Whatever Became of Global, Mandatory, Fair Use?

A Case Study in Dysfunctional Pluralism

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The title of this paper may sound like a 'provocation', but it is, in fact, deadly serious. As is explained elsewhere in detail,[2] the international copyright system requires all participants to recognise a freedom for fair quotation that covers much of the ground encompassed by the notion of 'fair use.' The obligation derives from Article 10(1) of the Berne Convention, and thus to some 174 countries (and, because Article 10(1) must be complied with under TRIPS, is carried over into the WTO Agreement). In contrast to other limitations in Berne, Article 10(1) is not optional, it is mandatory. It creates an obligation, and thereby imposes a ceiling on the freedom of action of Members of the Union. The breadth of the obligatory exception is wide: as enacted in national law, it should not be limited by work, nor by type of act, nor by purpose. The exception should not be subjected to additional conditions beyond those recognised in Article 10: to do so is to breach the obligation. Subject to those conditions, the freedom the Article secures to users encompasses any and every act of quotation, the meaning of which reflects how the term is ordinarily used across all cultural forms. That includes free-standing uses, transformative uses and parodic uses. Its breadth reflects, but is not limited by, the desire to give effect to the fundamental freedom, freedom of expression.[3] We have dubbed this 'global, mandatory, fair use', or GMFU, for short.

The title of this paper was in fact described as a 'provocation' by some who are known as advocates for broader and more flexible exceptions.[4] That such a view could be taken shows just how widely the international obligation to recognise GMFU has been marginalised. The same assumptions are reflected in the literature that questions whether and how far fair use is 'permissible' under the international copyright law. Professor Larry Helfer, for example, has argued that the United States'

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[2] T Aplin and L Bently, 'Global Mandatory Fair Use,' (2017, forthcoming).

[3] Cp. Case C-145/10, *Eva Maria Painer/Standard VerlagsGmbH* (CJEU, 1 Dec 2011), [134].

[4] Commenting on the presentation one of us gave at the ATRIP meeting in June 28, 2016, at Jagiellonian University, Cracow, Kimberlee Weatherall@kim_weatherall tweeted '@LionelBently at #ATRIP2016: Berne 10(1)= global, mandatory fair use. Gotta love a good provocation :).'

'open-textured fair use doctrine is suspect under the three-step test and ripe for WTO challenge.'[5] Gerald Dworkin likewise suggested that 'A generous application of the fair use defense [sic], however justified in social terms, does raise the question whether its application always falls within the terms of Article 9.2 of the Berne Convention.'[6] How can it be that first-rate scholars are debating whether 'fair use' is permissible when, on a plain reading of the international conventions, it is in fact mandatory? It is the aim of this Chapter to explore how, and why, this distortion of international obligations has occurred, and thus how, in its implementation, the international copyright regime has been thrown out of balance. In the light of the suggestive theme of the conference, we will argue that the marginalisation of Article 10(1) highlights the dangers of pluralism in copyright – a sort of 'dysfunctional pluralism'.[7]

1. What Is Global, Mandatory Fair Use?

The underpinning contention of this paper, namely that Article 10(1) of Berne recognises global, mandatory, fair use, is developed elsewhere. As that paper has yet to be published, what we offer here is only the briefest summary so that the premise is clear for the examination as to why the existence of GMFU has not been widely acknowledged. There are really three elements to the argument. The first is that Article 10 contains an obligation – i.e. that it is mandatory. The second is that it is broad in scope. The third is that it may not be subject to further conditions than those contained in the Article. To reach these conclusions, we rely primarily on the text of the Convention. That is, of course, what the Vienna Convention requires.[8] However, we also argue that such a

[5] Lawrence R. Helfer, 'World Music on a U.S. Stage: A Berne/TRIPS and Economic Analysis of the Fairness in Music Licensing Act,' (2000) 80 B U L Rev. 93, 184. For recent discussion about compatibility of the US fair use defence with Art 13 of TRIPs, see J Hughes, 'Fair Use and its Politics – At Home and Abroad,' Loyola Los Angeles Legal Studies Paper 2015-18 (in R. Okediji (ed), *Copyright Law in an Age of Exceptions and Limitations* (CUP, 2017) Ch 8, forthcoming).

[6] Gerald Dworkin 'Exceptions to Copyright Exclusivity: Is Fair Use Consistent with Article 9.2 Berne and the New International Order,' in Hugh Hansen (ed), 4 *International Intellectual Property Law and Policy* (Juris: 2000) Ch 66. But *cf*. G. Dinwoodie and R Dreyfuss, *A Neo-Federalist Vision of TRIPs* (OUP, 2012) 186, (appearing to argue that fair use 'illustrates how extensive' the freedom remains).

[7] The concept of 'functional pluralism' in international law is most obviously associated with the idea of functional differentiation between sub-systems within international law, for example, a subsystem aimed at promoting health, a sub-system aimed at co-ordinating IP rights, a sub-system focussed on promoting human rights, a sub-system concerned with plant resources or bio-diversity. The notion is thus linked to broader debates about fragmentation. See H G Ruse-Khan, *The Protection of Intellectual Property in International Law* (OUP, 2016) Ch 2. Clearly, the focus of this essay is not just on international law, but on its relationship with national law.

[8] Vienna Convention on the Law of Treaties (hereafter, VCLT), Art 31('A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.) For a review of treaty interpretation in the context of TRIPs, see The WTO's Application of 'the Customary Rules of Interpretation of Public International Law' to Intellectual Property" (2006) 46 Virginia Journal of International Law pp 365-431 S. Frankel, The WTO's Application of 'the Customary

reading is entirely consistent with the legislative history of the Article,[9] which was elaborated in its current form during the Stockholm Revision in 1967.[10] Indeed, one might add that this reading of Article 10(1) is also congruent with the post-War commitments to human rights (reflected in the Universal Declaration and Covenant),[11] and the host of the 1967 revision, Sweden's own historic commitment to freedom of expression.

Article 10 is entitled 'certain free uses of works.' Article 10(1) states:

> 'It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.'

Article 10(3) Berne adds a further requirement, providing that

> '[w]here use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.'

It leaves unstated whether this is to be a condition for the the availability of the quotation exception or an ancillary obligation (where failure to comply justifies its own remedy).

On its face, the Article creates an obligation on Members of the Union to permit quotation in cases where the conditions are met. It states 'it shall be permissible…'[12] The use of the word 'shall' is imperative. Article 10(1) uses quite different language to that in other exceptions. For example, Article 10(2), states, in relation to exceptions for education, that 'it shall be a matter for legislation in the countries of the Union...to permit...' Similar language is also found in Article 10bis in relation to reporting current events and Article 9(2), which allows exceptions to the reproduction right 'in certain special cases'. The language of Article 10(1) is distinct, and clearly reads as mandatory rather than permissive.

Rules of Interpretation of Public International Law' to Intellectual Property" (2006) 46 Virginia Journal of International Law 365.

[9] VCLT, Art 32.

[10] The details of the *travaux* are recorded in two volumes: WIPO, *Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967*, Vol I, (WIPO, 1971) (hearafter, '*Records*'). We have also relied on documents, including BIRPI documents, contained in the National Archive at Kew, England, in particular the documents of the Board of Trade. These are designated 'TNA: BT 209/…'

[11] Universal Declaration of Human Rights, Art. 19; International Covenant on Civil and Political Rights, Art 19 (agreed in 1966, in force from 1976, having 168 ratifications). The construction of Art 10(1) Berne here advocated is consistent with so-called 'harmonious interpretation' of international law. See, e.g., *Magyar Helsinki v Hungary*, App No 18030/11, (ECHR, Gr Ch, Nov 8, 2016), [123]; I Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP, 2009), 285 ff..

[12] The French, 'sont licites,' is perhaps even clearer, in that it indicates quotations are permitted rather than 'permissible.'

The view that the provision is mandatory has the support of key commentators (from both common and civil law countries). Leading US copyright scholar Paul Goldstein asserts categorically that 'Article 10(1) of … obligates member countries to permit 'quotations…'[13] Sam Ricketson and Jane Ginsburg refer to Article 10 as the one Berne exception that comes closest to embodying a 'user right' to make quotation: Article 10(1) exceptions are matters that *must* rather than *may* appear in national laws.[14] Lest it be thought that this is primarily an interpretation offered by writers from 'common law' jurisdictions, it is worth noting that the same view is held by Catalan Professor Raquel Xalabarder,[15] Dutch Professor Bernt Hugenholtz, and German scholars Annette Kur and Henning Grosse Ruse-Khan and Martin Senftleben.[16] Co-authoring with Goldstein, Hugenholtz argues that Article 10 represents 'the only instance of a mandatory limitation in an international copyright treaty.'[17] Martin Senftleben, has also said that the 'right of quotation' recognised in Article 10(1) is a 'mandatory use privilege.'[18]

The free use mandated relates to the 'making of' quotations. It is a freedom that applies to all the rights granted by the Member to copyright owners (not merely to rights which a required to be recognised under the Convention).[19] It justifies quotation in the context of communication, translation, and adaptation, as well as in reproduction.[20] It creates an exception applicable even to rights elaborated upon in later treaties, such as the making available right.[21]

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[13] *International Copyright: Principles, Law, Practice* (Oxford: OUP, 2001) 303. See also Dinwoodie and Dreyfuss, *op cit*, 185 ('a mandatory quotation right'); Daniel J Gervais, 'Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations' (2008) 5 U Ottawa L & Tech J 1, 9 and 20 (noting that the quotation right is mandatory.)

[14] Sam Ricketson & Jane C Ginsburg, *The Berne Convention and Beyond*, (Oxford: OUP, 2006), 788-9, [13.42].

[15]Raquel Xalabarder, *Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel* (WIPO, 2009); 'The Remunerated Statutory Limitation for News,' 2; 'Press Publisher Rights in the New Copyright in the Digital Single Market Draft Directive', CREATe Working Paper 2016/15 (Dec. 2016), 13.

[16] A Kur and H Grosse Ruse-Khan, 'Enough is Enough – The Notion of Binding Ceilings in International Intellectual Property Protection', in A Kur & M Levin (eds), *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* (Edward Elgar, 2011) (ordinary meaning of Art 10(1) 'does not lend itself to any other understanding than that it is meant to be binding….the 'context' of the clause confirms rather than contradicts that finding'); A Kur, 'Of Oceans, Islands, and Inland Water – How Much Room for Exceptions and Limitations under the Three Step Test?' (2008-9) 8 Rich J Global L & Bus 287 ('the copyright holder cannot enjoin others from using parts of it for quotation purposes, to the extent this complies with the requirements set out in Art 10(1) Berne…')

[17] Paul Goldstein and Bernt Hugenholtz, *International Copyright: Principles, Law, Practice* (OUP, 2010) 379, [11.4.1]; B. Hugenholtz and R Okediji (2008)15-16.

[18]In B Hugenholtz, A Quaedvlieg and D Visser (eds), *A Century of Dutch Copyright* (DeLex, 2012), 354.

[19] Report, [205]; in *Records*, p. 1165.

[20] The prevailing view is that, despite its form, the quotation right is not a limitation on the moral rights recognised under Art 6bis of Berne. In Bergstrom's report on the conclusions of the Main Committee I of the

Moreover, it applies to all works protected under the Convention. It is not limited to quotation from literary or dramatic works. This is inferred from the absence of any such limitation in the words of Article 10(1) which refers to quotation from 'a work' (in contrast with, e.g. Art 13(1) which allows for a compulsory licence applicable to a sub-category of works, i.e. 'a musical work and to the author of any words'), from the title of the Article which is 'free uses of works', and is confirmed by an examination of the *travaux preparatoires*.[22] Nor is the ordinary meaning of the term 'quotation' limited to quotation from literature: it is common to speak of quotation of art, music, and film. Countless examples exist of ordinary use of the term quotation to describe the inclusion of musical phrases in subsequent musical works,[23] performances or recordings, the inclusion of scenic incidents from one film in another,[24] or the inclusion of paintings in films.[25] The fact that the freedom includes the freedom to make quotations not just from texts, but also from music, art work and films has important implications for our understanding of the breadth of the term 'quotation'. In particular, conventions associated with literary quotation, such as the use of quotation marks, cannot be elevated into conditions for the existence of quotation within the Article 10(1) exemption, because to do so would exclude much that is ordinarily called 'quotation' in art, music or film from any possibility of exemption.

Stockholm conference, it is recorded that 'here too, as in the case of all uses of the work, the rights granted to the author under Art 6bis (moral rights) are reserved.'

[21] Aplin and Bently, forthcoming.

[22] Opening discussion in Main Committee I at the intergovernmental Conference on June 16, 1967, Judge Pierre Cavin, the Swiss representative, said his delegation approved the principle of extending the right of quotation to 'all the categories of protected works': Minutes, para. [761], *Records,* 860. Later, George Straschnov, the delegate for Monaco, objected to a proposal to limit the exception to 'short' quotations on the basis that this would raise particular problems in relation to the quotation of artistic works, where moral rights would be implicated if only part was used: Minutes, para. [769], *Records,* 861. For earlier references, e.g. to musical works, see the Report of the Committee of Governmental Experts, BIRPI: DA/22/33 p. 10, (Professor Ulmer, giving example of 'aesthetic purposes (quotation from one musical work in another musical work)'. This is also recognised in the commentaries: see, e.g., Nordemann, Vinck, Hertin, Meyer, *International Copyright and Neighbouring Rights* Law (VCH, 1990), 112.

[23] For an example, see J. Peter Burkholder, *All Made of Tunes: Charles Ives and the Uses of Musical Borrowing* (New Haven: Yale University Press, 1995) 1 ('Musical quotation is one of the most characteristic facets of Charles Ives' music…')

[24] See, for example, Anne Nesbet, 'Inanimations: Snow White and Ivan the Terrible,' (1997) 50(4) *Film Quarterly* 20, 29, n. 6 (describing Eisenstein's reference to Disney's *Snow White* in *Ivan the Terrible* as 'visual quotation').

[25] For example, Mikhail Iampolski, *The Memory of Tiresias: Intertextuality and Film* (trans. Harsha Ram) (Berkeley: U Cal Press, 1998) 38 (describing the shots of Picasso's painting in Jean-Luc Godard's *Breathless* as 'quotations from Picasso' and explain that 'the quotes here function much like a teacher's comments in red ink.')

The free use embodied in Article 10(1) is not limited by 'purpose.'[26] The Article does contain a number of conditions: that the work has been made available, that the use is in accordance with fair practice, that the use is attributed. One further exception, the so-called 'proportionality condition', refers to the need for a 'purpose': the extent of quotation must not exceed that justified by the *purpose*. But while the person making the quotation must have a 'purpose', nowhere is there a limitation to the sorts of purpose to which the exception applies. On a plain reading then, there is no justification for limiting the application of the quotation exception by reference to particular types of purpose. A close look at the *travaux* also reinforces this conclusion, because when proposals were made to limit the exception by reference to particular purposes, these proposals were rejected.[27] This does not mean that a user's purpose will be irrelevant: it not only affects the proportionality condition but may also be relevant to whether a quotation is 'compatible with fair practice.'

Admittedly, GMFU, as embodied in Article 10(1) of the Berne Convention, is not as broad as 'fair use' in US law. For a start, there are limiting conditions: attribution of authorship and the requirement that the work is already in circulation. Moreover, even understood across the full range of cultural practices, not every act that would count as 'fair use' under section 107 of the US Act can be described as 'quotation.' This is particularly so in relation to the technology-related uses, such as accessing interface information to ensure functional interoperability.[28] Nevertheless, the concept of 'quotation' is broader than has often been appreciated, and certainly can encompass many forms of expressive and transformative uses that, it has been said, lie at the heart of 'fair use' under US law.[29]

2. Dysfunctional Pluralism: Implementation of Article 10(1) in National Laws

[26] Raquel Xalabarder, *Study on Copyright Limitations and Exceptions for Educational Activities* (WIPO, 2009), SCCR/19/8, p 18; R Xalabarder, 'Copyright exceptions for teaching purposes in Europe,' (2004) WP04-004 (no page); Martin Senftleben, 'Internet Search Results – A Permissible Quotation?,'(2013) 235 RIDA 3, 15 (no purpose requirement in Art 10(1)).

[27] While initially the Study Group proposed to broaden the exception to quotations in general, the Committee of (Non-Governmental) Experts, which met in November 1963, thought this too broad and proposed that it should be limited to quotation for 'scientific, cultural, informatory or education' purposes. The Study Group rejected such a limitation, on the basis that it would not encompass 'artistic purposes'. The issue was again raised in the Committee of Governmental Experts. Here, the limitation was rejected as it would exclude from legitimate quotation, citation for 'judicial purposes, political purposes, aesthetic purposes and the purposes of entertainment.'

[28] *SEGA Enterprises Ltd v. Accolade Inc*, 977 F. 2c 1510 (9th Cir. 1992). See also *Oracle Am., Inc. v. Google, Inc*. 750 F.3d 1339 Fed. Cir. 2014 (Copying application programming interfaces); *Authors Guild Inc v Hathi Trust* (CA2, 2013) (Copying to enable text-searching). It would also be difficult to class private copying for the purpose of time-shifting as quotation, though this would also fall within the US fair use doctrine: *Sony v. Universal City Studios, Inc,* 464 US 417 (1984).

[29] *Campbell v. Acuff-Rose*, 510 US 569 (1994).

Despite its clear terms, only rarely have national legal systems implemented Article 10(1) in full.[30] One such example – perhaps not surprisingly given the history – is Sweden. There, Article 22 of the Act on Copyright in Literary and Artistic Works (1960:729) (as amended) declares 'Anyone may, in accordance with proper usage and to the extent necessary for the purpose, quote from works which have been made available to the public.'[31] This corresponds, almost precisely, with the terms of Article 10. While there are a few examples of national regimes which offer broader rubrics for exceptions – most obviously the United States and Israel,[32] many countries have subjected the fair quotation right to further qualifications or conditions. In doing so, the simple, mandatory text of Article 10 has been refracted and distorted into a raucous mob of malformed, and mostly narrower, exemptions.

Consider, for example, the 'fair dealing' exceptions in the laws of Australia, New Zealand, Canada, India, Jamaica, South Africa (and many other former British colonies),[33] each limited by a specified purpose.[34] In these countries, the obligation in Article 10(1) Berne Convention seems primarily to be reflected the fair dealing exception for the purpose of 'criticism or review', which typically requires that such criticism or review be of the work, or another work (or, in some instances, the

[30] Cf. Guido Westkamp, *The Implementation of Directive 2001/29/EC in the Member States* (2007), Part II, 44 (suggesting there are 'no significant deviations' from terms of Directive in implementation, though 'some minor peculiarities should be mentioned.')

[31] Copyright Act (1960:729, last amended by 2015:661), Art 22 (Sweden). For commentary see O-A Rognstad, 'Sweden' in L Bently (ed.), *International Copyright Law and Practice* (LexisNexis, 2016) (hereafter Bently (ed), ICLP), § 8[2][b][i]. The position is the same in Denmark, Finland and Norway: The Consolidated Act on Copyright, No. 1144 of October 23, 2014, Art 22 (Denmark); Copyright Act (Act No. 1961/404 of July 8, 1961, as amended up to Act No. 2015/608 of May 22, 2015), Art 22 (Finland); LOV-1961-05-12-02: Lov om opphavsrett til åndsverk m.v. (åndsverkloven) (konsolidert versjon av 2015), Art 22 (Norway). See also Cyprus, Copyright Law No. 59 of December 3, 1976, as amended, Art 7(2)6; Georgia, Law on Copyright and Neighbouring Rights, June 22, 1999 (as amended in 2005); Tanzania, Copyright Act 1999, s 11. See also Tunis Model Law on Copyright, s 7 in (1976) *Copyright* 165 ff.

[32] Copyright Act 1976, s 107 (US); Copyright Act 2007, s 19 (Israel); G Pessach, 'The New Israeli Copyright Ac,' (2010) IIC 187; J Hughes, 'Fair Use and its Politics – At Home and Abroad,' Loyola Los Angeles Legal Studies Paper 2015-18 (in R. Okediji (ed), *Copyright Law in an Age of Exceptions and Limitations* (CUP, 2017) Ch 8, forthcoming) (also considering Sri Lanka and South Korea as examples of exported 'fair use').

[33] But not all: cp. Trinidad, Act 8 of 1997 (as amended), s 10 (quotation exception).

[34] Copyright Act 1994, s 42-43 (criticism, review, reporting current events, research or private study) (New Zealand); Copyright Act 1968, s 40-42 (research or private study, criticism or review, parody or satire, reporting news), (Australia); Copyright Act 1957, s 52(a) (private use, including research, criticism or review, reporting current events, and various exceptions for computer programs); Copyright Act 1978, ss. 12-19 (South Africa); Copyright Act 1985 (as amended), s 29 (Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright) (Canada); Nigerian Copyright Act, c 28, as codified in 2004 (Second Schedule); Bermuda Copyright and Designs Act 2004, ss 41-42. Cf. Singapore Copyright Act 1987 (revised in 2006), s 35 (fair dealing exception with no limitation as to purpose); CDPA 1988, s 30(1ZA) added (Oct. 1, 2014) by The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, SI 2014/2356.

performance of a work).[35] This falls well short of permitting quotation for criticism in general,[36] let alone for other purposes. This is inconsistent with the clear terms of Article 10(1), and, evidently, with its legislative history.[37] Such limitations are not confined to former British colonies. For example, Portugal permits quotation for 'criticism, discussion or teaching', while Belgium permits quotation only for 'criticism, polemic, review, education or in scientific works'.[38] In Greece, a statutory quotation exception is limited to circumstances where the act of quotation is 'necessary in order to support one's own opinion, or to criticize the opinion of another.'[39] It therefore did not cover the use of extracts from claimant's book on Herodotus in the defendant's educational text because 'the extracts are not used to support the defendant's opinion or to criticise the plaintiff's opinion.'[40]

Limitations by purpose are by no means the only limitations on the right to quote that can be seen in national law. Some countries limit the availability of the freedom to quote to particular works: Austria, for example, refers only to literary or musical works,[41] while Lithuania's quotation exception is limited to 'a relatively short passage of a literary and scientific work.'[42] Some national laws require a faithful representation of a quoted author's work. In Estonia, it is provided that the quotation is

[35] Copyright Act 1994, s 42 ('criticism or review, of that or another work or of a performance of a work) (New Zealand); Copyright Ordinance 2011, Ch 528, s 39(1) (Hong Kong) (same); Copyright and Designs Act 2004 (Bermuda) (same); Copyright Act 1968, s 41 ('criticism or review, whether of that work or of another work') (Australia); Copyright Act 1957, s 52(a)(ii) (India) 'whether of that work or of any other work'); South Africa, act 98 of 1978, s 12(1)(b) ('of that work or another work').

[36] Cf Copyright Act 2001, Ch 130, s 26(1) ('criticism or review') (Kenya); Copyright Act 2004, sched 2 (Nigeria) (same).

[37] This conclusion might be avoided were the concept of 'substantial part' itself to be broadly interpreted to encompass fair uses. There is some support from commentators that this was the role which the concept was intended to take in the Copyright Act 1911, but gradually the courts… Laddie, Prescott & Vitoria; Burrell; Bently, 'Parody in the Common Law World,' in R. Xalabarder (ed) ATRIP.

[38] Código do Direito de Autor e dos Direitos Conexos, Art 77(1)(g) (Portugal); Article XI.189 of Book XI of the Economic Law Code, adopted by the Laws of 10 and 19 April ('criticism, controversy, or review') (Belgium); Latvia, Copyright Law (as amended up to December 31, 2014), Sec 20 ('for scientific, research, polemical, critical purposes') (Latvia); Armenia, Copyright and Related Rights Law of 15 June 2006, Art 22 ('for scientific, research, polemic, critical and informational purposes') (Armenia); France, IP Code, Art L. 122-5(3)(a) (referring to the 'critical, polemic, educational, scientific, or informative character of the work in which they are incorporated').

[39] Greek Copyright Act, Art. 19.

[40] *Re Quotations in Students' Text Books* (1 January 1990) [1992] E.C.C. 56 (Protodikion (District Court), Athens) (in English) (decided under Copyright Act 2387/1920, as amended by Act 4301/1929).

[41] 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. See Westkamp, *op cit*, 113.

[42] Lithuania, Law on Copyright and Related Rights No. VIII-1185 of May 18, 1999 (as amended on October 7, 2014 – by Law No. XII-1183), Art 21.

only permissible if the idea of the work as a whole is conveyed correctly.[43] In Mexico, quotation is only permitted 'without altering the work.'[44]

Some national laws purport to qualify the scope of the quotation expression by a 'quantitative' limit. The most obvious example of such a country is France, where the exception is limited to '*court citations*.'[45] The most dramatic applications of such a restriction are to be found in the cases that indicate that the complete reproduction of a work of art, whatever its format, cannot in any case be deemed to be brief quotation.'[46] The Copyright Law of Trinidad, which (unusually for a former British colony) operates a quotation exception, limits the quotation to 'a short part of a published work.'[47]

Some national laws, including the laws of France, Spain, Morocco, the Czech Republic, Lithuania and Poland (to cite just a few) seem to insist on incorporation of a quotation into 'another work'.[48] Article L. 122-5(3)(a) of the French I.P. Code exempts 'analyses and brief quotations justified on the grounds of the critical, polemic, educational, scientific, or informative character of *the work in which they are incorporated*.' Some French case-law suggests that the 'quoting text' must be able to operate effectively without the 'quoted text.'[49] Some jurisdictions also require that the quoting work comment upon or 'refer back' to the quoted text.[50] Even where such a requirement is not

[43] Copyright Act 2004 (consolidated text of February 1, 2017), Art 19(1).
[44] Ley Federal Del Derecho De Autor, 24 December 1996 (as amended), Art 148 (Mexico).
[45] Art L. 122-5(3)(a) of the I.P. Code . For commentary, see Yves Gaubiac, 'Freedom to Quote from an Intellectual Work', (1997) 171 RIDA 2. For other national laws with a similar limitation, see Greek Copyright Act, Art. 19 ('Quotation of short extracts of a lawfully published work …. shall be permissible …') (WIPO translation); Lithuania, Law on Copyright and Related Rights No. VIII-1185 of May 18, 1999 (as amended on October 7, 2014 – by Law No. XII-1183), Art 21 ('a relatively short passage of a literary and scientific work'); Spanish Copyright Act, *Art. 32 ('*fragments of the works of others'). A similar condition formerly operated in Belgian law, but was deleted on implementation of EU Information Society Directive: Westkamp, 129.
[46]See *Jean Fabris v Sté Sotheby's et autres* (1990) 145 RIDA 339 (C d'A Paris); *Fabris v Loudmer* (Cass, 1st Ch Civ) (1991) 148 RIDA 119, (1992) 23 IIC 294; Cass (full court)., 5 Nov. 1993, (1994) 159 RIDA 320; Martin Senftleben, 'Internet Search Results – A Permissible Quotation?,'(2013) 235 RIDA 3, 71-73 (discussing how this operated to exclude search results in the form of thumbnails from the French conception of 'quotation').
[47] Trinidad, Act 8 of 1997 (as amended), s 10.
[48] Spanish Copyright Act, Art 32 (' It shall be lawful to include in one's own work fragments of the works of others,….'); Morocco Law and Copyright and Related Rights, Feb 15, 2000, Law 2-00, Art 14 (quotation 'in another work'); Czech Republic, Art 31a Copyright Act 2000 ('included in one's own individual work'); Lithuania ('in the form of a quotation … in another work'); Polish Copyright Act 84 of 4 February 1994 (as updated), s 29.1 ('It shall be permitted to quote, in works *constituting an independent whole*…')
[49]See A Lucas & P Kamina, 'France', in Bently (ed), *ICLP*, § 8[2][b][i] , citing Paris, 4th ch., June 14, 2000, Juris-Data no. 121281 (finding that the requirement that the quoted text be 'incorporated' into another work is not satisfied when the quoting work is an anthology of extracts of texts so essential that the anthology could not stand on its own were they removed).
[50] In fact such a requirement was rejected at the intergovernmental conference itself. There, the Swiss delegation proposed a limitation 'to the extent that they serve as an explanation, reference or illustration in the context in which they are used' corresponding to that which had been suggested in the Committee of Experts. The matter was discussed in the Main Committee, but was ultimately defeated 27-10. *Records*, 591

embedded in legislation, it has at times been recognised in jurisprudence.[51] For example, German case law had insisted that there be 'some inner relation with the quoting text: for example, the quotation may clarify a larger context or illustrate the quoting text,'[52] only for the Constitutional Court in its 2000 *Germania III* decision to reject such a requirement where material was re-used as background incident in a play, and to require such an inner relation would unduly limit the playwright's constitutionally guaranteed 'freedom of art.'[53] Quite how far this moved German jurisprudence is unclear.[54] In *Thumbnails I*,[55] for example, the BGH rejected the possibility of exempting Google's generation of 'thumbnails', that is low resolution version of images already available on line, via the 'quotation' exception, because of the absence of any 'intellectual appraisal of the used work'. (The court held the service justified on the basis of implied consent).

Such pluralistic implementation of limitations and exceptions would not in general be regarded as problematic. Indeed, given the high level of international harmonization of the rights conferred on copyright-holders, limitations and exceptions are frequently regarded as an appropriate place for national regimes to express their particular cultural, social and economic character.[56] Thus, the international regime offers considerable freedom for diversity here, in particular, through the 'minor exceptions' doctrine and the open-ended exception to the reproduction right in Article 9(2) of Berne. Thus, a country with a relatively low average income might operate a relatively expansive educational defence;[57] a country with particular religious commitments might include in its national

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[51] Lucas & Kamina, ibid, citing Paris, 1re ch., Sept 10, 1996, [1997] 171 RIDA 3. However, when faced with a different set of circumstances the *Cour de Cassation* found that there was no need for discussion, and that the quotation exception was available where brief segments from works were brought together and classified in a database: *Le Monde v. Microfor*, Cass. civ. I, Nov 9, 1983, [1984] ECC 271, [7] (in English); Cass., Full Court, Oct 30, 1987, [1988] 135 RIDA 78, [1988] ECC 297 (in English).

[52] M Gruenberger, 'Germany,' in Bently (ed), *ICLP*, § 8[2][b][i].

[53] *Germania 3*, BVerfG (Federal Constitutional Court), June 29, 2000, 2001 GRUR 149, *reversing* OLG (Court of Appeal) Munich, March 26, 1998, 1998 ZUM 417, translated and analysed by Christophe Antons and Elizabeth Adeney, 'The Germania 3 Decision Translated: the quotation exception Before the German Constitutional Court,' [2013] E.I.P.R. 646.

[54] *Blühende Landschaften* (Blossoming Landscapes*),* BGH, Case No I ZR 212/10, Nov. 30, 2011, 2012 GRUR 819.

[55] *Thumbnails I*, BGH, Case No I ZR 69/08, April 29, 2010, BGHZ 185, 291 Rn 26, discussed in Mathias Leistner, 'The German Federal Supreme Court's judgment on Google's Image Search - a topical example of the 'limitations' of the European approach to exceptions and limitations,' (2011) 42 IIC 417-442; and Martin Senftleben, 'Internet Search Results – A Permissible Quotation?,'(2013) 235 RIDA 3, 59.

[56] See J Ginsburg, 'International Copyright: From a Bundle of National Copyright Laws to a SupranationaL Code' (2000) 47 *J Copyright Soc'y USA* 265; Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, 'Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together,' (1997) 37 Va. J. Int'l L 275, 306.

[57] Copyright Act 1957, s 52(1)(h) as interpreted in *Chancellor, Masters & Scholars of University of Oxford & Ors v. Rameshwari Photocopy Services & Ors,* Dec 9, 2016 (Delhi High Court, Division Bench).

law an exception for public performance at religious ceremonies;[58] and a country with a large research sector might introduce an exception for text and data mining.[59] This variation is desirable, and also is possible, because national differences of these sorts do not adversely affect the international exploitation of works (because the relevant acts occur only locally).

In contrast, the 'pluralistic' incorporation or interpretation of Article 10(1) is dysfunctional in at least two respects. First, because it is inconsistent with Article 10(1) itself. There is no freedom to create conditions beyond those embodied in the text. Indeed, when the Committee of Government Experts met in Geneva in 1965, a Swedish proposal to offer Member States the freedom to establish conditions was rejected 16 votes to 8.[60] With one or two exceptions (explained below), adding conditions breaches international law. Second, the pluralism is dysfunctional because the effect is to limit the global communication of works. Contemporary practices of communication demand some level of uniformity for the benefit of users (including authors who wish to quote from existing copyright-protected material). This is particularly so for expressive re-uses of material, where the intended audiences might be transnational or global. Here, in contrast with many other exceptions to copyright, there is much to be said for a common base-line so that such re-users are assured that works that include 'quotations' can circulate through the Internet. By adding conditions and qualifications to the exception for fair quotation, national jurisdictions render make the possibility of its transnational use complicated and uncertain. This pluralism is 'dysfunctional' because it is impeding the effective 'global' operation of GMFU.

3. The Causes of Dysfunctional Pluralism

How has this situation come about? How, and why, have members of the Berne Union acted so openly to contradict their international obligations? Although each instance of wrongful implementation into national law almost certainly has its own specifities, we suggest there are five inter-related explanations. Firstly, Article 10 has been presented in some contexts and by some commentators as 'optional' not mandatory. The effect of this is that some Members might have been led into thinking that in adding qualifications and conditions to the fair quotation exception, they were acting within the freedom left to them by the Treaty. Second, it has been assumed that Article 10(1) is subject to 3-step test, and this not only justifies but actually demands the addition of

[58] For example, Hungary, Act LXXVI of 1999, Art 38; Poland, Act of Feb 4, 1994, on Copyright and Neighboring Rights, Journal of Laws 1994, no. 24, text 83, Art 31; and Spain, *Ley de Propiedad Intelectual*, effective April 23, 1996, Art 38; (permitting performance of musical works in religious ceremonies, subject to certain conditions).
[59] CDPA 1988, s 29A (Copies for text and data analysis for non-commercial research) (United Kingdom).
[60] BIRPI: DA/22/33, p. 10, para. [54] (in BT 209/1245).

such conditions. Third, it has been assumed that 'quotation' describes a rather narrow set of permitted practices, limited by reference to a textual/print conception of quotation. Fourth, it might have wrongly been assumed that some of the conditions are legitimate elaborations of the (for some countries awkward) notion of 'fair practice.' Finally, the pluralistic implementation is underpinned by institutional difficulties with enforcing user freedoms in a state-based international legal order. We will consider each in turn.

(a) Is Article 10(1) Really Mandatory?

Some countries may have implemented Article 10(1) subject to conditions because they believed Article 10(1) was itself optional. One sign that this might be a widespread view might be found in the European Union's Information Society Directive, which presents the quotation exception as if it were optional within EU law. Article 5(3) states:

> Member States **may** provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:
>
> …
>
> (d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose.

The use of the term 'may', at first sight, clearly presents a choice to Member states as to whether to implement a quotation exception or not.[61] Indeed, according to one report, one EU Member State (Slovenia) has no such exception.[62]

In addition, a small group of commentators have begun to argue that, in spite of its clear terms, Article 10(1) is in fact an optional, rather than mandatory exception.[63] The effect has been to generate uncertainty as to the status of the fair quotation exception, creating the impression that it might be optional, and, in turn, that (outside the European at least) Members of Berne may add further qualifications or conditions to the exception. In our view, such a view is not sustainable.

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[61] This is how Ficsor reads it.

[62] G Westkamp, *The Implementation of Directive 2001/29/EC in the Member States* (2007) 44.

[63] M Ficsor, *The Law of Copyright and the Internet* (OUP, 2002) 259 ff, [5.09]; S von Lewinski, *International Copyright Law and Policy* (OUP, 2008), 156, [5.163]; J. Blomqvist, *Primer on International Copyright and Related Rights* (Edward Elgar, 2014), 159-160.

One argument that has been raised is that the mandatory nature of the quotation exception does not sit well with the 'logic' of Berne.[64] This is because Berne applies not to domestic works but only to foreign, Berne-originating, works.[65] The effect of treating article 10(1) as mandatory is that Members must recognise a right of quotation for users of 'foreign' works but not domestic works. This becomes even odder when it is recognised that there is an obligation (with exceptions) to give national treatment where the rights conferred on nationals exceed those required under the Treaty. If a quotation right is refused in relation to domestic works, the inference might be drawn that (as this gives stronger rights to domestic authors) such a restriction must also operate in relation for foreign works, and this implies a logical conflict. The way to reconcile the impasse, it is suggested, is to reinterpret Article 10(1) as optional rather than mandatory.

We do not propose to deny that there are oddities here. However, we do not find them surprising, and we certainly do not accept the answer to a logical impasse is to rewrite Article 10(1). To paraphrase Justice Holmes, the life of the law is not logic but experience.[66] Such a proposition must be even more true of a multilateral convention that is subject to repeated revision: when adopting new norms, respect is not always shown for the underlying logic of the treaty. But that does not imply the new norms should be rejected (or read down). Moreover, the adoption of these norms may reflect, or create changes, in the logic. Article 10(1) is just such a case. The adoption of Article 10(1) came at a time when Berne was becoming less a framework for co-ordinating national regimes, and more the basis of an international code.[67] This perception is reflected fact that there are very few examples of countries which operate national laws applicable only to domestic works that confer different protection to that required for foreign works under the Treaty.[68] Viewed in that light, a mandatory exception seems to be entirely consistent with the reality that Berne operates as an international code.

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[64] Ficsor, ibid, 260-1, [5.11].
[65] BC, Art 5(1).
[66] Oliver Wendell Holmes Jr, *The Common Law* (Little Brown, 1881) 1.
[67] The Stockholm Revision also saw the adoption of a provision allowing Member States to exclude from copyright 'official documents': Art 2(4) states that 'It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.' As it is difficult to conceive of many situations in which documents that are 'official' for a particular country will have their 'country of origin' (under Art 5(4)) in that country, so that formally speaking Berne is relevant (Art 5(1)), the inclusion of Art 2(4) can be explained by reference to the idea that the Convention was perceived increasingly as a code.
[68] The most notorious example relates to formalities under US law.

While the language leaves no doubt as to the mandatory nature of the exception, this is clearly affirmed in the *travaux*. In particular, when the Committee of Government Experts met in Geneva in July 1965, the British delegate tabled an amendment that would have aligned the status of Article 10(1) with the various other exceptions recognised in the Convention, or then being proposed. However, the Committee of Governmental Experts rejected the UK proposal by 19 votes to 7.[69] The matter was not raised thereafter, but the special status of Article 10(1) was clear.[70] In contrast, at the Inter-Governmental Conference in June 1967, amendments were made to Article 10bis(2), which re-enacted Article 9(2) from Brussels,[71] 'to avoid the impression' that it was compulsory.[72] This was altered at Stockholm, but the form of Article 10(1) was left intact.

The treatment of 'fair quotation' as mandatory is also consistent with its repeated characterisation as a 'right'. The BIRPI Study group (1963), rejecting a prior formulation that limited the exception to short quotation, repeatedly referred to the exception as 'the right to make quotations' or the 'right of quotation,'[73] language which was carried through into the proposal for the Stockholm conference,[74] and which is entirely consistent with the mandatory formulation of Article 10(1).[75]

Why, then, if Article 10(1) is mandatory, is Article 5 of the E.U.'s Information Society Directive expressed in optional terms? There are at least two possible answers. The first is that it is possible that the European Commission, in developing the proposal, did not fully take account of its obligations at international level. In effect, the optional form is simply a consequence of an historical oversight. The mandatory quality of the Convention is not called into doubt by the European Union's figuring of Article 5(3)(d) as 'optional' (the only mandatory exception under the Information Society Directive being for transient and incidental copies).[76] Moreover, it does not matter, as the CJEU will

[69] BIRPI: DA/22/33, p. 10, para. [53].
[70] See also Pierre Recht, 'Should the Berne Convention include a Definition of the Right of Reproduction?' (Apr 1965) *Copyright* 82-89, 84-5 ('The power to legislate freely on this point was removed from national legislations [sic], and the latter have had imposed on them a minimum below which they cannot go on the plea that the quotation must be short.')
[71] In its Brussels form (inherited from the Rome revision in 1928), Art 9(2) had stated, in mandatory terms, that 'articles…may be reproduced…unless the reproduction thereof is expressly reserved', thus seemingly leaving no freedom to Member States as to whether to adopt such an exception. See Ricketson & Ginsburg, *op cit*, [13.53], 800.
[72] Bergstrom, Report, [102], in *Records*, p. 1149.
[73] *Records*, 116.
[74] Document S/1, 'Proposals for Revising the Substantive Copyright Provisions, Arts 1-20 (Prepared by the Government of Sweden with the Assistance of BIRPI),' in *Records*, ibid, 117.
[75] Moreover, it based its reason of the widespread acceptance of such a right in the 'field of science.' Ibid, 117. See also Recht, 85 'I agree to this being stated *expressis verbis*, because this is the de facto situation.'
[76] In fact, in its Proposal for a European Parliament and Council Directive on the Harmonization of certain aspects of Copyright and Related rights in the Information Society (Dec 10, 1997), COM(97)628final, p 15, [10] the European Commission recognised the mandatory nature of Art 10 recalling that 'The Berne Convention

clearly interpret the Article in the light of the international obligations.[77] Furthermore, it might be noted that the Court has not shown any tendency to permit Member States to add additional conditions or qualifications to harmonised norms, even optional ones. The second explanation, however, is formal rather than historical. Article 5 does not create an obligation to operate a quotation exception because it relates to a host of works that are not Berne works: Article 5 is also an exception to neighbouring rights and the European Union's own related rights (for example, rights in film fixations). The form of Article 5 is optional because it encompasses both an option and a duty: a duty to recognise a right of quotation from Berne works, but an option to recognise (or not) such a right in respect of neighbouring rights.

(b) The Three-Step Test

A second justification for adding extra qualifications and limitations to the fair quotation right (GMFU) might be that such conditions are regarded as necessary to ensure compliance with the 'three-step test.' Although in the Berne Convention, Article 10(1) is not subject to such a requirement (which limits the residual discretion retained by Members to create exceptions to the reproduction right under Article 9(2) of the Convention), it is suggested by some that such compliance is required by Article 13 of TRIPs and Article 10 of the WIPO Copyright Treaty.[78] As a result, it has come to be regarded as the only norm - the 'single sieve' - that matters when considering national freedom to define exceptions. [79] Indeed, some see the WTO Dispute Panel decision as having adopted just such a position in the EC v. US 'fairness in music licensing' case.

There are at least two reasons for rejecting any such view. The first is that, as Martin Senftleben has argued, the breadth of three-step test is to be understood from the perspective of the other

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provides for a number of compulsory exceptions (for news of the day, miscellaneous facts, quotations) as well as several exceptions of an optional nature, notably for informational and educational use….'

[77] R Xalabarder, 'The Remunerated Statutory Limitation for News,' (2014) IN3 Working Paper Series (on SSRN) 33.

[78] G Dworkin, 'Exceptions to Copyright Exclusivity: Is Fair Use Consistent with Article 9.2 Berne and the New International Order,' in Hugh Hansen (ed), 4 International Intellectual Property Law and Policy (Juris: 2000) Ch 66, 66-13 ('One reading of Article 13 of TRIPS suggests that … any exceptions under Berne are now subject to Article 9.2 safeguards and controls'); Margot E. Kaminski and Dr Shlomit Yanisky-Ravid, 'The Marrakesh Treaty for the Visually Impaired', (2014) 75 University of Pittsburgh Law Review 255, 266 ('Countries' systems for limitations and exceptions must fit within the three-step test'); G. Dinwoodie, 'The Development and Incorporation of International Norms in the Formation of Copyright Law' 62 Ohio St L J 733 (2001), 769 ('a general test of permissible exceptions'); Dreyfuss and Lowenfeld, op cit, 306 (under TRIPs exceptions 'only for' circumstances meeting three step test). For a specific expression that the 3 step test applies to the quotation right, see Ficsor, op cit, 262, [5.14].

[79] Daniel J Gervais, 'Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations' (2008) 5 U Ottawa L & Tech J 1, 4, ('the single sieve').

permissible exceptions, rather than operating as a limit on them.[80] The second is that, in our view, the three-step test is irrelevant because Article 10(1) of Berne is mandatory. Being mandatory, it places an obligation upon Members of the Union which is owed to other Members of the Union. TRIPS and the WCT contain key clauses limiting their operation so that they function without prejudice to obligations under the Berne Union.[81] Thus, even if Senftleben's analysis is wrong, so that the three-step test in TRIPS operates as an additional set of conditions for all optional exceptions under Berne, it cannot do so in relation to the quotation exception, which Members are obliged to operate. [82]

Moreover, the WTO Panel decision that interpreted the three step test[83]has no bearing on this conclusion. This is because the WTO Panel decision did *not* address the relationship between Article 13 TRIPS and Article 10(1) Berne, but rather only commented on the applicability of Article 13 TRIPS to the minor exceptions doctrine.[84]

(c) Quotation

The third explanation for dysfunctional pluralism derives from an assumption that the term 'quotation' in Article 10(1) describes a rather narrow set of permitted practices. Thus, it might be argued that adding qualifications such as shortness, non-modification, referencing back and incorporation merely elaborate what is implicit in the term 'quotation.'[85] Of course, Members of the Union are free to elaborate in domestic legislation the meaning of the term 'quotation' to make its scope clear to its citizens. However, in doing so, Members have adopted an unjustifiably restrictive conception. This is because they have defined quotation by reference to a textual/print conception of quotation, rather than appreciating that the term should be understood as referring to practices across the whole range of works covered by the Convention.

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[80] However, Gervais, 32, argues that 'It would seem unnecessary to apply the three-step test as a further barrier to validity because, as a matter of treaty interpretation, exceptions such as articles 10(1) and 10(2) of the Convention include a different test, namely the reference to compatibility with fair practice.'

[81] TRIPs, Art 2(2) ('Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under ….., the Berne Convention….'); WCT, Art 1(2) ('Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.')

[82] See also M. Senftleben, in Hugenholtz *et al*, *A Century of Dutch Copyright*, (DeLex, 2012) 354-5, ('Given the mandatory nature of Article 10(1) BC, the right of quotation may alternatively be seen as a right of use (of authors wishing to build upon pre-existing material) that does not fall within the scope of the three-step test.')

[83]

[84] WTO Panel Report, *EC v US*, Section 110(5) of the United States Copyright Act, WT/DS160/R, [6.81] (June 15, 2000).

[85] Ficsor, *op cit*, 263, [5.15].

The meaning of the term 'quotation' in the Convention is, of course, its ordinary meaning.[86] The ordinary meaning can be found empirically by examining how the term 'quotation' is ordinarily used. By examining the practices described as 'quotation' in relation to the full range of cultural works covered by Berne, one immediately sees that adding qualifications and conditions such as 'shortness', non-modification, incorporation, referencing back or distinctness are incompatible with the meaning of the term quotation in Article 10(1). At most, they could be relevant factors in specific assessments of fair practice. Moreover, it is because of the potential breadth of the notion of quotation that it becomes clear that the 'fair quotation' exception comes very close to being a 'fair use' exception.

The argument is elaborated in detail elsewhere. For the purposes of this paper, we offer here a single example of ordinary use of the term quotation. Consider one of the most celebrated paintings of all time, [87] Edouard Manet's *Dejeuner sur L'herbe*. This painting, created in 1862, is widely understood as inaugurating 'modernism.' [88] It features an image of two bearded smartly dressed gentlemen picnicking with a naked woman, while in the middle distance another woman appears to be washing her feet in a pond. It is remarkable for its oddity.

The painting is also widely acknowledged as having been based upon a detail from Marcantonio Raimondi engraving of Raphael's *Judgment of Paris*. The three figures in Raphael are 'two river gods

[86] VCLT, Art 31.
[87] Beatrice Farwell, *Manet and the nude: a study in iconography in the Second Empire* (Garland, 1981), 1 ('among the most famous paintings executed in France in the 19th century').
[88] Michael Fried, *Manet's Modernism: or, The Face of Painting in the 1860s* (University of Chicago Press, 1996) 1 ('by common agreement the pivotal figure in the modern history of painting').

and a water nymph sitting by the marshes,' but in Manet become 'two Parisian men about town and their naked female companion.'[89] Tucker notes

> 'While retaining the general disposition of the classical figures, Manet not only altered their identities and poses but he also changed their trappings, attitudes, setting, and relationships, giving them greater individuality and presence than they possessed in the original.'[90]

What is interesting for our purposes is not whether this might have been an infringement of copyright (Raphael and Raimondi were long deceased) but what commentaries on the Manet painting tell us about the ordinary use of the term 'quotation'. Art critic, Michael Fried calls *Déjeuner* 'perhaps the most notorious instance of quotation from the Old Masters in Manet's oeuvre.'[91] (150) Fried explains 'the three foregrounded figures in Manet's painting are a direct quotation from Marcantonio Raimondi's engraving.'[92] Fried is not alone in describing the use as quotation: Beatrice Farwell, answering her question 'Why did he [Manet] need Raphael' explains that in doing so Manet was invoking the ideal, and that it 'is this and not 'weakness of imagination' that lay behind Manet's quotations of the old masters.'[93] Likewise, CUNY Professor of Art History, Carol Armstrong, calls it 'perhaps the most concentrated exercise in eclectic quotation since *The Old Musician* of 1860.'[94]

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[89] Paul Hayes Tucker, *Manet's Le déjeuner sur l'herbe* (Cambridge University Press, 1998) 19.
[90] Tucker, ibid., 20.
[91] Fried, 150.
[92] Fried, 56 and 152. Fried sees in Manet not just the emergence of modernist painting but 'a particular moment in the history of quotation in art' (183).
[93] Farwell, *op cit*, 255.
[94] Carol Armstrong, 'To Paint, To Point, To Pose: Manet's *Le déjeuner sur l'herbe,'* in P.H. Tucker (ed) *Manet's Le déjeuner sur l'herbe* (Cambridge University Press, 1998) Ch 4 (90-118), 94. See also Jean Clay, 'Ointments, Makeup, Pollen' (trans John Shepley), (1983) 27 *October* 4-5 ('It is precisely because he quotes – and by his mode of quotation – that Manet breaks with the fiction of an art history always already grounded in precedent'); Theodore Reff, *Manet, Olympia* (Allen Lane, 1976) 59-60 (discussing 'allusion, parody and quotation.')

What is striking here is that the ordinary use of 'quotation' includes re-use of material that is transformed and not presented as distinct in the work in which it is incorporated. It is a classic example of what United States courts might today refer to as 'transformative use.' [95]It might, too, be regarded as in some respects a parody, though not a parody of which Raphael or Raimondi were the targets. Viewed from the perspective of artistic commentary, 'quotation' seems to include the re-use of expressive material as a basic component of subsequent creative efforts.

The legal conception of quotation embodied in Article 10(1) should but understood to reflect the ordinary uses of the term across the full range of cultural practices encompassed in Berne subject-matter. Textual practices concerning quotation may suggest that quotation implies a situation in which text is unmodified, and while incorporated in another work is kept distinct through the use of devices such as indentation of quotation marks. However, the Manet example should make clear that there should be no place in a national definition of 'quotation' for conditions concerning the distinctness of the material used and the manner of incorporation in subsequent material. Any such conditions would effectively narrow the exception from its mandatory, 'ordinary meaning.'

(d) 'Rulification' of Fair Practice

A fourth possible explanation for the imposition of additional conditions and qualifications on the quotation exception when implementing it into national law might be that countries are using such rules to implement the standard of 'fair practice.'[96] It is clear from the Stockholm *travaux* that (despite the wide adherence to the notion of 'unfair' competition) a number of countries felt uncomfortable with the notion of fair practice,[97] and it is notable that many states have not, in fact, implemented that condition into national law.[98] Moreover, it is true that the notion of 'fair practice' received little elaboration at the Stockholm revision,[99] and it has been surmised by some commentators that the concept of fairness leaves a significant margin of appreciation to Members of the Union.[100] Consider, for example, Brazil's Copyright Law of 1998, which does not include a 'fair practice' limitation but does confine the legitimate uses of quotation to 'the purposes of study,

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[96] N Elkin Koren & O Fischman-Afori, 'Rulifying Fair Use' (2017) 59 Ariz L R 161.

[97] Claude Masouyé, (1964) 42 RIDA 27 ('too general and too vague'); Nordemann *et al*, *op cit*, 111, ('hitherto unknown in German legal terminology').

[98] Nordeman *et al*, ibid, (raised 'questions of translating it into other languages').

[99] Report of the Study Group (November 1963), DA 20/2, p. 46, in TNA: BT 209/903, (noting that application of the test required an 'objective appreciation.')

[100] Ricketson and Ginsburg, [13.41], 786.

criticism or debate, to the extent justified by the purpose, provided that the author is named and the source of the quotation is given.'[101] Might it be said that rather than being illegitimate expressions of 'dysfunctional pluralism', this represents a genuine attempt to translate a vague or 'foreign' concept (fair practice) into concrete national law?

One difficulty with this suggestion is that, as already noted, the question of whether Members should be able to add conditions had been raised, and rejected, in the 1965 Committee of Governmental Experts. While the 1965 Committee was not prepared to leave *all* the conditions to Members of the Union,[102] it is not possible to infer conclusively from this decision that the Committee would not have accepted Member States imposing conditions that merely elaborated on the concept of 'fair practice.' However, what does seem clear is that a country could not do this in a manner that contradicted other decisions as to the scope of the exception. To purport to justify imposing such a condition on the basis that it reflected national conception of 'fair practice' could hardly be regarded as a good faith implementation (as required by Article 31 of the Vienna Convention and, indeed, principles of customary international law).

The effect is that conditions as to the size of permissible quotation and the purposes for which such quotations might be used cannot legitimately be excused by reference to a desire to concretise 'fair practice'. The *travaux* reveal that proposals for such conditions were considered and rejected by the Study Group (in response to suggestions by the Committee of Non-Governmental Experts), by the Meeting of Governmental Experts in 1965 and by the Main Committee I at the Intergovernmental Conference in Stockholm on June 16, 1967. In these discussions, the point is made that these factors are instead treated as relevant to an assessment of fairness.[103] While that implies that the amount taken and the purpose of the quotation may – possibly must – be considered when assessing whether use in in accordance with 'fair practice', neither consideration can be treated as any more than a factor. The Study Group and delegates repeatedly indicated that a legitimate quotation might indeed have to be lengthy.[104] The clear implication is that fairness, like proportionality, should be assessed by reference to the facts, and it is not appropriate to turn either consideration into a rule.

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[101] Law No 9.610 of Feb 19, 1998, Art 46(III). Similarly, Law of Copyright and Related Rights, Jan 1, 2003, Art 25 (Cambodia).

[102] DA/22/33 p. 10.

[103] William Wallace (rejecting proposal to limit exception to 'short' quotations, explaining that 'the real safeguard for authors' lay in the 'fair practice' condition): Minutes, para. [764], *Records*, 860. Also Hesser para [767], and O'Hannrachain para [775], *Records*, 861.

[104] Report of the Study Group (November 1963), DA 20/2; Reimer in Minutes, para [765], *Records*, 860; Thorvald Hesser, para [767], *Records*, 861.

In contrast, it is conceivable that other types of conditions might be acceptable as national concretisations of the notion of fair practice. One example might be where a country replaces a 'fair practice' requirement with a condition that the use not be so substantial as to injure the market for the original work or otherwise prejudice the author.[105] As harm is clearly one factor to be considered in an 'objective assessment' of fair practice, it might be acceptable for such a condition to be adopted to concretise the standard (and it certainly would be acceptable as one of a list of factors). Similarly, consider, for example, a country considers that 'fair practice' precludes quotation in a manner that violates the integrity of a work. It was already noted that the Estonian law on quotation does not include a limitation as to 'fair practice', but require 'that its extent does not exceed that justified by the purpose and the idea of the work as a whole which is being summarised or quoted is conveyed correctly,' More generally, it would be unobjectionable to add a condition that a legitimate quotation not be a distortion or mutilation of a work (alongside the conditions with respect to divulgation and attribution explicitly mentioned in the Berne text). In contrast, even if it was thought that potential violations of the integrity of a work would preclude many quotations from artistic works, that would not justify the exclusion of artistic works from the operation of the exception altogether. After all, such a condition contradicts the text as adopted, and was specifically mentioned by one of the delegates as a reason for not limiting the scope of Article 10(1) to 'short' quotations.[106]

(e) Failures in the Transnational Compliance Processes

The final explanation for the dysfunctional pluralism that we have identified lies, we think, in failures in the 'transnational compliance procedures' in relation to copyright exceptions.[107] This failure reflects the weak position of users at both national and international levels. On the national level, as has been often noted, there is an asymmetry in the capacity of the various 'stakeholders' in copyright to participate in the legislative process: on the one hand there are rightholders who commonly form well-resourced groups to promote their interests with the legislature; on the other hand, there are users, which being large in number and widely distributed, are rarely able to co-ordinate effectively to resists extensions of copyright. The effect of this asymmetry is that rightholders lobby successfully for extended rights and longer terms, while users rarely are able to resist, let alone promote new exceptions. Where rare new exceptions do find support, they tend to

[105] Law 65-00 on Copyright, Art 31 (Dominican Republic) (coupled with 2 steps of 3 step test in Art 30); Law on Copyright, No 23 of Jan 28, 1998, Art 31 (Colombia).
[106] George Straschnov (Monaco), in Minutes, para [769], *Records*, 861.
[107] The term is from Harold Koh, 'Bringing International Law Home,' (1998) 35 Houston LR 623.

be narrowly defined and highly qualified. It is these processes that broadly explain why exceptions, such as the quotation right, end up in many national laws couched in a multiplicity of conditions and qualifications.

The matter is compounded because a similar structural failure also occurs at an international level.[108] While in general, it is no longer the case (as it might have been at the time of the Stockholm Revision) that Members of the Berne Union are able to become signatories to texts that contain obligations, to ratify those treaties, and yet to ignore their prescriptions, because the TRIPS Agreement gave teeth to Berne, this remains true for Article 10(1). In short, TRIPS works well for right-holders, not users. This is because the system depends on a nation state recognising a commercial interest that is substantially affected by non-compliance that it triggers the dispute resolution process. An example would be a right-holder group in country (A) that, because of non-compliance in country (B), is not benefiting from an expected revenue stream. All relevant right-holders in country (A) have an interest in causing country (B) to change its laws. However, it is much more difficult to envisage a parallel situation in respect of Article 10. That would require a national Government (A) to complain before the WTO that another contracting party (B) has not honoured its obligation to implement the mandatory exception, with the effect that businesses from (A) are unable to exploit their productions in country (B), or have been charged for unnecessary licences to do so.

Of course, it might be that international operators of Internet 'platforms' might have an interest in ensuring that the quotation right is properly secured to users.[109] Indeed, one possible response that Google might have made to the Spanish reforms to the quotation right could have been to seek action from the USTR to commence dispute settlement at the WTO. The claim would, presumably, been that the money paid over as remuneration by Google and other news platforms should be reimbursed. Instead, of course, as is well known, Google simply withdrew its Google News service.[110] Another possibility might be that the provider of an Internet platform complains that its interests (and thus those of the State in which it is established) are affected because a particular national law does not allow users to take advantage of quotation rights, so the platform is less well-used and thus less popular. It is easy to see, however, that a national Government might want to weigh the

[108] It is interesting that a number of EU countries, such as the Netherlands, modified their 'quotation exception' in order to comply with the EU's Information Society Directive, 2001/29/EC. As Article 5(3)(d) is not in significantly different terms from, and on its face it no stricter than, Article 10(1) Berne, such a response likely reflects different perceptions in the binding force of the two regimes.

[109] Guy Pessach, 'Beyond IP – The Cost of Free,' (2016) 54 Osgoode Hall Law Review 225, (highlighting the reliance of new media enterprises on free availability of cultural material).

[110] Xalabarder, 'Press Publisher Rights', op cit, 20-21.

interests to the platform against other interests of content producers which benefit from the fact that third countries impose unlawful conditions on the quotation right. Unless a particular national economy comes to be dominated by the economic interests of platforms (whose business depends on user-generated content, the legitimacy of which in turn relies on the quotation exception), it is difficult to imagine a national government seeking to vindicate the quotation right in WTO proceedings.

4. Conclusion

Even if the failings of transnational compliance procedures pose significant obstacles to combatting this 'dysfunctional pluralism,' the promise of GMFU is already to be found in the text of Article 10 BC, and much therefore can still realised by the concerted action of what Harold Koh referred to as 'transnational norm entrepreneurs' (including NGOS, academics, and intellectual communities). By highlighting the centrality of Article 10(1) in international copyright law, and clarifying its status as mandatory, the attention of national policy actors can be moved from the obsession with 'three step test' and what nation states cannot do for users (including author-users) and to what nation states are *already obliged* to do for users. More specifically, pressure can be brought to bear at a national level by repeated emphasis on the illegitimacy of limitations and qualifications as to shortness and purpose. Once these reforms are achieved, it will become possible to explore the breadth that the notion of 'quotation' in Article 10(1) offers. If this paper contains a provocation, it is to provoke norm entrepreneurs and their interpretive communities (Members of the Berne Union) to give full effect to a norm that has been on the books for fifty years, and thus, finally, to recognise GMFU.