Cambridge University Press 978-1-108-83545-9 — Global Mandatory Fair Use Tanya Aplin , Lionel Bently Table of Contents <u>More Information</u>

## Contents

| Acknowledgements   |                   |  |    |  |  |  |  |  |
|--|-------------------|--|----|--|--|--|--|--|
| Table of Legislation   |                   |  |    |  |  |  |  |  |
| Table of Cases   |                   |  |    |  |  |  |  |  |
| 1 00   | Table of Cases xx |  |    |  |  |  |  |  |
| 1  | Intr              | Introduction   |    |  |  |  |  |  |
| 2  | The               | e History of Article 10(1) Berne                       | 6  |  |  |  |  |  |
|  | Ι                 | Berne (1884–1886)                                      | 6  |  |  |  |  |  |
|  | II                | Rome (1928)  | 8  |  |  |  |  |  |
|  | III               | Brussels (1948)  | 12 |  |  |  |  |  |
|  | IV                | Stockholm (1967)                                       | 16 |  |  |  |  |  |
|  |                   | A The Study Group                                      | 17 |  |  |  |  |  |
|  |                   | B Committee of (Non-official) Experts                  | 20 |  |  |  |  |  |
|  |                   | C Second Report of the Study Group                     | 21 |  |  |  |  |  |
|  |                   | D Interest Group Inputs                                | 22 |  |  |  |  |  |
|  |                   | E Committee of Government Experts                      | 25 |  |  |  |  |  |
|  |                   | F The Draft Treaty                                     | 26 |  |  |  |  |  |
|  |                   | G The Intergovernmental Conference                     | 26 |  |  |  |  |  |
| 3 Preliminary Considerations about the Nature of the Quotation |                   |  |    |  |  |  |  |  |
|  | Exc               | eption   | 29 |  |  |  |  |  |
|  | Ι                 | The Mandatory Nature of the Quotation Exception        | 29 |  |  |  |  |  |
|  |                   | A Article 10(1) Berne as Mandatory                     | 29 |  |  |  |  |  |
|  |                   | B Is Article 10(1) Berne Imperative?                   | 38 |  |  |  |  |  |
|  | II                | Types of Works That Are Subject to Article 10(1) Berne | 43 |  |  |  |  |  |
|  |                   | A Berne Works  | 44 |  |  |  |  |  |
|  |                   | B Post-Berne Works                                     | 47 |  |  |  |  |  |
|  |                   | 1 Computer Programs and Databases                      | 47 |  |  |  |  |  |
|  |                   | 2 Rome Convention Subject Matter (Performance,         |    |  |  |  |  |  |
|  |                   | Phonograms and Broadcasts)                             | 50 |  |  |  |  |  |

v

Cambridge University Press 978-1-108-83545-9 — Global Mandatory Fair Use Tanya Aplin , Lionel Bently Table of Contents <u>More Information</u>

| vi |      | Contents   |            |
|----|------|--|------------|
|    |      |  |            |
|    |      | 3 Miscellaneous Subject Matter   | 53         |
|    |      | C Quotation and the Intersection of Authorial Works  |            |
|    | III  | and Related Rights<br>Types of Rights That Are Subject to Article 10(1) Berne  | 53         |
|    | 111  | A Economic Rights  | 55         |
|    |      | 1 Under Berne  | 55<br>55   |
|    |      | 2 Post-Berne   | 55         |
|    |      | B Moral Rights   | 57         |
|    | IV   | Non-applicability of the Three-Step Test to the Mandatory  | 71         |
|    |      | Quotation Right  | 60         |
|    |      | A Article 9(2) Berne   | 61         |
|    |      | B Article 13 TRIPS   | 63         |
|    |      | C Article 10 WIPO Copyright Treaty 1996  | 65         |
| 4  | Arti | cle 10(1) Berne: Requirements  | 69         |
|    | Ι    | No Limitation by Purpose   | 69         |
|    | II   | Article 10(1) Berne: Work Already Lawfully Made Available  |            |
|    |      | to the Public  | 71         |
|    | III  | Article 10(3) Berne: Attribution Requirement   | 77         |
|    | IV   | Article 10(1) Berne: The Requirement of Proportionality  | 78         |
|    |      | A The Interrelationship between Proportionality and Fair   | ,          |
|    |      | Practice   | 78         |
|    |      | B The Proportionality Enquiry  | 80         |
| 5  | Arti | cle 10(1) Berne: The Meaning of Quotation  | 83         |
|    | Ι    | Introduction   | 83         |
|    | II   | Characteristics of Quotation in Relation to the Source Material  | 90         |
|    |      | A Is Quotation Inherently Limited to Literary Works or Text?   | 90         |
|    |      | 1 Music  | 92         |
|    |      | 2 Film   | 93         |
|    |      | 3 Architecture   | 95         |
|    |      | B Is a Quotation Inherently Short?   | 101        |
|    |      | <ul><li>C Is It Possible to Quote an Entire Work?</li><li>D Must the Quotation Be Taken from Another Author?</li></ul> | 104        |
|    | III  | Characteristics of Quotation in Relation to the Destination Material   | 109        |
|    | 111  | A Must the Quotation Be Used in Another 'Work'?  | 110<br>110 |
|    |      | B Must the Quotation Be Proportionately Short?   | 113        |
|    |      | C Must the Quotation Be Unaltered?   | 114        |
|    |      | D Must the Quotation Be Identifiable?  | 125        |
|    | IV   | Characteristics of Quotation According to the Interrelationship  | -          |
|    |      | between the Source and Destination Material  | 128        |
|    |      | A Must a Quotation Be Deliberately Used?   | 128        |

CAMBRIDGE

|              |      | Contents  | vii         |
|--------------|------|---|-------------|
|              |      |   |             |
|              |      | B Must a Quotation Be Used to Further an Argument   | 131         |
|              | V    | Conclusion  | 138         |
| 6            | Arti | cle 10(1) Berne: Fair Practice  | 140         |
|              | Ι    | Introduction  | 140         |
|              | II   | Rejecting Three Possible Approaches to Fair Practice  | 142         |
|              |      | A Fair Practice as Solely Determined by National Law  | 142         |
|              |      | B Fair Practice as a Matter of State Practice   | 148         |
|              |      | C Fair Practice as Synonymous with the Three-Step Test  | 150         |
|              | III  | Fair Practice as an Independent, Pluralistic Norm   | 151         |
|              |      | A Fair Practice – The Role of Harm  | 154         |
|              |      | B Fair Practice – The Role of Freedom of Expression   | 159         |
|              |      | C Fair Practice – The Role of Distributive Justice  | 163         |
|              |      | D Fair Practice – The Role of Custom  | 168         |
|              |      | <ul><li>E Fair Practice – The Role of Good or Bad Faith</li><li>F Fair Practice – A Role for Honest Commercial Practices?</li></ul> | 176<br>180  |
|              | IV   | Fair Practice – A Matter of Rules or Standards?   | 185         |
|              | 1 V  | Fair Fractice – A Matter of Rules of Standards:   | 105         |
| 7            | The  | Consequences of Global Mandatory Fair Use   | 190         |
|              | Ι    | Article 10(1) Berne in Contrast to the Three-Step Test  | 190         |
|              |      | A Acceptable Scope of the Exception   | 192         |
|              |      | B The Normative Value of the Exception  | 194         |
|              |      | C The Unpublished Nature of the Source Work   | 198         |
|              |      | D The Treatment of Moral Rights of Authors  | 199         |
|              |      | E The Cumulative Nature of the Requirement  | 201         |
|              |      | F Free-Use Exceptions   | 204         |
|              | II   | Changes to National Exceptions  | 204         |
|              |      | A Specific-Quotation Exceptions   | 204         |
|              |      | B Fair Dealing Exceptions   | 208         |
|              | III  | Judicial Interpretation   | 209         |
|              | IV   | Making Sense of the Parody Exception  | 216         |
|              | V    | Industry Guidelines and Practices   | 222         |
| 8            | Со   | nclusion  | 225         |
| Bibliography |      |   |             |
| Index        |      |   | <b>2</b> 49 |