SCCR/9/7
ORIGINAL: English
DATE: *April 5, 2003*

WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment[1],[3]

prepared by Mr. Sam Ricketson, Professor of Law, University of Melbourne and Barrister, Victoria, Australia

Page 18

Lawful Rights of Quotation

The making of "quotations" from works has long been recognized as an exception under the Berne Convention, where it is now contained in Article 10(1) as a mandatory requirement to which each Union member must give effect in relation to works claiming protection under the Convention. It provides as follows:

> "(1) 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."

---

1 In this regard, the author has drawn on his previous writings in this area, in particular from: S. Ricketson, *The* Berne Convention *for the Protection of Literary and Artistic Works*: *1886-1986*, Centre for Commercial Law Studies, Queen Mary College, London, 1987, chapter 9 ("Ricketson I"); S Ricketson, "The Boundaries of Copyright: Its Proper Limitations and Exceptions–International Conventions and Treaties, *Intellectual Property Quarterly* (UK), Issue 1, 56-94, (1999) ("Ricketson II"); S Ricketson, "The Three-step Test, Deemed Quantities, libraries and Closed Exceptions," Advice prepared for the Centre of Copyright Studies Ltd.," Centre for Copyright Studies, Sydney 2003 ("Ricketson III").

3 For ease of reference, the earlier versions of the Berne Convention are referred to as "Acts" and are qualified by the name of the place at which they were adopted by a revision conference. Thus: Berne *Act* 1886–the original text adopted at Berne in 1886 (there were earlier draft texts of 1884 and 1885 respectively that were produced for the successive revision conferences of those years. *Paris Additional Act* 1896–the Additional Act of the Convention formulated in Paris 1896. *Berlin Act* 1908–revision formulated at Berlin 1908. *Rome Act* 1928–revision formulated at Rome 1928. *Brussels Act* 1948–revision formulated at Brussels 1948. *Stockholm Act* 1967–revision formulated at Stockholm 1967. *Paris Act* 1971–revision formulated at Paris 1971 (arts 1-21 the same as in Stockholm Act).
For ease of reference, the following abbreviations are used to refer to the records of the above conferences: *Actes* 1884: Actes de la Conférence internationale pour la protection des droits d'auteur réunie à Berne du 8 au 19 septembre 1884; *Actes* 1885: *Actes de la 2ème Conférence internationale pour la protection des œuvres littéraires et artistiques réunie à* Berne *du 7 au 18 septembre 1885; Actes* 1886: *Actes de la 3ème Conférence internationale pour la protection des œuvres littéraires et artistiques réunie à* Berne *du 6 au 9 septembre 1886. Actes* 1896: *Actes de la Conférence de Paris de 1896; Actes* 1908: *Actes de la Conférence de Berlin 1908; Actes* 1928: *Actes de la Conférence réunie à Rome du 7 mai au 2 juin 1928*: *Documents* 1948: *Documents de la Conférence réunie à Bruxelles du 5 au 26 juin 1948. Records* 1967: *Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967; Records* 1971: *Records of the Paris Conference 1971 (Paris, July 5 to 24, 1971).*

The following comments may be made about this provision**:**

1. *The meaning of "quotation"*: Although Article 10(1) does not define "quotation," this usually means the taking of some part of a greater whole–a group of words from a text or a speech, a musical passage or visual image taken from a piece of music or a work of art–where the taking is done by someone other than the originator of the work.[19] There is nothing in the wording of Article 10(1) to indicate that this exception is only concerned with reproduction rights: quotations may be made just as easily in the course of a lecture, performance or broadcast, as in a material form such as a book, Article or visual work of art.

2. Length of quotation: No limitation is placed on the amount that may be quoted under Article 10(1), although as suggested above "quotation" may suggest that the thing quoted is a part of a greater whole. Quantitative restrictions, however, are notoriously difficult to formulate and apply, and Article 10(1) leaves this as a matter to be determined in each case, subject to the general criteria of purpose and fair practice.[20] Thus, in some instances it may be both consistent with the purpose for which the quotation is made and compatible with fair practice to make lengthy quotations from a work, in order to ensure that it is presented correctly, as in the case of a critical review or work of scholarship. It is also possible to envisage other circumstances where quotation of the whole of a work may be justified, as in the example given by one commentary of a work on the history of twentieth-century art where representative pictures of particular schools of art would be needed by way of illustration.[21] Another might be cartoons or short poems where these are quoted as part of a wider work of commentary or review.

3. *The work in question must have been "lawfully made available to the public"*: This is wider than the concept of a "published work" under Article 3(3) where such acts as broadcasting and public performance are excluded from the scope of "publication" and it is also required that the work be published "with the consent of the author." The requirement of "lawful availability" under Article 10(1) is significantly different in that it includes the making available of works by any means, not simply through the making available of copies of the work. Thus, if a dramatic or musical work is performed in public or broadcast, Article 10(1) should permit the making of quotations from it by a critic or reviewer who takes down passages verbatim for use in his or her review. "Lawful availability" under Article 10(1) also covers the situation where this has occurred under a compulsory license, although in the case of sound recordings the compulsory license allowed for under Article 13(1) only comes into operation when the author has first authorized the recording, and presumably the making available, of his or her musical work.[22] Finally, it will be seen that Article 10(1) contains no limitation on the kinds of work that may be quoted.

4. *"Compatible with fair practice"*: "Fair practice" is possibly a concept that is more familiar to Anglo-American lawyers than their continental European counterparts,[23] and will essentially be a matter for national tribunals to determine in each particular instance. However, the criteria referred to in Article 9(2) (see below) would appear to be equally applicable here in determining whether a

---

19 See here the first meaning given in the definition in the *Concise Oxford Dictionary*, 10th Ed. 2001, pp. 1176.

20 *Ibid*, 1147 (Report).

21 Nordemann *et al*, 83.

22 Note that Desbois *et al* take the view that a similar limitation applies in respect of compulsory licenses under art 13(2): *Documents* 1948, 188. This view is considered below at paragraph 9.45.

23 Nordemann, 83.

particular quotation is "fair," namely whether it conflicts with a normal exploitation of the work and unreasonably prejudices the legitimate interests of the author.[24] There is no mention in Article 10(1) of the possibility of uses taking place pursuant to a compulsory license, but in principle where a use by way of quotation is remunerated and "does not exceed that justified by the purpose" (see below), this should more readily satisfy the requirement of compatibility with fair practice than would a free use.

5. *The extent of the quotation must "not exceed that justified by the purpose"*: In its Report to the Stockholm Conference, Main Committee I noted that any list of specified purposes could not hope to be exhaustive.[25] Nevertheless, it is clear from the preparatory work for the Conference and the discussions in Main Committee I that quotations for "scientific, critical, informatory or educational purposes" were certainly seen as coming within the scope of Article 10(1).[26] Other examples are quotations in historical and other scholarly writing made by way of illustration or evidence for a particular view or argument. Again, in the 1965 Committee of Experts report for the Stockholm Conference reference was made to quotations for judicial, political and entertainment purposes.[27] A further instance that was given in both the programme[28] and the discussions in Main Committee I was quotation for "artistic effect."[29] 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).[30]

6. *Quotations from newspaper Articles and press summaries*: In one respect, however, Article 10(1) refers to a specific kind of quotation, namely "quotations from newspaper Articles and periodicals in the form of press summaries." This preserves some of the wording of Article 10(1) of the Brussels Act, but not without a change in its meaning. The latter provision, in fact, referred generally to the making of short quotations, and then provided that this extended to the right to include such quotations in press summaries. The present wording does not have this meaning and makes little sense: while a summary of a newspaper or periodical Article may include a quotation from that Article (as envisaged by the Brussels text), the making of the summary is not the same thing as the making of a quotation. It is difficult therefore to know what the present Article 10(1) means when it refers to a quotation in the form of a summary. This is a contradiction in terms, and plays no useful purpose in exemplifying the operation of the provision.[31]

7. *Mandatory not permissive*: Finally, as noted above, this is a mandatory exception that must be applied by member countries in their national laws. In this regard, it is unique among Berne limitations and exceptions, as all the others contained in the Convention are permissive, in the sense that they set the limits within which national laws *may* provide for limitations and exceptions to protection.

Utilization for Teaching Purposes

---

24 See also Nordemann *et al*, 83–84.

25 *Records* 1967, 860–861.

26 *Ibid*, 116–117 (Doc S/1), 860–861 (minutes).

27 *Ibid*, 117.

28 *Ibid*.

29 *Ibid*, 861 (comments by Swedish delegate, Mr. Hesser).

30 US *Copyright Act* 1976, Section107.

31 See here the explanation in the Report of Main Committee I, which hardly takes matters much further: "It was also pointed out that the last phrase, referring to press summaries, gave rise to some ambiguities. It was felt, however, that it would be difficult to get rid of that ambiguity which the courts would be able to decide upon, but that it was not absolutely essential to do so." *Records* 1967, 1147.

The relevant provision is Article 10(2), which provides as follows:

> "(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided that such utilization is compatible with fair practice."

The following points about the interpretation of this provision should be noted:

1. What is the "utilization… [of works] for teaching" is a matter to be determined by national legislation, or by bilateral agreements between Union members (see also Article 20). All that Article 10(2) does, therefore, is to set the outer limits within which such regulation may be carried out.

2. Unlike earlier versions of this Article, no quantitative limitations are contained in Article 10(1), apart from the general qualification that the utilization of works should only be "to the extent justified by the purpose, ... by way of illustration ... for teaching, provided that such utilization is compatible with fair practice." These references to purpose and fair practice are similar to those in Article 10(1), and make the provision more open-ended, implying no necessary quantitative limitations. The words "by way of illustration" impose some limitation, but would not exclude the use of the whole of a work in appropriate circumstances, for example, in the case of an artistic work or short literary work.[32]

3. The utilization must be "by way of illustration" for the purpose of "teaching." The meaning of the latter expression received considerable attention from the delegates at the Stockholm Conference, and the following explanation of their views was provided in the Committee's Report:

> "The wish was expressed that it should be made clear in this Report that the word 'teaching' was to include teaching at all levels–in educational institutions and universities, municipal and State schools, and private schools. Education outside these institutions, for instance general teaching available to the general public but not included in the above categories, should be excluded."[33]

This is a restrictive interpretation,[34] as it clearly excludes the utilization of works in adult education courses, and, in developing countries, would also exclude adult literacy campaigns, although the latter use may be covered by the provisions of the Appendix to the Paris Act (see below).

4. Is "teaching" confined to actual classroom instruction, or does it also extend to correspondence or online courses where students receive no face-to-face instruction from a teacher. The latter are of importance in many countries, and it is suggested that there is no reason to exclude them from the scope of "teaching" for the purposes of Article 10(2).

5. The requirement that the utilization be "compatible with fair practice" is the same as for lawful quotations under Article 10(1). This involves an objective appreciation of the situation, and, as suggested above, the criteria referred to in Article 9(2) would provide a useful guide (see further

---

[32] No further guidance on these matters is to be found in the Report of Main Committee I, although the reports of the Committee's proceedings indicate that at least one delegate (that of the UK) explicitly stated that this wording would permit the use of the whole of a work and that he also thought this was the view of other delegates.

[33] *Records* 1967, 1148.

[34] Note that in Main Committee I some delegates thought that this was too limiting: *ibid*, 886 (Mr. Reimer, FRG).

below).

6. The range of utilization's permitted by Article 10(2) includes not only publications (presumably this means reproductions), but also broadcasts and sound or visual recordings. In the case of broadcasting, this may allow for dissemination to a wider audience that those for whom the instruction is intended.

7. One form of utilization which is not referred to in Article 10(2) is the distribution of a work either as part of an original programme or as part of a broadcast over a cable system. This is included in other provisions dealing with exceptions to authors' rights (Article 10*bis*(1) and (2)), so its omission from Article 10(2) must be regarded as deliberate.

8. Article 10(2) does not contain any restriction on the number of copies that may be made in the case of publications and sound or visual recordings that are made for teaching purposes. Just as no limitation is imposed in respect of the public which is reached by a broadcast intended for teaching purposes, so there can be no limitation on the number of copies that can be made for the same purpose. The only further qualification applied here is that the making of multiple copies must be compatible with "fair practice." Obviously, if this competes with the author's normal exploitation of his work and unreasonably prejudices his legitimate interests, Article 10(2) should not apply. In this regard, the amount copied will also be a highly relevant factor, particularly where large numbers of copies are made for individual classroom use by students. Remuneration for such uses under a compulsory license may therefore make the use more "compatible with fair practice."

Quotation and Teaching Uses: *Attribution of Source and Authorship*

Both Articles 10(1) and (2) are subject to a further requirement in Article 10(3) to the effect that, where use is made of works in accordance with those paragraphs, mention shall be made of the source, and of the name of the author if it appears thereon.

This is a mandatory requirement, and while it may seem superfluous in the light of Article 6*bis*, it was thought appropriate that it should be added to Article 10 in order to remove any doubt that the right of attribution was to be respected in the case of quotations and utilizations made under that provision.[35] This may raise a problem as regards the right of respect or integrity: is the application of this requirement under Article 6*bis* thereby excluded from the provisions of Article 10? A statement in the Report of Main Committee I of the Stockholm Conference notes that delegates were generally agreed that Article 6*bis* applied in respect of exceptions authorized by the Convention, including Article 10.[36] However, there are practical reasons for arguing that Article 6*bis* should not apply to the provisions of Article 10. Modifications and alterations to a work are often necessary where it is quoted or utilized for teaching purposes, and the need for such flexibility is supported by the records of the Rome Conference, where proposed amendments to make borrowings under the Article "conform entirely to the original text" were rejected.[37] The question of modifications and other changes has not been raised at subsequent Revision Conferences in the context of Article 10 and, from this, it can be concluded that, unlike the right of attribution, there has been no agreement about the need to respect the right of integrity under Article 10. In the absence of such agreement, the application of Article 6*bis* to lawful quotations and borrowings cannot therefore be assumed.

In addition, Article 10(3) may fill a gap which is left open by Article 6*bis*. Under the Brussels Act, this provision did not require the protection of the right of attribution after the death of the author, and it is still possible under Article 6*bis*(2) of the Stockholm, Paris Acts for a Union member to deny such protection. In such a case, Article 10(3) makes it clear that such a country must still accord this protection in the case of quotations and utilizations falling under Article 10.

Finally, it should be noted that Article 10(3) is not confined solely to attribution of authorship–an obligation that only arises where the author's name appears on the work–but it requires attribution of source–presumably the publication details of the work, including the name of any larger work in which the work appears.

---

35 *Documents* 1948, 245 (comments in the programme). See also preliminary proposals for the postponed Conference of 1935: [1933] *DA* 99.

36 *Records* 1967, 1165.

37 *Actes* 1928, 252ff. See further Ricketson, paragraph 9.28.

Exceptions Made for the Benefit of the Press

From its inception, the Convention has contained provisions in favor of the press: see the limitations under Article 2(8) for "news of the day" and "miscellaneous facts discussed above. The other provisions concerned with press usage fall into two broad categories: the use of Articles in newspapers and periodicals (Article 10*bis*(1)) and the use of works for the purposes of reporting and informing the public (Articles 2*bis*(2) and 10*bis*(2)).

The Use of Articles in Newspapers and Periodicals

This is dealt with in Article 10*bis*(1) as follows:

> "(1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of Articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed."

Although previously a mandatory exception, this is now left as a matter for national legislation. The following comments can be made about its scope.

1. The acts which may be allowed extend to reproduction, broadcasting and communication to the public by wire.

2. Not only does it apply to Articles published in newspapers and periodicals, but also to "broadcast works of the same nature" (but not to "works of the same nature" that have been communicated to the public by wire). It also appears that entire works can be taken. On the other hand, the qualification that these should be Articles or broadcast works "on current economic, political or religious topics" excludes a wide range of newspaper and periodical writing, such as literary and artistic reviews, sports reports, articles on scientific and technical matters and so on. The word "current" also indicates that the Articles in question must be of immediate relevance, as the purpose behind the exception is to expedite the free flow of information on current events.[38] Longer Articles which review these topics in a longer-term framework would not therefore be included.

3. The provision does not refer to the reproduction and broadcasting of Articles in translation.[39] It was not thought necessary to do this at the Stockholm Conference, on the basis that the right of translation under Article 8 of the Convention was implicitly subject to the same exceptions as those of reproduction and broadcasting:[40] See further below.

4. As with Article 10(2), where a work covered by this provision is broadcast or communicated to the public by wire, this must also cover any further dissemination that occurs through the reception of

---

[38] Note, for example, the statement of the Czech delegate which implies that he saw this as being concerned principally with statements by public figures: *ibid*, 859.

[39] Doc S/51: *ibid*, 688.

[40] *Ibid*, 1149 (Report of Main Committee I).

the broadcast or wire service, for example, where it is played in public.[41] In the case of reproductions, there can clearly be no limitation on the number of copies made.

5. National laws may impose more rigorous limitations than those set by Article 10*bis*(1), or may refuse to allow any derogations whatsoever in these cases. The only condition to be complied with under the Article is that the source of the Article must be indicated (see further below). There is also no reason why a country invoking Article 10*bis*(1) should not make such uses subject to the payment of a compulsory license fee: this, after all, would be a lesser derogation than that which the provision allows.[42]

6. Any exception formulated under national laws pursuant to this provision must require that the source of the Article be indicated. This is a partial recognition of the author's right of attribution, but is differently worded from the requirement in Article 10(3). Under the latter, compliance with this requirement is necessary if the quotation or utilization in question is to be lawful. Under Article 10*bis*(1), however, the legal consequences of the breach of this obligation are left to be determined by the legislation of the country where protection is claimed. Thus, it would be open to national legislation to decree that a breach involves some lesser penalty, such as liability to a sum of damages or a fine, and does not make the use itself unlawful.

Use of Works in the Reporting of Current Events

Incidental uses of works in the reporting of current events by means of photography, cinematography and radio are dealt with in Article 10*bis*(2), which provides as follows:

> "(2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public."

The following comments can be made about this provision.

1. This is not a mandatory requirement, but is simply left as a matter for national legislation. In providing for the uses detailed in Article 10*bis*(2), a Union member could make one of the conditions for this to occur the payment of remuneration under a compulsory license.[43] It would also be open to a Union member not to provide for any of these uses.

---

41 See also to the same effect, Masouyé, 61.

42 See also to the same effect, Desbois *et al*, 198–199.

43 See also Desbois *et al*, 201.

2. The means of reporting that are covered by the provision are photography, cinematography, broadcasting and communication to the public by wire. However, it will be noted that, apart from photographs and cinematographic films, reproduction generally of works in the course of reporting current events is not allowed. Such uses will therefore have to be justified under the right of quotation in Article 10(1) or as being within the general exception under Article 9(2). An example would be a sound recording of a current event that is made for subsequent broadcast: in so far as this contains a reproduction of a protected work, this will not be covered by Article 10*bis*(2).

3. The subject of the report must be a "current event," and the work in question must be "seen or heard in the course of the event." This places an important temporal limitation on the provision, meaning that it would not be permissible after the report has been made to embellish it by the addition of a picture of a work of art or a musical accompaniment, as neither of these would have been "seen or heard in the course of the event."

4. The use of the work must be "justified by the informatory purpose." It will be clear that this does not allow *carte blanche* for the reproduction of whole works under the guise of reporting current events: this will only be permitted where the nature of the work is such that it would not be possible to make the report without doing so.[44]

Reporting of Lectures, Addresses and Other Similar Works

Article 2*bis*(2) also permits member states to regulate the conditions under which these kinds of orally delivered works may be used for the purposes of reporting, providing that:

> "It shall also be a matter for legislation in the countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in Article 11*bis*(1) of this Convention, when such use is justified by the informatory purpose."[45]

This will not include, for example, lectures, addresses, etc, that are delivered to private groups, nor will it cover sermons, unless they are covered by the compendious term "other works of the same nature." The public interest rationale of the provision is also made explicit, with the overriding requirement that the uses it allows are to be justified by the "informatory purpose." This does not necessarily mean that the works reproduced, broadcast, etc, must themselves be "news," so long as the reproduction, broadcast, etc, is made with the purpose of informing the public. In this regard, it contrasts with Article 10*bis*(2) which is limited to reporting "current events."

---

[44] Examples would include a report on the dedication of a new public sculpture or building, and a report on a sporting event where the stadium is covered with various works of art: *Ibid*, 119.

[45] Stockholm, Paris Acts, art 2*bis*(2).

The following further points of comparison with Article 10*bis*(2) should be noted:

1. As the conditions under which the uses covered by Article 2*bis*(2) may occur are left to national legislation, it is likewise open to Union members to make them subject to compulsory licenses and the payment of remuneration.

2. Unlike Article 10*bis*(2), Article 2*bis*(2) does not cover the making of a cinematographic film of the works covered by the provision.