

The quotation exception in EU copyright law: misunderstood and misapplied?

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Art 5(3)(d) Directive 2001/29

“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;*

Art 10(1) Berne Convention

Article 10 Certain Free Uses of Works:

(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.

Art 10(3) Berne Convention

“where 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”.

Art 10(1) = Global Mandatory Fair Use

- 1. Global (Berne + TRIPS membership)
- 2. Mandatory - “It shall be permissible...”
- 3. Use
 - Scope of application
 - Meaning and purpose of quotation is broad
- 4. Fair – because of the requirements:
 - Lawfully made available to the public
 - Attribution
 - Proportionality
 - Fair practice

Global

- Members of the Berne Union at present - 179
- Arts 1-21 (excl. Art 6bis) Berne incorporated into TRIPS Agreement - WTO has 164 Members

Mandatory

- Language of Art 10(1): “It shall be permissible...” cf with Art 10(2), Art 10bis, Art 9(2): “It shall be a matter for legislation in the countries of the Union...to permit...”
- Commentators support this view
 - See Ricketson & Ginsburg, Hugenholtz & Goldstein, Grosse Ruse-Khan & Kur, Xalabarder, Senftleben, Dinwoodie & Dreyfus, Gerbrandy & Klaver, Okediji
- Travaux:
 - BIRPI Study group (1963) referred to “the right of quotation”
 - the UK proposed at the meeting of Government experts to make optional, but the proposal was rejected by 19 votes to 7 (1965)
 - Contrast amendments to Art 10bis(1) to ‘avoid the impression’ it was compulsory

Use: scope of application

- Applies to *all* Berne works not just literary works; optional for related rights
 - Language of the provision; *travaux*
- Applies to *all* economic rights – those in Berne and in WCT & TRIPS
- Does *not* apply to moral rights
 - see *travaux* suggesting moral rights are reserved
 - Art 10(3) is a different requirement to right of attribution (the ‘source’)

Use: meaning of “quotation”

- Language in Berne is *not limited by purpose* (incl. a requirement of ‘dialogue’)
 - *Travaux* confirm that it was intention to leave Art 10(1) language open because couldn’t agree on purposes to which it should be limited
- “Quotation” not limited to “print paradigm”
- Ordinary use of term – esp. outside print - covers: use of whole, transformative uses, uses without explicit critical commentary

Use: broad meaning of quotation

- Does not have to be short
- Can be of the whole work
- Can be of any type of work
- Need not be distinct
- Need not be used in another work
- Need not support or further an argument or critique

Examples



Cézanne's *Compotier, verre et pommes* (trans. *Fruit Bowl, Glass and Apples*), which he painted in 1878-9

» Maurice Denis' *Homage to Cézanne* (1900)



Examples

- Konstantin Melnikov
- Rusakov Club



James Stirling, Leicester
Engineering Building

Examples

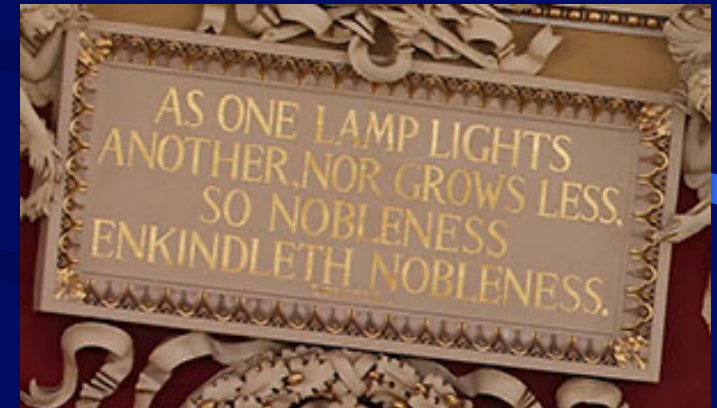
- Sergei Eisenstein's Film, *The Battleship Potemkin*



Francis Bacon, Study
for the Nurse from the
Battleship Potemkin

Ordinary Meaning of Quotation

The Langdell room at Harvard Law School includes a series of inscriptions from Cicero, Justinian, Psalms, Ecclesiasticus and Sir Edward Coke. A guide identifying these is entitled “*Quotations in the Langdell Reading Room.*”



- The Library of Congress publishes a guide to the building called “*On these Walls: Inscriptions and Quotations in the Buildings of the Library of Congress.*”

Fair

- Art 10(1) requirements help constrain the exception:
- Work must have been lawfully made available to the public
- Attribution
- quotation does not exceed that justified by its purpose (proportionality)
- Fair practice

(i) Lawfully made available to the public

- wider notion than publication under Art 3(3) Berne
 - Not restricted to making available of copies of the work – can be by any means - and covers situations where works have been made available via compulsory licence

(ii) Attribution

- Art 10(3): “mention shall be made of the source, and of the name of the author *if* it appears thereon”. (emphasis added)
- Distinct from right of attribution in Art 6bis Berne
- As a result should be viewed more flexibly
 - E.g. attributions in abbreviated form, indirectly accompanying the quotation, or implicit attribution, or easily identifiable

(iii) Proportionality

- The extent of the quotation does not exceed that justified by the purpose
- Prior, distinct enquiry from fair practice
- Concerned with the size of the quotation relative to its purpose
- Borrow from Strasbourg
 - Suitability – is quotation capable of achieving the purpose that is claimed
 - Necessity – whether shorter quotation would be as effective in achieving the purpose and less restrictive of author's rights

(iv) Fair practice

- Fair practice = fairness
- Informed by:
 - Notions of economic and moral harm
 - Freedom of expression
 - Distributive justice
 - (to a limited extent) custom

(iv) Fair practice

- This points to the following considerations:
 - Nature or purpose of the quotation
 - Size of quotation and its proportion to the source work
 - Harm to the market for the source work
 - Impact on the integrity interests of author of source work
 - Nature of the claimant's work
 - *No role for good/bad faith; limited role for custom*

Consequences of GMFU

- **Specific quotation exceptions**
 - Portugal– in contravention by restricting purposes to “criticism, discussion or teaching” or China by restricting to commenting on a certain work
 - Austria, Zimbabwe – in contravention by limiting quotation to only literary and musical works
 - France, Greece, Serbia – in contravention by restricting to “short” quotations
 - Jurisdictions that insist on incorporation into another work in contravention – e.g. France, Spain, Poland
 - Germany – for apparent requirement that there must be an inner relation between quoting and quoted work

Consequences of GMFU

- **Judicial interpretation**
- *Pelham v Hütter* C-476/17
- *Spiegel Online* C-516/17
- *Funke Median* C-469/17

Pelham v Hütter C-476/17

- 2 second sample of a rhythm sequence from the Kraftwerk song 'Metall auf Metall' used in 'Nur Mir'
- Reproduction of part of the sound recording
- Questions referred by the BGH which, in essence, asked whether the sample from the claimant's sound recording was a reproduction within Article 2(c) InfoSoc Dir. and if there was a quotation within Article 5(3)(d) InfoSoc Dir.

Pelham v Hütter C-476/17

- CJEU ruled
- Sound sample from a sound recording would *not* constitute a ‘reproduction’ within Article 2(c) if, ‘in exercising the freedom of the arts’ as contained in Art 13 of the EU Charter, it was used ‘in a modified form unrecognizable to the ear, in a new work’ [31]

Pelham v Hütter C-476/17

- CJEU ruled
- Art 5(3)(d) – quotation should be interpreted consistently with the usual meaning in everyday language, the legislative context and the underlying rationale [70]
- This pointed to the essential characteristics being:
 - “the use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work *for the purposes of illustrating an assertion, or defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user*, since the user of a protected work wishing to rely on the quotation exception must *therefore have the intention of entering into ‘dialogue’ with that work*, as the Advocate General stated in point 64 of his Opinion”. [71]

Pelham v Hütter C-476/17

- What does entering into dialogue mean ?
- Is “illustrate/defend/compare” an exhaustive list? Or are there other ways?
- Or is it as broad as AG Szpunar implies at [64]
- “whether in confrontation, as a tribute to or in any other way, interaction between the quoting work and the work quoted is necessary”.

Pelham v Hütter C-476/17

- CJEU ruled
- “In particular, where the creator of a new musical work uses a sound sample taken from a phonogram which is recognisable to the ear in that new work, the use of the sample may, depending on the facts of the case, amount to a ‘quotation’, on the basis of Article 5(3)(d) of the Directive 2001/29 read in the light of Article 13 of the Charter, *provided that that use the intention of entering into dialogue with the work from which the sample was taken, within the meaning referred to in paragraph 71 above, and the conditions set out in Article 5(3)(d) are satisfied. However, as the Advocate General stated in point 65 of his Opinion, there can be no such dialogue where it is not possible to identify the work concerned by the quotation at issue.*” [72]-73]

Pelham v Hüter C-476/17

- ‘identifiability’ of the work
- How is this to be assessed? The audience of the work, but which audience? Problematic.
- Should ‘identification’ be through how the material is presented – e.g. quotation marks? Also problematic.

Spiegel Online C-516/17

- Volker Beck (German MP from 1994-2017) – controversial article authored by him which was published, he alleged, in a modified way
- To illustrate this point, Beck published on his website the original (manuscript) version of his article and the published version
- Spiegel Online linked to these two versions, alongside an article that suggested Beck had been misleading the public for years. BGH referred several questions to CJEU.

Spiegel Online C-516/17

- “Is there no publication for quotation purposes under Article 5(3)(d) of Directive 2001/29 if quoted textual works or parts thereof are not inextricably integrated into the new text – for example, by way of insertions or footnotes – but are made available to the public on the internet by means of a link in the form of pdf files which can be downloaded independently of the new text?”

Spiegel Online C-516/17

- AG Opinion:
- “41. The exception for quotations is one of the most traditional exceptions to copyright. It has long been regarded as applying only to literary works. In works of this type, quotations are traditionally signalled by typographical means: inverted commas, italics, a different typeface from that of the main text, footnotes and so on.
- 42. At the present time, it does not seem inconceivable that [the exception for] quotations may also apply to other categories of work, in particular musical and cinematographic works, as well as works of visual art. In these cases, the methods for incorporating quotations into the work making them and for identifying them obviously have to be adapted.
- The same applies, in my opinion, to the incorporation of quotations into literary works...”

Spiegel Online C-516/17

- “neither the wording of Article 5(3)(d) of Directive 2001/29 nor the concept of ‘quotation’...require that the quoted work be inextricably integrated, by way of insertions or reproductions in footnotes for example, into the subject matter citing it, so that a quotation may thus be made by including a hyperlink to the quoted work.” [80]
- *This aspect of the ruling is positive*

Spiegel Online C-516/17

- Use ‘must be made “in accordance with fair practice, and to the extent required by the specific purpose”, so that the use of that manuscript and article for the purposes of quotation must not be extended beyond the confines of what is necessary to achieve the information purposes of that particular quotation’. [83]
- *Implicitly rejecting Advocate General’s Opinion that indicated that quotation of an entire work was not possible.*

Spiegel Online C-516/17

- Work is lawfully made available to the public where it is ‘with the authorisation of the copyright holder or in accordance with a non-contractual licence or a statutory authorisation’. [89]
- But because the author had included disclaimers on both the manuscript and article, the court suggested this did not mean that that a copy of the manuscript that Spiegel placed online had already been made available to the public: ‘the documents were lawfully made available to the public *only in of far* as they were accompanied by those statements of dissociation’ [93]

Funke Median C-469/17

- Leaking of large number of military status reports
- BGH referred several questions relating to implementation of exceptions in Directive 2001/29 and relationship to freedom of expression
- Held:
 - Article 5(3)(c) and (d) do not constitute full harmonisation of the scope of the exceptions or limitations which it contains although discretion of Member States is constrained by: principles of proportionality; objectives of the Directive, safeguarding the effectiveness of exceptions; Art 5(5) and the principles enshrined in the Charter [43]

Funke Median C-469/17

- “As is clear from the case-law of the European Court of Human Rights, for the purpose of striking a balance between copyright and the right to freedom of expression, that court has, in particular, referred to the need to take into account the fact that the nature of the ‘speech’ or information at issue is of particular importance, inter alia in political discourse and discourse concerning matters of the public interest...” [74]

Funke Median C-469/17

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Summary

- *Pelham*

- wrongly introduces a requirement of ‘intention of entering into ‘dialogue’ with a work’ although *dialogue could be interpreted broadly*
- Also wrongly imports an ‘identifiability’ or recognisability of the quotation

- *Spiegel Online*

- Wrongly limits the purposes of quotation to illustrating an assertion, defending an opinion or allowing an intellectual comparison with the work
- Interpretation of work made available with a disclaimer is problematic
- BUT suggests an entire work may be quoted and all types of works

Summary

- *Funke Median*
- suggests that different speech interests may be relevant to how quotation exception should be applied
- Overall
- there are some elements of the rulings that are consistent with Art 10(1) Berne, but other aspects that are not

Cambridge Intellectual Property and Information Law

Global Mandatory Fair Use

The Nature and Scope of the Right
to Quote Copyright Works

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CAMBRIDGE

Thank you