

Article 10(1) Berne: The Meaning of Quotation

I INTRODUCTION

We turn now to the important question of what constitutes a ‘quotation’. Clearly, the breadth of the concept of ‘quotation’ will affect the scope of any quotation exception and so it is vital to identify what can be characterised as quotation. Our central argument in this chapter is that the concept of ‘quotation’ in Article 10(1) is far wider than the ‘typical’ case of textual quotation and that the attributes of ‘typical’ quotation must not be elevated to conditions for the availability of the exception.

What, then, is the typical example of quotation? This is where a person excerpts a portion of text from another work, places the excerpted text in quotation marks,¹ and in surrounding text authored by the ‘quoter’, where that surrounding text relies on the quoted material to support or critique an argument contained in the quoted text, or comments on the quoted text. In this typical example, a ‘quotation’ has several features, which can be conceptualised according to (i) the source material, (ii) the destination material and (iii) the relationship between the source and destination material. In relation to the source material, this typical example is a short passage from a longer text from another author. In relation to the destination material, it is an unaltered, distinct, short passage that is recognisably used in another work. Finally, the relationship between the source and destination material reflects a deliberate act of taking from one work to place in another, in order to advance an argument.

However, the paradigmatic example does not define the limits of the notion of ‘quotation’. We can imagine a whole myriad of situations where one or more of the elements described above is missing, but the use of the material may nevertheless count as ‘quotation’. This is particularly the case once we venture outside the realm of printed text, with its now well-established rituals of ‘quotation marks’, ‘insetting’, footnote or endnote citation.

In this chapter, we examine the features of a ‘typical’ quotation in order to assess whether any of these are a necessary component of the legal concept of quotation.

¹ Also referred to as ‘speech marks’ or ‘inverted commas’.

We argue that it is difficult to point to any necessary features of quotation but that, even if one had to do so, the concept of quotation is much broader than has previously been appreciated.

Before we begin, it is worth noting the range of possible sources from which we can answer the question of whether particular examples of reuse of material are, in legal terms, ‘quotations’.² According to Article 31(1) of the Vienna Convention on the Law of Treaties, ‘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’.³ But how is ordinary meaning to be ascertained? Rather surprisingly, given its central importance to legal interpretation, ‘ordinary meaning’ has been rather neglected (at least in comparison to the role of legislative history) as a topic of legal analysis.⁴ While judges sometimes refer to the dictionary definitions to determine ‘ordinary meaning’,⁵ including of treaty

² Our approach is in stark contrast with that taken by Lionel Bochumberg, *Le Droit de Citation* (Masson 1994), who considers the right of quotation from the perspective of comparative law with a view to identifying a ‘universal legal definition’ of the right. While we also refer at various points to the practice of individual states, our goal is to understand the scope of the obligation imposed by Article 10(1) (treated by Bochumberg only at 23–24, [26]), and we are conscious that national practice might in fact be inconsistent with this obligation. See Chapter 7, Section II, pp. 204–209. As explained herein, in Chapter 5, Section II, Part A, pp. 90–101, Article 10 should not be understood solely in the light of the literary/print paradigm of quotation. In contrast, Bochumberg himself notes that his ‘universal definition’ of quotation corresponds exactly with the notion of literary quotation and matters become more complex and nuanced when one considers quotation of and in artistic works, music and film; *ibid.*, 128, [200].

³ Emphasis added. For a discussion of ‘ordinary meaning’ in the Vienna Convention, see Richard Gardiner, *Treaty Interpretation* (2nd ed, Oxford University Press 2015), 181 *et seq.* Appeals to ‘ordinary’ meaning is common in national and regional law, despite having been widely critiqued by academic writing in the United States. For an explanation of the advantages of plain meaning as a presumptive starting point, see Fred Schauer, ‘Statutory Construction and the Coordinating Function of Plain Meaning’ [1990] *Sup Ct Rev* 231 (reviewing the increased reliance of the Supreme Court of the US on ‘plain meaning’ and, given the virtually unanimous criticism of academics to that approach, seeking to develop an explanation based on the idea that ‘reliance on plain meaning may be a hardly novel sub-optimizing second-best solution’ for reaching agreement); David Strauss, ‘Why Plain Meaning?’ (1997) 72 *Notre Dame LR* 1565 (reviewing other arguments for plain meaning and, finding each problematic, arguing that Schauer’s explanation is the most plausible and has broader applicability than just the Supreme Court).

⁴ Brian G Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (University of Chicago Press 2013), 27 (‘Despite being a fundamental aspect of legal interpretation that is relevant to nearly all interpretations of legal texts, the ordinary meaning doctrine has not been extensively examined by courts or scholars’), 30 (‘the ordinary meaning doctrine is greatly undertheorized’). See also Gardiner, *Treaty Interpretation*, 181 *et seq.*

⁵ For examples where dictionaries are referred to by the UK Supreme Court, see *Yemshaw v. London Borough of Hounslow* [2011] UKSC 3, [19] (Baroness Hale) (defining ‘violence’ and referring to *Shorter OED*); *HMRC v. The Rank Group Ltd* [2015] UKSC 48, [25] (per Lord Carnwath) (referring to *Concise OED* in defining ‘gaming machine’); but cf. *Stocker v. Stocker* [2019] UKSC 17 (criticising use of dictionaries to determine the ‘single meaning’ of statements at issue in defamation cases, with Lord Kerr, at [25], explaining that ‘meaning is to be determined according to how it would be understood by the ordinary reasonable reader. It is not fixed by technical, linguistically precise dictionary definitions, divorced from the context in which the statement was made’). On the increased use of dictionaries by

language,⁶ this practice raises its own problems, which have been identified by a number of scholars.⁷ To begin with, dictionaries may or may not see themselves as repositories of the ‘ordinary meaning’ of words, but as policemen of correct meaning – as prescriptive rather than descriptive.⁸ There seems no reason to believe that a lexicographer’s idea of a correct meaning corresponds to that envisaged by the legislature, or, in international treaty-making, the signatories. Even if a dictionary is ‘descriptive’, it is necessarily constrained and therefore selective in its prioritisation of particular uses from the so-called linguistic ‘corpus’.⁹ Furthermore, while (historically) dictionaries may have sought to define

the Supreme Court of the United States, see Samuel A Thumma and Jeffrey L Kirchmeier, ‘The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries’ (1999) 47 *Buff LR* 227; Jeffrey L Kirchmeier and Samuel A Thumma, ‘Scaling the Lexicon Fortress: The United States Supreme Court’s Use of Dictionaries in the Twenty-First Century’ (2010) 94 *Marq. LR* 77; James Brudney and Lawrence Baum, ‘Oasis or Mirage: The Supreme Court’s Thirst for Dictionaries in the Rehnquist and Roberts Eras’ (2013) 55 *William & Mary LR* 483. For an example of the CJEU in the copyright context, see C-210/13 *Deckmyn v. Vandersteen* EU:C:2014:2132 (CJEU, Grand Chamber), [2014] ECDR 21, [20], referring to the ‘usual meaning of the term “parody” in everyday language’ and the Opinion of the Advocate General Cruz Villalón delivered on 22 May 2014, where he derives the meaning from dictionary definitions in different languages [47] *et seq.* For an example of reliance on dictionaries specifically to define quotation, see Jane Parkin, ‘The Copyright Quotation Exception: Not Fair Use by Another Name’ (2019) 19 *Oxford University Commonwealth Law Journal* 55, 67 ff. (purporting to follow Advocate General Cruz Villalón’s ‘definitional approach’). It is notable, if regrettable, that in Case C-476/17 *Pelham GmbH v. Hütter* EU:C:2019:624, [71], the CJEU identified the ordinary meaning by mere intuition, referring only to the Opinion of Advocate General Szpunar, at EU:C:2018:1002, who inferred the meaning of ‘quotation’ from the additional words ‘for purposes such as criticism or review’ in Article 5(3)(d) of Directive 2001/29/EC.

- ⁶ Gardiner, *Treaty Interpretation*, 186–9. For examples in the WTO, see WTO Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (20 April 2005) WT/DS285/AB/R, [164]–[167] (discussing the meaning of the word ‘sporting’, the Appellate Body accepted that ‘[i]n order to identify the ordinary meaning, a Panel may start with the dictionary definitions of the terms to be interpreted’.)
- ⁷ Cunningham et al., ‘Plain Meaning and Hard Cases’ (1993) 103 *Yale LJ* 1561, 1614–16; Frank H Easterbrook, ‘Text, History, and Structure in Statutory Interpretation’ (1994) 17 *Harv. J.L. & Pub. Pol’y* 61, 67 (‘[T]he choice among meanings must have a footing more solid than a dictionary – which is a museum of words, an historical catalog rather than a means to decode the work of legislatures.’)
- ⁸ Patrick Hanks, ‘Definition’ in Philip Durkin (ed.), *The Oxford Handbook of Lexicography* (Oxford University Press 2016), 95 (describing the efforts of lexicographers to satisfy the ‘folk belief’ that words can be defined by way of necessary and sufficient conditions); Thumma and Kirchmeier, ‘The Lexicon’ (describing the historical battle between prescriptive and descriptive approaches to definition). Tribunals rarely examine the goals of dictionaries and frequently make erroneous assumptions: WTO Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (20 April 2005) WT/DS285/AB/R, [164]. (‘[D]ictionaries . . . typically aim to catalogue all meanings of words – be those meanings common or rare, universal or specialized.’)
- ⁹ Sidney I Landau, *Dictionaries: The Art and Craft of Lexicography* (2nd ed., Cambridge University Press 2001), ch. 4, in particular 154 (‘[T]he space allotted to each definition must be severely limited, else the total number of terms must be reduced’); 182 (‘All definitions of things are compromises between specific accuracy and breadth of inclusiveness. . . . [N]o definition can take in all of the particular things referred to by the word defined’); 204 (on the commercial pressures to include new words rather than to pay attention to ‘older established words and meanings it has omitted to make

words by reference to necessary and sufficient conditions, theories of language have highlighted the futility of this aspiration and lexicographers who are conscious of this have warned that definitions should not be understood as ‘implying boundaries ... the boundaries are inevitably vague and fuzzy and should be acknowledged as such’.¹⁰ Moreover, definitions necessarily depend on other words, sometimes presenting a problem that these words need further definition.¹¹ Finally, even if dictionaries do purport to describe usage, dictionaries are not identical, and many offer up multiple definitions, leaving the court with the difficult question of which to choose. Indeed, evidence from the US Supreme Court suggests that dictionary definitions are selected in a conclusory fashion – that judges simply reinforce their preferred interpretation by reference to particular dictionaries that offer similar definitions.¹²

All these problems seem, if anything, to be exacerbated in an international context,¹³ with multiple language versions of treaties,¹⁴ and as consequent

room for’ a practice that ‘mischievously exaggerates the importance of neologisms in lexicography... to the detriment of a better understanding of the qualities that make for a good dictionary’). Many dictionaries identify meaning from a ‘linguistic corpus’ and utilise criteria of ‘frequency’ and ‘predictability’: as Adam Kilgarriff notes, ‘[C]learly, different dictionaries have different thresholds of frequency and predictability’: ‘I Don’t Believe in Word Senses’ in Thierry Fontenelle (ed.), *Practical Lexicography: A Reader* (Oxford University Press 2008), ch. 9, 135–51, 145.

¹⁰ Patrick Hanks, ‘Definition’ in Philip Durkin (ed.), *The Oxford Handbook of Lexicography* (Oxford University Press 2016), 95, 115; Thierry Fontenelle, ‘Introduction’ in Thierry Fontenelle (ed.), *Practical Lexicography: A Reader* (Oxford University Press 2008), 1–15, 5 (‘Dictionaries are based on a huge oversimplification which posits that words have enumerable, listable meanings which are divisible into discrete units’).

¹¹ (Judge) A Raymond Randolph, ‘Dictionaries, Plain Meaning, and Context in Statutory Interpretation’ (1994) 17 *Harv JL & Pub Poly* 71, 72. (‘[C]iting to dictionaries creates a sort of optical illusion, conveying the existence of certainty – or “plainness” – when appearance may be all there is. Lexicographers define words with words. Words in the definition are defined by more words, as are those words. The trail may be endless; sometimes, it is circular. Using a dictionary definition simply pushes the problem back.’)

¹² Brudney and Baum, ‘Oasis or Mirage’, 49 (‘seeking out definitions that fit a Justice’s conception of what a word should mean rather than using dictionaries to determine that meaning’); Ellen P Aprill, ‘The Law of the Word: Dictionary Shopping in the Supreme Court’ (1998) 30 *Ariz St LJ* 275, 321 (suggesting Justice Scalia used dictionaries in this way). Slocum, *Ordinary Meaning*, at 34 and 215, makes a different criticism: ‘acontextual dictionary definitions ... often favor inappropriately broad meanings that capture “possible” rather than “ordinary” meanings’.

¹³ For discussion of the extent of the practice, as well as the desirability of principles to guide the use of dictionaries in international law, see Chang-Fa Lo, ‘Good Faith Use of Dictionary in the Search of Ordinary Meaning under the WTO Dispute Settlement Understanding’ (2010) 1 *Journal of International Dispute Settlement* 431, 431–2 (emphasising the frequency of resort to dictionaries and proposing guidance); Isabelle Van Damme, ‘On Good Faith Use of Dictionary in the Search of Ordinary Meaning under the WTO Dispute Settlement Understanding – A Reply to Professor Chang-Fa Lo’ (2011) 2 *Journal of International Dispute Settlement* 231–9 (acknowledging that during the first few years of WTO tribunals resorted extensively to dictionary definitions, but doubting the value of a set of principles); David Pavot, ‘The Use of Dictionary by the WTO Appellate Body: Beyond the Search of Ordinary Meaning’ (2010) 4(1) *Journal of International Dispute Settlement* 29–46.

¹⁴ Although the Berne Convention has official texts in English, French and Spanish, where the texts vary, the French text is said to be authoritative: Berne, Art. 37.

proliferation of dictionary sources (and approaches).¹⁵ Moreover, comparative lexicography demonstrates that different traditions exist with respect to different language dictionaries. For example, English dictionaries are more likely to include a variety of usage than French ones. As an expert commentary notes:

French dictionaries, such as *Larousse* or *Le Petit Robert*, and in particular the *Dictionnaire de l'Académie française* (DAF), are considered as reference works whose purpose is to 'inform usage'. They are the product of an exclusionary rather than inclusionary approach to language. ... French dictionaries, whether commercial such as the *Larousse* or *Robert*, or government-sponsored such as the DAF, have always limited the scope of what to include. The OED project, by contrast, operated with a very different approach to inclusivity.¹⁶

It seems unlikely that these different approaches are recognised as and when legal tribunals are referred to or consult dictionaries, or even among commentators.¹⁷

Recognising the limitations of dictionary meaning, we go well beyond mere resort to dictionary sources when it comes to ascertaining the ordinary meaning of 'quotation'.¹⁸ In addition to examining dictionaries, the works of linguists and philosophers,¹⁹ as well as cultural theorists,²⁰ we draw on a broad range of sources in which the term quotation is not defined or analysed but rather is *used*.²¹ That is, we try to shed further light on the

¹⁵ See also Gardiner, *Treaty Interpretation*, 189: 'That there are so many dictionary meanings makes almost inevitable immediate recourse to context and the other aids prescribed by the rules for selection of the appropriate ordinary meaning.'

¹⁶ D Estival and A Pennycook, 'L'Académie Française and Anglophone Language Ideologies' (2011) 10 *Language Policy* 325–41, 331, 337.

¹⁷ WTO Panel Report, United States – Section 110(5) of the Copyright Act 1976, (15 June 2000), WT/DS/160/R, [6.108]–[6.110] (defining 'certain', 'special' and 'cases' by referring to *The New Shorter Oxford English Dictionary* (Oxford 1993), [6.164]–[6.165] (ditto for 'normal' and 'exploitation'); WTO Appellate Body Report, United States – Section 211 Omnibus Appropriations Act of 1998 (2 January 2002), WT/DS176/AB/R, [137] (referring to *Le Robert*).

¹⁸ Parkin (2019), 65, attacks our methodology on the basis that our examples 'provide singular instances of use of the term "quotation", in the often-specialised vocabulary of particular fields'. While she agrees our examples 'represent evidence of the kind that might form part of a lexicographer's corpus', it is not at all obvious that they should be disregarded in favour, exclusively, of reliance on dictionaries, as she proposes. As Slocum, *Ordinary Meaning*, explains, at 243–4, 'even a flawed prototype analysis is typically superior, at least as a matter of ordinary meaning determination, to the practice of relying on a dictionary definition and treating it as though it sets forth necessary and sufficient conditions for category membership'.

¹⁹ For an overview of the vast literature on quotation in the philosophy of language, see Paul Saka, 'Quotation' (2013) 8 *Philosophy Compass* 935–49. For an influential discussion of the application of the concept of quotation to the visual arts, see Nelson Goodman, 'Some Questions Concerning Quotation' (April 1974) 58(2) *The Monist* 294–306.

²⁰ These include Richard Dyer, *Pastiche* (Routledge 2007); Finnegan, *Why Do We Quote? The Culture and History of Quotation* (Open Book Publishers 2011); Ingeborg Hoesterey, *Pastiche: Cultural Memory in Art, Film, Literature* (Indiana University Press 2001); David Metzger, *Quotation and Cultural Meaning in Twentieth Century Music* (Cambridge University Press 2003).

²¹ Cp. Phillip A Rubin, 'War of the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles' (2010) 60 *Duke LJ* 167, 205–6 (describing how in US cases involving interpretation of the US Constitution, *amicus* briefs have occasionally been submitted by Professors of

meaning of quotation empirically by examining how the term ‘quotation’ is used in a variety of cultural contexts, contexts which range well beyond the reuse of printed text.²² These sources are valuable and important because of the *legal* framing of the question: the question of interpretation posed by Article 10(1) is what is the ordinary understanding of quotation across the cultural fields to which that provision applies. These fields include art, film, music and architecture. As a result, the views of commentators and scholars operating in those fields seem especially relevant.²³ The way they use the term quotation then offers special assistance to the task of ascertaining the meaning of the term ‘quotation’ and thus the scope of the exception.

While ordinary meaning is the prescribed starting point for interpretation of Article 10(1), it is clear that ordinary meaning is not determinative of *legal* meaning.²⁴ Most obviously, this would be the case if the term were defined in Article 10 of the Berne Convention (though it is not). Nevertheless, there may be inferences as to its legal meaning that we can draw from the structure of legal texts (e.g. as already noted, the field in which the exception operates, as well as the formulation of other exceptions),²⁵ as well as from national case law interpreting these instruments.²⁶ There are certain

Linguistics, History and English with a view to elucidating contemporaneous usage of terms and thus to assist the ‘textual originalist’ members of the US Supreme Court).

²² We do not claim that the meaning of ‘quotation’ varies from context to context. As a legal term, there is only one legal meaning, and this must be equally applicable in relation to all Berne works. What we say is that this meaning must be ascertained from the use of the term ‘quotation’ across those contexts (rather than solely deduced from the world of printed text). This is different from interpreting the ordinary meaning of ‘quotation’ in light of the context of the treaty – that is, the grammatical construction of the provision, punctuation, the title, headings and chapeaux, the preamble or use of the same term in other parts of the treaty. See Gardiner, *Treaty Interpretation*, 199–210.

²³ In this respect, it might be said that we do not focus on the ‘usual meaning in everyday language’, – which is said by the CJEU to be the appropriate approach: *Pelham*, [70], [71] (on quotation); an approach that can be traced at least as far back as Case C-349/85 *Denmark v. Commission EU*: C:1988:34, [9] (interpreting terms ‘meat’ and ‘fat’). However, it is clear from the case law of the CJEU that ‘everyday’ does not imply use by the general public: see, e.g., Case C-443/17 *Abraxis Bioscience LLC* C:2019:238, [25] (defining meaning of ‘active ingredient’ in ‘everyday language’ by reference to meaning in pharmacology). We therefore do not see the sources we use as in any way inconsistent with the task of seeking the ‘ordinary’ or ‘everyday’ meaning.

²⁴ Vienna Convention, Article 31(4) (‘A special meaning shall be given to a term if it is established that the parties so intended’). Slocum, *Ordinary Meaning*, 29 (‘Ordinary meaning is the default meaning of a legal text, cancellable (often implicitly) for various reasons, including because the author(s) intended some other meaning’). We see the process of determining legal meaning as involving a necessary blending of ordinary meaning and legal inference, often carried out intuitively and through iterative processes rather than a two-stage one (as Slocum’s comment might suggest). In the case of ‘quotation’, there are initial contextual cues from the Convention generally, and the structure of Article 10(1), that exclude certain (dictionary) meanings of quotation, and then certain other cues than enable a tribunal to select between different plausible interpretations. Cf. Fred Schauer, ‘Is Law a Technical Language?’ (2015) 52 *San Diego L Rev* 501 (raising questions about the commonplace distinction between ordinary meaning and technical meaning in law, and the distinction between interpretation and construction, and implying that all legal texts might have technical meaning).

²⁵ Article 10(2) and Article 10bis(2), Berne.

²⁶ Martin Senffleben, ‘Internet Search Results – A Permissible Quotation?’ (2013) 235 *RIDA* 3 (exploring Dutch, German, Spanish and French cases).

'legal logics', too, that underpin legal interpretation of terms – for example, where a use is subject to an open-textured 'fairness' analysis, even if the 'ordinary meaning' suggested similar factors might be relevant to assessing whether the act counted as 'quotation', it would seem unnecessary and potentially duplicative for similar considerations to inform a threshold analysis of whether an activity fell within that concept.²⁷ Rather, for legal purposes, the threshold concept should be formulated in a free and open-ended manner. Moreover, when interpreting a legal concept that permits a particular activity (such as 'quotation'), even if ordinary use of the term suggested otherwise, policy logic implies that the interpretation of the concept should be broad enough to encompass *less* intrusive or *less* egregious acts of reuse.

Some guidance may also be gained from the preparatory documents (so-called *travaux*).²⁸ Article 32 of the Vienna Convention allows for the possibility of referring to a Treaty's *travaux préparatoires* to confirm the meaning of a term or to determine that meaning when an interpretation based on the ordinary meaning of a provision, in the light of its object and purpose, would leave the meaning of that term ambiguous or obscure or lead to a result which is manifestly absurd or unreasonable.²⁹

We must also pay attention to the importance of 'quotation' as the legal concept that, in the context of copyright law, operates to facilitate *fundamental* freedoms, recognised in international conventions,³⁰ such as freedom of expression and freedom of art. Even if ordinary usage pointed away from certain acts being regarded as 'quotation', it might be the case that because a particular activity implicates freedom of expression and art, and cannot otherwise be accommodated within copyright's structure, a harmonious interpretation of international law³¹ requires that the notion of quotation be understood more broadly than its ordinary usage to encompass such an activity.³² (Reconciliation of the right of freedom of expression with the rights of

²⁷ For example, ordinary use might suggest that a 'misquotation' was not a quotation at all, but because the question of whether something is 'misquotation' might involve difficult questions of interpretation, legal considerations might imply that the matter is best considered under the rubric of 'fairness': misquotation might make a quotation unfair, rather than excluding it from the benefit of the defence as a matter of threshold analysis. See p. 125, below and Chapter 6, Section III, pp. 157–159.

²⁸ See Chapter 2.

²⁹ For discussion, see Gardiner, *Treaty Interpretation*, ch. 8.

³⁰ Universal Declaration of Human Rights, Article 19 ('Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'). Article 27(2) also recognises 'the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.

³¹ For a discussion, see Henning Grosse Ruse-Khan, *The Protection of Intellectual Property in International Law* (Oxford University Press 2016), [3.08], p. 34. See also *Magyar Helsinki Bizottság v. Hungary*, App No 18030/11, (ECHR, Gr Ch, Nov 8, 2016), [123].

³² See below, pp. 159, fn. 106 and 160, fn. 107 (emphasising link between quotation right and freedom of speech); Bochumberg (1994), 31 ('Quotations must at the same time ensure educational and scientific progress, freedom of expression and freedom of information').

authors and copyright owners can be calibrated, as we will see, through the application of the ‘fair practice’ condition.)³³

II CHARACTERISTICS OF QUOTATION IN RELATION TO THE SOURCE MATERIAL

A Is Quotation Inherently Limited to Literary Works or Text?

We have already observed (in Chapter 3, Section II) that Article 10(1) is not limited in its application to a subset of works protected under the Berne Convention: in principle, it applies to all works (including original computer programs and databases). Nevertheless, the paradigm example of a ‘quotation’, with many associated conditions, is of text. Indeed, etymologically, there is some basis for the view that the English ‘quotation’ and French ‘citation’ were initially terms used in the printing trade.³⁴ Might it be argued, then, that while formally applicable to all Berne works, ‘quotation’ is necessarily textual (i.e. of text and in text)? Some French scholars have, in fact, taken this position,³⁵ while it is perhaps implicit in some countries’ laws which define quotation as involving ‘transcribing’,³⁶ or specify a maximum number of lines

³³ See Chapter 6, Section III, Part B, pp. 159–163, below.

³⁴ Edmund King, “‘Small Scale Copyrights?’ Quotation Marks in Theory and Practice’ (March 2004) 98 (1) *The Papers of the Bibliographical Society of America* 39–53 (response to De Grazia); Case C-476/17 *Pelham GmbH v. Hütter*, EU:C:2018:1002 (Advocate General’s Opinion), [62] (‘The quotation exception has its origin and is mainly used in literary works’) (AG Szpunar).

³⁵ André Françon, *Cours de Propriété Littéraire, Artistique et Industriel* (Léitec 1999), 244 (legislation seems to have been drafted with reference to quotation from literary works so that it is difficult to imagine as lawful quotation for a musical work or work in the plastic arts); Nicolas Bouche, *Intellectual Property Law in France* (2nd ed., Kluwer 2014), 85, [235] (‘This exception has been obviously intended to apply to literary works’); Henri Desbois, *Le Droit d’Auteur en France* (Dalloz 1978), 315–16, [249] (suggesting that the reference to ‘short’ in Article 41-3 of the French Law of 1957 would prevent artistic quotation, adding a further reason that the quoted and borrowing work should be of the same nature); 317, [250] (arguing too that quotation is ‘absolutely impossible’ in music because one musical work cannot discuss another); Claude Colombet, *Propriété Littéraire et artistique et droits voisins* (9th ed., Dalloz 1999). Very occasionally, French courts have taken the same position: *Le Mauvais ceil*, 13 Oct 1959, TGI Seine, (April 1961) 31 *RIDA* 93 (refusing to use quotation exception to use of image of an eye taken from a painting); *Edgar Rice Burrough Inc. v. Sté Anagramme Editions H. Veyrier et al* TGI Paris, 30 September 1983, D. 1984 S.C. 289, Colombet obs. (refusing in principle to accept that a work of visual art could be quoted), both cited in Y Gaubiac, ‘Freedom to Quote from an Intellectual Work’ (1997) 171 *RIDA* 2, 72, fn. 66 and 67. Note also Maurice Casteels, ‘Works of Art and the Right of Quotation’, (1954) 11 *RIDA* 81–97 (explaining that the quotation exception in the Belgian law of 1886 was only applicable to literary works, as confirmed in a Belgian Supreme Court decision of 1952).

³⁶ This is the case with some states in Central and South America: Colombia, Law No. 23 of 28 January 1982 on Copyright, Article 31 (‘It shall be permissible to quote an author by transcribing the necessary passages . . .’); Costa Rica, Law No. 6683 of 14 October 1982 on Copyright and Related Rights (as amended up to Law No. 8834 of 3 May 2010), Article 70; Dominican Republic, Law No. 65-00 on Copyright, Article 35; Guinea-Bissau, Copyright Code (approved by Decree-Law No. 46.980 of 28 March 1972), Article 185 (‘Authors of any text shall have the right to transcribe or summarize’).

or words³⁷ or paragraphs.³⁸ If quotation is so limited, the effect is, in substance, to render the exception in Article 10(1) inapplicable to painting, music, architecture, film and photography.

It is central to our argument that the term 'quotation' in Article 10(1) is not so limited, and thus that the conditions that are associated with the textual paradigm should not be regarded as necessary legal conditions for the existence of quotation. Rather the meaning of the term 'quotation' in this context must be understood to accommodate ideas of what counts as quotation in music, film and the visual arts.

To begin, it is worth noting that many dictionary definitions accept that quotation extends beyond the act of reproducing words. The *Oxford English Dictionary* (OED), for example, defines quotation to include '[a] short passage or tune taken from one piece of music to another or quoted elsewhere'.³⁹ The *Shorter OED* mentions not just music but visual art: defining a quotation as '[a] quoted passage or remark; transf. a short passage or tune taken from one piece of music and quoted in another; a visual image taken from one work of art and used in another'.⁴⁰ In her review of dictionary definitions of 'quotation' in other European languages ('citazione' in Italian, 'citation' in French and 'zitat' in German), Jane Parkin helpfully identifies a number of further examples from Italian dictionaries: *Sabatini/Colletti* defines the term in reference to architecture and the figurative arts, while *Treccani* refers to the use of preceding works in musical and dramatic works, in films or figurative artworks.⁴¹ As we shall now show, discussions by musicologists, film experts and architectural experts regularly acknowledge the practice of quotation in these fields.

³⁷ Argentina, Law No. 26,570 of 25 November 2009, amending Law No. 11,723 of 28 September 1993 on Legal Intellectual Property Regime, Article 10 (specifying 1,000 words or 8 bars or 'the parts of the text essential for that purpose'); Eritrea, Civil Code 1993, Article 1661 (40 lines of poetry or 10,000 characters).

³⁸ Jordan, Law No. 22 of 1992 on Copyright and its Amendments up to 2005, Article 17(d) ('Quoting paragraphs from the work in another work') (emphasis added).

³⁹ J A Simpson and E S C Weiner (eds.), *The Oxford English Dictionary* (Clarendon 1989), vol. 13, 52.

⁴⁰ *Shorter Oxford English Dictionary on Historical Principles*, vol. 2 (6th ed., Oxford University Press 2007), 42.

⁴¹ Parkin (2019), 68, fn 100. See also Tullio de Mauro, *Grande Dizionario Italiano dell'uso* (Torino, 1999), 92 (defining quotation as including shooting and echoing of preceding work in later literary, musical or film work and giving example 'la scena finale è una [citazione] da un film de Fellini'); cf. Nicola Zingarelli, *Lo Zingarelli 1994: vocabolario della lingua italiana* (Zanichelli 1993) 375 (defining citare as 'textual reference to passages of others in support of their own reasoning') and Pasquale Stoppelli, *Il Grande Dizionario Garzanti dell'Italiana* (1993) 386 (referring to citation of passages in a text or speech). In understanding the 'textualist' orientation of French commentators, it is notable how frequently they rely on dictionaries. For example, the influential treatise A Lucas, H-J Lucas and A Lucas-Schloetter, *Traité de la Propriété Littéraire et Artistique* (4th ed, LexisNexis 2012), 390, [426], refers to the definition in *Le Petit Robert*, ('passage cité d'un auteur'). Yves Gaubiac, 'Freedom to Quote from an Intellectual Work' (1997) 171 *RIDA* 2, 58, fn. 8 and 72, fn. 63, also cites French dictionary definitions, noting that they refer to literary sphere, but contrasts this with the fact that most of the French case law accepts potential application of quotation right to other material.

1 Music

Discussion of reuse of music as ‘quotation’ is very common.⁴² Sometimes the term is used to describe reuse of melody (e.g. in the work of Charles Ives, Louis Armstrong or Michael Nyman)⁴³ or incorporation of literary material, but it is also used to refer to the reuse of recordings of music, such as Vladimir Ussachevsky’s reuse of a recording of a 1951 performance of Wagner’s *Parsifal* in his avant-garde *Wireless Fantasy*,⁴⁴ a 1960 sound collage combining the performance with the sounds of Morse-code signals being tapped out.⁴⁵ In line with this, most commentators characterise digital sound sampling, which first emerged in the mid-1980s and became widely associated with hip-hop music, as a form of quotation.⁴⁶ For example, John Oswald, composer and music Professor at York University, who described his use of sampling as ‘plunderphonics’, in turn explained that ‘[a] plunderphone is

⁴² See, for example, the special issue, (2014) 33(2) *Contemporary Music Review* on music borrowing and quotation; Bochumberg, *Droit de Citation*, 154, [234] (describing quotation of one musical work in another as ‘a widespread phenomenon’).

⁴³ Christopher Ballantine, *Music and Its Social Meanings* (Gordon and Breach 1984), ch. 4 (discussing Charles Ives’s use of musical quotation); J Peter Burkholder, *All Made of Tunes: Charles Ives and the Uses of Musical Borrowing* (Yale University Press 1995), 1 (‘Musical quotation is one of the most characteristic facets of Charles Ives’ music. . . . The music Ives uses includes hymn tunes, patriotic songs, marches, bugle calls, drum patterns, popular songs, fiddle tunes, college songs and cheers, and classical pieces by composers from Bach to Debussy’); Jorge Daniel Veneciano, ‘Louis Armstrong, Bricolage and the Aesthetics of Swing’ in Robert G O’Meally, Brent Hayes Edwards and Farah Jasmine Griffin (eds.), *Uptown Conversation: The New Jazz Studies* (Columbia University Press 2004), 256–78, 269–70 (drawing on Armstrong’s hobby of creating collages of photographs to cast light in his music, and linking it to Armstrong’s use of musical quotation, perhaps most famously of Gershwin’s *Rhapsody in Blue* on his 1929 solo of *Ain’t Misbehavin*, as well as Armstrong’s frequent quotation of advertising jingles). For more on Armstrong, see Krin Gabbard, ‘The Quoter and his Culture’ in Reginald Buckner and Steven Wieland (eds.), *Jazz in Mind: Essays on the History and Meaning of Jazz* (Wayne State University Press 1991). Robert Worby, ‘Foreword’, to P Ap Siôn, *The Music of Michael Nyman: Texts, Contexts and Intertexts* (Ashgate 2007), xi, xii (‘Composers had always appropriated folk tunes or politely quoted fragments from other composers’).

⁴⁴ Available via You Tube: <https://www.youtube.com/watch?v=bEShyzQlj4U> (accessed 31 January 2020).

⁴⁵ Richard Beaudoin, ‘Counterpoint and Quotation in Ussachevsky’s *Wireless Fantasy*’ (2007) 12(2) *Organised Sound* 143–51, esp. 147–9.

⁴⁶ David Sanjek, ‘Don’t Have to DJ No More: Sampling and the “Autonomous Creator”’ (1992) 10 *Card Arts & Ent LJ* 607, 612, 613, 614 (describing various forms of sampling as quotation). Cf. Aram Sinnreich, *Mashed Up: Music, Technology and the Rise of Configurable Culture* (University of Massachusetts Press 2010), 124 (suggesting that sampling is ‘not “quoting” because (a) it’s the mediated expression itself, not merely the idea behind it, that’s being used, and (b) the output often bears little or no resemblance to the input’. Quite where Sinnreich gained his ‘definition’ for the concept of quotation is never explained. Certainly, it was not from the manner in which his interviewees use the term quotation. On the very next page, Sinnreich quotes from an interview with Matt Wand, a UK-based composer from (Stock, Hausen and Walkman), asking, in relation to musical reuse, ‘How far can you go with quotation?’). Note also Johnson Okpaluba, ‘Digital Sampling and Music Industry Practices, Re-Spun’ in K Bowrey and M Handler (eds.), *Copyright Law in the Age of the Entertainment Franchise* (Cambridge University Press 2014), ch. 4, 75–100, 81 (‘Digital sampling . . . can therefore be seen to be related to other practices of music quotation . . .’, citing J P Burkholder, ‘The Uses of Existing Music: Musical Borrowing as a Field’ (1994) 50 *Notes* 851).

a recognisable *sonic quote*, using the actual sound of something familiar which has already been recorded'. Mark Katz, similarly, refers to sampling as 'performative quotation', as it reutilises the timbre of a unique sound event.⁴⁷ Tellef Kvifte used the term 'audio quotation'.⁴⁸ Kevin Holm-Hudson used a different term, 'timbral quotation'.⁴⁹ Serge Lacasse developed a related distinction, that between autsonic and allosonic quotation,⁵⁰ where sampling is a type of 'autsonic quotation' whereas imitation of a sound and its re-recording – a sound-alike – is 'allosonic quotation', which has been picked up and deployed in subsequent studies.⁵¹ Although these commentators often seek to draw distinctions between sampling, a form of musical borrowing, and other forms of quotation in music generally, so as to highlight that sampling has certain special qualities, it is notable that for most the practice is treated unquestioningly as 'quotation'. Not surprisingly, therefore, in *Pelham v. Hütter*, the CJEU recognised the possibility that a sample from the recordings of avant-garde electronic artists Kraftwerk might qualify as quotations of the musical works the samples embodied.⁵²

2 Film

Use of the term 'quotation' in film studies and film commentary is also very common indeed.⁵³ Sometimes the term refers to quotation from literary material, or the replication of film within films. A good example of the latter occurs in the comedy

⁴⁷ M Katz, *Capturing Sound: How Technology Has Changed Music* (University California Press 2010), 140–1 ('quotation that recreates all the details of timbre and timing that evoke and identify a unique sound event').

⁴⁸ Tellef Kvifte, 'Digital Sampling and Analogue Aesthetics' in A Melberg (ed.), *Aesthetics at Work* (Unipub 2007), 193 ('the digital sampler has always been a compositional tool. It is not only a looping device for audio quotation, . . . even though this has dominated the production of hip-hop and the study of sampling'), cited by Paul Harkins, 'Microsampling: From Akufen's Microhouse to Todd Edwards and the Sound of UK Garage' in Anne Danielsen (ed.), *Musical Rhythm in the Age of Digital Reproduction* (Ashgate 2010) 177, 180 (discussing Tellef Kvifte's four meanings of sampling, explaining the third as 'that of integrating existing recordings into a new recording as a recognizable sonic quotation').

⁴⁹ K Holm-Hudson, 'Quotation and Context: Sampling and John Oswald's Plunderphonics' (1997) 7 *Leonardo Music Journal* 17–25, 17 [abstract] ('Although the music industry . . . insisted that digital sampling is 'theft', it is perhaps better viewed in historical and theoretical context as timbral quotation. Often the sample functions as a quote that is recontextualized but that nevertheless bears the weight of its original context').

⁵⁰ Serge Lacasse, 'Intertextuality and Hypertextuality in Recorded Popular Music' in Michael Talbot (ed.), *The Musical Work: Reality or Invention?* (Liverpool University Press 2000), ch. 2.

⁵¹ See e.g. Dr Justin Williams's doctoral thesis at Nottingham, 'Musical Borrowing in Hip-Hop Music' (2010), published as *Rhymin' and Stealin'* (Michigan University Press 2014).

⁵² Case C-476/17 *Pelham GmbH v. Huetter* EU:C:2019:624 (CJEU, Grand Chamber), [68], [72].

⁵³ See L Bently, 'Copyright and Quotation in Film and TV,' CREATe Working Paper (June 2020). We are grateful to Dr Claudy Op den Kamp for sharing multiple other examples of expressive re-use of, and in, film which are described as quotation, and look forward to her forthcoming multimedia exploration: Dr Op den Kamp *Turning Your Film into Mine; Cultural Practices in Filmmaking and Copyright Exceptions* (forthcoming).

slasher film *Scream* (1996, dir. Wes Craven), where key characters are observed watching an earlier horror film, *Halloween* (1978, dir. John Carpenter).⁵⁴ Occasionally, the term is used to describe the referencing of works of art in film scenes, as, for example, with Derek Jarman's reference in his film *Caravaggio* (1986) to Jacques-Louis David's painting *Death of Marat* (1793). In this painting, the radical journalist Jean-Paul Marat is shown lying dead in his bath, after being murdered by Charlotte Corday. In Jarman's film *Caravaggio*, he features a scene where the storyteller is in the bath, head wrapped in a towel, writing on a typewriter and then slouched back in the tub, one arm extended outside it.⁵⁵ According to one commentator, this is in turn quoted in the television mini-series *Painted Lady* (1997, dir. Julian Jarrold), starring Helen Mirren.⁵⁶

However, perhaps the most prevalent use of the term 'quotation' in film commentary is to describe references made in one film to scenes in another. In fact, the 'quotation' is widely deployed to describe aspects of the films of a host of other filmmakers, including Jean-Luc Godard,⁵⁷ Ridley Scott⁵⁸ and Quentin Tarantino. Indeed, Tarantino has been associated with a particular cinematographic practice, so-called 'hyperquotational cinema'.⁵⁹

⁵⁴ Yvonne Sarah Morris, 'The Legal Implications Surrounding the Practice of Video Sampling in the Digital Age' in S Greenfield and G Osborn (eds.), *Readings in Law and Popular Culture* (Routledge 2008), 274–309, 286 (describing this as the quotation of *Halloween* in *Scream*).

⁵⁵ Ingeborg Hoesterey, *Pastiche: Cultural Memory in Art, Film, Literature* (Indiana University Press 2001), 67 (describes this as 'a full-fledged pictorial quotation with high recognition value').

⁵⁶ Hoesterey, *Pastiche*, 124, fn. 10 ('citing both David's painting and Jarman's quotation in *Caravaggio*').

⁵⁷ James F Austin, *Proust, Pastiche and the Postmodern or Why Style Matters* (Bucknell University Press 2013), 186 ('Godard's work in particular is known for the practice of quoting'). Mikhail Iampolski, *The Memory of Tiresias: Intertextuality and Film* (trans. Harsha Ram) (University of California Press 1998), 31. ('Jean-Luc Godard is well known as one of the most intertextually oriented of film directors. Several of his films are practically collages of quotes. Godard reveals his passion for the quotation in his very first film, *Breathless* (*A bout de souffle*). . . . *Breathless* is riddled with all sorts of quotes. The source of the widest layer of quotes in the film was American film noir.') Iampolski also quotes Godard, *Jean-Luc Godard par Jean-Luc Godard* (Cahiers du cinema 1985), 216–18, who explained, 'You have to put the blame on my taste for quoting, a taste I have always kept. But why blame me for it? In life people quote the things they like. We have a right to quote whatever we like.'

⁵⁸ Hoesterey, *Pastiche*, 47–52 (referring, for example, to 'a number of quotations from *Metropolis* that Ridley Scott pastiches in *Blade Runner*') (49). Giuliana Bruno, 'Ramble City: Postmodernism and *Blade Runner*' (1987) 41 *October* 61–74, 62: 'Pastiche is intended as aesthetics of quotations pushed to the limit: It is an incorporation of forms, an imitation of dead styles deprived of any satirical impulse' (a paraphrase of Frederic Jameson); Jack Boozer Jr, 'Crashing the Gates of Insight' in Judith B Kerman (ed.), *Retrofitting Blade Runner* (Bowling Green University Popular Press 1991), 212–28; Mike Wilmington, 'The Rain People' (January–February 1992) 28(1) *Film Comment* 17–18.

⁵⁹ Mikhail Iampolski, *The Memory of Tiresias*, esp. at 35 (explaining the notion of the 'hyperquote'); Asbjørn Grønstad, *Transfigurations: Violence, Death and Masculinity in American Cinema* (Amsterdam University Press 2008), 144, 159 (Tarantino's 'fetishistic quotationism'), 160 (Tarantino's 'aesthetics of quotation'), 162 ('hyper-quotational cinema'), 164 (referring to the 'quotational promiscuity of *Reservoir Dogs*'), 167 ('the hypermodern film aesthetic of unconstrained quotationality').

3 Architecture

Although some philosophers of language have doubted whether one architectural work can 'quote' another,⁶⁰ the term 'quotation' is also widely deployed by commentators on architecture to refer to modes of reuse of particular architectural forms.⁶¹ Such descriptions became more widespread once the view that buildings were functional gave way to the view that buildings, like novels, tell stories.⁶² Seen in this way, buildings (or at least architects) are part of a dialogue, and the audience recognises the represented form as derived from elsewhere and understand it as quotation. According to one commentator, 'quotation . . . became the very medium of architectural conception'.⁶³ Common examples of architects who openly acknowledged quoting include Phillip Johnson (1906–2005) and James Stirling (1926–92).

Johnson, described in his time as 'the reigning dean of American architecture',⁶⁴ famously shifted from functionalism and internationalism to a style often described

⁶⁰ Remei Capdevila-Werning, 'Can Buildings Quote?' (2011) 69 *Jo Aesthetics and Art Criticism* 115–24 (applying Nelson Goodman's work on quotation to architecture). Interestingly, Capdevila-Werning starts with a number of examples of use of the term 'quotation' in art.

⁶¹ The term is also used in design. See, for example, Brenda Schmähmann, 'Intertextual Textiles: Parodies and Quotations in Cloth', (2017) 15(4) *Textile: The Journal of Cloth and Culture* 336–43 (introduction to a special issue) ('Strategies such as quotation and parody have also been deployed in numerous works made from textiles or incorporating textile elements'). In fact, the EU Design Regulation, Council Regulation (EC) No 6/2002 of 12 December 2001, Art 20(1)(c) gives an exception to 'acts of reproduction for the purpose of making citations'. In its English-language version, this seems as an explicit acknowledgement that, in law (as well as ordinary language), one can quote a design. The same inference can be drawn from the Spanish- and Italian-language versions, which refer, respectively, to 'los actos de reproducción realizados con fines de cita' and 'atti di riproduzione a fini didattici o di citazione'. It is, however, notable that in the French-language version of the Regulation, the exception is worded differently: '[D]'actes de reproduction à des fins d'illustration'. In Cases C-24/16 and C-25/16, *Nintendo Co Ltd v. Big Ben Interactive GmbH*, EU:C:2017:724, the CJEU offered a 'purposive' interpretation of 'citation' to ensure that design rights did not discourage innovation. It therefore held, at [76]–[77], that 'citation' included advertising of a lawful product that included an image of a protected design in order to demonstrate the joint use of both products.

⁶² Stephen Barthelmess, 'Richard Meier's Stadthaus Project at Ulm' (1990) (Spr) 44(3) *Jo Architectural Education* 2–19, 12 (relating emergence of historical quotation in architecture to the turn away from abstract functionalism); Cynthia Davidson (ed.), *Robert A M Stern: Tradition and Invention in Architecture: Conversations and Essays* (Yale University Press 2011), 5 ('Architecture is a narrative art, and architectural style is analogous to poetic diction. Simple writing may communicate on a basic level but it does not give much pleasure. Since the time of ancient Greece, storytellers have embroidered their tales with references to and quotations from works of the past, thereby linking with tradition and perpetuating age-old tales. The complexity of narrative – its allusiveness, its resonance, its aggrandizement of the reader's own experience – raises the statement of a simple theme, whether literary or architectural, to the realm of art'); Hoesterey, *Pastiche*, 33 ('The 'textuality' of architecture, to be deciphered like a text, became a central topos in the discourse of architectural form and ornament').

⁶³ Barthelmess, 'Richard Meier's Stadthaus', 12. See also Mary MacLeod, 'Architecture and Practice in the Reagan Era' (February 1989) 8 *Assemblage* 22–59, 34.

⁶⁴ Marvin Trachtenberg and Isabelle Hyman, *Architecture: From Prehistory to Postmodernism* (2nd ed., Pearson 2001), 573.

as postmodernism or modern classicism.⁶⁵ One building that symbolised this shift was built to house the headquarters of the US communications giant AT&T at 550 Madison Avenue in New York,⁶⁶ which one commentator called ‘a granite-clad, goldleafed, postmodern masterwork’.⁶⁷ Colloquially known as the ‘Chippendale’ building,⁶⁸ because it was thought to look ‘like a colossal Chippendale highboy cabinet’,⁶⁹ the 647-feet, 36-storey skyscraper is a mix of styles.⁷⁰ One online commentary by David Landon⁷¹ describes the top as the

single most important architectural detail of the last fifty years. Emerging bravely from the glassy sea of Madison Avenue skyscrapers in midtown Manhattan, the open pediment atop [the] 1984 AT&T Building ... singlehandedly turned the architectural world on its head. *This playful deployment of historical quotation* explicitly contradicted modernist imperatives and heralded the mainstream arrival of an approach to design defined instead by a search for architectural meaning.⁷²

Similarly, well-known art critic Craig Owens called the AT&T building ‘a compendium of legible historical references and quotations’.⁷³ Although it is widely acknowledged that the building contains a number of quotations, there is less

⁶⁵ Frank Schulze, *Philip Johnson: Life and Work* (Alfred Knopf 1994), 333 (‘Postmodernist architecture ... as it developed in the 1970s and 1980s, treated the history of building as one immense source book’); Hoesterey, *Pastiche* (‘For two decades architects practiced the evolving aesthetics of quotation and incorporation of past forms and styles with a vengeance’). At 34, Hoesterey offers the example of Charles Moore’s Piazza d’Italia (New Orleans) and mentions his ‘quotation style’.

⁶⁶ For an image, see www.archdaily.com/61169/ad-classics-at-and-t-building-philip-johnson-and-john-burgee (accessed 3 July 2020). When AT&T went into financial decline, Sony bought the building and occupied it until 2013. Apparently, it is now owned by Olayan and Chelsfield and is empty, apart from a ground-floor restaurant.

⁶⁷ ‘Preface’ by John O’Connor in Hilary Lewis and John O’Connor, *Philip Johnson: The Architect in his Own Words* (Rizzoli 1994), 8 (stating that ‘Johnson references the gamut’); Hilary Lewis, ‘No Rules, Just Art’ in *The Architecture of Philip Johnson* (Bullfinch Press 2002), 3–4, 4 (‘Johnson at his most postmodern’). However, contrast the views of Charles Jencks, who called the AT&T Building ‘the reverse of postmodernism’: Charles Jencks, ‘Contextual Counterpoint in Architecture’ (2012) 24 *Log* 71–80, 73.

⁶⁸ Paul Goldberger, ‘Philip Johnson Is Dead at 98: Architecture’s Restless Intellect’, *New York Times* (New York, 27 January 2005) (‘Chippendale skyscraper’).

⁶⁹ Trachtenberg & Hyman, 574. The eighteenth-century English cabinet maker Thomas Chippendale’s works were widely copied for the US market.

⁷⁰ Leland M Roth, *Understanding Architecture: Its Elements, History, Meaning* (The Herbert Press 1993/1994), ch. 21, ‘Late Twentieth-Century Architecture: A Question of Meaning’ 506 (‘whose classical loggia base and so-called Chippendale top made clear allusions to such New York skyscrapers of the 1920s as Warren and Wetmore’s New York Central Building (Helmsley Building) of 1929’); Stanley Abercrombie, ‘A Few Good Buildings: Reading the Obituaries of Philip Johnson’ (2005) 74 (2) *The American Scholar* 117–20.

⁷¹ ‘AD Classics: AT&T Building’ (20 March 2015), at www.archdaily.com/61169/ad-classics-at-and-t-building-philip-johnson-and-john-burgee (accessed 2 February 2020).

⁷² Emphasis added.

⁷³ Craig Owens, ‘Philip Johnson: History, Genealogy, Historicism’ in Kenneth Frampton, *Philip Johnson: Processes. The Glass House, 1949 and The AT&T Corporate Headquarters, 1978* (Inst for Arch & Urban Studies NY 1978), 3. See also Robert Stern, *Modern Classicism* (T&H) 84–6 (‘One can pick out the references’).

agreement as to which prior works were being quoted by the architect.⁷⁴ Although Johnson is generally said to have been willing to acknowledge his sources,⁷⁵ with respect to the AT&T, he was rather coy when asked about the topic. He denied the top came from a Chippendale clock, though hinted that the inspiration for the base was the Pazzi Chapel in Florence (a work commonly attributed to Brunelleschi).⁷⁶ Others have found the source much closer to home: from 558 Madison Avenue.⁷⁷

The technique of James Stirling,⁷⁸ who Ada Louise Huxtable described as a 'creative genius',⁷⁹ has likewise been described as 'quotational'.⁸⁰ One famous example is his Leicester University Engineering building,⁸¹ the lecture theatres for

⁷⁴ Though Johnson's critics, preferred other terms, such as pastiche: Ada Louise Huxtable, architecture columnist for the *New York Times*, called it 'a pastiche of historical references' ('Johnson's Latest – Clever Tricks or True Art?' *New York Times* (New York, 16 April 1978), 26, quoted in Schulze, *Philip Johnson*, at 351). Elsewhere she referred to it as 'pedestrian pastiche' (Architecture View: "Towering" Achievements of '78', *New York Times*, 31 December 1978, D21) and Johnson's work generally as 'clever cannibalism' (Huxtable, 'The Troubled State of Architecture', *New York Review of Books*, 1 May 1980, 22–9, cited in Schulze, *Philip Johnson*, at 366). Johnson said he had no objection to describing his work as pastiche.

⁷⁵ Hilary Lewis and John O'Connor, *Philip Johnson: The Architect in His Own Words* (Rizzoli 1994), 14. Many of Johnson's other works, and probably most notoriously the Hines College of Architecture, University of Houston (1983), clearly adapted from the work of French architect Claude Nicolas Ledoux, have been described in similar terms: Schulze, *Philip Johnson*, 334 (describing Johnson's chapel in Thanksgiving Square, Dallas, which was based on the ninth-century mosque at Samarra as 'candidly mimicking the conventional look . . . of the minaret that crowned the Samarra mosque'); Charles Jencks, 'Philip Johnson and the Smile of Medusa' in Emmanuel Petit (ed.), *Philip Johnson: The Constancy of Change* (Yale University Press 2009), 136, 146 (stating that for the Glass House in New Canaan, Johnson 'cast about in a veritable snake pit of historical references').

⁷⁶ Christian Bjone, *Philip Johnson and his Mischief: Appropriation in Art and Architecture* (Images Publishing Group 2014), 31 (quoting Johnson as saying that base was designed 'rather like the Pazzi Chapel in Florence (Brunelleschi), the middle to copy the Chicago Tribune middle and the top – well, I'm not sure, but it did not come from a Chippendale clock').

⁷⁷ C Bjone, *Philip Johnson*, 32 and fn. 15 (based on an interview with Renny Booth in 2013).

⁷⁸ For a gossip-filled biographical account, see Mark Girouard, *Big Jim* (Pimlico 2000).

⁷⁹ Ada Louise Huxtable, 'Architecture: Bigger – And May Be Better: The Outlook in Architecture' *New York Times* (26 August 1978), 83 ('one of the few authentic creative geniuses of our time').

⁸⁰ Francesco Dal Co refers to Stirling's 'quotational tendency': 'The Melancholy Experience of Contemporaneity' (1993) 2 (Sept/Oct) *ANY (Architecture New York)* 26–9, 27 (special issue on Stirling). Vittorio Pizzigoni, an architect and researcher who teaches architectural design at the University of Genoa, has published an analysis of Stirling's Florey Building in Oxford, noting the 'never-ending quotation process through which Stirling reuses any piece of the architecture of the past in his projects untroubled by their origin' and observing that 'Stirling preferred to choose cryptic and difficult rather than predictable and explicit quotations . . . one can easily find formal echoes with the work of Le Corbusier, Aalto or Melnikov, but it's much more difficult to find a single specific quotation'. www.gizmoweb.org/2009/12/the-florey-building-a-key-project-of-stirlings-work/ (accessed 2 February 2020). See also Claire Zimmerman, 'Stirling Reassembled' (2007) 56 *AA Files* 30–41, 34 (explaining that Stirling 'combined dense architectural quotation with postwar ambivalence. . . . Stirling copied, repeated and recombined motifs . . . ' and describing Stirling as a montagist); Manfredo Tafuri, 'L'Architecture dans le Boudoir: The Language of Criticism and the Criticism of Language' in K Michael Hays (ed.), *Architecture Theory Since 1968* (MIT Press 1998), 146–73, 149 ('the difficult task of determining the meaning of Stirling's enigmatic and ironic use of the "quotation"').

⁸¹ www2.le.ac.uk/departments/engineering/about/building (accessed 3 July 2020).

which are trapezoidal forms protruding from the main building.⁸² For many commentators, these are quotations from the constructivist work of Konstantin Melnikov (1890–1974)⁸³ – in particular, his Rusakov Club in Moscow.⁸⁴ Although Mark Crinson has cast doubt on whether Stirling knew of Melnikov’s works at the relevant time,⁸⁵ those who believed this to be the source of the form of the lecture theatres in the Leicester Engineering Building have rarely hesitated to use the language of ‘quotation’ to describe Stirling’s practice. Amanda Reese-Lawrence, for example, in an important study of Stirling’s practice, which she describes as ‘re-visioning’, proclaims that the Leicester project ‘openly referenced a much broader range of recognizable and specific quotations – most famously the Rusakov Workers’ Club’.⁸⁶ The same is true of Stirling’s Stuttgart museum, which Barthelmess called ‘an initial testing ground for the project of quotation from the history of architecture’,⁸⁷ while the German newspaper *Die Zeit* identified so many quotations that it dubbed the building ‘Das zitatenmuseum’.⁸⁸ Moreover, Amanda Reese-Lawrence has explored a further dimension of Stirling’s work, his ‘self-quotation’ in architecture, focusing on Stirling’s proposal to reuse thirty of his own earlier projects, sometimes in the

⁸² Kenneth Frampton, ‘Leicester University Engineering Laboratory’ (1964) 34(2) *Architectural Design* 61; John McKean, *Leicester University Engineering Building: James Stirling and James Gowan* (Phaidon 1994).

⁸³ Owen Hatherley, ‘Konstantin Melnikov’s Legacy’ *Architectural Review* (28 August 2015).

⁸⁴ For an image, see www.archdaily.com/155470/ad-classics-rusakov-workers-club-konstantin-melnikov.

⁸⁵ Mark Crinson, ‘Melnikov in Leicester – A Mythology’ (2013) 4 *Leuchtturmprojekte* 48–63; Mark Crinson, *Stirling and Gowan: Architecture from Austerity to Affluence* (Yale University Press 2012), 78 (‘given the obscurity of Melnikov’s work at this time this seems unlikely’); 240 (‘the question of how Stirling and Gowan might have seen Melnikov’s design is not easily resolved’). Cf. Amanda Reese-Lawrence, *James Stirling: Revisionary Modernists* (Yale University Press 2012), 112 (‘Melnikov’s influence is unquestionable though perhaps overemphasized and oversimplified’), and Mark Girouard, *Big Jim* (Pimlico 2000), 77 (‘The idea of showing the shape of the lecture theatres [in Sheffield University design of 1953] externally comes without doubt from the Constructivist architect Melnikov’s Workers’ Clubhouse in Moscow (1926). Jim certainly knew of this at this date, although there were occasions when he claimed that he did not’); Owen Hatherley, ‘Whose Modernist Icon Is It Anyway?’ (2010) (April 23) *Building Design* 9 (Stirling ‘borrowed’ from Melnikov’s design); ‘Actually Existing Social Condensers: On the Mundanity of Soviet Modernism’ (2017) 22(3) *Journal of Architecture* 512, 518 (saying Melnikov was ‘widely plagiarized’, including by Stirling).

⁸⁶ *James Stirling: Revisionary Modernists* (Yale University Press 2012), 84. At 106 she refers to ‘the numerous historical quotations’ and at 112 describes the over-hanging lecture theatres as ‘the most accessible and certainly the most discussed “quotation” in the building’. Here she uses inverted commas, probably to emphasise that Stirling’s work is more than simply quotation. As she argues, at 3, ‘Stirling didn’t simply string together a series of direct quotations: he interrogated precedent based on a discovered or desired connection between the original and his own project, often citing a continued functional or programmatic use.’

⁸⁷ Barthelmess, ‘Richard Meier’s Stadthaus’, 13. See also Robert Campbell, ‘Architect James Stirling: Controversial, Daring, Amazing’, *The Boston Globe* (30 June 1992) (‘Stuttgart is an anthology of private jokes, of bits and pieces quoted from the work of other architects and other styles’).

⁸⁸ Manfred Sack, *Die Zeit*, 9 March 1984, at www.zeit.de/1984/11/das-zitatenmuseum/seite-4 (accessed 3 July 2020); Kenneth Frampton, ‘James Stirling: A Premature Critique’ (1993) 26 *AA Files* 3–6, 6 (‘the historical quotation is a grotesque parody’); Emilio Ambasz, ‘Popular Pantheon’ (December 1984) *Architectural Review* 35 (‘a work full of parodies’).

entirety.⁸⁹ Reese-Lawrence suggests that it is Stirling's 'forays into self-quotation' that define his 'entire oeuvre'.⁹⁰

Quotation, then, does not seem to be an intrinsically textual concept. Recognition of this, rather than some peculiar adherence to formalism, almost certainly informed the Study Group's decision to extend the quotation exception to all works.⁹¹ In turn, importantly, we can infer that the meaning of quotation was not to be interpreted by reference only to its 'textual' conception. The notion of quotation in the Convention must be understood in a manner that enables it to be applied to all Berne works. Importantly this means that a rather liberal approach should be taken when determining which, and how many, of the 'typical' features associated with the prototypical – text – notion of quotation must be present to render a particular practice 'quotation'.

Although courts have (as yet) to draw on these sorts of sources, they have rarely hesitated to extend quotation and related exceptions to music, painting, photography and film. The CJEU in *Pelham* treats quotation as including reuse not only of text but also of music (embodied in a sound recording);⁹² and in *Painer*, as extending to the use of a photograph;⁹³ while in *Spiegel Online*, AG Szpunar also recognises that quotation might involve artworks or film.⁹⁴ National courts have taken a similar position: the English Court of Appeal applied the 'fair dealing for criticism or review' exception to significant portions of the film *A Clockwork Orange* in a broadcast documentary reviewing the decision to withdraw the film from circulation in the United Kingdom,⁹⁵ while the German *Bundesgerichtshof* permitted the insertion of two film excerpts, in total about five minutes, inside a documentary film, with a length of forty-three minutes.⁹⁶ According to Yves Gaubiac, much French case law recognises that

⁸⁹ Amanda Reese-Lawrence 'The Return of the Dead: Stirling's Self-Revision at Roma Interotta' (2011) 22 *Log* 22–31. (With respect to Stuttgart, *De Zeit* adds, 'Of course, Stirling also quotes Stirling, but that is not bad at all; every architect is in love with some of his former inventions'.)

⁹⁰ See also Amanda Reese-Lawrence, *James Stirling*, 79 (referring to Stirling's 'strategy of self-quotation'). On self-quotation as 'quotation' for Article 10, see pp. 109–11, below.

⁹¹ See Chapter 2, Section IV, Part A, pp. 19–22.

⁹² Case C-476/17 *Pelham GmbH v. Hütter* EU:C:2019:624 (CJEU, Grand Chamber), [72]; EU: C:2018:1002 (Advocate General's Opinion), [62], [64].

⁹³ Case C-145/10 *Painer v. Standard Verlags GmbH* EU:C:2011:798, [2012] ECDR 6 (CJEU, 3rd Chamber), [122]–[123].

⁹⁴ Case C-516/17 *Spiegel Online GmbH v. Volker Beck*, EU:C:2019:16 (Advocate General's Opinion), [42].

⁹⁵ *Time Warner v. Channel 4* [1994] EMLR 1; Miguel Emery, 'Argentina' in L. Bently (ed.), *International Copyright Law and Practice* (LexisNexis 2019) ARG-49, refers to a case where it was accepted that the exception applied to use of an audiovisual work in a television programme, but the court rejected the defence on the facts because the quotation amounted to seventy-six minutes from the film and so did not meet the condition of fair practice: C.N. Crim. & Correc., Sala II, Aug. 25, 1978, E.D. 81–87.

⁹⁶ BGH (Federal Court of Justice), Dec. 4, 1986 – *Filmzitat* (Film Quote), 1987 GRUR 362, as explained by Michael Gruenberger, 'Germany' in L. Bently (ed.), *International Copyright Law and Practice* (LexisNexis 2019), GER-189.

in principle the exception can apply to quotation from artistic works, video games and films,⁹⁷ while the Court of Appeal in Paris even admitted the possibility of the quotation of sports events.⁹⁸ As a result, French scholars have declared that the strict confinement of the exception to text is no longer defended.⁹⁹

Moreover, legal application of quotation exceptions to non-textual material is not new: the historical records reveal a host of cases applying quotation exceptions in national law to non-textual works, including musical and artistic material. A Belgian case from 1895 considered the quotation of music;¹⁰⁰ a German case involved reuse of a motif from Richard Strauss by Heinrich Gottlieb Noren (in his *Kaleidoskop*);¹⁰¹ the French court, having at the turn of the nineteenth century denied the possibility of quotation of drawings (in a case concerning the works of Henri Gabriel Ibels),¹⁰² two decades later reversed its position and recognised the quotation of artistic works (in a case concerning use of photographs of works of Corot and Rodin in a history of France);¹⁰³ and of music in another musical work in the 1930s.¹⁰⁴ Some national legislation applied the term quotation specifically to re-use of musical works, highlighting that there is nothing intrinsically 'literary' to the legal concept of quotation.¹⁰⁵

Finally, there is plenty of evidence that those involved in negotiating the revision of Berne well understood that the French term 'citation' and English 'quotation' were not intrinsically limited to uses of, or indeed in, text. Speaking at the Thirty-Fifth Congress of the ALAI in Warsaw in September 1926, its President, Georges Maillard, explained that photographic reductions of paintings could constitute

⁹⁷ Y Gaubiac, 'Freedom to Quote from an Intellectual Work' (1997) 171 *RIDA* 2, 46, citing *Sté MH Films et autres v. Sté Dima Films et autres*, TGI, 14 Sept 1994, (1995) (Apr.) 164 *RIDA* 407 (film); *Fabris v. Loudmer* Cass. 1st Civ. 22 January 1991 (visual art); *Sotheby's v. Fabris* Cass. 1st Civ. 22 January 1991 (visual art); *Tardy v. Librairie Larousse* Cass. 1st Civ. 13 April 1988 (visual art); 22 Sept 1988, CA Paris, D. 1988 IR 258, JCP 1990, II 265 (videogame). See Nicolas Bouche, *Intellectual Property Law in France* (2nd ed., Kluwer 2014), 85, [235] ('case-law applies it even to pictorial, graphical and sculptural works').

⁹⁸ *TFI v. Antenne 2*, 15 June 1989, as explained by Y Gaubiac, 'Freedom to Quote from an Intellectual Work' (1997) 171 *RIDA* 2, 72, fn. 73.

⁹⁹ Marie Cornu and Nathalie Mallet-Poujol, 'Le droit de Citation Audiovisuelle: Légitimer la Culture par L'image' [1998] *Legicom* 119–45 ('Le strict cantonnement de l'exception au domaine littéraire n'est plus guère défendu'). Belgian law explicitly abandoned the limitation of the quotation exception to short quotation and, as a result, 'quotation in Belgium is no longer interpreted as limited to literary works and it is now assumed that the exception is extended to works of all kinds': J Cabay and M Lambrecht, 'Remix Prohibited: How Rigid EU Copyright Laws Inhibit Creativity' (2015) 10(5) *Journal of Intellectual Property Law & Practice* 359, 370.

¹⁰⁰ P Wauwermans, 'Lettre de Belgique' (June 1895) *Le Droit D'Auteur* 75–8. See further Edouard Fueter, 'Musikalische Zitate', *Schweizerisch Musikzeitung*, 27 January 1923.

¹⁰¹ *Lauterbach & Kuhn v. Leuckart* reported in (March 1910) *Le Droit D'Auteur* 37.

¹⁰² *Ibels v. Grand Carteret*, Tribunal de la Seine, in (February 1901) *Le Droit D'Auteur* 18.

¹⁰³ *Chamouillet et autres v. Librairie Hachette*, (1924) *Le Droit D'Auteur* 48 (Tribunal Correctionnel de La Seine); Albert Vaunois, 'Lettre de France' (March 1925) *Le Droit D'Auteur* 29–32.

¹⁰⁴ *Société Raoul Breton v. Choudens*, Gazette de Palais, 26 October 1934, discussed in (July 1935) *Le Droit D'Auteur* 81 (also referring to an article by François Hepp that 'admettre la licéité de la citation musicale textuelle d'asprit parodique').

¹⁰⁵ For example, the Austrian Copyright Law of 1920, Article 43.

‘quotations’: ‘un reproduction de ce genre est une citation artistique’.¹⁰⁶ Two years before then, a study by the Berne Bureau had proposed an article for the Convention in which Members recognised the right to quote in terms of ‘analyses et courtes citations textuelles’ – the adjective ‘textuelle’ itself implicitly recognising the linguistic possibility, even in French, of non-textual quotation (whatever a few late-twentieth-century Francophone commentators might assert).¹⁰⁷ Likewise, as we explained in Chapter 2, Section II, in a proposal for the Rome Revision Conference in 1928, it was explicitly suggested that the Convention exempt ‘textual’ quotations. That qualification again recognises the possibility of non-textual quotation, and its absence from later texts implies that precisely such a broader conception of quotation was intended. Moreover, in the proceedings in 1948, the Director-General of the Bureau, Bénigne Mentha, observed (contrasting Article 10 with that of Article 9) that the reproduction of artistic works ‘could be considered as a quotation’.¹⁰⁸

It is reasonable to assume that the Study Group for the Stockholm revision was fully cognisant of this background. The proposal appeared to view the ‘universal application’ of the quotation exception as implicit but in need of *expressis verbis*. However, it also acknowledged this was an enlargement and thus recommended the condition that the work quoted had been lawfully made available to the public.¹⁰⁹ In response to the Study Group’s second Report (1964), the Authors’ Consultative Committee (CCA), set up by BIRPI, said it was ‘disquieted by the considerable extension’ to be effected by the proposed Article 10(1), which it noted covered all categories of works.¹¹⁰ However, the Swiss proposal to the Committee of Government Experts to limit the quotation right, given that in its proposed form it applied to all works,¹¹¹ was rejected. As such, there is nothing in the history of Article 10(1) Berne to suggest that ‘quotation’ was conceived as being only possible with, or in, text. The absence of any express limit, in fact, confirms precisely the opposite.

B Is a Quotation Inherently Short?

In the paradigm textual example, a quotation is a short passage selected from a longer text, and the passage quoted is incorporated by the quoter in a longer text. Although, unsurprisingly, several dictionary definitions define quotation in terms of ‘shortness’,¹¹² we suggest that there is no such quantitative limit *intrinsic* to the concept of quotation, either as a matter of common understanding of the concept

¹⁰⁶ (November 1926) *Le Droit D’Auteur* 128.

¹⁰⁷ ‘Les Emprunts Licite’, (1924) *Le Droit D’Auteur* 87, 97.

¹⁰⁸ *Documents* (1951), 249

¹⁰⁹ BIRPI: DA/20/2, p. 46. See Chapter 2, Section IV, pp. 19–20, above.

¹¹⁰ BIRPI: DA/22/7, p. 9. See pp. 22–23, above.

¹¹¹ BIRPI: DA/22/17. See p. 25, above.

¹¹² See eg J A Simpson and E S C Weiner (eds.), *The Oxford English Dictionary* (Clarendon 1989), vol. XIII, 52, 3c: ‘A short passage or tune taken from one piece of music to another or quoted elsewhere’ (emphasis added).

of 'quotation', or as a matter of law (though we recognise that the amount of material used is a very significant factor in assessing whether a use is proportionate and compatible with 'fair practice').

The ordinary use of the term 'quotation' would certainly seem to encompass instances of sizeable reproductions. Indeed, it is common to talk of 'lengthy quotations', or 'quoting extensively', and it is frequently recognised that this may be necessary and desirable to represent or 'do justice' to the author and their argument. For example, in the preface of a dictionary of philosophical quotations,¹¹³ Jane O'Grady describes the dilemmas facing a compiler of such a work: 'To reproduce too many long closely argued passages runs the risk of boring the reader; to produce only the conclusions to such arguments would be baffling and frustrating; and it is often misleading, distorting or impossible to convey an argument in small chunks or in passages full of ellipses.' What is interesting here is, once again, less what O'Grady states than what she takes for granted. She states the problem of taking closely argued passages as that of 'boring the reader'; she does not suggest that such passages would not qualify as 'quotations'. To the contrary, she takes for granted that a dictionary of 'quotations' *could* include such material.

Outside of the literary context, 'shortness' seems particularly irrelevant.¹¹⁴ In an important study entitled *Quotation and Cultural Meaning in Twentieth Century Music*, the musicologist David Metzger discusses Douglas Gordon's *24 Hour Psycho* (1993), which is an art piece comprising a slowed down (and mute) rendering of Hitchcock's famous film to two frames per minute.¹¹⁵ Metzger recognises that the change creates a new experience¹¹⁶ and that each viewer will, in fact, only watch for a segment of the full twenty-four-hour rendering. Although Metzger is uncomfortable with describing this as quotation, he also articulates the position that Gordon's work is at the 'outer limit' of quotation and that, in the late twentieth century, the concept of quotation can include transformative uses of 'entire or nearly entire pieces'.¹¹⁷ Thus, Metzger implies that the term 'quotation' is flexible as to extent: quotations can be short or long.

In the context of the visual arts of painting, drawing, sculpture, engraving or architecture, the idea that 'quotation' is necessarily 'short' is problematic, since these cultural forms are not conceived in terms of 'length'. Some commentators and courts have inferred from this that the quotation exception cannot apply to such works.¹¹⁸

¹¹³ J O'Grady, 'Introduction' in A J Ayer and J O'Grady (eds.), *A Dictionary of Philosophical Quotations* (Blackwell 1992), vii.

¹¹⁴ Indeed, as already noted, French commentators have often treated the quotation right in France as limited to text precisely because the domestic legislation uses the term 'short' ('courtes').

¹¹⁵ D Metzger, *Quotation and Cultural Meaning in Twentieth Century Music* (Cambridge University Press 2003). Metzger is Professor of Musicology at the University of British Columbia.

¹¹⁶ Metzger, *Quotation and Cultural Meaning*, 214.

¹¹⁷ Metzger, *Quotation and Cultural Meaning*, 217.

¹¹⁸ Pierre Recht, 'Pseudo-Quotation in the Field of the Plastic and figurative Arts' (1957) 17 *RIDA* 84, 104 ('We think, as a matter of fact, that the word "quotation" can only apply to quotations of a written phrase or a musical phrase, in a literary work, but never to a total or fragmentary reproduction of

However, as we will see, this is to analyse the matter in the wrong order. Indeed, the legal sources indicate that ‘shortness’ was explicitly rejected as a condition for the application of the quotation exception in the Berne Convention, in part because it was recognised that such a qualification could not sensibly be applied to artistic works. To reimport a condition of shortness, and then to infer that the exception cannot apply to artistic works, is to reverse the logic that informed the removal of the condition.

It will be recalled that in its 1948 Brussels version, the Berne Convention permitted the use of ‘small quotations’ (from journals and newspapers), but when the BIRPI/Swedish Study Group drafted a text for the Stockholm revision, the term ‘short’ was specifically abandoned. The Study Group reported that while a quotation normally should be short ‘this principle does not have absolute universal validity’.¹¹⁹ When the French delegation sought to reintroduce such a requirement,¹²⁰ it was discussed in the Main Committee, with the British and German delegates speaking against such a limitation. The British delegate William Wallace pointed out that a quotation that was not short could nevertheless be regarded as in accordance with fair practice.¹²¹ Dietrich Reimer, the German delegate, stated that ‘cases occurred in which quotations were permissible even though they were not short’, referring to provisions in the then recently adopted German Act, which, he explained, placed no quantitative restriction on what may be a legitimate quotation.¹²² The Swedish delegate and member of the Study Group, Torwald Hesser, a Justice of the Supreme Court, offered his support for the British view that ‘long quotations’ might be justified and that the real limitation was to be found in the ‘fair practice’ condition.¹²³ The Monaco delegate, Georges Straschnov, who was also legal director of the European Broadcasting Union, drew attention to the fact that the adjective short would raise particular problems in relation to the quotation of artistic works, where moral rights would be implicated if only part was used. The effect, he said, of its introduction would be to prevent the exception applying to the showing of a picture in a television programme. The condition was thus not desirable.¹²⁴ While the French delegate indicated that he approved of this effect, the Conference rejected the proposal. As a result, there is evidently no condition of shortness, and the quotation right must be applicable to use of artistic works. The legal commentaries also support this view.¹²⁵

a plastic work’; also citing other authors such as Francois Hepp, ‘The International Protection of the Plastic Arts’ (1957) *Le Droit D’Auteur* 144).

¹¹⁹ Preparatory Documents S/1, p. 46 in *Records*, vol. I, 116. See further Chapter 2, Section IV, pp. 19–20.

¹²⁰ ‘Texts of Documents S/13 to S/302’, in *Records*, vol. I, 615. The French delegate sought explicit reference to such a condition precisely because in its view the notion of ‘quotation’ did not of itself ‘involve the idea of brevity’: Robert Touzery, Main Committee, [762], in *Records*, vol. II, 860.

¹²¹ Main Committee, [764] in *Records*, vol. II, 860. See pp. 26–28, above.

¹²² Main Committee, [765] in *Records*, vol. II, 860.

¹²³ Main Committee, [767] in *Records*, vol. II, 861.

¹²⁴ George Straschnov, in Minutes, [769], *Records*, vol. II, 861.

¹²⁵ Claude Masouyé, *Guide to the Berne Convention* (WIPO 1978), 59, and Paul Goldstein, *International Copyright: Principles, Law, Practice* (Oxford University Press 2001), 304.

In addition, the idea that a ‘quotation’ must in itself be short seems incompatible with another condition placed on the quotation exception in Article 10 of the Berne Convention: the requirement of ‘proportionality’ to purpose. We discuss this in more detail in Chapter 4,¹²⁶ but for the moment, it is sufficient to note that Article 10(1) places a limit on the extent of permissible quotation – namely that ‘their extent does not exceed that justified by the purpose’. Such a condition would be strange if ‘quotation’ itself implied a *small* taking – not least because the extent required by the purpose might be quantitatively substantial. Imagine, for example, that one wanted to present evidence in a manner that clearly included the context of particular statements so that there could be no misunderstanding (or accusation of selective quotation or quotation out of context), or where a person wishes to compare two texts to identify and discuss differences, or where the text being referred to is not otherwise easily accessible.¹²⁷ In these cases, long extracts might be justified to achieve the purpose.

C Is It Possible to Quote an Entire Work?

In the typical situation, a ‘quotation’ involves use of ‘a part’ of the quoted work.¹²⁸ Indeed, especially when focusing on textual reuse, dictionaries very frequently define ‘quotation’ as ‘a passage’. One legal commentator seeks to define the legal concept as ‘an excerpt from a larger work’.¹²⁹ If a person reproduced the entirety of a novel, we simply would struggle to call that a quotation. But must a quotation always be a small proportion of the work from which the quotation derives? Could it even involve reuse of the whole?

Some legal systems appear to have rejected the possibility that there can be a quotation if the whole of a work is reproduced. For example, in France, the exception is limited to analyses and ‘short quotations’,¹³⁰ and while it is not clear from that whether ‘short’ refers to an intrinsic characteristic, or is to be viewed from the perspective of the source from which the quotation is taken, one court has stated that ‘the complete reproduction of a work of art, whatever its format, cannot in any

¹²⁶ Chapter 4, Section IV, Part B, pp. 80–82.

¹²⁷ Stephen O Murray and Will Roscoe, *Islamic Homosexualities: Culture, History, and Literature* (New York University Press 1997), 10 (‘lengthy quotations are meant to minimise distortion of what earlier writers wrote. . . . There has been so much misrepresentation . . . that lengthy quotations . . . are invaluable’).

¹²⁸ Kevin Holm-Hudson, ‘Quotation and Context: Sampling and John Oswald’s Plunderphonics’ (1997) 7 *Leonardo Music Journal* 17–25, 17. ‘The act of quotation in music (here defined as reproducing a melodic, stylistic or timbral *excerpt* of a pre-existing musical work in the new context of another musical work)’ (emphasis added). Metzger, *Quotation and Cultural Meaning*, 4: ‘The practice, as defined here, refers to the placement of *parts* of a preexistent piece in a new composition or performance’ (emphasis added).

¹²⁹ Jørgen Blomqvist, *Primer on International Copyright and Related Rights* (Edward Elgar 2014), 161.

¹³⁰ Article L122–5(3)(a) of the IP 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’. For a list of countries that follow the French, see Bochemberg, *Le Droit de Citation*, 65, [114].

case be deemed to be brief quotation'.¹³¹ Likewise, Spanish law refers to 'fragments of the works of others'.¹³² Moreover, Ricketson and Ginsburg refer to quotation in the context of Article 10 of Berne as 'the taking of some part of a greater whole'.¹³³ The notion of taking 'part' of the work rather than the whole is implicit also in the Advocate General's Opinion in C-476/17 *Pelham v. Hütter*.¹³⁴

We think this is incorrect both as a matter of 'ordinary meaning' and as a necessary consequence of the state of the law. After all, the phrase 'quote in full' is regularly used to describe an act of quotation that reproduces the totality of a work. A good example of reproduction of the whole of a work in another work is provided by the field of painting, where artists sometimes create works that include in the subject matter preexisting works. Take, for example, Cézanne's *Compotier, verre et pommes* (trans. *Fruit Bowl, Glass and Apples*),¹³⁵ which he painted in 1878–9, and which for the next decade or two was owned by Paul Gauguin.¹³⁶ Gauguin featured it as a backdrop to his 1890 painting *Portrait de femme à la nature morte de Cézanne*.¹³⁷

¹³¹ *Fabris v. Guy Loudmer*, Cass., Ass. plen., 5 Nov. 1993, (1994) 159 RIDA 320 (in relation to catalogues of works of Maurice Utrillo); *Antenne 2 v. Spadem*, Cass 1^{ère} Ch Civ, 4 July 1995, (1996) 167 RIDA 262 (reproduction of murals by Edouard Vuillard, which adorn walls of theatre bar, in a broadcast about new dramatic productions at the theatre could not be justified as 'courtes citations' because the murals were reproduced in full if only for a short time); *Mr X, Promocom, FNAC v. Moulinsart*, Cass. civ. I, 26 May 2011, (2011) 229 RIDA 468 (not allowing reproductions of full images of the character 'Tintin' from a comic book in an educational book). Martin Senfleben, 'Internet Search Results – A Permissible Quotation?' (2013) 235 RIDA 3, 71–3 (discussing how this operated to exclude search results in the form of thumbnails from the French conception of 'quotation'). See also Maurice Casteels, 'Works of Art and the Right of Quotation' (January 1954) 11 RIDA 81–97 (representative of AAPB, a society representing professional artists, discussing the quotation exception in the Belgian law of 1886, which was only applicable to literary works, but arguing that were it regarded as applicable to works of art, it could not justify publishing the whole of such a work).

¹³² Consolidated Text of the Law on Intellectual Property, regularizing, clarifying and harmonizing the Applicable Statutory Provisions (approved by Royal Legislative Decree No. 1/1996 of April 12, 1996), Art. 32(1); the reproduction of the whole of a short story in a collection is not a 'fragment': Audiencia Provincial Madrid (Section 28) July 25, 2019, Aranzadi Civil 2019, no. 1413. See also Greek Copyright Law No 2121/1993, Article 19, 'Quotation of short extracts of a lawfully published work ... shall be permissible' (WIPO translation).

¹³³ S Ricketson and J Ginsburg, *The Berne Convention and Beyond* (Oxford University Press 2006), 788, [13.40]; Claude Masouyé, *Guide to the Berne Convention* (WIPO 1978) 59 (stating that the dictionary meaning involves an 'extract'). But cf. J C Ginsburg, 'Copyright without Walls? Speculations on Literary Property in the Library of the Future' (1993) 42 *Representations* 53, 53: 'Where collecting quotations from printed sources today requires transcription or photocopying, in the library of the future it may be possible to download and print out excerpts, or even the entire work, through the user's personal computer.'

¹³⁴ EU:C:2018:1002, [65], in stating that 'the *extract* quoted must be incorporated in the quoting work' (emphasis added).

¹³⁵ An image of the painting can be viewed on the Museum of Modern Art's website: www.moma.org/collection/works/78670 (accessed 3 July 2020).

¹³⁶ Anne Distel, Michel Hoog and Charles S. Moffett, *Impressionism: A Centenary Exhibition* (New York: Metropolitan Museum of Art 1974), 56 (available at www.metmuseum.org/art/metpublications/impressionism_a_centenary_exhibition#) (accessed 2 February 2020).

¹³⁷ The image can be seen on the website of its holder, the Art Institute of Chicago: www.artic.edu/artworks/16648/woman-in-front-of-a-still-life-by-cezanne. For Gauguin's ownership of the Cézanne, see Merete Bodelsen, 'Gauguin's Cézannes' (1962) 104 *Burlington Magazine* 204, 208 (identifying

Cézanne's painting is also featured in Maurice Denis's *Homage to Cézanne* (1900),¹³⁸ a work that depicts the various members of the 'Nabis' group of painters (Odilon Redon, Édouard Vuillard, André Mellerio, Ambroise Vollard, Maurice Denis, Paul Sérusier, Paul Ranson, Ker-Xavier Roussel, Pierre Bonnard and Madame Maurice Denis) 'gazing, like spellbound disciples, at one of the Master's paintings'.¹³⁹

Is the depiction of Cézanne's painting a 'quotation'? Certainly, art historians seem happy to use the word to describe the practice. In a lengthy comment on the painting, Katherine Kuenzli refers to the three pictures in the background, noting that 'Hanging along the back wall are examples of paintings by Gauguin, Renoir and Vuillard. Denis paints recognizable types of their works *rather than quoting specific canvases*'.¹⁴⁰ In contrast, Denis is clearly regarded as quoting Cézanne's painting.

Although one might observe that Denis does not reproduce the whole Cézanne, as Serusier's hand blocks the view of a part of the picture, the idea that this might be regarded as 'quotation' but a version that had been slightly differently composed would not do so seems wholly unattractive: the canvas depicted would function in precisely the same way in both instances. Similarly, one could suggest that Denis does not quote the 'whole' because the representation within the picture is smaller and necessarily different (painted by Denis) than in the Cézanne version. That might imply that reductions and perhaps lower-resolution versions of images could be 'quotations', as well as photographs (or films) of paintings could be quotation,¹⁴¹ but full versions in the same form (e.g. photographs of photographs) would not be.

Compotier, verre et pommes as one of Cézanne's paintings that Gauguin owned in the late 1880s, and noting that Gauguin 'includes [it] in the background of his portrait'; Donatien Grau, 'Theoretical Brutality: Cézanne and Gauguin', *Brooklyn Rail* (February 2014), at <https://brooklynrail.org/2014/02/criticspage/theoretical-brutality-czanne-and-gaugui>. The Cézanne is also said to have inspired Gauguin's 'Bowl of Fruit and Tankard before a Window' (1890), which can be seen at www.nationalgallery.org.uk/paintings/paul-gauguin-bowl-of-fruit-and-tankard-before-a-window.

¹³⁸ The work is owned by the Musée d'Orsay, Paris, and can be viewed on the Museum's website: www.musee-orsay.fr/en/collections/works-in-focus/painting.html?no_cache=1&zoom=1&tx_dam_zoom_pi%5BshowUid%5D=2312 (accessed 3 July 2020).

¹³⁹ Richard Cork, 'A Master of Mind and Matter', *The Times*, 10 October 1995, 34. Apparently, Cézanne wrote to Denis expressing his gratitude: Carolyn Lanchner, *Paul Cézanne* (Museum of Modern Art, 2011), 8. Denis would in 1914 again reprise Cézanne's *Compotier, verre et pommes* as a lithograph for a deluxe folio album published by the Bernheim brothers to raise money for Maillol's sculptural monument to Cézanne.

¹⁴⁰ Katherine Marie Kuenzli, 'Aesthetics and Cultural Politics in the Age of Dreyfus: Maurice Denis's *Homage To Cézanne*' (2007) 30 *Art History* 683 (emphasis added).

¹⁴¹ Iampolski, *The Memory of Tiresias*, 38 (describing the shots of Picasso's painting in Jean-Luc Godard's *Breathless* as 'quotations from Picasso' and explain that, reaffirming the dialogue, 'the quotes here function much like a teacher's comments in red ink'). For a useful account of the making of films about painters and painting, especially those of Alain Resnais, see Steven Jacobs, *Framing Pictures: Film and the Visual Arts* (Edinburgh University Press 2011), ch. 1 (suggesting, at 30, that such filmmakers had a duty to show the whole picture). For discussion of a film about the artist Francis Bacon, *Love Is the Devil: Study for a Portrait of Francis Bacon* (1998; director John Maybury), which featured no images of his paintings because Bacon's estate refused permission, see Bently, 'Copyright and Quotation in Film and TV'.

Again, attempting to exclude from quotation replication of ‘the whole’ seems to require some arbitrary and thus unattractive distinctions.

Our view that ‘quotation’ might include reproducing the whole of the work also seems correct as a matter of specifically legal interpretation. However odd it might be as a matter of ‘ordinary use’, the evolution in the scope of protection by copyright means that the legal meaning of ‘quotation’ must include reproduction of the whole. There are many circumstances in which the work that is protected is much less extensive than a novel. In such cases, a requirement that a quotation be a proportionately small fragment from the source work has the potential to render the quotation exception meaningless. Consider, for example, the example of a title, a slogan, epigram or a very short poem (a haiku). Jurisprudence in many countries, including now the United Kingdom, suggests that there are circumstances in which such small works might be protected as original literary works.¹⁴² Partial reproduction of such small works would in many, if not all, cases be completely meaningless. It seems therefore that ‘quotation’ must extend to reproduction of the whole.

Our view gains some support from the Berne legislative history (though there is no indication that the various participants had in mind the possible protection of trivial works). The Swedish/BIRPI Study Group, focusing on press reuse of material relating to politics, economics, religion and culture, noted that ‘sufficient direction’ might not be provided unless it was permissible to reproduce ‘in some cases, fairly considerable portions of articles constituting the contributions of others to public discussions’.¹⁴³ The Study Group rejected any *a priori* standard, preferring to emphasise the principle of proportionality. As we argued in Section I, Part B (discussing whether a quotation must be ‘short’), there may be cases where a person’s aim can only be achieved by reproducing the whole – for example, when discussing the compositional structure of a painting (as opposed to some detail therein). This suggests that the notion of ‘quotation’ should not be limited to cases of partial reproduction.

Many national laws, implementing the Convention, recognise that use of the whole work is permissible in certain cases. In particular, acknowledging that it might be inconsistent with an author’s moral right of integrity (recognised under Article 6bis) to reproduce only a part, certain laws specify that quotation of the whole might be necessary. For example, the copyright legislation of Bosnia and Herzegovina,¹⁴⁴

¹⁴² Case C-5/08 *Infopaq Int v. Danske Dagblades Forening* [2009] ECR-I 6569 (4th Ch), [45]–[48] (indicating that work is protected if it is ‘author’s own intellectual creation’ and leaving it to national court to determine whether 11-word extract reached this standard); Parkin, ‘Copyright Quotation Exception’ (2019), 62 (agreeing that, in light of *Infopaq*, quotation could be of material that could be regarded in itself as an original work).

¹⁴³ General Report of the Swedish/BIRPI Study Group, established June 1, 1963, BIRPI: DA/20/2, p. 45; S/1, p. 46 in *Records*, vol. I, 116. See, herein, pp. 19–20, above.

¹⁴⁴ Bosnia and Herzegovina, Law of July 13, 2010, Article 47. (‘It shall be permitted to literally quote passages and quotations from a disclosed work or individual disclosed works of photography, fine art, architecture, applied art and industrial and graphic design.’)

Brazil¹⁴⁵ and Ecuador¹⁴⁶ each allows for quotation of ‘individual works’ from the visual arts. Moreover, explicitly recognising that ‘small works’ might be original, the statutory rules operating in the Czech Republic specifically permits uses of ‘excerpts from a work, or small works in their entirety’.¹⁴⁷

Case law and commentary also accept the possibility that it might be a justifiable quotation to reproduce the whole of a work.¹⁴⁸ The CJEU in *Pelham v. Hütter* defined ‘quotation’ as ‘the use, by a user . . . of a work or, more generally, of an extract from a work’ – the qualification ‘or more generally’ acknowledging explicitly the possibility, if appropriate, of quotation of a whole work.¹⁴⁹ Von Lewinski argues that while the Berne language ‘from a work’ (‘les citations tirées d’une œuvre’) suggests that only parts may be quoted, ‘it should also cover quotations of entire works, where this is the only way to reach the purpose of quotation, as in the case of a photograph, drawing, or other art-work’.¹⁵⁰ Walter and von Lewinski, who generally adopt a broad reading of copyright’s prohibitions, when discussing Article 5(3)(d) of the Information Society Directive, state that ‘where excerpting is not possible’ then quotation might cover reuse of ‘the entire work (such as a photograph or short poem)’.¹⁵¹ Even the French courts have acknowledged, through some contorted reasoning, that reproduction of the whole of a work might be warranted in certain situations.¹⁵²

¹⁴⁵ Brazil, Law No. 9.610 of February 19, 1998 on Copyright and Neighboring Rights, Article 46(VIII) (‘the reproduction in any work of short extracts from existing works, regardless of their nature, or of the whole work in the case of a work of three-dimensional art’).

¹⁴⁶ Ecuador, Intellectual Property Law (Consolidation No. 2006-13), Article 839a (‘the inclusion in a given work of fragments of other works by other people in written, aural or audiovisual form, and also that of individual three dimensional, photographic, figurative or analogous works, provided that the works concerned have already been disclosed and that the inclusion thereof is by way of quotation’).

¹⁴⁷ Czech Republic, Consolidated Version of Act No. 121/2000 Coll., on Copyright and Rights Related to Copyright and on Amendment to Certain Acts (the Copyright Act, as amended by Act No. 81/2005 Coll., Act No. 61/2006 Coll. and Act No. 216/2006 Coll.), Article 31(1)(b).

¹⁴⁸ *Fraser-Woodward v. BBC* [2005] FSR 762 (inclusion of copyright photographs in broadcast was fair, taking into account the brief time for which the images were shown); *Hubbard v. Vosper* [1972] 2 QB 84, 94–5, 98 (Megaw LJ) (example of a parishioner quoting an epitaph on a tombstone in the churchyard); *Sillitoe v. McGraw Hill* [1983] FSR 545; *Associated Newspapers Group v. News Group Newspapers* [1986] RPC 515, 520; cf. *Zamacois v. Douville* [1943] 2 DLR 257, where the Canadian Exchequer Court suggested that the copying of an entire work cannot qualify as fair dealing. See also the Opinion of the Advocate General Trstenjak in Case C-145/10 *Painer v. Standard Verlags GmbH*, EU:C:2011:239, [212] and Opinion of Advocate General Szpunar in Case C-516/17 *Spiegel Online GmbH v. Volker Beck*, EU:C:2019:16, [45], which envisage circumstances in which quotation of the full work might be permitted.

¹⁴⁹ Case C-476/17 *Pelham GmbH v. Huetter* EU:C:2019:624 (CJEU, Grand Chamber), [71].

¹⁵⁰ Silke von Lewinski, *International Copyright Law and Policy* (Oxford University Press 2008), 156–7, [5.164].

¹⁵¹ M M Walter and Silke von Lewinski, *European Copyright Law: A Commentary* (Oxford University Press 2010), 1050, [11.5.58].

¹⁵² Pascal Kamina, ‘France’, in L. Bently (ed.), *International Copyright Law and Practice* (2019), FRA-135, refers to a decision of Paris, 14th ch, 12 October 2007, P.I. 2008, no. 27, 219, obs. A. Lucas (applying the quotation exception to the reproduction of one photograph to illustrate an article in a magazine, though referring to Article 5(3)(c) of Directive 2001/29/EC).

D *Must the Quotation Be Taken from Another Author?*

Returning to the typical situation, the text that is reproduced will normally be the text of another author, and this is reflected expressly in the terms of some national laws. For example, Spanish law states that it shall be lawful 'to include in one's own work fragments of the works of others'.¹⁵³ However, we suggest that normal use of the term 'quotation' includes 'self-quotation'. Indeed, the literature that deals with what is referred to as academic 'self-plagiarism' seems to assume that 'self-quotation' is legitimate, as long as it complies with certain rituals associated with quotation of others. As we will suggest, there certainly seems no good normative reason to limit the concept of 'quotation' in Article 10(1) Berne to quotation of works other than those of the quoting author.

The reuse by creators of their own material has been very common historically. Writing in 1960, Winton Dean observed that 'many, perhaps most, composers of the past have borrowed from their own earlier work'.¹⁵⁴ The same seems true of artists, who have frequently returned to subjects and utilised images and motifs repeatedly.¹⁵⁵ Such re-use is often called 'self-quotation'. Certainly, historians of music have used the term in this way when describing the practice of 'self-borrowing' that was prevalent among many of those who have received the imprimatur of the critics and entered into the musical canon and which 'can be regarded as normal compositional procedure'.¹⁵⁶ While music scholars frequently refer to these practices as 'self-borrowing', they regularly also talk about 'quotation'. For example, discussing French baroque composer Rameau, one commentator notes that 'some listeners might hear as *self-quotation* which I would regard as mere chance resemblance'.¹⁵⁷ Similarly, when cataloguing self-borrowing by the twentieth-century composer Charles Ives (1874–1954), Clayton Henderson observes, 'Ives often borrowed from himself. While this can be termed *self-quotation*, the manner in which he used his own material differs significantly from the way he quoted from the music of others'.¹⁵⁸ Likewise, David Metzger treats self-borrowing as quotation, referring to Schoenberg's self-borrowing from his own *Am Wegrand* in the closing scene of *Erwartung* as 'quotation'.¹⁵⁹ And Pwyll Ap Siôn describes as 'self-quotations' Michael Nyman's reuse of his own material, such as the

¹⁵³ Consolidated Text of the law on Intellectual Property, regularizing, clarifying and harmonizing the Applicable Statutory Provisions (approved by Royal Legislative Decree No. 1/1996 of April 12, 1996), Article 32(1) (emphasis added).

¹⁵⁴ Winton Dean, 'Bizet's Self-Borrowings' (1960) 41(3) *Music and Letters* 238–44, 238.

¹⁵⁵ Eliza E Rathbone, William H Robinson, Elizabeth Steele and Marcia Steele, *Van Gogh Repetitions* (Yale University Press 2013). Another example would be Matisse's use of his 'bilboquets' in multiple compositions. On architectural self-quotation, see p. 99, above.

¹⁵⁶ Benoît Gibson, *The Instrumental Music of Iannis Xenakis: Theory, Practice, Self-Borrowing* (Pendragon Press 2011), xix.

¹⁵⁷ G Sadler, 'A Re-examination of Rameau's Self-Borrowings' in J H Heyer (ed.), *Jean-Baptiste Lully and the French Baroque: Essays in Honor of James R. Anthony* (Cambridge University Press 1989), 259, 260.

¹⁵⁸ Clayton W. Henderson, *The Charles Ives Tunebook* (2nd ed., Indiana University Press 2008), 7–8.

¹⁵⁹ Metzger, *Quotation and Cultural Meaning*, 7. See also ch. 3, esp. 79–83.

use in *Concerto for Harpsichord* of elements from *Tango for Tim* (1994) that themselves appeared in the soundtrack for *A La Folie*.¹⁶⁰

If the ‘normal use’ of ‘quotation’ includes ‘self-quotation’, as we suggest, is there any reason why international copyright law should have a narrower understanding? In normative terms, it seems unnecessary to exclude authorial ‘self-copying’ from the notion of quotation: it makes little sense to allow any third party to use material but not allow the author to do so. In fact, in cases where an author has assigned copyright (for example, to a publisher), the availability of a ‘quotation’ exception may offer important freedom to the author to refer to and reuse their own work. It is perhaps notable that no provision is made in Article 5 of the Information Society Directive for an exception covering authorial self-copying, so that any such exceptions in national law (such as that contained in section 64 of the CDPA) would fall to be justified – almost certainly – by reference to Article 5(3)(d) of that Directive (i.e. as ‘quotations’). Indeed, this exception is justified under Article 10(1) Berne, the limitation to not copying ‘the main design’ being best seen as legislative indications of a key factor in a ‘fair practice’ analysis.¹⁶¹

III CHARACTERISTICS OF QUOTATION IN RELATION TO THE DESTINATION MATERIAL

A Must the Quotation Be Used in Another ‘Work’?

In order for an excerpt from a work to be recognised as a ‘quotation’, does the destination material in which the quote is incorporated have to be a ‘work’? Certainly not in the narrow sense of another printed work – words, for example, can be quoted in a visual work, sound recording, film or broadcast, and, of course, in unrecorded expression, such as recitation or performance (which might not implicate the reproduction right conferred by copyright, so much as the public performance right or the right of communication to the public).¹⁶²

This may appear uncontroversial, but curiously some national laws seem to have been formulated in a way that would preclude the operation of the ‘quotation’ exception in the absence of something that meets the legal definition of a ‘work’. For example, Article L. 122–5(3)(a) of the French IP Code exempts ‘analyses and brief quotations justified on the grounds of the critical, polemic, educational, scientific,

¹⁶⁰ P Ap Siôn, *The Music of Michael Nyman: Texts, Contexts and Intertexts* (Ashgate 2007), 70. The author is a composer and musicologist, Professor of Music at Bangor University.

¹⁶¹ The formal devices of the use of quotation marks and attribution may operate to indicate that a self-quotation is something one has said before, and thus provide valuable information to some readers. Insofar as the attribution requirement is understood as a more flexible variant of the authors’ moral right (see pp. 77–78, above), it is probably unobjectionable for such a condition to be waived in a case of self-copying. More problematic, however, is that exceptions such as those in Copyright Designs and Patents Act 1988 (‘CDPA’), section 64, also extend to works that have not been ‘made available’.

¹⁶² Ricketson and Ginsburg (2006), [13.42], 788.

or informative character of *the work in which they are incorporated* (emphasis added). German law likewise purports to limit the quotation exception in Article 51 of the Copyright Act 1965 to cases of reproduction in ‘an independent scientific work’, ‘an independent work of language’ or ‘an independent musical work’.¹⁶³

This may be viewed as consistent with the claim that the right to quote is itself ‘an author’s right’, which has been offered as an explanation for why Article 10(1) is included in a convention devoted to the protection of authors’ rights,¹⁶⁴ and how the formal expansion of the right in the Stockholm Revision can be regarded as consistent with the fundamental premise of Berne that it gradually extends the rights of authors.¹⁶⁵ It is also consistent with the theoretical claim, developed from Kantian premises, that the right to quote lies at the point where the claims of an earlier author runs up against those of a later author; ‘authors have exclusive rights in respect of their works only where such rights are consistent with everyone else’s equal authorship’.¹⁶⁶ This conceptualisation is perhaps expressed most vividly in the legislation of Guinea-Bissau,¹⁶⁷ which frames the right to quote as an author’s right, but limited to the authors of ‘a text’: ‘Authors of any text shall have the right ...’.

Nevertheless, the idea that there must be a ‘work’ into which the quoted material is incorporated seems strange as a matter of both ordinary language and legal policy. With respect to ordinary language, consider the example of a selected fragment of text placed on a building. Texts that are regarded as having particularly poignancy or relevance are frequently placed on or near buildings (or other spaces open to the public), such as courts, law schools,¹⁶⁸ libraries and even sports stadia.¹⁶⁹ These inscriptions typically signal, exhort or promote the values that those learning, working or playing inside the building should possess. Consider, for example, the lines taken from John Milton’s *Areopagitica* that ‘[a] good book is the precious life-blood of a master spirit, embalmed and treasured up on purpose to a life beyond life’. This much-beloved statement appears on a number of libraries in the United States including the New York Public Library, Indiana University Library (now Franklin

¹⁶³ Lionel Bochemberg, *Le Droit de Citation*, 50 (describing incorporation requirement as ‘a notion universally recognised’).

¹⁶⁴ Berne, Article 1 (‘The countries to which this Convention applies constitute a Union for the protection of *the rights of authors* in their literary and artistic works’); Preamble (‘The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, *the rights of authors* in their literary and artistic works’) (emphasis added).

¹⁶⁵ See Chapter 3, Section I, Part A.

¹⁶⁶ Abraham Drassinower, *What’s Wrong with Copying* (Harvard University Press 2015), 56. Framing this idea, Drassinower refers, at 55, to the public domain as ‘an irreducible condition of the audience’s entitlement to respond to and participate in the ongoing conversation of which the author is but a part’. For further discussion, see Section IV, Part B, pp. 131–136, below.

¹⁶⁷ Guinea-Bissau, Copyright Code (approved by Decree-Law No. 46.980 of March 28, 1972), Article 185.

¹⁶⁸ For an example of an exhibition of quotations about justice in Harvard Law School, see ‘Words of Justice’, at <http://library.law.harvard.edu/justicequotes/> (accessed 2 February 2020).

¹⁶⁹ Lines from Rudyard Kipling’s poem *If* appear above the entrance to the Centre Court at Wimbledon.

Hall), Chicago Cultural Center, and Cardinal Cushing Library at Emmanuel College, Boston. The inscription recognises the importance of books and therefore the value of libraries as repositories and providers of access. Of course, such inscriptions can be controversial, particularly in so far as they suggest a religious affiliation. Our interest, however, is much more mundane. There can be little doubt that such reuse of material is commonly referred to as quotation. For example, 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’.¹⁷⁰ Likewise, 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’.¹⁷¹ We do not want to belabour the point. It should be clear that the ordinary use of the word ‘quotation’ includes many situations where material, particularly words, are merely taken and placed in a new context. The context may sometimes be a copyright work itself – a compilation (as in a dictionary of quotations) or an architectural work – but this is absolutely irrelevant to the characterisation of the reuse of the material as a quotation.¹⁷²

Equally, consider statements on the back cover of a book recommending it (or statements from newspaper reviews on the sign boards outside a theatre). Or the statements made by Andy Warhol, such as ‘Pop Art is for everyone’, featured on the back of Campbell’s soup cans in the company’s 2012 limited edition?¹⁷³ Wouldn’t we happily refer to these as ‘quotations’? We think so. Of course, we could argue that the recommendation on the back cover is part of a compilation (along with the work itself and all the remaining ‘front matter’ and ‘back matter’). But such an argument feels so strained (like that in relation to inscriptions on buildings) that it really clarifies that a freestanding replication of material can, in fact, ordinarily be called a ‘quotation’.

There is no basis in the specific law and history of the Berne Convention for eschewing the ordinary meaning of quotation and adding a condition of incorporation into another work. Nor is there a basis in state practice.¹⁷⁴ Indeed, given our

¹⁷⁰ <http://hls.harvard.edu/library/about-the-library/history-of-the-harvard-law-school-library/quotations-in-the-langdell-reading-room> (accessed 2 February 2020).

¹⁷¹ www.loc.gov/loc/walls/jeffi.html (accessed 2 February 2020).

¹⁷² In certain circumstances, courts have treated the combination of words, representation and placement as a work: Cour de Cassation, No 06-19021, 2008, translated by Jane Ginsburg in Jane Ginsburg and Edouard Treppoz, *International Copyright Law: US and EU Perspectives, Text and Cases* (Edward Elgar 2015), 289 (stencil of word PARADISE in gold over door of dilapidated building regarded as a ‘personal creation’).

¹⁷³ Chris Michaud, ‘Life imitating art? Warhol-inspired soup for sale’, *Reuters, Arts*, 11 September 2012, at www.reuters.com/article/us-art-warhol-soup/life-imitating-art-warhol-inspired-soup-for-sale-idUSBRE88AoVE20120911 (accessed 9 June 2020).

¹⁷⁴ Cf. Lionel Bochumberg, *Le Droit de Citation*, ch. 3 (insisting on incorporation in a second work as ‘universally recognised’).

argument that the quotation limitation is a mandatory exception,¹⁷⁵ such a condition is probably contrary to the Convention.

B *Must the Quotation Be Proportionately Short?*

Must the 'quoting' text in which a segment of an earlier work appears be longer than the 'quoted text'? One of the leading commentaries on the EU Information Society Directive, Walter and von Lewinski, suggest this must be so, or at least that the quoted text must be ancillary. There is also a requirement of this sort in French case law, where it has been suggested that the 'quoting text' must be able to operate effectively without the 'quoted text'.¹⁷⁶

Once again, we suggest there is no such requirement. After all, we have just argued that there need not be a 'quoting text'. Of course, there will very often be a work (or other material) in which a quotation is incorporated. Even then, however, we see nothing intrinsic in the concept of 'quotation' to suggest that the quoting context must be in some sense 'larger' than the quoted material.

To require that the 'quoting text' be more substantial than the 'quoted elements' would raise practical and theoretical questions about how to appraise different contributions. First, one would be required to identify precisely the quoting 'text': in some cases, of course, this will be straightforward – it will be the article or chapter or book in which the quoted material is included; or the image that is depicted within the frame; or the film that is presented to an audience for viewing in a single session. But in the online environment these traditional frames are often less clear: web pages and websites being often amalgamations of materials derived from different sources and having diverse character. A 'snippet', returned in response to a search, sits amid an array of different possible works.

Even where it is possible to identify the 'quoting text', there arises the question of 'evaluation'. How is one to decide whether the 'quoting' text is significant compared with the 'quoted text'? Is this a quantitative matter? Consider, for example, a film being quoted in a painting;¹⁷⁷ or a painting in a photograph;¹⁷⁸ or a textual caption

¹⁷⁵ Chapter 3, Section I, pp. 29–38.

¹⁷⁶ *Editions Musicales AB et Lucky Imprimerie v. Editions Durand*, Cour d'Appel Paris, 4th ch, 22 May 2002, (2002) 194 RIDA 320, 323 (in relation to books for teaching musical theory, finding no quotation where the books could not 'survive withdrawal' of the quoted material ['ne peut survivre à leur retrait, qu'il n'y a donc pas incorporation des citations dans une oeuvre seconde']).

¹⁷⁷ In Chapter 5, Section III, Part C, pp. 118–120, below, we give the example of the schoolmistress/nurse in *The Battleship Potemkin* being quoted by Francis Bacon.

¹⁷⁸ For example, Victor Burgin's quotation of Edward Hopper's *Office by Night* (1940) in Burgin's 1986 series of photographs of the same name. See Jan Estep, 'Victor Burgin', in Lynne Warren (ed), *Encyclopaedia of Twentieth Century Photography* (Routledge 2006), vol. 1, 179. Burgin himself describes his 'direct quotation of Hopper's painted secretary and boss' in some of his images: Victor Burgin, 'The Separateness of Things' at www.tate.org.uk/research/publications/tate-papers/03/the-separateness-of-things-victor-burgin. See also Filip Lipinski, 'The Elusive Everyday and the "Life" of Edward Hopper's Paintings', *Textes and Contextes*, <https://preo.u-bourgogne.fr/textesetcon>

added to an image of a painting in a manner that radically re-shapes the meaning of the painting.¹⁷⁹ In these examples of trans-media quotation, the whole idea that the quoting work must, in some sense, be greater than the quoted would require the comparison of expressive material from distinct genres that are simply incommensurable. Nor is the challenge of incommensurability resolved by asking questions about the relative proportion of creative effort. To start to investigate the creative effort that particular creators have embodied in specific works would necessarily open a Pandora's box.

Of course, it must be right that the smaller the contribution from the quoter, the more likely the re-use is to appear as mere reproduction whose only function is to harm the market for the work reproduced. But the numerous counter examples, such as those in the previous part of this chapter, imply that these sorts of evaluations are not relevant to determining whether there is a 'quotation', as such; rather they relate to whether the quotation is in accordance with fair practice.¹⁸⁰

C Must the Quotation Be Unaltered?

In the typical printed-text situation, the quoted text is kept distinct from the quoting text, and its integrity is intact. Is this latter feature part of the definition of when something is a quotation? The *Collins Pocket Dictionary of the English Language* offers some basis for such a suggestion, defining a quotation as 'a written or spoken passage repeated *exactly* in a later work, speech or conversation, usually with an acknowledgment of its source'.¹⁸¹

Some national legal systems have treated the maintenance of textual integrity as a condition for the operation of the quotation exception. Indeed, Advocate General Trstenjak seemed to suggest such a condition for the operation of the European quotation exception.¹⁸² Some commentators support this narrow view, in particular by arguing that a summary is not a quotation.¹⁸³

[textes/index.php?id=2517#bodyftn3](https://www.collinsdictionary.com/dictionary/english/quotation) (referring to the 'frequent quotations' of Hopper's images in art and visual culture) (accessed 3 July 2020).

¹⁷⁹ For example, Barbara Kruger's body of work where found images, usually pre-existing and wholly unremarkable stock commercial photographs, are reproduced in black and white with terse captions in red-and-white superimposed, the brief text demanding that the viewer interrogate and understand the image in a particular way. Famous examples are *Untitled* ('Your Body Is a Battleground') (1989) and *Untitled* ('I Shop, Therefore I Am') (1987).

¹⁸⁰ See Chapter 6, Section III, Part A, esp. pp. 155, 185, below.

¹⁸¹ *Collins Pocket Dictionary of the English Language* (1989) 691 (emphasis added).

¹⁸² Case C-145/10 *Painer v. Standard Verlags GmbH*, EU:C:2011:239 (Advocate General's Opinion), [210] (Advocate General Trstenjak): 'In natural language usage, it is extremely important for a quotation that third-party intellectual property is reproduced without modification in identifiable form.'

¹⁸³ Ricketson and Ginsburg (2006), 787, [13.41] ('the making of a summary is not the same thing as the making of a quotation'); Silke von Lewinski, *International Copyright Law and Policy* (Oxford University Press 2008), 157–8, [5.16] ('summaries of texts do not constitute quotations'); Mihály Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO*

Again, we suggest this is incorrect. Maintenance of the absolute identity of the quoted material is not consistent with many ordinary usages of the term ‘quotation’ and makes little sense as a matter of law or policy. Indeed, even the narrowest conceptions of literary quotation provide for standardised ways in which what is quoted in print may be altered: sections may be omitted by using ‘...’, and new matter can be inserted for explanatory purposes, conventionally in square brackets. We suggest that the term ‘quotation’ is even broader and might, for example, include summary or paraphrase of text, the incorporation of a phrase of music in a composition and its elaboration, or a transformative use of an artwork in a later artwork or film.

In the context of textual reuse, philosophers of language have explored this question of transformative use, denominating these different types of ‘quotation’ as ‘direct’ and ‘indirect’. According to Nelson Goodman,¹⁸⁴ direct and indirect quotation are possible, but share two necessary conditions: ‘(a) *containment* of some paraphrase of what is quoted, and (b) *reference* to what is quoted, either by naming or predication’.¹⁸⁵ For direct quotation, there needs to be ‘syntactic identity’ between what is quoted and what is contained; whereas, for indirect quotation, there needs to be ‘semantic paraphrasis’ – that is, ‘some sort of equivalent of reference or meaning’.¹⁸⁶ While Goodman’s attempts to define the conditions of quotation may be queried, not least because they do not easily encompass pictorial or musical quotation, it is encouraging to see that his definition (which operates effectively in literary quotation) includes a notion of paraphrase.

Outside the field of text, ‘reuse’ of derived material is frequently described as ‘quotation’, irrespective of the fact that the material is re-worked, altered or adapted. Certainly this is the view of musicology professor David Metzger. In his book *Quotation and Cultural Meaning in Twentieth Century Music*,¹⁸⁷ Metzger reviews quotation practices in music during the last century, highlighting the role of quotation as a cultural agent. For Metzger, a key aspect of quotation is that it stands out in the text in which it is deployed, but it is also transformed. Mark Katz also emphasises the necessary transformation.¹⁸⁸ Most digital sampling involves some level of

(Geneva: WIPO 2003), 62. (‘A “summary” itself is obviously not a quotation, since the faithful repetition of a part of the quoted text is an indispensable element of the concept of quotation. Instead of a possible self-contradictory interpretation according to which a quotation could take the form of summaries, here again, another more reasonable interpretation offers itself; namely that, in this case, quotations – in harmony with the above-mentioned justified purposes of quotations – may be parts of such summaries (rather than being summaries themselves).’)

¹⁸⁴ Nelson Goodman, *Ways of Worldmaking* (Hackett 1978), ch. 3, ‘Some Questions Concerning Quotation’. See also Edward Said, *Beginnings: Intention and Method* (Columbia University Press 1985), 22 (referring to quotation as taking the form of paraphrase and allusion).

¹⁸⁵ Goodman, *Ways of Worldmaking*, 43.

¹⁸⁶ Goodman, *Ways of Worldmaking*, 43.

¹⁸⁷ Metzger, *Quotation and Cultural Meaning*.

¹⁸⁸ M Katz, *Capturing Sound: How Technology Has Changed Music* (University California Press 2010), 156.

transformation, but it nevertheless is, as already explained, commonly described as 'quotation'.

Beyond the views of commentators turning their minds to what constitutes quotation, we can see a wide array of uses of the term 'quotation' to describe transformative use of material from earlier works. This is especially relevant in relation to the use of material other than printed text. Indeed, perhaps the most widely discussed example of 'quotation' among art historians concerns just such a case of adaptation (as opposed to replication). Edouard Manet (1832–3), the great 'pre-impressionist',¹⁸⁹ was involved in 'overt citation of a whole host of canonical old masters',¹⁹⁰ including in his, most famous work *Le Déjeuner sur l'herbe* (Lunch on the Grass, 1862–3).¹⁹¹ Comprising an image of two bearded men picnicking with a naked woman, while in the middle distance another woman appears to be washing her feet in a pond, this painting is usually honoured for Manet's superb handling of paint and stark objectivity'.¹⁹² The painting also generates a level of discomfort in the viewer: 'the nude looks at us too intently; the conversational partners appear to ignore one another; and a distant, wading figure refuses to keep her distance and threatens to make a quarter of the foreground trio, whose existence she nevertheless seems to ignore.'¹⁹³

The painting is also widely acknowledged to have been based upon a detail from a Marcantonio Raimondi engraving of Raphael's *Judgment of Paris*.¹⁹⁴ The three

¹⁸⁹ David Carrier, 'Manet and His Interpreters' (1985) 8(3) *Art History* 320 calls Manet 'the first modernist and/or the last old master', before interrogating whether his work might be regarded as 'postmodern'; 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').

¹⁹⁰ Eik Kahng, (ed.), *The Repeating Image: Multiples in French Painting from David to Matisse* (Yale University Press 2007), 16. According to Michael Fried, *Manet's Modernism*, 23, it is an 'extraordinary fact' that '[m]ost of the important pictures of the 1860s depend either wholly or in part on works of Velázquez, Goya, Rubens, Van Dyck, Raphael, Titian, Giorgione, Veronese, Le Nain, Watteau, Chardin, Corbet'. Fried's interest is to explain 'the most remarkable aspect of Manet's borrowings, the literalness and obviousness with which he often quoted earlier paintings' (24). Others describe Manet's practice as quotation: David Carrier, 'Manet and His Interpreters' (1985) 8(3) *Art History* 320 (describing how *Olympia* has been interpreted as 'a Titian-quotation' and that critics have referred to the 'erudition manifested in Manet's quotations'), 332 ('the notion of image-appropriation does not distinguish Manet from Rubens, whose art is filled with quotations').

¹⁹¹ Fried, *Manet's Modernism*, 57 ('his sheerest, most intractable masterpiece'); Farwell (1981), 1 ('among the most famous paintings executed in France in the 19th century'). The painting is housed in the Musée d'Orsay in Paris and can be viewed here: https://m.musee-orsay.fr/en/works/commentaire_id/luncheon-on-the-grass-7123.html (accessed 9 June 2020).

¹⁹² George L. Mauner, *Manet, Peintre-Philosophe: A Study of the Painter's Themes* (Pennsylvania State University Press 1975), 6.

¹⁹³ Mauner, *Manet, peintre-philosophe*, 6.

¹⁹⁴ The work can be seen at www.metmuseum.org/art/collection/search/337058 (accessed 9 June 2020). According to Fried, *Manet's Modernism*, there are also references in *Le Déjeuner* to Titian's *Concert champêtre* [Pastoral Concert] (1508), Courbet's *Young Woman on the Banks of the Seine* (1856–7) (as regards subject matter, and via the inclusion of the rowing boat).

figures in Raphael are ‘two river gods and a water nymph sitting by the marshes’ but, in Manet, become ‘two Parisian men about town and their naked female companion’.¹⁹⁵ 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.’¹⁹⁶

Michael Fried has made much of what he refers to as Manet’s ‘strategy of more or less conspicuous allusion to or citation of particular “sources”’¹⁹⁷ to establish his Frenchness and his connection to European painting. Manet was engaging, as his contemporaries did ‘in some version of citing or conspicuously adapting the art of the past’¹⁹⁸ actively and explicitly with the art of the past.¹⁹⁹ Here, we note Fried’s commentary for the more pedestrian purpose of establishing that Manet’s practice, as with that of many other great artists, is today commonly described as ‘quotation’. Fried²⁰⁰ calls *Le Déjeuner* ‘perhaps the most notorious instance of quotation from the Old Masters in Manet’s oeuvre’.²⁰¹ Fried explains ‘the three foregrounded figures in Manet’s painting are a direct quotation from Marcantonio Raimondi’s engraving’.²⁰² 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’.²⁰³ Likewise, Professor of Art History Carol Armstrong calls it ‘perhaps the most concentrated exercise in eclectic quotation since *The Old Musician* of 1860’.²⁰⁴

¹⁹⁵ Paul Hayes Tucker, *Manet’s Le déjeuner sur L’herbe* (Cambridge University Press 1998), 19.

¹⁹⁶ Tucker, *Manet’s Le déjeuner*, 20.

¹⁹⁷ Fried, *Manet’s Modernism*, 4.

¹⁹⁸ Fried, *Manet’s Modernism*, 13.

¹⁹⁹ Fried, *Manet’s Modernism*, 10–13.

²⁰⁰ Fried, *Manet’s Modernism*, 150.

²⁰¹ E H Gombrich, *The Ideas of Progress and their Impact on Art* (Cooper Union 1971), 76 (‘a simple transposition of a detail from a composition by Raphael’).

²⁰² Fried, *Manet’s Modernism*, 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). See also *Manet’s Modernism*, at 24, 28, 29 (referring to ‘the obviously deliberate quotations of specific paintings by previous masters that one finds in [Old Musician (1862)]’); 30 (‘the apparent gratuitousness of the almost literal quotations from [Velasquez’s] the Drinkers’); 37 (stating that in contrast Manet’s use of Watteau ‘rarely entailed direct quotation of specific works’); 37 (‘Bazin has shown [La Pêche] contains quotations from two paintings by Rubens’); 68; 136 (‘Manet’s practice of quotation and allusion’); 138 (‘Manet’s practice of quotation’).

²⁰³ Beatrice Farwell, *Manet and the Nude: A Study in Iconography in the Second Empire* (Garland 1981), 255.

²⁰⁴ 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’).

Other examples of practices that are regarded as examples of ‘quotation’ include uses of film and photographic subjects in painting²⁰⁵ and, of course, in other film. Here, we want to draw attention to a couple of examples involving the use of material from Sergei Eisenstein’s classic black-and-white movie *The Battleship Potemkin* (1925),²⁰⁶ a film of a similar iconic stature to Manet’s *Le Déjeuner*.²⁰⁷ As is well known, the film was set in tsarist Russia, and the subject of the film is a mutiny in 1905 by the starving and ill-treated sailors who man the battleship *Potemkin* when it is touring the Black Sea. When the ship docks at the port of Odessa, the local residents show support for the sailors, and in the most famous sequence, set on the enormous set of sandstone stairs leading down from the town to the harbour, many are massacred by the Tsar’s artillery.²⁰⁸ In the face of the panicking stampede of citizens, running amok among the injured and dead, an old woman wearing a white headscarf (said to be a schoolmistress or nurse) and round, pince-nez spectacles proposes that they ‘go and talk them [the militia] out of it’, but the firing continues. A woman picks up and carries her injured son and pleads with the militia (‘My boy is very ill. . . . Don’t shoot’), only to be mercilessly shot down. A fleeing woman pushing a child in a pram reaches the top of the stairs and turns. The pram teeters on the edge and, as the mother is shot and falls, begins its descent down the stairs, miraculously staying upright as it speeds from one flight to the next. The scene culminates as the pram collapses at the bottom, and the schoolmistress/nurse, who had proposed negotiation moments earlier, is savagely and repeatedly struck by the sword of a Cossack soldier; her glasses are smashed, and she is bleeding from her right eye.

Not surprisingly, given its status, much has been written about the film and particularly the Richelieu (known as the ‘Potemkin’) steps scene – especially in relation to Eisenstein’s technique of montage and the way in which the film cuts repeatedly between a number of scenes with ever-increasing speed and intensity. In addition, the film has proved remarkably influential on subsequent artists and

²⁰⁵ Van Deren Coke, *The Painter and the Photograph from Delacroix to Warhol* (University of New Mexico Press 1964), 208, describes André Derain’s *Bal des Soldats à Suresnes/At the Suresnes Ball* (1903), as ‘a quotation from a snapshot of soldiers off duty’ from a photograph, ‘Soldiers Off Duty’, in (1903).

²⁰⁶ Eisenstein is himself said to quote Disney’s *Snow White* in *Ivan the Terrible*: Anne Nesbet, ‘Inanimations: Snow White and Ivan the Terrible’ (1997) 50(4) *Film Quarterly* 20, 29, fn. 6. (‘Not only does the latter film provide a *visual quotation* (Ivan’s men digging are framed by their cavern just as the dwarfs are framed by theirs), but it also plays this scene as a musical number, the dwarfs’ work song transformed into a minor-key (but equally rhythmic) meditation on war preparation’ (emphasis added).)

²⁰⁷ James M Brandon, ‘Battleship Potemkin’ in Philip C Di Mare (ed.), *Movies in American History: An Encyclopaedia*, vol. 1 (ABC-CLIO 2011), 27 (‘worthy of consideration as one of the greatest films of all time’).

²⁰⁸ Richard Taylor, *The Battleship Potemkin: The Film Companion* (I. B. Tauris 2000), 35. (‘The pivotal Odessa Steps sequence of *The Battleship Potemkin* may well lay claim to being the most famous single sequence of images in the history of world cinema.’) The sequence can be viewed online. For a brief written description, see James Goodwin, *Eisenstein, Cinema, and History* (University of Illinois Press 1993), 67–9; Robert P Kolker, *Film, Form, and Culture* (4th ed., Routledge 2016), 105ff.

filmmakers. It has been said to have been ‘almost as widely quoted and parodied as the “Mona Lisa”’.²⁰⁹ For example, the British painter Francis Bacon drew on the scene for a range of images of screaming figures (including his well-known image of Pope Innocent).²¹⁰ Various stills of the schoolmistress were found in Bacon’s studio,²¹¹ and the capturing in a silent movie of her ‘scream’ must have offered a key aid to Bacon’s aspiration ‘to make the best painting of the human cry’.²¹² The reference is explicit in the 1957 painting ‘Study for the Nurse from the Battleship Potemkin’.²¹³

Writing of this, the English art critic Lawrence Alloway chose to describe Bacon’s use of the image as a ‘quotation’:

He used, in screaming heads that he painted at this time, a still from an old movie, *The Battleship Potemkin*. This image, of the nurse wounded in the eye in the Odessa-steps sequence, though mixed with other elements, of course, was central to the meaning of the work . . . *The difference between Bacon’s use of quotations from the mass media and other, earlier uses is this: recognition of the photographic origin of a part of his image is central to his intention.*²¹⁴

Similarly Rachel Tant refers to Bacon’s ‘quotation of the screaming nurse’,²¹⁵ while Roy Behrens having described the scene observes that it ‘was “quoted” (just as

²⁰⁹ Ian Christie, ‘Introduction: Rediscovering Eisenstein’ in Ian Christie and Richard Taylor (eds.), *Eisenstein Rediscovered* (Routledge 1993), 1, 1.

²¹⁰ It is cited as an influence for *Study for a Portrait* (1949) and *Untitled (Study after Velasquez)* (1950) in Anthony Bond (ed.), *Francis Bacon: Five Decades* (Thames and Hudson 2013), 100, 108, as well as Head VI (1949) in Paul Joannides, ‘Bacon, Michelangelo and the Classical Tradition’ in P Joannides, A Geitner, and T Morel (eds.), *Francis Bacon and the Masters* (Fontanka Publications 2015), 26, 35; David Sylvester, ‘Un Parcours’, 13–32, 17, while Dawn Ades sees the gaze of the schoolmistress ‘echoed’ in Head III (1949): Dawn Ades, ‘Web of Images’, in Dawn Ades et al., *Francis Bacon* (The Tate Gallery in association with Thames and Hudson 1985), 15. Bacon has been described as ‘an eclectic modernist, who took what he needed from the art of the past to make the art of the present’. Paul Greenhalgh in *Francis Bacon and the Masters* (Fontanka Publications 2015), 12.

²¹¹ For the most well-known image, see this still on the website of the Museum of Modern Art in New York: www.moma.org/collection/works/89286 (accessed 9 June 2020).

²¹² David Sylvester, *Interviews with Francis Bacon* (3rd ed., Thames and Hudson 1987), 34 (discussing *The Battleship Potemkin* and saying that ‘I was not able to do it and it’s much better in the Eisenstein and there it is’).

²¹³ For this work, see <https://sammlung.staedelmuseum.de/en/work/study-for-the-nurse-in-the-film-battleship-potemkin-by-eisenstein> (accessed 9 June 2020) (the accompanying text explains ‘Francis Bacon has locked a naked, screaming woman into a confined space. . . . He quoted the image from a scene in Sergei Eisenstein’s “Battleship Potemkin”’ (accessed 16 February 2020).

²¹⁴ Lawrence Alloway, ‘“Pop Art” Since 1949’ *The Listener* (London, 27 December 1962), reprinted Richard Kalina (ed.), *Imagining the Present: Essays by Lawrence Alloway* (Routledge 2006), 81 (emphasis added). Victoria Walsh, ‘Real Imagination in Technical Imagination’ in Matthew Gale and Chris Stephens (eds.), *Francis Bacon* (Tate Publishing 2008), 74, 76, describes the practice as ‘borrowing’.

²¹⁵ Rachel Tant, ‘Archive’ in Matthew Gale and Chris Stephens (eds.), *Francis Bacon* (Tate Publishing 2008), 165–8, 165 (citing Robert Melville, ‘Francis Bacon’, (December 1949–January 1950) 20(120–1) *Horizon* 419–23).

famously) 25 years later by British painter Francis Bacon in his portraits of pontiffs in boxes'.²¹⁶ One critic regards these pictures as not among Bacon's best because they 'rely too much on direct quotations'.²¹⁷

Perhaps the most widely acknowledged revisitation of the 'Odessa Steps' sequence is in Brian De Palma's 1987 film *The Untouchables*.²¹⁸ The film is set in 1930s United States and concerns a very different subject – the the US Treasury's pursuit (led by Eliot Ness) of the gangster Al Capone. One scene is clearly influenced by *The Battleship Potemkin*.²¹⁹ The scene is set on the steps of a railway station (Union Station, Chicago), and when the two sides, government officers and Capone's mob, confront one another, Ness lets go of a pram containing a baby, and the pram begins tumbling down the steps.²²⁰ Ness, played by Kevin Costner, pursues the pram, as the child's mother screams inaudibly 'My baby!' As in *Potemkin*, the film is cut so as to repeatedly revisit the pram, but in contrast with the silent film, the wheels of the pram make a rhythmic thud as they traverse each step. Ultimately the pram is stopped at the bottom of the stairs by a brave official, George Stone (played by Andy Garcia), who dives underneath it. Meanwhile, one of the mobsters grabs Walter Payne, Capone's chief bookmaker, and puts a gun to his head. In an image reminiscent of the schoolmistress (or nurse) in *Potemkin*, the bookmaker, wearing round spectacles and a hat, screams.²²¹

This sort of 'borrowing' was nothing new to De Palma, whose earlier films often reproduced scenes from Hitchcock movies.²²² While the reuse of Eisenstein is sometimes described in terms such as 'sampling', 'mimickery' or 'parody',²²³ film scholars have not hesitated to describe it as an example of 'quotation' in film. For

²¹⁶ Roy Behrens, Review of 'Eisenstein: The Master's House' (2004) 37(3) *Leonardo* 252.

²¹⁷ John Russell, *Francis Bacon* (Thames and Hudson 1993), reviewed by Andres Zervigón, 'Remaking Bacon' (1995) 54(2) *Art Journal* 87, 88.

²¹⁸ Beverly Heisner, *Production Design in the Contemporary American Film: A Critical Study of 23 Movies and their Designers* (McFarland & Co 2004), 77. The two scenes have been excerpted on this YouTube video: www.youtube.com/watch?v=QR-U6WXnoMo (accessed 9 June 2020).

²¹⁹ John Biguenet, 'Double Takes: The Role of Allusion in Cinema' in Andrew Horton, Stuart Y McDougal (eds.), *Play It Again, Sam: Retakes on Remakes* (University of California Press 1998), 138 (highlighting that while the position of the state differs (oppressor in *Potemkin*, liberator in *The Untouchables*), both films depict the Tsar and Capone as similarly savage).

²²⁰ Although De Palma is reputedly a 'master of suspense', the scene in fact begins tediously with Costner waiting for Capone's mob, scrutinising various members of the public as they traverse the terminal, and eventually deciding to help a mother who was struggling to get her child and pram up the stairs.

²²¹ Bruce Weber, 'Cool Head, Hot Images' in Laurence Knapp (ed.), *Brian De Palma – Interviews* (University Press of Mississippi 2003), 108–19, at 112–13 (describing scene and discussion with De Palma).

²²² Michael Bliss, *Brian De Palma* (Scarecrow Press 1983) xii–xiii (discussing 'film homages' to Hitchcock and giving an example of the recreation of the shower scene – 'down to every angle and cut' – from *Psycho* in *Phantom of the Paradise*).

²²³ John Biguenet, 'Double Takes' 138 ('homage'); James M Brandon, 'Battleship Potemkin', in Philip C Di Mare (ed.), *Movies in American History: An Encyclopaedia*, vol. 1 (ABC-CLIO 2011), 29 (sample); Robert Edgar, John Marland, Steven Rawle, *The Language of Film* (2nd ed., Bloomsbury 2015), 196 (mimick).

example, Laurence Knapp (who did his doctoral thesis on De Palma) explains 'De Palma *quotes openly, and unapologetically, from other films* ... Sergei Eisenstein's *The Battleship Potemkin* for *The Untouchables*'.²²⁴ American Film critic and NYU Professor Emanuel Levy says that De Palma's 'use of film quotation' is here 'marked by pastiche'.²²⁵

The use of the term 'quotation' to describe De Palma's refiguring of Eisenstein's scene is by no means unusual in film scholarship. To reiterate, we are not concerned with the possibility that such uses infringe copyright (arguably in many of the instances described as quotation what is reused is merely the idea, something unprotected by copyright). Rather, we are merely concerned with the characteristics of the usage. For our purposes, the significance of the usage implies that 'quotation' is not limited to reuse of material in exactly the same form, as in all situations the filmmaker remakes the shot. In other words, the ordinary use of 'quotation' in this context does not imply as a necessary condition that the quoted material remain distinct in the quoting text. Without wanting to belabour the point, similar usage of the term quotation can be seen in music scholarship.

The normal use of the term 'quotation' thus seems to encompass a broad range of 'uses' of existing materials. Is there any reason why the legal meaning should not follow this ordinary usage of the word *quotation*? We think the language and structure of Berne as well as good policy, in fact, confirm that 'quotation' encompasses reuse of material that has been altered, for example, by way of paraphrase or summary.

With respect to language, it is notable that Article 10(1) of Berne explicitly includes within the concept of 'quotation' so-called 'press summaries'. On its face this would seem conclusively to indicate that 'quotation' is not limited to verbatim reproduction or replication. This is probably the correct inference; nevertheless, we should note that at least two commentators consider this to be a misinterpretation. Both Ricketson and Ginsburg and von Lewinski argue that 'press summaries' does not refer to 'summaries', but rather *reviews* by replication of news items.²²⁶ The basis for so saying is the French-language version of the Berne text,²²⁷ which in the case of differences is to be regarded as 'authoritative' (Article 37(3) Berne) and which refers to 'revues de presse'. This would, they say, include the presentation of a number of news stories from different sources in a form that is identical to that in which they first appeared.²²⁸ If that is right, they say, no inference can be drawn from the

²²⁴ Laurence F Knapp (ed.), *Brian De Palma: Interviews* (University Press of Mississippi 2003), 11 (emphasis added).

²²⁵ Emanuel Levy, *Cinema of Outsiders: The Rise of American Independent Film* (New York University Press 1999), 56.

²²⁶ Ricketson and Ginsburg (2006), [13.41], 787; Silke von Lewinski, *International Copyright Law and Policy* (Oxford University Press 2008), 158, [5.167].

²²⁷ The Spanish version also refers to 'revistas de prensa' (press reviews). On this, see J Marín López, 'Derecho de Autor, Revistas de Prensa y Press Clipping' (2008) 215 *RIDA* pp. 2–101, 15.

²²⁸ Ricketson and Ginsburg (2006), [13.41], 787, 'a collection of quotations from a range of newspapers and periodicals, all concerning a single topic, with the purpose of illustrating how different

reference to press reviews that ‘quotation’ covers non-identical uses. However, just because ‘press reviews’ include identical uses does not mean that they do not also include summaries. The reference to press reviews was thought to be a useful clarification, and the proposal to delete it at Stockholm (made by the Japanese delegation) was rejected.²²⁹ We think that the significance of retaining the reference was that it was thought to assist in defining the scope of the notion of quotation: to include *both* extracts without commentary *and* summaries. The English-language version helps clarify the latter aspect.²³⁰

This view is reinforced by the structure of the Stockholm and Paris Revision of the Berne Convention. Various rights that Union Members must recognise for Berne works are set out – without particular logic – in a number of articles: Article 8 concerns the ‘right of translation’; Article 9 the ‘right of reproduction’; Article 11, *11bis*(1) and *11ter* with various rights to control public performance, communication to the public and broadcasting; and Article 12 the ‘right of adaptation’. The provisions concerning exceptions are also located in different places, sometimes as applicable only in relation to a specific right (as with Article 9(2) with respect to the reproduction right and Article 13 as regards recording of musical works). Others, such as Article 10*bis*(2), specify acts that are permitted for particular purposes. In contrast, the two exceptions – one mandatory, the other optional – in Article 10 are not limited by reference to any particular right. The implication is that a person may quote a work in a text, artwork, film, sound recording (a reproduction) or by way of performance (e.g. reciting a poem), communication to the public or broadcast or translation or adaptation. The structure of the Convention then implies that quotation might be a limitation on any right recognised by the Treaty. In turn, this implies that quotation includes translation or adaptation.

The third reason that we think the legal concept of ‘quotation’ includes adapted versions such as summaries, paraphrased and transformed versions (such as De Palma’s quotation of Eisenstein or Manet’s of Raphael) is that there seems no good policy reason for limiting ‘quotation’ to replication. Indeed, because the user has to expend their own effort and skill to produce a paraphrase, summary or adaptation, such a reuse is to be regarded as less intrusive on the copyright owner’s rights than replication. It is less intrusive because it reproduces primarily the unprotected elements – facts, ideas, style – rather than the (protected) choices as to how these are expressed. (It is a distinct question of whether a quotation of this sort might violate an author’s right of integrity.) It does not make sense for Article 10 of Berne to require the more

publications report on, or express opinions about, the same issue. In consequence, the genre of “*revue de presse*” necessarily includes quotations’.

²²⁹ Note “Texts of Documents S/13 to S/302”, in *Records*, vol. I, 624 (Japanese proposal to delete this as duplicative was rejected).

²³⁰ Indeed, the Spanish implementation states ‘Periodical compilations made in the form of *press summaries* or *press reviews* shall be treated as quotations’ (emphasis added).

intrusive act, quotation-by-replication, to be allowed but to require parties to prohibit a less intrusive act, such as quotation-by-summary or paraphrase.

A fourth reason to think that quotation in Article 10(1) includes modified forms relates to the history. As explained in Chapter 2, in 1928, a quotation exception was included in the conference programme at Rome but rejected.²³¹ The proposal explicitly required that the quotation (and other borrowings) ‘*doivent être conformes au texte original*’, and explained this implied that any borrower should ‘not alter the text of the original’, given that an alteration of his work is capable of damaging (an author’s) reputation as a writer.²³² However, the deliberations of the Rome Conference made clear that various countries wanted the freedom to allow such changes to be made where they were deemed necessary, given the purpose of the publication. No provision on ‘conformity’ exists in Article 10 as adopted in 1967, the moral interests of authors being secured through Article 6*bis* and the concept of ‘fair practice’.

One objection to legal recognition of a broad notion of ‘quotation’ that extends beyond literal reproduction is the overlap that this would create with other exceptions, such as that relating to ‘parody, caricature and pastiche’ in Article 5(3)(k) of the EU Information Society Directive (and in UK law, CDPA s 30A(1)).²³³ As is well known, many countries subject such an exception to specific limitations, for example, that the parodic use accords with the ‘rules of the genre’ and/or does not produce any confusion as to the origin of the parody.²³⁴ In the EU, the Court of Justice has said that a ‘parody’ must ‘evoke’ the parodied work and be intended to be humorous.²³⁵ If ‘quotation’ in Article 10(1) Berne and Article 5(3)(d) of the Information Society Directive covers adaptations and other versions of the quoted work, could quotation not include parody?

Cultural theorist Richard Dyer, in his exploration of ‘pastiche’, distinguishes quotation from pastiche.²³⁶ Dyer argues that a distinctive attribute of pastiche is ‘imitation’, which he says is distinct from ‘unmediated reproduction’. He offers an example from Robbie Williams’s 1998 work ‘Millennium’, which reuses ‘the repeated lush string cadence’ of the James Bond theme “You Only Live Twice” (1967). Whether this was done by orchestra or by sampling, Dyer argues, does not matter, because Williams ‘was not trying to be like it but was reproducing it’. Dyer contrasts this with Williams’s *Swing When You’re Winning* (2001), where he imitates Frank Sinatra. This, for Dyer, is pastiche or homage. Dyer seeks to develop the distinction:

²³¹ Chapter 2, Section II, pp. 8–10.

²³² Union Internationale pour La Protection des Oeuvres Littéraire et Artistique, *Actes de la Conférence Réunie A Rome Du 7 Mai au 2 Juin 1928* (Berne: Bureau de L’Union, 1929), 74–75. See Chapter 2, herein, pp. 8–9. For opposition to such a limitation, see p. 9, fn. 12.

²³³ CDPA, section 30A(1) (‘Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work’).

²³⁴ See further Chapter 7, Section IV, pp. 216–222.

²³⁵ Case C-210/13 *Deckmyn v. Vandersteen* EU:C:2014:2132 (CJEU, Grand Chamber), [2014] ECDR 21, [20] (‘the essential characteristics of parody are, first, to evoke an existing work while being noticeably different from it, and, secondly, to constitute an expression of humour or mockery’).

²³⁶ R Dyer, *Pastiche* (Routledge 2007), 23.

'An imitated work is like or similar to another, but does not replicate it; reproduction, on the other hand, actually as far as possible, does.' We struggle with Dyer's attempted distinction. Much of what is ordinarily described as 'quotation' cannot easily be called replication and involves transformation;²³⁷ as a result, it comes very close to 'imitation'. As a consequence, we think it is better to acknowledge that 'pastiche' is a subgenre of quotation: pastiche involves quotation,²³⁸ but not all quotation is pastiche.

Would this not undermine the aims of the limitations on the availability of the parody defence in national or EU law? Our view is that this does not come close to being a fatal objection to the broad notion of quotation that we have recognised. This is for two reasons. The first is that (formally at least) the EU and national elaborations of the circumstances in which parody is permissible do not merely add conditions: they also clarify that parody is permissible *even in the absence of attribution*. This implies that there might be situations in which the quotation exception will not exempt a reuse that would be permissible under the parody defence. In other words, that defence is not rendered redundant. The second reason is that we think the parody exceptions in national and EU law ought, in fact, to be thought of as a sub-set of particular cases that do fall within the quotation right. That is, we think parody is precisely an example of a practice that is ordinarily described as 'quotation'.²³⁹ There is no other place in the Berne Convention for such an exception. (Article 9(2) offering only freedom to create exceptions as regards 'certain special cases' to the 'reproduction right', though parodies often-times implicate rather the adaptation right.) Freedom to create parodies, like freedom to quote, is underpinned by the internationally recognised fundamental right of free expression.²⁴⁰ In effect, we suggest that Article 10 itself requires recognition of freedom to parody. Of course, it would need to be in accordance with fair practice, proportionate and appropriately attributed. National and regional elaborations of a specific parody exception represent national understandings of fair practice and clarify that formal attribution is in practice unnecessary in the cases of parody, caricature and pastiche.

²³⁷ Dyer recognises this, at least in part, at 49, fn. 24 ('In so far as quotation, citation and sampling both deform the selected element (by taking it out of context, deracinating it) and transform it (putting it in a new context, rooting it in new connections), they do some of the things that imitation and, a fortiori, signalled, evaluative imitation, including pastiche, do').

²³⁸ Contrast Emily Hudson, 'The Pastiche Exception in Copyright Law: A Case of Mashed-Up Drafting?' [2017] *IPQ* 346, 362, who argues for a broad interpretation of 'pastiche', which draws on its ordinary meaning as 'imitation of style of pre-existing works, the incorporation of parts of earlier works into new works, and the production of medleys' (362). While Hudson considers the relationship of pastiche to parody, she does not consider its relationship to quotation.

²³⁹ As we saw at p. 121, above, with Emanuel Levy's description of De Palma's *The Untouchables* as 'quotation by pastiche'.

²⁴⁰ G Dinwoodie and R Dreyfuss, *A Neo-federalist Vision of TRIPS* (Oxford University Press 2012), 187 (differentiating between purposes of 'quotation' and 'parody' exceptions, the former important to the cumulative nature of knowledge production, the latter to do with creativity).

Another possible objection to treating quotation as including the modification of parts of preexisting works is that it implies ‘quotation’ includes ‘misquotation’. We accept that this is so and do not see it as an objection with any merit. Misquotation is simply a form of quotation. This does not mean that it will be impossible for an author to oppose misquotation. If the alteration, whether intentional or not, distorts the quotation, the use might still be opposed under moral rights. Moreover, as we explain in Chapter 6, prejudice to such moral interests might also render a use incompatible with fair practice.²⁴¹

One important consequence of this aspect of the ordinary (and thus legal) meaning of quotation is that quotation of another’s work is – like translation – not inconsistent with the authorship of the quoting work.²⁴² A summary of the writing of another, or a compilation, may well have its own originality as a summary, so that it is the intellectual creation of the summariser or compiler, as well as a reproduction or adaptation of the text that is summarised or collected. Copyright lawyers are at ease with this kind of layering of works and rights, though there can be little doubt that such layering adds complexities to other features of ‘quotation’ (such as the need to acknowledge that the text is, in fact, an expression of another).

D Must the Quotation Be Identifiable?

In the ‘typical’ situation, one which involves printed text, a ‘quotation’ is placed in quotation marks (in French ‘guillemets’ or angle quotes – «»), perhaps set in from the surrounding text, in such a way that it is kept distinct.²⁴³ Is the maintenance of the

²⁴¹ Chapter 3, Section III, Part B, pp. 57–60 (moral rights); Chapter 6, Section III, Part A, pp. 157–159.

²⁴² Some might suggest that ‘quotation’ is necessarily authorship. Consider Ralph Waldo Emerson’s contention that ‘[w]e are as much informed of a writer’s genius by what he selects as by what he originates. We read the quotation with his eyes, and find a new and fervent sense; as a passage from one of the poets, well recited, borrows new interest from the rendering.’ (‘Quotation and Originality’ in R W Emerson, *Letters and Social Aims* (Houghton Mifflin 1875), 194.) Leo Steinberg, ‘The Glorious Company’ in Jean Lipman and Richard Marshall, *Art about Art* (Whitney Museum 1978), 8–31, 25 (‘there is as much unpredictable originality in quoting, imitating, transposing, and echoing, as there is in inventing’).

²⁴³ These rituals are relatively recent in historical terms. Indeed, quotation marks once operated as suggestions to readers as to what should be quoted from a text. See Douglas C McMurtrie, *Concerning Quotation Marks* (New York: 1934) (at http://media.aphelis.net/wp-content/uploads/2012/12/McMURTRIE_1933_Quotation_Mark_light.pdf) (accessed 9 June 2020); Marjorie Garber, *Quotation Marks* (Routledge 2003), 13ff.; Keith Houston, *Shady Characters: The Secret Life of Punctuation, Symbols, and Other Typographical Marks* (Norton & Co 2013); Ruth Finnegan, *Why Do We Quote? The Culture and History of Quotation* (Open Book Publishers 2011), <https://doi.org/10.11647/OBP.0012>, ch. 4; Margreta de Grazia, ‘Sanctioning Voice: Quotation Marks, the Abolition of Torture, and the Fifth Amendment’ in M Woodmansee and P Jaszi (eds.), *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke University Press 1994), 281–302, 287–90; Margreta de Grazia, ‘Shakespeare in Quotation Marks’ in Jean I Marsden (ed.), *The Appropriation of Shakespeare: Post-Renaissance Reconstructions of the Works and the Myth* (St Martin’s Press 1992), 57–71; Kevin Petersen, ‘Shakespeare and Sententiae: The Use of Quotation in Lucrece’ in Julie Maxwell and Kate Rumbold (eds.), *Shakespeare and Quotation* (Cambridge University Press 2018), ch. 2. But cf. Edmund King, ‘Small Scale Copyrights’ (questioning the historical accuracy of some of De Grazia’s claims).

quoted text (image, sound, etc.) as ‘distinct’, or even just ‘identifiable’, merely a characteristic of the typical case of textual quotation or a condition that must be met before any reuse of other creative material can be described as ‘quotation’?²⁴⁴ Some academic commentators see this as a characteristic of quotation. For example, Canadian philosopher of music Dr Jeanette Bicknell described a musical quotation as ‘one intended to be heard as a reference to other music, and that succeeds, minimally, in being so heard, at least by its intended audience’. Noting the absence of anything akin to quotation marks, Bicknell states that ‘the composer has to rely on recognition, which in turn requires, if not direct familiarity, then some degree of musical literacy’.²⁴⁵ She asserts that ‘a quotation that is not recognised as such is not aesthetically effective as a quotation’.²⁴⁶ In some national laws, this requirement is made explicit.²⁴⁷ Indeed, in the *Pelham v. Hütter* decision, the CJEU specifically held that in order to fall within the quotation exception in Article 5(3)(d) of the Information Society Directive, the quoted material must be ‘identifiable’ in any quoting work: ‘the concept of “quotations”, referred to in that provision, does not extend to a situation in which it is not possible to identify the work concerned by the quotation in question’.²⁴⁸

We suggest ‘distinctness’ is not required – either as a matter of ordinary usage, nor as a matter of law (while we acknowledge that a failure to indicate clearly where a quote begins and ends may be relevant when assessing fair practice in some genres). We have already considered a number of examples of practices that have been described as quotation: Denis’s representation of Cézanne’s still life, Manet’s reuse of the three figures from Raphael, and Bacon’s and De Palma’s use of images and sequences from Eisenstein’s *The Battleship Potemkin*. Each of these were described as ‘quotation’, but only in Denis’s *Homage* is the quoted work distinguished – there by the frame that surrounds the still life. Rather, a ‘quotation’ may become evident from all sorts of triggers that allow the connection to be made between works. Richard Dyer, in his work on *Pastiche*, identifies ‘textually signalling’ as an important characteristic of parody, pastiche and homage.²⁴⁹ Picking up on this cue, Justin Williams explores

²⁴⁴ See Nelson Goodman, *Ways of Worldmaking* (Hackett 1978), ch. 3, requiring that the quoting text ‘refer to’ the quoted text and discussing how this requirement could be met across the cultural field, for example, in music, painting or architecture.

²⁴⁵ J Bicknell, ‘The Problem of Reference in Musical Quotation: A Phenomenological Approach’ (2001) 59 *Journal of Aesthetics and Art Criticism* 185, 190–1.

²⁴⁶ Bicknell, ‘The Problem of Reference in Musical Quotation’, 190.

²⁴⁷ For example, Guinea-Bissau, Copyright Code (approved by Decree-Law No. 46.980 of March 28, 1972), Article 185 (allowing quotation ‘as long as such extracts are distinguished from their own text’).

²⁴⁸ Case C-476/17 *Pelham GmbH v. Huetter* EU:C:2019:624 (CJEU, Grand Chamber), [74]. See *Metall auf Metall IV* (BGH), Case No I ZR 115/16 (30 April 2020) (finding no quotation “because there is no indication that the listeners ... could assume that the [sample] was taken from another work or sound recording”).

²⁴⁹ R Dyer, *Pastiche* (Routledge 2007), 24. Dyer argues that ‘pastiche intends that it is understood as pastiche by those who read, see or hear it’ (3). The case ‘for any given work being considered pastiche has to be made through a combination of contextual and paratextual indications, textual markers and aesthetic judgment’.

‘signals’ in hip-hop music that indicate quotation, highlighting that there is a very wide range of such signals, from including the ‘hiss’ of vinyl, the timbre of television or radio, material obviously from different genres, to a simple aesthetic sense that the quoted material ‘does not fit’. He says that recognition of these signals depends on the ‘imagined community’ of hip-hop.²⁵⁰

It seems, then, that the ordinary use of the term ‘quotation’ outside the sphere of text does not require that the quoted material remain clearly distinguished from that which the quoter adds. However, the grammatical signals – such as quotation marks, ‘air-quotes’ in oral presentations, frames around pictures and so forth – do achieve a function over and above marking the distinctness of the quoted text, image or other material: they signal the fact that a quotation exists and thereby facilitate its recognition. This may suggest that a defining feature of quotation is the very *recognisability* of material as having been quoted. There is support for this view from Metzer. He states:

[E]lectronic idioms have pushed quotation to extremes. Studio technologies have allowed musicians to transform borrowed sounds to the brink of unrecognizability. Many musicians have been drawn to that point and some have travelled beyond it. These far-reaching sonic alterations threaten to collapse quotation. For, as asked above, if the original is not recognized at all, is there a quotation?²⁵¹

Metzer’s apparent support for recognisability is because he is interested in quotation as a vehicle for ‘cultural exchange’, and this

can start only if the listener can recognize the quotation. As described above, quotations are displayed more markedly than other types of borrowing, but that prominence does not ensure that the listener will be able to identify the particular borrowing. The listener has to be able to ‘name’ the quotation in order to understand fully what it stands for. Recognition then forms a crux for quotation, especially in its role as a cultural agent.²⁵²

Nevertheless, Metzer agrees that ‘some quotations can sneak by without being spotted’, even though they stand out stylistically.²⁵³ Meanwhile, McLeod and DiCola have no difficulty with the idea of an ‘unrecognizable musical quotations’.²⁵⁴ And Ap Siôn²⁵⁵ has written about how musical quotations can be heavily integrated to produce a synthetic whole.²⁵⁶

²⁵⁰ J Williams, *Rhyming and Stealin’* (University of Michigan Press 2013), 9 ff.; repeated in J Williams, ‘Theoretical Approaches to Quotation in Hip-Hop Recordings’ (2014) 33(2) *Contemporary Music Review* 188–209, 196.

²⁵¹ Metzer, *Quotation and Cultural Meaning*, 11–12.

²⁵² Metzer, *Quotation and Cultural Meaning*, 6.

²⁵³ Metzer, *Quotation and Cultural Meaning*, 7–8, mentioning Eliot’s *The Waste Land* or the Ghanaian national anthem in Stockhausen’s *Hymnen*.

²⁵⁴ K McLeod and P Dicola, *Creative Licence: The Law and Culture of Digital Sampling* (Duke University Press 2011), 4.

²⁵⁵ Ap Siôn, ‘Hidden Discontinuities and Uncanny Meaning’ (2014) 33(2) *Contemporary Music Review* 167.

²⁵⁶ Ibid. (referring to Procul Harum’s ‘A Whiter Shade of Pale’ as incorporating ‘quotations’, even though they are used to produce a synthetic whole). Ap Siôn uses this as a starting point for discussion

We do think that recognisability is a feature of the kinds of practice that are, in ordinary language, described as ‘quotation’: material has been re-located and is capable of being recognised as deriving from a different authorship or source. However, as the examples demonstrate, ‘recognisability’ does not add much: the derivation might be recognised by a substantial section of the immediate audience (as might have been the case with *The Untouchables*), but – as in the case of Manet’s *Le Déjeuner sur l’herbe* – might only occur much later. One critic at the time is known to have noted Manet’s reference,²⁵⁷ even if – according to Michael Fried – Manet’s uses of quotation were themselves intended as a form of homage or ‘acknowledgment’.²⁵⁸ Fried argues that ‘the sheer perspicuousness with which both paintings [*Le Déjeuner* and *Olympia*] refer to their Italian sources [signify] that Manet wanted to make the clearest possible – the most explicit – public acknowledgment of what was probably the most important alteration in his vision of the art of the past that he had yet experienced’.²⁵⁹ If ‘recognisability’ only requires that experts at some time after the creation of the quoted work are able to see that parts derive from the authorship of third parties, then the requirement hardly adds much more than the requirement that material emanating from such a third party has been used.²⁶⁰

IV CHARACTERISTICS OF QUOTATION ACCORDING TO THE INTERRELATIONSHIP BETWEEN THE SOURCE AND DESTINATION MATERIAL

A Must a Quotation Be Deliberately Used?

In the paradigmatic example, an act of quotation is a conscious, deliberate act. Intention is also assumed to be present in many of the non-legal descriptions of quotation. This is a view expressed by a number of philosophers. For example, Jeanette Bicknell states:

of poly-stylistic composition and collage works, such as those of Stockhausen and Kagel and ultimately Lera Auerbach’s 2008 composition ‘Sogno de Stabat Mater’.

²⁵⁷ Beatrice Farwell, *Manet and the Nude: A Study in Iconography in the Second Empire* (Garland 1981), 255 (‘Only the sophisticated eye of Ernest Chesneau in 1863 recognized Manet’s reference, but he saw no more in it than a deplorable profanation’); Theodore Reff, *Manet, Olympia* (Allen Lane 1976), 48 (noting that Chesneau noted Manet’s debt to Raimondi in a footnote to his 1864 work, *L’Art et les artistes modern en France et en Angleterre* (Paris 1864), 190, fn. 1.); Michael Fried, *Manet’s Modernism*, 23 (a few of Manet’s ‘historically aware contemporaries recognized explicit references to past art in some of his important pictures of [the 1860s]’). Cf. Tucker, 19 (‘no critic noticed the now often cited appropriations that Manet had made from earlier art’).

²⁵⁸ Fried, *Manet’s Modernism*, 37.

²⁵⁹ Fried, *Manet’s Modernism*, 90.

²⁶⁰ Jampolski, *The Memory of Tiresias*, 31–2 (describing a ‘quote’ by Jean-Luc Godard from Jean-Luc Godard’s *Forty Guns* as a ‘buried quote’, only discernible because Godard later referred to it, and suggesting that ‘prior to Godard’s commentary, this episode, paradoxically enough, was not a quote’).

A musical quotation is a deliberate evocation within a composition of a different musical work. It can be distinguished from both coincidental similarities between works and plagiarism on the basis of intention: The composer does not mean for the audience to hear the quoted passage as his or her own unproblematically.²⁶¹

Likewise Robert Sokolowski comments:

Quotation is not merely repetition, even though it involves repeating what someone else has said. Quotation is repeating something as having been stated by another. The difference is one of *presentational or intentional form*. There may be no difference in the words being repeated, but they are repeated differently: it is as though we no longer saw an object directly but now only in a mirror. To quote is to say something as said by someone else.²⁶²

Indeed, all the examples so far examined – Denis’s use of Cézanne, Manet’s use of Raphael, Bacon’s and De Palma’s use of Eisenstein (all of which are described as quotation) – are also recognised deliberate acts of reuse (and reference).

Nevertheless, as film theorist Richard Dyer has observed, ‘intention is a notion that has made cultural theorists twitchy for at least a century’.²⁶³ Relatedly, perhaps, there is also a growing body of scholarship that acknowledges the possibility of ‘unintentional quotation’. This begins with the work of the French post-structuralists of the 1960s, such as Roland Barthes, who argued works were not to be understood by reference to the intentions of their authors, but rather, that meaning was generated by readers. Barthes rejected the idea of a chain of influence from author-to-work-to-reader, in which the reader seeks out the meaning of the work by reference to the (presumed) thought of the author, and embraced in its stead the notion of ‘intertextuality’ – that individuals do not ‘author’ works so much as serve as vehicles through which language and previous works combine, and that when readers read those works they understand them by reference to the connections to and differences from the works that precede them. Barthes thus conceived any work as a ‘tissue of quotations’.²⁶⁴ Others have characterised cultural productions as ‘palimpsests’ and postmodernism as practising the ‘aesthetics of quotation’.²⁶⁵

Importantly, this characterisation does not conceive of ‘quotation’ as an intentional act of a conscious cultural agent. It allows for the possibility that ‘quotation’ might be simply a result of the operation of preexisting texts *through* an ‘authorial’

²⁶¹ J Bicknell, ‘The Problem of Reference in Musical Quotation: A Phenomenological Approach’ (2001) 59 *Journal of Aesthetics and Art Criticism* 185.

²⁶² Robert Sokolowski, ‘Quotation’ (1984) 37(4) *The Review of Metaphysics* 699, 699 (emphasis added).

²⁶³ *Pastiche* (2007), 2 (discussing whether intention is necessary for pastiche and arguing that ‘it is really not extravagantly speculative to say that a work is meant to be funny or sad, in this or that genre, is or is not pastiche’).

²⁶⁴ Roland Barthes, *Image, Music, Text* (Fontana Press 1984), 146.

²⁶⁵ M Calinescu, ‘Rewriting’ in Hans Bertens and Douwe W Fokkema (eds.), *International Postmodernism: Theory and Literary Practice* (J Benjamins 1997), 243–8, 246.

subject. Writing in the context of film theory, NYU Professor Robert Stam indicates such a possibility: in his description of the theory of ‘intertextual dialogism’, he claims that ‘all texts are tissues of anonymous formulae . . . , variations on those formulae, *conscious and unconscious quotations*, and confections and inversions of other texts’.²⁶⁶

It might, we anticipate, be said that the linguistic uses of ‘post-structuralists’ should not count towards any consideration of ‘ordinary meaning’ (perhaps on the basis that this was not the ‘ordinary meaning’ in 1967 and 1971 – the dates of the Stockholm and Paris Revision conferences, when these movements were just taking root). We recognise the concern (even if we do not share it and certainly do not feel comfortable with it) that, given some of the starting points adopted, some such commentators might not be said to be using language ‘ordinarily’. Perhaps these commentators, for whom questions involving the ‘play’, ‘joy’ or ‘excess’ of language are so central, cannot be taken as examples of a notion of ‘ordinary use’.

There is nothing in the language of Article 10(1) of Berne that requires there to be a subjective, conscious intention to quote. Possibly the proportionality condition – namely that the extent of the quotation does not exceed that justified by the purpose – comes closest to suggesting that ‘quotation’ must be intentional. But a user may have a ‘purpose’ without having an intention to quote. Moreover, there are at least two advantages with eliminating ‘intention’ from any legal definition of ‘quotation’. The first is that questions of subjective intention always raise problematic evidential questions, and legal regimes frequently, therefore, try to avoid such conditions. Indeed, most copyright regimes do not make infringement dependent on the intention for precisely this reason. It was also for this reason that the UK courts preferred to exclude considerations of subjective intent from the interpretation of the fair-dealing defences available under the CDPA 1988 (as enacted).²⁶⁷ Second, it is not obvious why a legal system would want to privilege an intentional act over an unintentional or subconscious (albeit purposive) act. What copyright policy is served by exempting the reuse of eight notes where that use is intentional (and therefore quotation), but to regard the same act as infringing because the alleged infringer had not appreciated they were using someone else’s work?

Of course, unconscious reuse may often lack other characteristics necessary to constitute an exempt quotation, in particular, attribution of the source and author.²⁶⁸ But that, as we have noted, is different from excluding unintentional reuse of material from the notion of quotation.

²⁶⁶ Robert Stam, *Film Theory: An Introduction* (Blackwell 2000), 201 (emphasis added).

²⁶⁷ *Hyde Park Residence v. Yelland* [2000] EMLR 363, [21]: Aldous LJ indicated that ‘for the purposes’ of is equivalent to ‘in the context of’, a matter to be decided objectively. See also *Pro Sieben Media v. Carlton Television* [1999] FSR 610, 620, per Walker LJ indicating that deciding whether a use was ‘for the purposes of criticism or review’ was not to be decided by the court putting itself in the shoes of the infringer, but that ‘intentions and motives of the user . . . are most highly relevant on the issue of fair dealing’.

²⁶⁸ Contrast Board of Trade, *Report of the Copyright Committee* (1951–2) (Cmd. 8662), p. 16 (acknowledgment should only be required only for ‘definite’ and ‘deliberate’ quotations ‘where a large part of a work is reproduced by fair dealing’).

B *Must a Quotation Be Used to Further an Argument*

In the paradigm textual example, the 'quoted text' is used as part of an argument that is made by the quoting text: the quote may be used to support the argument being made, or as a starting point from which to interrogate and critique the assertions contained in the quoted text.²⁶⁹ This attribute is sometimes referred to in dictionary definitions. For example, the *Collins Dictionary* defines quotation as 'a phrase or passage from a book, poem, play, etc, remembered and spoken, esp to illustrate succinctly or support a point or an argument'.²⁷⁰ Indeed, the use of quotations in support of argument is widely recognised as one of the most important benefits of the practice of quoting. According to Marjorie Garber, 'no kind of utterance or reference is more powerful when accurately deployed, for ... the quotation creates authority by its very nature and form. It instates an authority elsewhere, and, at the same time, it imparts that authority, temporarily, to the speaker or the writer.'²⁷¹

It is one thing to suggest that use of text in a particular manner (e.g. to support an argument) is an important and valuable type of quotation (as 'esp' does in the *Collins* definition), but quite another to suggest that this function is intrinsic to the very characterisation of the extract as a 'quotation'. Nevertheless, just such an understanding of quotation is embodied specifically in some laws: 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'.²⁷² French and German courts have also embraced such a standard, though it has not been held to completely consistently. In France, the legislation itself exempts 'analysis or brief quotation' on the grounds of the nature of the 'quoting work', and this has been said to imply that the 'prior work should be used solely to illustrate the argument, theme, or tenor of the subsequent 'quoting' work'.²⁷³ Likewise, German case law has sometimes required that there be 'some contextual

²⁶⁹ Indeed, Samuel Johnson's *A Dictionary of the English Language* (W Strahan 1755), 1626 (reprint, New York, 1967), defines a 'quotation' as a 'Passage adduced out of an author as evidence or illustration'. Interestingly, though, Johnson's definition of the verb 'quote' is not so restricted: 'To cite an author or passage of an author; to adduce by way of authority or illustration the words of another.'

²⁷⁰ HarperCollins (2008), 1363.

²⁷¹ Marjorie Garber, *Quotation Marks* (Routledge 2003), 2. See also Edward Said, *Beginnings: Intention and Method* (Columbia University Press 1985), 22: 'Quotation can serve to accommodate, to incorporate, to falsify . . . , to accumulate, to defend, or to conquer.' There are many aims of quotation in music: see Bicknell (2001), 190–1. ('Quotational links between pieces of music can have many aims: homage, irony, comment, joke, technical challenge, and so on'.)

²⁷² Greek Copyright Act, Article 19 ('Quotation of short extracts of a lawfully published work by an author for the purpose of providing support for a case advanced by the person making the quotation or a critique of the position of the author shall be permissible') (WIPO translation).

²⁷³ Pascal Kamina, 'France' in L. Bently (ed.), *International Copyright: Law and Practice* (Lexis-Nexis 2019) FRA-134, citing Paris, 1re ch, 10 Sept. 1996, [1997] 171 RIDA 3. See also *Le Monde v. Microfor*, Cass. civ. I, 9 Nov. 1983, [1984] ECC 271, [7] (in English); Cass., Ass. plen., 30 Oct. 1987, [1988] 135 RIDA 78, [1988] ECC 297 (in English) discussed in Chapter 7, Section II, p. 207, fn. 115, below.

relation with the quoting text: for example, the quotation may clarify a larger context or illustrate the quoting text'.²⁷⁴ Most recently, the CJEU has indicated in relation to Article 5(3)(d) of the EU Information Society Directive that quotation is permitted 'for the purpose of illustrating an assertion, of defending an opinion or allowing an intellectual comparison between that work and the assertions of that user'.²⁷⁵ These purposes the Court characterised as a requirement that the user wishing to rely on the exception must have 'the intention of entering into "dialogue" with that work'. In so doing, the Court drew on the Opinion of Advocate General Szpunar, who himself was influenced by the specific formula in Article 5(3)(d) – in particular, the illustration that quotation could be permitted 'for purposes such as criticism or review'. It was on the basis of these words that the Advocate General founded the 'dialogue limitation'. Yet, those words are not present in Article 10(1) of Berne, which the provision is intended to implement. Treated purely as an illustration, these words are, of course, unobjectionable: many, possibly most, quotations will be for such purposes. However, by understanding the examples (criticism or review) as a basis from which to generalise a restriction on the operation of the exception, the Court set itself on a course which, if followed, will place European Union law at odds with the international obligations of its Member States (and its own, under TRIPS and the WCT).

While, in identifying a dialogic limitation on the right of quotation, the Court followed the Opinion of the Advocate General, it is less clear that the Court shared the Advocate General's understanding of the concept. In one respect, the Court seems to have a narrower conception: illustration of an assertion, defence of an opinion or comparison. In contrast, the Advocate General referenced a broader array of dialogical interactions including 'confrontation, as a tribute to or in any other way, interaction between the quoting work'.²⁷⁶ Whether the Court was deliberately seeking to narrow acceptable forms of 'quotation' is not clear. One matter which suggests it did not intend to do so is that the Court appeared to accept that sampling of sounds might involve the required dialogue, whereas the Advocate General went out of his way to rule out such a possibility.²⁷⁷

²⁷⁴ Michael Gruenberger, 'Germany' in L. Bently (ed.), *International Copyright: Law and Practice* (LexisNexis 2019), at [GER-187]–[GER-189]. See further Chapter 7, Section II, pp. 206–208, below.

²⁷⁵ Case C-476/17 *Pelham*, EU:C:2019:624 (CJEU, Grand Chamber), [71]. Similarly, when considering 'citation' exception in Council Regulation (EC) No. 6/2002, Art 20(1)(c), the CJEU's starting point was that citation involves use of a design to 'serve as a basis for the explanations or commentary': Cases C-24/16 and C-25/16, *Nintendo Co Ltd v. Big Ben Interactive GmbH*, EU:C:2017:724, [76]. As noted at p. 95, fn. 61 above, the CJEU went on to rule that 'citation' was not so limited. This conclusion was informed both by divergences in different language versions of the Regulation and in the purposive approach taken to interpretation, the latter leading the CJEU to prefer an interpretation that ensured the rights granted to design holders did not unjustifiably limit further innovation.

²⁷⁶ Case C-476/17 *Pelham GmbH v. Hütter* EU:C:2018:1002 (Advocate General's Opinion), [64].

²⁷⁷ Case C-476/17 *Pelham GmbH v. Hütter* EU:C:2019:624 (CJEU, Grand Chamber), [72]; EU:C:2018:1002 (Advocate General's Opinion), [64].

Some commentators have welcomed the CJEU's invocation of the concept of dialogue on the grounds that it aligns interpretation of Article 5(3)(d) with a Kantian conception of copyright,²⁷⁸ perhaps similar to that developed by Canadian legal philosopher Abraham Drassinower in his book *What's Wrong with Copying?*²⁷⁹ Without belabouring his elegant text with references to Kant's famous representation of copyright as protecting an author's act of communicating the work to the public, Drassinower claims that contemporary Canadian copyright law is undergirded by the idea of protecting authorial communication.²⁸⁰ Importantly, in such a 'dialogic' understanding of copyright,²⁸¹ protection by copyright should give way where it conflicts with the ability of other (subsequent) authors to communicate.²⁸² Were it to require one author to obtain permission from another author to speak, including to respond to the first, the law would not be respecting equally the dignity of each author.²⁸³ Drassinower thus sees the right to quote as part of the necessary limits of copyright.²⁸⁴ The public domain, which would include the right to quote, is, he says, is a 'radically non-negotiable set of conditions for dialogue flowing from the very nature of copyright subject matter as communication'.²⁸⁵

Whether or not the CJEU was intending to invoke Kant's vision of copyright, it is worth noting, if only in passing, that it is not the only 'dialogic' account of copyright law. Indeed, another Canadian law professor, Carys Craig, has presented a feminist vision of copyright as communication that invokes quite a different set of philosophical starting points.²⁸⁶ Rather than drawing on Kant, Craig develops the work of the early-twentieth-century Russian philosopher Mikhail Bakhtin, whose work gave

²⁷⁸ Alexander Peukert, keynote talk, University of Luxembourg, 7 November 2019 (complimenting the CJEU on preferring a Kantian understanding of copyright to that of Josef Kohler which, Peukert explained, had dominated German interpretation during the twentieth century).

²⁷⁹ Abraham Drassinower, *What's Wrong with Copying?* (Harvard University Press, 2015).

²⁸⁰ Ibid., 6 ('copyright law is a construal, under the rubric of right, of the communicative nexus between authors and public in respect of works of authorship'); 8 ('a work of authorship – is a communicative act . . . copyright infringement is wrongful because it is compelled speech'); 111 ('The right attendant on speaking in one's own words is thus a right to preclude others from repeating one's speech'); ch. 4 (generally).

²⁸¹ Ibid., 11 ("dialogue" rather than "balance," is a more appropriate metaphor to guide copyright interpretation'); 220 (referring to his 'narrative of copyright as dialogue'); 221–2, 225 (referring to the 'dialogic model' of copyright).

²⁸² Ibid., 8 ('because a work is a communicative act, rights attendant on it must (a) be consistent with the communicative rights of others, especially where such rights require copying of a work for the purpose of responding to its author's communication'); 64.

²⁸³ Ibid., 56 ('authors have exclusive rights in respect of their works only where such rights are consistent with everyone else's equal authorship'); 222 (critiquing the so-called 'work right' under US law as inconsistent with this).

²⁸⁴ Ibid., 55 ('the audience's entitlement to respond to and participate in the ongoing conversation of which the author is but a part').

²⁸⁵ Ibid., 182.

²⁸⁶ *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar 2011).

rise to much writing on ‘dialogism’.²⁸⁷ Bakhtin’s conception of ‘dialogue’ was the inspiration for the late-twentieth-century discussion of intertextuality (and even the ‘death of the author’),²⁸⁸ and the implications of this conception of dialogue are very different from those of Kant. Perhaps importantly, every act of communication is said by Bakhtin to be an act of dialogue; every word is already ‘inhabited by others’ voices’.²⁸⁹ Craig sees Bakhtin as offering a way of thinking about copyright divorced from the transcendental self that underpins romanticism (and much personalist theorising of copyright) by recognising ‘speakers’ as situated, using signs and symbols ‘already saturated with the voices of others’ and yet possessing at least some agency (that later theories of intertextuality seem to deny). Authorship, Craig concludes, involves ‘interacting with the meanings and texts and discourses that are already out there . . . and adding to them something of ourselves and our (socially constructed) subjectivity’.²⁹⁰ This relational theory of authorship ‘must leave room for others to engage in a similar communicative process [. . .] to acknowledge, respond to, and build upon the contribution the author has made’.²⁹¹ In many ways, Craig’s and Drassinower’s approaches mirror one another, but given the starting point of a situated, derivative notion of authorship, it seems implicit that Craig’s invocation of dialogue would generate a broader set of limitations that permit ‘access to and participation in cultural dialogue’. Use privileges, such as ‘quotation’ rights, would not be limited to those that ‘create works’, at least as far as current law understands such creation.

Whatever the precise philosophical conception of dialogue, the CJEU’s requirement of an intent to enter into dialogue probably constitutes a broadening in the interpretation of the notion of quotation from that previously being deployed in the laws of some Member States of the EU. Nevertheless, in our view, it is wrong to elevate this typical characteristic as to the function of many quotations into a necessary condition for the existence of a quotation.²⁹² Indeed, to do so conflicts both with the ordinary meaning of ‘quotation’ and with the legislative history of Article 10(1).

²⁸⁷ Craig (2011), 38–42. For previous deployments of Bakhtin within feminist scholarship, see Dale M Bauer and S. Jaret McKinstry (eds.), *Feminism, Bakhtin and the Dialogic* (State University of New York 1991).

²⁸⁸ Graham Allen, *Intertextuality* (Routledge 2000), 14–30.

²⁸⁹ M. Bakhtin, *Problems of Dostoevsky’s Poetics*, (trans. C. Emerson, University of Minnesota Press 1984) quoted in Allen (2000), 27.

²⁹⁰ Craig (2011), 40.

²⁹¹ Craig (2011), 54.

²⁹² See also B Justin Jütte and João Pedro Quintais, ‘Sample, Sample in My Song, Can They Tell Where You Are From?’ *Kluwer Copyright Blog*, 19 November 2019, at http://copyrightblog.kluweriplaw.com/2019/11/19/sample-sample-in-my-song-can-they-tell-where-you-are-from-the-pelham-judgment-part-ii/?doing_wp_cron=1591532283.0854818820953369140625 (accessed 9 June 2020) (highlighting the potential difficulties of establishing such an intention as illustrating ‘the problematic nature of this requirement’).

Perhaps the most obvious common use of the term ‘quotation’ that does not envisage the quoted text to be situated within a discussion is that of the ‘dictionary of quotations’.²⁹³ Since the first dictionary of quotations was published in the late eighteenth century,²⁹⁴ a wide range of such publications have been compiled, typified by extracts from poems, plays and novels,²⁹⁵ some arranging the passages by authors²⁹⁶ and some by subject.²⁹⁷ Perhaps the most famous in the United Kingdom is *The Oxford Dictionary of Quotations*, which was first published in 1941, containing about 11,000 ‘quotations’. The latest edition (the seventh), edited by Elizabeth Knowles (2009), contains more than 20,000 ‘quotations’. As Ruth Finnegan (Visiting Research Professor and Emeritus Professor in the Faculty of Social Sciences at the Open University) explains:

Here is a different strand in the treatment of others’ words which complements the strategy of using quotation signs to demarcate them inside a longer text. This is not recognition in the midst of other words, but the decisive extracting of chunks of wordage, gathered in a frame of other quoted units. . . . Here we are dealing with sharply demarcated excerpts, short sayings picked out from the innumerable words of human beings to be preserved in deliberately constructed stores.²⁹⁸

The quotations are not discussed: they are collected together, ordered and categorised. There can be no doubt that as a matter of common language, these are described as ‘quotations’. The same would be said of a host of other books that record

²⁹³ In Section III, Part A, pp. 111–112, above, we discuss another obvious example: the use of inscriptions on buildings. Here there is a clear intention to use the quotation to exhort or inspire or recommend but there is no ‘work’ entering into dialogue with the quoted material.

²⁹⁴ David Evans MacDonnell, *A Dictionary of Quotations in Most Frequent Use: Taken from the Greek, Latin, French, Spanish and Italian Languages* (3rd ed., Pr. for G.G. and J. Robinson 1799).

²⁹⁵ Eugene Ehrlich and Marshall DeBruhl, *The International Thesaurus of Quotations* (Harper Perennial 1996) (16,000 quotations; does not include ‘lengthy quotations’; limits to 50 words).

²⁹⁶ John Bartlett (1820–1905) and Justin Kaplan, *Bartlett’s Familiar Quotations* (17th ed., Little, Brown 2002) (1st ed., 1855) (arranged alphabetically by author with index by topic); Donald Fraser (ed.), *Dictionary of Quotations* (Collins 1983) (8,000 quotations from 1,300 authors arranged alphabetically by author, and within alphabetically by work); J M and M J Cohen, *The New Penguin Dictionary of Quotations* (Viking 1992); Rosalind Fergusson, *The Hamlyn Dictionary of Quotations* (Hamlyn 1989) (3,500 quotations arranged alphabetically by author); D C Browning, *Dictionary of Quotations and Proverbs* (Chancellor 1952) (just over 10,000 quotations and proverbs arranged alphabetically by author; within each author heading chronologically).

²⁹⁷ James Randall (ed.), *Anthology of Quotations: Over 12,000 Quotations Arranged by Theme* (Bloomsbury 2002) (divided into 700 themes); Auriel Douglas and Michael Strumpf, *Webster’s New World Dictionary of Quotations* (Macmillan 1998) (organised by topic); Dorothy Winbush Riley, *My Soul Looks Back, ‘Less I Forget: A Collection of Quotations by People of Color’* (Harper Perennial 1995) (alphabetical by topic, within the topic chronologically); Robert I Fitzhenry, *Say It Again, Sam: A Book of Quotations* (Michael O’Mara 1996) (by topic); John Chapin, *The Book of Catholic Quotations* (John Calder 1957), vii (10,400 quotation arranged under subject headings and within topic in chronological order); Ian Crofton, *A Dictionary of Art Quotations* (Routledge 1988) (arranged alphabetical by topic); J L Baron, *A Treasury of Jewish Quotations* (Crown, New York 1956) (alphabetically under topics).

²⁹⁸ Ruth E Finnegan, *Why Do We Quote? The Culture and History of Quotation* (Open Book Publishers 2011), ch. 5, 113–14.

examples of clever, apposite, funny or even ridiculous things people have said.²⁹⁹ These are books of ‘quotations’, a term understood in its ordinary meaning to encompass cases of extraction and representation of texts of others, even in the absence of discussion or referencing back. This is not to say that the ‘referencing back’ is irrelevant to the legal assessment of the legitimacy of any given quotation: it certainly is something that could help justify the taking of sizeable passages. However, the function of an act of reuse is relevant to its proportionality and fairness, rather than the threshold requirement of whether there is quotation.

This ‘ordinary language’ understanding of ‘quotation’ was embraced by the treaty makers at the Stockholm Revision. As will be recalled, various Member States proposed revisions to the Swedish/BIRPI proposed text. Among them was a Swiss proposal to limit, inter alia, permissible quotations ‘to the extent that they serve as an explanation, reference or illustration in the context in which they are used’.³⁰⁰ However, the Swiss amendment was duly rejected by twenty-seven votes to ten.³⁰¹ In these circumstances, it seems particularly regrettable that some national courts, as well as the CJEU, have sought to reintroduce the very same requirement that the Conference rejected.³⁰²

Might it be said that such a requirement can be deduced from state practice? We have noted that a number of national laws have adopted this condition, either in legislation or jurisprudence. But it certainly cannot be said that there is unanimity. Although Dutch law once contained such a requirement, as Senftleben and others show, it was abandoned in the *Damave/Trouw* case, which concerned the inclusion of an illustration from the book *The Growing Pains of Adrian Mole* in a review of the book (a review that barely commented on the illustration).³⁰³

If we are correct, and ‘quotation’ does not require any discussion or referencing, is not the possibility raised of considerable overlap with other exceptions – for example, ‘illustration’ for teaching? Article 10(2) of Berne explicitly permits Members of the Union to allow the use of copyright-protected works for the purposes of illustration in education.³⁰⁴ The provision envisages use not just in

²⁹⁹ Marjorie Garber, *Quotation Marks* (Routledge 2003), 17–19 (referring to these as ‘disembodied quotations’).

³⁰⁰ Preparatory Documents, S/68, in *Records*, 690. See pp. 27–28, above.

³⁰¹ Amendment proposed by Czechoslovakia, Hungary, Poland, Preparatory Documents, S/51, in *Records*, 688; Chairman, Minutes, [780] in *Records*, 861.

³⁰² At a conference of the University of Luxembourg, ‘Owning Expression and Propertizing Speech’, on 7 November 2019, Advocate General Szpunar acknowledged that he had been unaware of this background and, had he been, his Opinion might have been different. The conference proceedings are available at www.fr.uni.lu/universite/presentation/galerie_de_videos (accessed 9 June 2020).

³⁰³ Martin Senftleben, ‘Internet Search Results – A Permissible Quotation?’ (2013) 235 *RIDA* 3, 17–19; Senftleben, *A Century*, 356–8.

³⁰⁴ ‘(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 utilisation, 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 such utilisation is compatible with fair practice.’ For EU countries, this possibility is recognised in Article 5(3)(a) of the EU’s Information Society Directive.

the classroom but also in publications and broadcasts. If such uses were capable of being construed as 'quotation', would there be any place for the operation of Article 10(2)? The answer is that there could indeed be considerable overlap, as must have been clear from the various attempts to limit quotation to only certain purposes, which typically included education and/or instruction. Moreover, the overlap was recognised at the Stockholm Revision Conference. As we explain in chapter 2,³⁰⁵ the UK delegation specifically raised the possibility that Article 10(2) might be redundant given the breadth of Article 10(1).³⁰⁶ However, at that stage, the proposal relating to Article 10(2) retained a similar scope to that in the Brussels Revision, and as a result was not subject to a fair practice requirement. Once that was added during the Stockholm conference, the difference between Article 10(1) and 10(2) was very considerably diminished.³⁰⁷ Nevertheless, at least at a formal level, it is possible to identify some role for Article 10(2). For example, it extends to works that have not been made available to the public, whereas Article 10(1) does not do so. More significantly, it seems likely that while the quotation exception cannot be subject to a requirement of remuneration,³⁰⁸ the optional educational exception might be. As a result, where a use would be regarded as fair only if the economic harm to the right holder is avoided through some form of equitable compensation, a broader array of re-uses might be permissible under Article 10(2) than under Article 10(1).³⁰⁹ A good example might be an educational course pack for use in a university in the developed world that is comprised solely of lengthy extracts (e.g. over 25%) from published works: such use might count as quotation but not be in accordance with fair practice so not be mandatorily permitted under

³⁰⁵ S/13 in *Records*, 630. Note also the Publishers Association to William Wallace, Board of Trade, 14 October 1963, (raising issue of overlap between proposed Articles 10(1) and 10(2) in the Study Group's 1963 draft); comment of Mr R. Bowen of the Board of Trade, wondering whether Article 10(2) was 'necessary at all' in the light of the proposed Articles 10(1) and 9(2): Third Meeting of the Copyright Committee, 11 August 1966, TNA: BT 209/908. See, generally, Chapter 2, Section IV, Part E, pp. 25–26, above.

³⁰⁶ One answer to this seeming conundrum was to see Article 10(2) as a 'lex specialis' and Article 10(1) as a 'lex generalis'. According to this principle, which William Wallace advocated to the Drafting Committee at the Stockholm Revision Conference, each specific exception was to operate in its own domain, and the conditions recognised were not to be undermined by other exceptions. If a use falls within Article 10(2), i.e. relates to 'utilization ... of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching', then its operation is covered by Article 10(2), not Article 10(1). See Bergström, *Report*, [14] in *Records*, 1134 (mentioning specifically the relationship between Article 9 and Articles 10, 10bis, 11bis and 13).

³⁰⁷ On the breadth of Article 10(2) see Professor Raquel Xalabarder's Study for the World Intellectual Property Organisation's Standing Committee on Copyright and Related Rights (Nineteenth Session, Geneva, 14–18 December 2009), entitled 'Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel' (SCCR/19/8).

³⁰⁸ See Chapter 6, pp. 150–151 and Chapter 7, Part I, Section F, p. 204, below.

³⁰⁹ Indeed, the German delegate to the 1965 Committee of Government Experts suggested retaining Article 9(2) of Brussels, but qualifying it by an author's right to obtain equitable remuneration: BIRPI: DA/22/22. For a report of the discussion, see BIRPI: DA/22/33, [56].

Article 10(1), but at the same time might be acceptable, coupled with compensation, under Article 10(2).³¹⁰

V CONCLUSION

This chapter extensively examined the outer limits of ‘quotation’ and sought to identify whether there are any necessary conditions that need to be satisfied before an act can be characterised in law as ‘quotation’. Importantly, we have shown that the breadth of quotation extends well beyond the ‘typical’ case of textual quotation, and it is critically important that such typical features do not end up being elevated into conditions for the availability of the exception. We do not, however, suggest that the concept of quotation is limitless. Importantly, we suggest that ‘quotation’ refers to a range of practices that have a ‘family resemblance’. Like Wittgenstein’s famous example of ‘games’, quotation is a phenomenon characterised by ‘a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail’.³¹¹ Or, as Slocum explains:

[C]ourts often choose to proceed by assuming that categories inherently possess necessary and sufficient membership criteria. Such an assumption, though, is inconsistent with research from linguists and psychologists on the prototypical structure of categories. Instead of clear criteria for membership, many categories are instead characterized by having no explicit definition, at least in terms of necessary and sufficient conditions. Similarity of features plays a significant role in category membership, with certain features being generally true of category members but not uniformly so. Many categories will thus have a graded structure in which some items are more clearly and uncontroversially members of the category than are others. The graded membership structure means that features do not involve simple binary truth values (i.e., membership vs. nonmembership). Instead, some items are members of a category to a greater extent than are other items.³¹²

If it was necessary to identify any *necessary* features that render a specific act one of ‘quotation’, it would be that (i) the quotation involves the reuse of expressive material (ii) for its expressive qualities, where (iii) that material is recognisable, or could be recognised, as material authored by another and (iv) is used or intended to be used in an act of expression, or at least in representation, for its expressive

³¹⁰ Such uses in a developing country might be regarded as permissible under Berne Art 10(2) or 9(2) even without remuneration. See *The Chancellor, Masters and Scholars of the University of Oxford v. Rameshwari* (Delhi High Court, 9 December 2016), [63] (discussing the leeway offered by Berne Article 9(2) to India’s copyright law in the context of a case concerning the creation of ‘course-packs’ by a photocopying shop for use by students at the University of Delhi. One of the extracts was 141 pages from a book of 416 pages, i.e. 33.8 per cent; but in most the number of pages and proportions were considerably smaller).

³¹¹ Wittgenstein, *Philosophical Investigations* (4th rev. ed., Wiley-Blackwell 2009), [66].

³¹² Slocum, *Ordinary Meaning*, 275.

qualities. As a result, we think that, neither in ordinary use nor in legal usage, would 'quotation' encompass copying entire works at home purely so as to have a duplicate, nor creating back-up copies of software. Nor would it cover decompilation of software in order to develop connections that allow different components to 'inter-operate'. Nor would it encompass mass-digitisation, such as the Google Books project, nor digitisation for non-expressive purposes.

Nevertheless, the concept of quotation is broader than has often been appreciated. Viewed in this way, the quotation defence that is required to be given effect in the laws of all Berne Union countries comes close to a 'fair use' defence. It encompasses, for example, the reuse of music and sounds as a result of digital sampling,³¹³ appropriation art, the creation of snippets and at least the presentation of the results of text mining. To the extent that any such practices of reuse might be regarded as infringing, it must be on the basis that other aspects of Article 10, such as sufficient acknowledgment, proportionality and compatibility with fair practice, have not been complied with. As William Wallace, the British representative at the Stockholm Revision noted, 'the real safeguard for authors' is to be found in the words 'provided they are compatible with fair practice'.³¹⁴ It is to the significance of this condition that we now turn.

³¹³ However, it should be acknowledged that the range of uses of digital sampling makes generalisations dangerous: see Johnson Okpaluba, 'Digital Sampling and Music Industry Practices, Re-Spun' in K Bowrey and M Handler (eds.), *Copyright Law in the Age of the Entertainment Franchise* (Cambridge University Press 2014), ch. 4, 75–100, esp. 81–82; J Okpaluba, 'Digitisation, Culture and Copyright Law: Digital Sampling, A Case Study' (PhD thesis, King's College London, 2000), pp. 69–76. One problematic example might be what Okpaluba describes as the 'layering slivers of barely recognisable sound samples to create a dense aural collage': at the point it becomes impossible to identify the source of the sounds as those of another source, it might be thought, such reuse loses the quality of 'quotation'. For a focus on the problem of recognisability, see David Metzger's definition of sampling: *Quotation and Cultural Meaning*, 163. Metzger identifies two sorts of sample – building blocks; and more extended 'interlopers that stand out in the mix, creating a constant give and take between the associations of the original source and those of the new surroundings. In other words, these extended samples are quotations ...' (163). He argues that 'if the borrowed work is transformed beyond recognition, especially if the original has never been stated, then there is no evidence of a borrowing. Once altered so severely, the dynamics between original and transformation that define quotation disappear, as all that is left is a strange new sound rather than a transformed old sound' (171–2). See pp. 127–128, above. Importantly, the CJEU resolved this conundrum in the Kraftwerk case by ruling that, in the context of artistic re-use, there would be no reproduction of 'a part' and thus no infringement if the part was no longer recognisable to the human ear: *Pelham*, [31]–[39]. On this, see James Parish, 'Sampling and Copyright – Did the CJEU Make the Right Noises?' [2020] 79 *Cambridge Law Journal* 31, 32–33.

³¹⁴ Main Committee, 7th Meeting, 16 June 1967. See further Chapter 2, Section IV, Part G, pp. 26–28.