article 5(3)(b) 40, 43

Article 5(3)(c) 108

Article 5(3)(d) 35, 36, 37, 40, 47, 52, 53, 54, 74, 108, 126, 132, 133, 210–216

Article 5(3)(e) 40

Article 5(3)(k) 123, 220–222

Article 5(5) 37

Article 6 40

Article 6(4) 40, 43

- Directive 2006/116/EC on the Term of Protection of Copyright and Certain Related Rights (codified version) OJ L372, 27.12.2006  
Article 3(3) 53
- Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community Trade Mark, OJ L78, 24.3.2009  
Article 12 182–3
- Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to Approximate the Laws of the Member States Relating to Trade Marks OJ L 336, 23.12.2015 ('Trade Marks Directive')  
Article 12 182–184  
Recital 27 183
- Directive (EU) 2016/943 of 8 June 2016 on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) against Their Unlawful Acquisition, Use and Disclosure [2016] OJ L157/1 ('Trade Secrets Directive')  
Article 3(1)(d) 184  
Article 4(1)(b) 184  
Article 4(2)(a) 184
- Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017, OJ L154, 16.6.2017 ('EU Trade Mark Regulation')  
Article 14(2) 182–3  
Recital 21 183
- Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on Certain Permitted Uses of Certain Works and Other Subject Matter Protected by Copyright and Related Rights for the Benefit of Persons Who Are Blind, Visually Impaired or Otherwise Print-Disabled ('Marrakesh Directive')  
Article 3(5) 43  
Recital 9 43
- Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market Amending Directives 96/9/EC and 2001/29/EC OJ L 130, 17.5.2019 ('Digital Single Market Directive')  
Article 15 54  
Article 17(7) 36, 41–2  
Recital 57 55

## TABLE OF NATIONAL LEGISLATION

- Andorra, Law on Copyright and Neighboring Rights  
Article 8, 188



- Argentina, Law on Legal Intellectual Property Regime, No 26.570, 2009, (amending Law No 11.723 of 28 September 1993)  
 Article 10 91, 99, 205
- Armenia, Copyright and Related Rights Law 2006  
 Article 22 205
- Australia, Copyright Act 1968 (Cth)  
 Section 40 208  
 Section 40(2) 144  
 Section 41 208  
 Section 41A 217–20  
 Section 42 208  
 Section 103AA 217–218
- Australia, Copyright Amendment Act 2006 (Cth)  
 Sch 6 Pt 3, Items 9A–9B 217
- Austria, Federal Law on Copyright in Literary and Artistic Works and Related Rights (Copyright Act) (as amended up to Federal Law Gazette (BGBl) I No. 99/2015)  
 Section 46 205
- Belgium, Book XI, Title V of the Code of Economic Law (Authors and Related Rights) (updated 19 June 2019)  
 Article XI.189 204
- Bermuda, Copyright and Designs Act 2004  
 Section 41 208  
 Section 42 208
- Bosnia and Herzegovina, Act of 13 July 2010 on Copyright and Related Rights  
 Article 47 107
- Brazil, Law No 9.610 of 19 February 1998 on Copyright and Neighboring Rights)  
 Article 46(VIII) 108, 205
- Burundi, Law No. 1/021 of 30 December 2005 on the Protection of Copyright and Related Rights in Burundi  
 Article 26, 188
- Cambodia, Law on Copyright and Related Rights 2003  
 Article 25 205
- Canada, Copyright Act 1985  
 Section 29 208, 209
- China, Copyright Law of the People's Republic of China of February 26, 2010 (amended up to the Decision of February 26, 2010, by the Standing Committee of the National People's Congress on Amending the Copyright Law of the People's Republic of China)  
 Article 22 204
- Colombia, Law on Copyright No 23, 1982  
 Article 31 90

- Costa Rica, Law on Copyright and Related Rights No. 6683, 1982 (as amended up to Law No 8834 of 3 May 2010)  
 Article 70 90
- Cyprus, Law on Copyright and Related Rights of 1976 (Law No. 59/1976, as amended up to Law No. 18(I)/1993)  
 Section 7(f) 90
- Czech Republic, Consolidated Version of Act No. 121/2000 Coll., on Copyright and Rights Related to Copyright and on Amendment to Certain Acts (the Copyright Act, as amended by Act No. 81/2005 Coll., Act No. 61/2006 Coll. and Act No. 216/2006 Coll.)  
 Article 31a 206  
 Article 31(1)(b) 108
- Dominican Republic, Law on Copyright, No 65–00  
 Article 35 90, 188
- Ecuador, Intellectual Property Law (Consolidation No. 2006–13)  
 Article 839a 108
- Eritrea, Civil Code 1993  
 Article 1661 91
- Estonia, Copyright Act 2004 (consolidated text of 1 February 2017)  
 Article 19(1) 205
- France, Intellectual Property Code 1992 146–147  
 Article L113–2 143  
 Article L121 72  
 Article L122–5(3)(a) 33, 104, 110, 131, 146–7, 205, 206  
 Article L211–3(3) 53  
 Article L215–1 53
- France, Law No. 57–298 of March 11, 1957 on Literary and Artistic Property  
 Article 41–3 90
- Germany, Authors' Rights Law of September 9, 1965  
 Article 12(1) 75  
 Article 51 111, 147  
 Article 51(1) 73  
 Article 51(2) 73  
 Article 51(3) 73  
 Article 70 53  
 Article 72 53
- Germany, Basic Law 1949  
 Article 5 207
- Greece, Law No. 2121/1993 on Copyright, Related Rights and Cultural Matters (as amended up to Law No. 4281/2014)  
 Article 19 105, 188, 204–5, 206
- Guinea-Bissau, Copyright Code (approved by Decree-Law No 46.980 of 28 March 1972)

- Article 185 90, 111, 126
- Hong Kong, Copyright Ordinance 2011, Ch 528
  - Section 39(1) 208
- India, Copyright Act 1957
  - Section 52 209
  - Section 52(a) 208
  - Section 52(a)(ii) 208
- Israel, Copyright Act 2007
  - Section 19 145
- Italy, Protection of Copyright and Neighbouring Rights, Law No 633, 1941
  - Article 70 147–8
- Jordan, Law on Copyright No 22, 1992 (and Amendments up to 2005)
  - Article 17(d) 91
- Kenya, Copyright Act 2001, Ch 130
  - Section 26(1) 208
- Korea, Republic of, Copyright Act (Act No. 432 of January 28, 1957, as amended up to Act No. 12137 of December 30, 2013)
  - Article 28 188, 204
- Latvia, Copyright Law (as amended up to 31 December 2014)
  - Section 20 205
- Lithuania, Law on Copyright and Related Rights No. VIII-1185 of 18 May 1999 (as amended on 7 October 2014 – by Law No. XII-1183)
  - Article 21 205, 206
- Malaysia, Copyright Act 1987 (Act 332, as at 1 January 2006)
  - Section 13(m) 145, 188
- Malta, Copyright (Amendment) Act No. IX of 2009
  - Section 9 205
- Mexico, Ley Federal Del Derecho De Autor, 24 December 1996 (as amended)
  - Article 148 205
- Morocco, Law and Copyright and Related Rights, 15 February 2000, Law 2–00
  - Article 14 206
- New Zealand, Copyright Act 1994
  - Section 42 208–9
  - Section 43 208
- Niger, Decree No. 93-027 of March 30, 1993, on Copyright, Neighbouring Rights and Folklore
  - Article 10 188
- Nigeria, Copyright Act, Cap c28, Laws of the Federation of Nigeria 2004 (Second Schedule)
  - Section 6 208, 209
- Poland, Copyright Act 84 of 4 February 1994
  - Section 29.1 206

- Portugal, Código do Direito de Autor e dos Direitos Conexos 1985  
Article 77(1)(g) 204
- Romania, Law No. 8 of March 14, 1996 on Copyright and Neighbouring Rights  
Article 33(1)(b) 206
- Senegal, Law No. 2008-09 of January 25, 2008, on Copyright and Related Rights  
Article 44 188
- Serbia, Law on Copyright and Related Rights (Official Gazette Republic of Serbia  
No. 104/2009, 99/2011, 119/2012 and 29/2016)  
Article 49 206, 207
- Singapore, Copyright Act 1987 (revised in 2006)  
Section 35 144–145, 208  
Section 35(2) 144–145  
Section 36 144–145, 208, 209  
Section 37 144–145  
Section 39A 145
- South Africa, Copyright Act 1978  
Section 12 208  
Section 12(1) 209  
Section 12(1)(b) 208  
Section 12(3) 205, 208
- Spain, Consolidated Text of the law on Intellectual Property, regularizing, clarifying  
and harmonizing the Applicable Statutory Provisions (approved by Royal  
Legislative Decree No. 1/1996 of 12 April 1996)  
Article 32(1) 46, 80, 105, 109, 206  
Article 32(2) 151, 227
- Sri Lanka, Intellectual Property Act No 36, 2003  
Section 11 143–144, 206  
Section 11(3) 143–144  
Section 12 143–144, 188, 206
- Trinidad, Copyright Law, Act 8, 1997  
Section 10 206, 208
- Uganda, The Copyright and Neighbouring Rights Act 2006  
Section 15 145, 188
- Zimbabwe, Copyright and Neighbouring Rights Act (Chapter 26:05)  
Section 31 188, 205
- UK, Copyright, Designs and Patents Act 1988  
Section 5B 54  
Section 8 53  
Section 10(1) 143  
Section 11(2) 75  
Section 29 145  
Section 30 145

- Section 30(iZA) 41, 145, 146, 208, 209, 210, 216, 221–222, 223–224
- Section 30A 41, 220–222
- Section 30A(1) 123
- Section 30A(2) 41
- Section 30(1A) 146
- Section 30(2) 75
- Section 30(4) 41
- Section 64 110
- Section 296A 41
- UK, Copyright and Rights in Performances (Quotation and Parody) Regulations  
2014, SI 2014/2356 208, 209, 220
- US, Trademark Act 1946, as amended in Title 15, United States Code  
Section 43(a) 58
- US, Copyright Act 1976 as amended in Title 17, United States Code  
Section 101 75, 143  
Section 106A 200  
Section 107 2, 62, 143, 144, 145, 146, 177, 178, 191, 193, 194, 196–7, 198–201, 203,  
204, 207  
Section 110[5](B) 192–3, 202  
Section 201(b) 76
- US, Berne Convention Implementation Act 1988 p. 58
- US, Visual Artists Rights Act 1989 200–201

## Table of Cases

### UNITED KINGDOM

- Ashdown v. Telegraph Group Ltd [2001] EWCA Civ 1142, [2002] Ch. 149 72, 146, 161, 210, 216
- Associated Newspapers Group v. News Group Newspapers [1986] RPC 515 108
- Baigent v. Random House Group Ltd [2007] EWCA Civ 247, [2007] FSR 24 177
- Beloff v. Pressdram [1973] FSR 33 176, 177
- Brighton v. Jones [2004] EMLR 26 143
- EWCB Ltd v. Tixdaq Ltd [2016] EWHC 575 (Ch), [2016] RPC 21 82, 176
- Fraser-Woodward v. BBC [2005] FSR 762 108
- HMRC v. The Rank Group Ltd [2015] UKSC 48 84
- HMSO v. Green Amps [2007] EWHC 2755 (Ch) 176
- Hubbard v. Vosper [1972] 2 QB 84 108, 146, 216
- Hyde Park Residence v. Yelland [2000] EMLR 363, [2001] Ch. 143 81, 130, 146, 176, 216
- Hyperion Records v. Sawkins [2005] EWCA Civ 565, [2005] RPC 32 142
- Ladbroke v. William Hill [1964] 1 WLR 273 142
- Norowzian v. Arks (No. 2) [2000] FSR. 363 54
- Pro Sieben Media v. Carlton Television [1999] FSR 610 130, 177
- SAS Institute Inc v. World Programming Ltd [2013] EWHC 69 (Ch), [2013] RPC 17 39
- SAS Institute Inc v. World Programming Ltd [2013] EWCA Civ 1482, [2014] RPC 8 39
- Sillitoe v. McGraw Hill [1983] FSR 545 108
- Stocker v Stocker [2019] UKSC 17 84
- Time Warner Entertainment Co Ltd v. Channel 4 Television Corp Plc [1994] EMLR 1 72, 176, 178
- Walter v. Lane [1900] AC 539 142
- Yemshaw v. London Borough of Hounslow [2011] UKSC 3, [2011] 1 WLR 433 84

## UNITED STATES

- Authors Guild v. HathiTrust 755 F. 3d 87 (2d Cir. 2014) 196
- Brammer v. Violent Hues Productions 922 F. 3d 255 (4th Cir. 2019) 197
- Bridgeport Music v. Dimension Films 410 F. 3d 792 (6th Cir. 2005) 84, 149, 206
- Cambridge University Press v. Patton 769 F. 3d 1232 (11th Cir. 2014) 146
- Cambridge University Press v. Albert 906 F. 3d 1290 (11th Cir. 2018) 146
- Campbell v. Acuff-Rose Music 510 US 569 (1994), 114 S Ct 1164 (1994) 143, 177, 194, 196, 217
- Cariou v. Prince 714 F. 3d 694 (2d Cir. 2013) 196–197
- Childress v. Taylor 945 F. 2d 500 (2d Cir. 1991) 143
- Feist Publications v. Rural Telephone 111 S Ct 1282 (1991) 142
- Field v. Google 412 F. Supp. 2d 1106 (D. Nev. 2006) 177
- Fisher v. Dees 794 F. 2d 432 (9th Cir. 1986) 177
- Fox News Network v. TVEyes Inc 883 F. 3d 169 (2d Cir. 2018) 197
- Harper & Row, Publishers Inc v. Nation Enterprises 471 US 539 (1985), 105 S Ct 2218 (1985) 177, 198
- Kienitz v. Sconnie Nation 766 F. 3d 756 (7th Cir. 2014) 197
- LA News Services v. K-Cal TV Channel 108 F. 3d 1123 (9th Cir. 1997) 177
- Oracle Am., Inc. v. Google, Inc. 750 F.3d 1339 (2014) 194
- Oracle Am., Inc. v. Google, Inc. 135 S Ct 2887 (2015) 194
- Sega Enterprises Ltd v. Accolade Inc 977 F. 2d 1510 (9th Cir. 1992) 194
- Sony Corporation of America v. Universal City Studios., Inc., 464 US 417 (1984) 143, 194
- Stewart v. Abend 495 US 207 (1990) 143
- TCA Television Corp v. McCollum 839 F. 3d 168, 181 (2d Cir. 2016) 197
- Thomson v. Larsen 147 F. 3d 195 (2d Cir. 1998) 143
- Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc, 425 US 748 (1976) 161
- Wright v. Warner Books, Inc 953 F. 2d 731, 20 USPQ 2d 1892 (2d Cir. 1991) 198

## EUROPEAN UNION

- Case C-443/17 Abraxis Bioscience LLC C:2019:238 88
- Case C-63/97 Bayerische Motorenwerke A.G. v. Deenik EU:C:1999:82 [1999] 1 CMLR 1099 183
- Case C-210/13 Deckmyn v. Vandersteen EU:C:2014:2132 (CJEU, Grand Chamber), [2014] ECDR 21 85, 123, 158, 221
- Case C-349/85 Denmark v. Commission EU:C:1988:34 88
- Case C-469/17 Funke Medien NRW GmbH v. Bundesrepublik Deutschland EU: C:2019:623 (CJEU, Grand Chamber) 35, 36, 37, 161, 163

- Case C-100/02 Gerolsteiner Brunnen GmbH & Co v. Putsch GmbH EU:C:2004:11, [2004] RPC 39 (CJEU, 5<sup>th</sup> Chamber) 183
- Case C-228/03 Gillette Co v. LA-Laboratories Ltd Oy EU:C:2005:177, [2005] FSR 37 (CJEU, 3<sup>rd</sup> Chamber) 183
- C-5/08 Infopaq Int. v Danske Dagblades Forening [2009] ECR-I 6569 (4th Chamber) 107
- C-24/16 and C-25/16 Nintendo Co Ltd v Big Ben Interactive GmbH EU:C:2017:724 98, 132
- Case C-145/10 Painer v. Standard Verlags GmbH, EU:C:2011:239 (Advocate General's Opinion) 108, 114, 160, 210, 211
- Case C-145/10 Painer v. Standard Verlags GmbH EU:C:2011:798, [2012] ECDR 6 (CJEU, 3<sup>rd</sup> Chamber) 47, 99, 160, 211
- Case C-476/17 Pelham GmbH v. Hütter EU:C:2018:1002 (Advocate General's Opinion) 43, 70, 90, 105, 132, 212, 213, 215
- Case C-476/17 Pelham GmbH v. Hütter EU:C:2019:624 (CJEU, Grand Chamber) 4, 35, 36, 37, 47, 52, 70, 85, 88, 93, 99, 108, 126, 132, 139, 163, 211–214, 215
- Case C-558/08 Portakabin Ltd, Portakabin BV v. Primakabin BV EU:C:2010:416 (CJEU, 1<sup>st</sup> Chamber) 183
- Case C-406/10 SAS Institute Inc v. World Programming Ltd EU:C:2012:259 (CJEU, Grand Chamber) 39
- Case C-516/17 Spiegel Online GmbH v. Volker Beck EU:C:2019:16 (Advocate General's Opinion) 44, 60, 71, 74, 99, 108, 215
- Case C-516/17 Spiegel Online GmbH v. Volker Beck EU:C:2019:625 (CJEU, Grand Chamber) 4, 35, 36, 37, 44, 74, 75, 161, 163, 211, 214, 215

#### EUROPEAN COURT OF HUMAN RIGHTS

- Ashby Donald v. France App. No. 36769/08 [2013] ECHR 287 160
- Handyside v. United Kingdom (1976) 1 EHRR 737 160
- Karatas v. Turkey App. No. 23168/94 ECHR 1999-IV, IHRL 2880 162
- Krone Verlag GmbH & Co KG v. Austria App. No. 34315/96 (2003) 36 EHRR 57 160
- Magyar Helsinki Bizottság v. Hungary App. No. 18030/11 (ECHR, Gr Ch, 8 Nov 2016) CE:ECHR:2016:1108JUD001803011 89
- Nilsen and Johnsen v. Norway App. No. 23118/93 (2000) 30 EHRR 878 160
- VgT Verein gegen Tiefabriken v. Switzerland App. No. 24699/94 (2002) 34 EHRR 4 160



## WTO PANEL REPORTS

- WTO Appellate Body Report, Canada – Patent Protection of Pharmaceutical Products (17 March 2000) WT/DS114/R 195
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- WTO Panel Report, United States – Section 110(5) of the Copyright Act 1976, (15 June 2000), WT/DS160/R 64, 65, 68, 87, 148, 152, 191, 192–3, 194, 195, 199, 202

## FRANCE

- Antenne 2 v. Spadem Cass 1ère Ch Civ, 4 July 1995, (1996) 167 RIDA 263 105
- Douces Transes Cass., 12 January 1988 (1988) 137 RIDA 98 78
- Cass. civ. I, 11 Dec. 2013, Com. com. électr. 2014, comm. no. 15, note Caron, P.I. 2014, no. 50, 65, obs. Lucas. 72
- Chamouillet et autres v. Librairie Hachette, (1924) Le Droit D'Auteur 48 100
- Dutronic et autres v. Sté Musicdisc, 10 May 1996, (1996) 170 RIDA 324 147
- Edgar Rice Burrough Inc. v. Sté Anagramme Editions H. Veyrier et al TGI Paris, 30 Sept 1983, D. 1984 S.C. 289, Colombet obs. 30
- Editions Musicales AB et Lucky Imprimerie v. Editions Durand, Cour d'Appel Paris, 4th ch, 22 May 2002, (2002) 194 RIDA 320 113
- Fabris v. Loudmer Cass. 1<sup>st</sup> Civ. 22 January 1991 100, 206
- Fabris v. Sté Sotheby's et autres (1990) 145 RIDA 339 (C d'A Paris) 206
- Fabris v. Guy Loudmer Cass., Ass. plen., 5 Nov. 1993, (1994) 159 RIDA 320 105, 206
- Ibels v. Grand Carteret, Tribunal de la Seine, in (1901) (Feb) Le Droit D'Auteur 18 100
- Jirinovski v. Daenickx et autres TGI Paris 3e ch, 10 May 1996, (1996) 170 RIDA 315 75
- Lauterbach & Kuhn v. Leuckart reported in (1910) (March) Le Droit D'Auteur 37 100
- Le Mauvais ceil, 13 Oct 1959, TGI Seine, (1961) (Apr) 31 RIDA 93 90
- Le Monde v. Microfor Cass., Ass. plen., 30 Oct. 1987, (1988) 135 RIDA 78 207
- Le Monde v. Microfor Cass. civ. I, 9 Nov, 1983, [1984] ECC 271 131, 207
- Mr X, Promocom, FNAC v. Moulinsart, Cass. civ. I, 26 May 2011, (2011) 229 RIDA 468 105, 146
- Maurice Lengelle, dit Tardy v. Librairie Larousse et autres (1988) 138 RIDA 297 146
- Paris, 14e ch, 12 Oct. 2007, P.I. 2008, no. 27, 219, obs. A. Lucas 108, 147
- Paris, 4th ch, 14 June 2000, Juris-Data no. 121281 206

- Société Raoul Breton v. Choudens, *Gazette de Palais*, 26 October 1934, (1935) (July)  
 Le Droit D'Auteur 81 100
- Sotheby's v. Fabris Cass. 1<sup>st</sup> Civ 22 January 1991 100
- Sté le minotaure v. Fauvet et Fléouter, 1<sup>st</sup> Civ. 22 May 1979, (1980) 105 RIDA  
 166 147
- Sté MH Films et autres v. Sté Dima Films et autres, TGI, 14 Sept 1994, (1995) (Apr.)  
 164 RIDA 407 100
- Tardy v. Libraire Larousse Cass. 1<sup>st</sup> Civ. 13 April 1988; 22 Sept 1988, CA Paris, D. 1988 IR  
 258 100
- TFI v. Antenne 2, 15 June 1989 100

## GERMANY

- Blühende Landschaften (Blossoming Landscapes), BGH (Federal Court of Justice),  
 Case No I ZR 212/10, Nov. 30, 2011, 2012 GRUR 819 207
- Germania 3, BVerfG (Federal Constitutional Court), Beschluss vom  
 29.06.2000 – 1 BvR 825/98, 2001 GRUR 149 147, 207
- Metall auf Metall IV, BGH), Case No I ZR 115/16, April 30 2020 126, 213
- Thumbnails I, BGH, April 29, 2010 – I ZR 69/08, BGHZ 185 207
- Übernahme nicht genehmigter Zitate aus Tagebüchern und Briefen in eine  
 Biografie KG (Court of Appeal) Berlin, Dec. 21, 2001, 2002 GRUR-RR 313 147
- Unauthorised Reproduction of Telephone Directories on CD-Rom [2002] ECDR 3  
 (BGH) 142

## SPAIN

- Audiencia Provincial (Court of Appeal) Barcelona (Section 15), 3 May, 2010,  
 Westlaw JURisprudencia 2010, no. 162897 80
- Audiencia Provincial (Court of Appeal) Madrid (Section 28), June 21, 2012, Aranzadi  
 Civil 2012, no. 1345 73
- Commercial Court (no. 6) Madrid, Jan. 13, 2010, Westlaw JURisprudencia 2010, no.  
 149960 46
- Commercial Court (no. 9) Madrid, April 19, 2010, Westlaw JURisprudencia 2010,  
 no. 163042 80

## OTHER JURISDICTIONS

- CCH Canadian Ltd v. Law Society of Upper Canada [2004] 1 SCR 339  
 [Canada] 142

- Global Yellow Pages Ltd v. Promedia Directories Pte Ltd [2017] SGCA 28  
[Singapore] 142
- Re Quotations in Students' Text Books (1 January 1990) [1992] ECC 56 [Greece] 205
- Société des Produits Nestlé v. Nespresso Club Ltd C.A. 3425/17 (SC 7 August 2019)  
[Israel] 196, 200
- TCN Channel Nine Pty Ltd v. Network Ten Pty Ltd [2002] FCAFC 146  
[Australia] 217, 218
- The Chancellor, Masters and Scholars of the University of Oxford v Rameshwari  
(Delhi High Court, 9 December 2016) 138
- Zamacois v. Douville [1943] 2 DLR 257 [Canada] 108



## 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?<sup>1</sup> 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.*<sup>2</sup> This is precisely the effect of Article 10(1) of the Berne Convention.<sup>3</sup>

<sup>1</sup> 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.

<sup>2</sup> 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 fnns. 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.’

<sup>3</sup> 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).