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COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST

An Analysis of the Three-Step Test in International and EC Copyright Law

Martin Senftleben

KLUWER LAW INTERNATIONAL

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FOREWORD

Writing this doctoral thesis was a three-step process. It led me to the *Institut für Informationsrecht* of the University of Karlsruhe (TH), the *Instituut voor Informatierecht* (IViR) of the University of Amsterdam and the *Max-Planck-Institut für Geistiges Eigentum, Wettbewerbs- und Steuerrecht* in Munich.

This final book would not have been possible without all the guidance and support offered to me by my two supervisors Bernt Hugenholtz and Thomas Dreier. They always had a listening ear for my questions. In Karlsuhe, it was Thomas Dreier who helped me to identify the three-step test as an appropriate research topic. In Amsterdam, it was Bernt Hugenholtz who supported me in developing a concept on which not only the research at that time but also this final book could be based. I would like to thank both of them for their constant help and support.

After graduation at the University of Heidelberg in 2000, I had the opportunity to enhance my knowledge of current trends and problems in the field of copyright law at the *Institut für Informationsrecht* in Karlsruhe. On the basis of the research project in which I was involved, I finally took the decision to write a doctoral thesis about the three-step test in international copyright law. For the inspiring working atmosphere and numerous useful discussions, I would like to thank all my colleagues and particularly Georg Nolte.

It became obvious that the Institute in Karlsruhe had been an excellent starting point when I applied for a full time research position at the *Instituut voor Informatierecht* in Amsterdam. In March 2001, I could move to the Netherlands immediately. Profiting from the help and support offered by my new colleagues, I managed to develop the concept on which the book rests to this day. In particular, I would like to thank Lucie Guibault, Natali Helberger, Kamiel Koelman, Nirmala Sitompoel and Rosanne van der Waal for their support of my work. I would also like to thank the ITeR program (*Informatietechnologie en Recht*) for financing my work.

When the research project in Amsterdam came to an end in March 2002, I received a scholarship from the *Max-Planck-Institut für Geistiges Eigentum, Wettbewerbs- und Steuerrecht* in Munich. This research grant offered me the possibility to continue the intensive work on my thesis. The Institute's excellent library and international working atmosphere guaranteed that I finally succeeded in completing my analysis of the three-step test. For supporting my work and for many fruitful discussions, I would particularly like to thank Christophe Geiger, Gisbert Hohagen, Alexander Peukert and Rupprecht Podszun. For financing the third step of my research I would like to thank the *Max-Planck-Gesellschaft*.

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Most of all, I would like to thank Stephanie Steinmetz. She always supported and encouraged my work, and even approved my decision to leave for Amsterdam. Listening patiently to all my monologues about the three-step test, she became a specialist in the field herself. Without her, my research would not have resulted in this book, nor would the time of my life which I spent writing it have gained the particular importance which it now has for me.

If not otherwise indicated, I am responsible for the translation of Dutch, French or German texts. The Dutch summary which forms part of the 'promotieeditie' of this book has been carefully reviewed by Gerard Mom. The research for this book was completed on 1 October 2003.

Karlsruhe, 1 November 2003

Martin Senftleben

CONTENTS

LIST OF ABBREVIATIONS

BC	Berne Convention for the Protection of Literary and Artistic Works
BGH	German Federal Court of Justice (*Bundesgerichtshof*)
BGHZ	Official collection of decisions of the German Federal Court of Justice (*Entscheidungen des Bundesgerichtshofs in Zivilsachen*)
BVerfG	German Federal Constitutional Court (*Bundesverfassungsgericht*)
BVerfGE	Official collection of decisions of the German Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts*)
CD	Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society
CDPA	UK Copyright, Designs and Patents Act
EC	European Community
ECHR	European Court of Human Rights
EU	European Union
FRG	Federal Republic of Germany
GATT	General Agreement on Tariffs and Trade
GG	German Constitution (*Grundgesetz*)
HR	Dutch Supreme Court (*Hoge Raad*)
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights

UCITA	US Computer Information Transactions Act
UK	United Kingdom of Great Britain and Northern Ireland
US	United States of America
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WIPO 'Internet' Treaties	The WCT and WPPT
WTO	World Trade Organization
WPPT	WIPO Performances and Phonograms Treaty

Chapter 1

Introduction

When a WTO Panel reporting on section 110(5) of the US Copyright Act embarked on a detailed interpretation of article 13 TRIPs in 2000,[1] a provision of international copyright law was brought into the limelight which had not attracted much academic attention before:[2] the so-called 'three-step test' in international copyright law. Silently, this magic formula,[3] consisting of three abstract criteria, had become widespread in international copyright law by making its way not only into the Berne Convention but also the TRIPs Agreement and the WIPO 'Internet' Treaties.[4] Nowadays, it is enshrined in article 9(2) BC, 13 TRIPs, article 10 WCT and 16(2) WPPT alike.[5] The fundamental problem which the three-step test concerns is the delicate balance between grants and reservations of copyright law. Viewed from a functional perspective, it sets limits to limitations on exclusive rights.

Traditionally, this is one of the most controversial issues of international copyright law. A country's specific system of limitations, in general, seems to be a sacrosanct feature of domestic copyright laws[6] which is always protected from any corrosive effect to the greatest extent possible at the international level.[7] Every time an amendment of international copyright law gives rise to the question of permissible limitations, a wide variety of currently existing exemptions is brought to the fore which are all declared indispensable for reacting adequately to a country's specific social, cultural and economic needs. At the 1967 Stockholm Conference for the revision of the Berne Convention, however, the philosopher's stone for solving the problem of permissible limitations appeared to have been found. To pave the way for the formal recognition of the general right of reproduction *jure conventionis*, the abstract formula, known today as the three-step test, was devised and introduced in international copyright law. Pursuant to article

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1 For the Panel's report, see WTO Doc. WT/DS160/R, dated 15 June 2000. Just three month earlier, another WTO Panel reporting on Canada's patent protection regime of pharmaceutical products had devoted attention to article 30 TRIPs, the three-step test of the TRIPs' patent section. See WTO Doc. WT/DS114/R, dated 17 March 2000. See for a detailed discussion of the application of the three-step test in these two WTO dispute settlement cases Ficsor 2002b.

2 More detailed comments on the three-step test are scarce. However, see Desbois/Francon/Kerever 1976, 203-207, Collovà 1979; C. Masouyé 1981, 58-60; Ricketson 1987, 479-489 and 1999; Frotz 1986; du Bois 1997; Gervais 1998, 88-91; Heide 1999.

3 This characterisation is used by Visser 2001, 15.

4 The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

5 Cf. the overview given by Davies 2002, 279-281.

6 Cf. Hoeren 2000, 516, who speaks of 'sakrosankten Orten nationaler Heiligtümer'.

7 Examples of this phenomenon will be given in chapter 3. See chapter 5 for the problems raised by this tendency in the context of the Copyright Directive 2001/29/EC.

9(2) BC, unauthorised reproductions of copyrighted works may be permitted 'in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author'. This provision constituted the first three-step test in international copyright law.

As already indicated above, international policy-makers have embraced this abstract rule. In 1994, it reappeared in article 13 of the TRIPs Agreement. In 1996, it was also embodied in the WIPO 'Internet' Treaties – as a regulatory instrument determining the shape of copyright limitations to come in the digital environment.[8] The gradual infusion of international copyright law with the three-step test begs the question of its precise meaning. Is it capable at all of fulfilling the extensive tasks which have explicitly been assigned to its catalogue of abstract criteria? Or is it only a fig leaf for the helplessness of international policy makers? In the European Union, there is all the more reason for inquiring into the regulatory substance of the three-step test because Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Copyright Directive) also contains its three abstract criteria. Thus, the impact of the three-step test on the traditional set of limitations and new exemptions to come must necessarily be clarified.

To accomplish this task, a synthetic approach is pursued here. The three-step test is regarded and treated as one uniform instrument of international copyright law. Pursuant to this conception, the different provisions embodying the three-step test are to be qualified as limbs of the same unitary body. As such, they add different connotations and may assign different functions to the three-step test which must be analysed in detail. The specific value of the outlined synthetic method lies in its considerable potential for revealing the general structure and functioning of the three-step test rather than overemphasising the peculiarities of each single context in which the three-step test has been embedded. The ensuing examination can accordingly also be put to good use in the realms of other disciplines of intellectual property law in which provisions based on the three-step test of copyright law are to be found as well.[9]

Nevertheless, in the course of the ensuing inquiry, sufficient attention will be devoted to the specific role which the three-step test plays in the Berne Convention, the TRIPs Agreement and the WIPO Copyright Treaty. The following, introductory chapter 2, however, first of all seeks to delineate the copyright balance between exclusive rights of authors and limitations imposed on these rights, against the backdrop of copyright's two legal traditions – the common law system and the civil law system. The reconciliation of the divergent interests of authors and users is the

8 See the agreed statement concerning article 10 WCT. WIPO Doc. CRNR/DC/96.

9 See, for instance, article 30 TRIPs. Cf. in this respect the interpretation of article 30 TRIPs by the WTO Panel – Patent 2000, §§ 7.39-7.84. Although dealing with a patent case, the Panel did not hesitate to consult material concerning article 9(2) BC. See ibid., § 7.72.

central field of application of the three-step test. Therefore, the delicate balance between grants and reservations of copyright law must be inspected closely before turning to the interpretation of the three-step test. The ensuing chapter 3 then explains in depth the contextual background to the incorporation of the three-step test into the Berne Convention, the TRIPs Agreement and the WIPO 'Internet' Treaties. It is necessary to sift through relevant conference material to lay sufficient groundwork for an appropriate analysis of the role the three-step test plays in international copyright law. It yields valuable insights into the notions and considerations underlying the test, thereby reflecting the different connotations the test has acquired since its introduction at the 1967 Stockholm Conference.

Vested with this information, a precise analysis of the structure and functioning of the three-step test, as well as a detailed interpretation of each of its criteria, will be conducted in chapter 4. Accordingly, it forms the centre of gravity of this book. It will be examined which limitations can be qualified as 'certain special cases' (criterion 1); when a 'conflict with a normal exploitation' arises (criterion 2), and how to avoid an 'unreasonable prejudice to the legitimate interests of the author' (criterion 3). An appropriate abstract standard of review will be developed for each criterion, the impact of which on different types of limitations will be demonstrated by giving numerous examples. Afterwards, the results of the interpretative analysis will be employed in chapter 5 to clarify the meaning of the three-step test in the context of the European Copyright Directive. All limitations permitted under the Directive will be scrutinised in the light of each criterion of the three-step test. The results of the examination of the three-step test will be summarised in chapter 6. before ultimately presenting in chapter 7 several concluding remarks on the potential future alignment of copyright law with the specific needs of authors and the desirable amendment of the rules governing limitations on exclusive rights in international copyright law.

Chapter 2

The Three-Step Test Within the Copyright System

Works of the intellect can be exploited without limit. Myriad persons can use and enjoy human intellectual productions without decreasing their potential to be communicated.[10] Nevertheless, they are far from being as 'free as the air to common use'.[11] By setting forth exclusive authors' rights, copyright law ensures that the creators of literary and artistic works can control the use and enjoyment of their works for a certain period of time. The legal monopolisation of rights in intellectual works on the side of their authors, however, is not absolute. The exemption of specific ways to employ a copyrighted work also forms an integral part of the copyright system. Therefore, a balance is established between the exclusive rights which afford authors the opportunity to control the spread of their works and thus enable their exploitation, and privileged free uses which create breathing space for socially-valuable ends. At the interface between both sides of this balance, the three-step test has to accomplish the task of preventing copyright limitations from encroaching upon authors' rights.

Functionally, the delineated position of the three-step test at the core of the copyright balance can be described as follows: *the three-step test sets limits to limitations on authors' rights.* It is a control mechanism safeguarding the delicate balance between grants and reservations of copyright law. The three-step test, thus, fulfils a specific task. It may only be invoked after, firstly, exclusive rights have been conferred on the authors and, secondly, limitations are about to be imposed on these rights. Before embarking on an inquiry into the background to the three-step test (chapter 3) and the interpretation of its abstract criteria (chapter 4), it is therefore advisable to inspect more closely the outlined sequence – grant of exclusive rights; imposition of limits on these rights; application of the three-step test. Accordingly, the reasons for vesting authors with exclusive rights will be discussed in the following section 2.1. Subsequently, attention will be devoted in section 2.2 to justifications supporting the exemption of certain uses from authors' rights. Finally, the copyright balance itself and thus the field of application of the three-step test will be brought into focus in section 2.3.

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10 Viewed from an economic perspective, works of the intellect are 'public goods'. See Fisher 1988, 1700.

11 See the dissenting opinion of Brandeis J. in International News Services v. Associated Press, 248 U.S. 215, 250 (1918). Cf. Benkler 1999, 354-360.

2.1 Rationales of Copyright Protection

Two markedly different traditions of legal theory lie at the core of the international copyright system. On the one hand, the notion of natural law is brought to the fore to explain why authors are vested with exclusive rights. In particular, continental European civil law copyright systems are often expressly rooted in natural law and tend to confer an air of 'sacredness' on intellectual works.[12] In the natural law theory, the author of a work of art occupies centre stage. His unique form of self-expression which emerges in the course of the creative process leading to a work, constitutes the centre of gravity.[13] On the basis of this finding, it can be assumed that a bond unites the author with the object of his creation which is conceived as a materialisation of his personality.[14] Moreover, the author acquires a property right in his work by virtue of the mere act of creation.[15] This has the corollary that nothing is left to the law apart from formally recognising what is already inherent in the 'very nature of things'.[16] Therefore, the author-orientation of the civil law system calls on the legislator to safeguard rights broad enough to concede to authors the opportunity to profit from the use of their self-expression, and to bar factors that might stymie their exploitation. In consequence, the natural law concept enshrines flexibly-devised, broad rights for authors and restrictively-delineated exceptions which, in addition, must survive the more thorough scrutiny of the courts pursuing their strict interpretation.[17]

On the other hand, considerations of social utility are brought into focus in order to lay sufficient groundwork for copyright protection. In particular, the common law approach to copyright which complements the outlined civil law approach rests on utilitarian considerations.[18] Anglo-American copyright systems envision intellectual property rights as a utilitarian notion that fails to indicate an inherent right of authors to their creations.[19] Seeking instead to enhance the benefits for society, advocates of the common law approach invoke marketplace principles to spur the creation of socially valuable works. Accordingly, the resulting system of copyright protection mirrors the reliance on the motivating power of economic incentives. The promise of monetary rewards is offered to the creators of literary

12 Cf. Kerever 1991, 13 and Edelman 1994, 82-87.

13 Cf. Geller 1994, 169-170; Strowel 1994, 236-237; Edelman 1994, 82-87.

14 Cf. Ulmer 1980, 110-111. See Desbois 1978, 538: 'L'auteur est protégé comme tel, en qualité de créateur, parce qu'un lien l'unit à l'objet de sa création.'

15 Cf. Desbois 1978, 538; Hubmann 1988, 5 and Calandrillo 1998, 312-316.

16 See Ricketson 1987, 5-6; Ulmer 1980, 105-106.

17 Cf. Geller 1994, 170; Strowel 1994, 249-250; Grosheide 1986, 2. See as to the dogma that copyright limitations must be interpreted restrictively Melichar, in: Schricker 1999, 742; Lucas/Lucas 2001, 253-254 and the critical comments made by Kröger 2002, 18. Cf. Bornkamm 1996, 650-652, substantiating that courts may nevertheless be capable of providing sufficient breathing space.

18 Cf. Strowel 1994, 235 and Fisher 1988, 1686-1692.

19 Cf. Weinreb 1998, 1211 and 1214-1215; Calandrillo 1998, 310; Michelman 1967, 1208-1213.

and artistic works as a bait to encourage their intellectual productivity.[20] Copyright is perceived as an 'engine of free expression'.[21] A marketable right is conferred to ensure a sufficient supply of disseminated knowledge and information. The marketplace underpinning, however, merely justifies rights strong enough to induce the desired production of intellectual works. Therefore, the exclusive rights of authors are regarded as granted prerogatives which deserve positive legal enactment.[22] They are enumerated in a closed catalogue and precisely delineated. Their limitation, on the contrary, need not be straitjacketed. Open-ended provisions such as fair use or fair dealing correspond to the society-orientation of the common law approach.[23]

The differences in the theoretical underpinning on which the two traditions of copyright law rest frequently induce scholars to draw a strict boundary line between the civil law and the common law approach to copyright. Regardless of the asserted incompatibilities between both systems, however, it was possible to reach an agreement on an extensive set of shared norms on the international level. The Berne Convention, the TRIPs Agreement and the WIPO Copyright Treaty give evidence for the far-reaching consensus that could be found internationally. As the three-step test is a provision of international copyright law, it appears appropriate to embark on a discussion of the reasons for copyright protection that emphasises similarities rather than discrepancies between the two traditions of copyright law. The lines of intersection that can be drawn between the two copyright traditions are central to the test's effective functioning.

To further support this approach, a brief historical analysis will be conducted in the following subsection 2.1.1. It will be shown that both copyright traditions have always touched upon each other and influence each other to this day. On this basis, an overview of the reasons for copyright protection will be given in the ensuing subsection 2.1.2 that encompasses notions of natural law and considerations of a utilitarian nature alike. Finally, the specific merits and shortcomings of the various arguments in favour of copyright protection will be discussed in subsection 2.1.3.

2.1.1 THE HISTORICAL INTERPLAY OF NATURAL LAW AND UTILITARIAN NOTIONS

The frequently asserted separation of copyright's legal traditions can hardly be supported by the history of copyright law. On the contrary, a closer inspection of early literary property regimes brings to light a wide array of similarities. The first copyright statute, known as the Statute of Anne (1709), lays the groundwork for both the English and US copyright laws. As an 'Act for the Encouragement of

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20 Cf. Michelman 1967, 1211; Calandrillo 1998, 310-312; Geller 1994, 159 and 164-166.

21 See US Supreme Court, Harper & Row v. Nation Enterprises, 471 US 539 (1985), III B.

22 Cf. Phillips 1987, 114; Strowel 1994, 241-249; Calandrillo 1998, 310.

23 See Geller 1994, 170; Strowel 1994, 250-251; Ginsburg 1994, 133. Cf. in respect of the public interest concept underlying UK law Phillips 1987, 110-113.

Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies', it pursues the objective to offer authors an incentive to create. Its preamble maintains that the Act aims at the 'Encouragement of Learned Men to Compose and Write Useful Books'.[24] The Statute obviously rests on utilitarian notions. The grant of copyright protection shall encourage authors to write books for the benefit of society.

It is to be noted, however, that this utilitarian foundation of the Anglo-American copyright tradition was embedded in an intellectual climate pervaded by the ideas of John Locke.[25] His elaboration of a natural right to property in his Second Treatise on Government is traditionally invoked as a basis for the natural law approach to copyright. Nonetheless, Locke's labour theory influenced not only the decisions Millar v. Taylor and Donaldson v. Beckett, which had to respond to the question of whether there exists a common law copyright that is rooted in natural law and is thus independent of the stipulations of the Statute of Anne.[26] It was also reflected in the dawn of US copyright legislation. All of the states except Delaware enacted copyright statutes before the adoption of the US Constitution, thereby for the most part unequivocally referring to principles of natural law.[27] Not surprisingly, throughout the nineteenth century, US courts defended copyright on the grounds of rightness and justice far more than as a matter of the public good even though the first US copyright statute ultimately reflects the intention to apply copyright, along the utilitarian lines drawn in the Statute of Anne, as a means of fostering public education.[28] In practice, courts thus did not hesitate to intersperse the utilitarian framework laid down in early Anglo-American copyright statutes with notions stemming from the natural law theory.

A similar tendency to intermingle natural law and utilitarian considerations can also be observed in the history of civil law copyright systems. At an early stage of development, the notion of authors' natural rights had not yet been linked with the romantic elaboration of criteria such as originality, organic form and the work of art as a materialisation of the unique personality of the artist. By contrast, it was often brought to the fore to mask manifest economic interests of booksellers.[29] The person of the author was used as a dummy. The development of copyright law in Germany, in particular, bears witness to the invocation of Locke's labour theory in favour of publishers. The inefficiency of the German privilege system, caused by Germany's

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24 See Ginsburg 1994, 137; Gieseke 1995, 138-139.

25 Cf. Strowel 1993, 185-190.

26 Cf. Gieseke 1995, 139-140; Strowel 1993, 114-115.

27 Cf. Weinreb 1998, 1211-1212. See Ginsburg 1994, 139, who refers to the preamble to the Massachusetts Act of 17 March 1783 and Sterk 1996, 1199, quoting the preamble to Connecticut's 1783 copyright statute.

28 Cf. Ginsburg 1994, 140; Weinreb 1998, 1212-1213, who points out that early treatises dealing with copyright law are to the same effect.

29 See Jaszi 1992, 295-296. In respect of 'The Battle of Booksellers', cf. Strowel 1993, 114-115. In respect of the situation in France, see Ginsburg 1994, 149.

territorial fragmentation, prompted various scholars to rely on the author's natural right in his writings as a starting point for the explanation of the illegitimacy of unauthorised reprints.[30]

The situation in France also shows that utilitarian objectives were hidden under the mask of the rhetoric of natural law. According to the analysis conducted by Ginsburg, the French enactments of 1791 and 1793 reflect certain instrumentalist objectives. The defence of the public domain against the monopoly enjoyed by the Comédie Française, for instance, can be regarded as the main principle of the 1791 law instead of the focus on author's rights as 'the most sacred, the most legitimate, the most inviolable, and […] the most personal of all properties'.[31] Ginsburg maintains that, in 1793, the French Revolutionary legislators applied an amalgam of the notion of authors' natural rights and enlightenment values.[32] The latter support the public interest in the progress of knowledge rather than strong property rights in intellectual works. The 1793 decree, therefore, need not necessarily be regarded as a tribute enthusiastically paid to natural law theory. By contrast, there is substantial reason to believe that this piece of copyright legislation, in reality, formed part of a much broader scheme seeking to promote public education.[33] Not surprisingly, the 1793 law bears features, such as the compliance with formalities as a prerequisite for suit, that call to mind utilitarian Anglo-American statutes.[34]

Hence, the mixture of the several notions that are often exclusively assigned to the sphere of one legal tradition of copyright law defines its early development. This historical common ground of copyright's legal traditions influences both of them to this day. Weinreb, for instance, has pointed out that even though the natural rights argument has been muted in recent years, it still remains a significant factor in the background of the US copyright system.[35] The accession of common law countries to the Berne Convention also indicates that these countries are not

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30 For instance, see Pütter 1774, § 20 and § 23, who bases his argumentation against unauthorised reprints on the assumption that new literary works which are published for the first time are 'gleich ursprünglich unstreitig ein wahres Eigenthum ihres Verfassers, so wie ein jeder das, was seiner Geschicklichkeit und seinem Fleisse sein Daseyn zu danken hat, als sein Eigenthum ansehen kann.' Cf. Bappert 1962, 256-257 and 262-267; Gieseke 1995, 121-122. In the context of Anglo-American copyright law, Jaszi 1994, 65, similarly points out that, 'effectively, "authorship" had been introduced into English law as a blind for the booksellers' interests, and it continued to perform that function throughout the eighteenth century – and beyond'.

31 See Ginsburg 1994, 144-145. The quoted passage is taken from an often quoted statement made by Le Chapelier, who reported on the 1791 decree, that is also quoted by Ginsburg, ibid., 144. She asserts that Le Chapelier's remark merely concerned unpublished works.

32 See Ginsburg 1994, 147-151.

33 See Ginsburg 1994, 146.

34 See Ginsburg 1994, 147-151. Nevertheless, Strowel 1993, 314, points out that the protection itself was independent of any formalities.

35 See Weinreb 1998, 1216. Cf. also the analyses conducted by Sterk 1996, 1198-1204, and Jaszi 1992, 297-302, who present examples of court decisions. Jaszi, ibid., 298, states that 'over the history of Anglo-American copyright, Romantic "authorship" has served the interests of publishers and other distributors surprisingly well'.

necessarily loath to depart, at least to some extent, from their utilitarian basis. The UK was among the first countries that became party to the Convention in 1887. India and Australia followed in 1928 and the US in 1989. Pursuant to its preamble, the Berne Convention is not inspired with the aim to enhance the benefits for society but animated by the 'desire to protect, in as effective and uniform a manner as possible, the rights of authors'. This formula recalls the author-centric natural law concept. The framework set out in the Convention resembles the natural law model of broad rights for authors and restrictively-defined exceptions.[36] The Berne Convention also serves as a vehicle to introduce moral rights protection into utilitarian systems even though this is a typical feature of natural law theory.[37]

On the side of civil law countries, Schricker has suggested enriching the natural law foundation by introducing notions of the US copyright system in order to ensure that copyright law furthers intellectual, cultural and cultural-economic progress.[38] Notions of this kind made their way into the European Copyright Directive 2001/29/EC which impacts on continental-European civil law copyright systems. Pursuant to recital 4 of the Directive, 'a harmonised legal framework on copyright and related rights […] will foster substantial investment in creativity and innovation […] and lead in turn to growth and increased competitiveness of European industry […]. This will safeguard employment and encourage new job creation'.[39] Inevitably, one is left to wonder which role the author and a work of art as manifestation of his personality may play in this utilitarian framework. The industrial policy which is clearly given expression in recital 4 is difficult to reconcile with the focus on the author and the act of creation that would correspond to the natural law approach to copyright. To conceive of the two traditions of copyright law as two incompatible, separate systems therefore hardly portrays the actual situation accurately. By contrast, the two traditions of copyright law can be described as mixtures of a shared set of basic ideas derived from natural law theory and utilitarian notions alike.

2.1.2 THE LABOURER'S CLAIM AND THE ENTITLEMENT OF THE PUBLIC

As an amalgam of the two theoretical lines of reasoning – the natural law argument and utilitarian arguments – is applied in both traditions of copyright law anyway, it is appropriate to understand the different reasons given for copyright protection as a uniform underpinning of authors' rights. Accordingly, the following survey of arguments in favour of copyright protection encompasses notions of natural law and utilitarian considerations alike.

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36 Cf. Geller 1994, 170 and Strowel 1994, 249-250.

37 See article 6*bis* BC. Cf. Ginsburg 1991, 598-600; Dworkin 1995, 245-257; Cornish 1989, 449-452.

38 See Schricker, in: Schricker 1999, Einleitung, 7.

39 See recital 4 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

The natural law argument supporting authors' rights appeals to feelings of rightness and justice. As it is the author who spends time and effort on the creation of a new work of the intellect, it is deemed justified to afford him the opportunity of reaping the fruit of his labour.[40] Accordingly, it is posited that the author acquires a property right in his work by virtue of the mere act of creation.[41] A copyright law awarding authors exclusive rights, therefore, merely recognises formally what has already occurred in the course of the act of creation. The labourer's property right in his work is regarded as an unalterable result of his creative activity – a natural consequence that is inherent in the 'very nature of things'.[42] Hence, the central element of the natural law argument is that an intellectual property right accrues directly from creative labour.

To explain this central feature, advocates of the natural law approach to copyright follow the lines of Locke's elaboration of a natural right to property in his Second Treatise on Government. Locke envisions an unrestricted supply of resources in a world of abundance and for individuals born free to enjoy the rightful liberty to use the earth's plenty.[43] In this world, so runs Locke's argument, whenever one mixes his effort with the raw stuff of the world, he has joined to it 'something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other Men'.[44] The focus of Locke's labour theory on ethical postulations about individual merit instead of the desirability of certain consequences concerning the property system as good for the welfare of society, has led to its qualification as a 'desert' theory.[45] Needless to say, the real world bears little resemblance to Locke's world of abundance. Within the realm of intangible products, however, a certain degree of similarity can hardly be denied. Later authors are free, insofar as access is conceded, to ground their own creative activities in the creations of their predecessors without diminishing the intellectual world's supply of ideas and individual expression because of the 'public good' character of intellectual works.[46]

Consequently, a line has been drawn between Locke's elaboration of a natural right to property in a world of abundance and the author's right to his creation in the world of ideas and individual expression. The mechanism of acquiring property, in both worlds, is the same. The property right results directly from the labour mixed with the raw material to be found in the respective world of abundance. As the author spends time and effort on the creation of a new intellectual work, this work

40 Cf. Grosheide 1986, 128 (argument B).

41 Cf. Desbois 1978, 538; Hubmann 1988, 5.

42 Cf. Ricketson 1987, 5-6; Ulmer 1980, 105-106.

43 Cf. Weinreb 1998, 1223; Gordon 1993, 1553; Strowel 1993, 184.

44 See Locke 1698, book II chapter 5 § 27. Cf. Michelman 1967, 1204; Strowel 1993, 183.

45 Cf. Michelman 1967, 1203-1204.

46 Cf. Weinreb 1998, 1224. See in respect of the 'public good' character of intellectual works Fisher 1988, 1700.

becomes his property. The reference to Locke's labour theory, however, is not only conducive to explaining the sudden change of creative labour in intellectual property, but also helps to understand certain further ramifications of the natural law approach to copyright. Locke's concept of acquiring property in a world of abundance is an individualistic one. The labourer is given an isolated position. By postulating an unrestricted supply of resources, it becomes possible to focus on the individual labourer at the moment when property is acquired instead of considering the potential implications for the overall welfare of society. The surrounding in which Locke places his elaboration of a natural right to property thus allows the concentration on a single occurrence: the act of mixing labour with the raw material of the envisioned world. Under these circumstances, the individual merit of the labourer can be made visible in order to explain his natural right to property.

Against this backdrop, it becomes understandable why the natural law approach to copyright is author-centric. In line with Locke's labour theory, it concentrates on the author engaging in the creation of a new work. Copyright limitations must be regarded as an exception in this framework. Serving the public interest, they do not conform to the individualistic concept underlying Locke's elaboration of a natural right to property.[47] Besides the danger that important matters of public concern might be neglected, the author-centric position taken by the natural law approach has the merit of focusing attention on the act of creation. The insight that a literary or artistic work mirrors the personality of its creator because his unique form of self-expression is transferred to his work in the course of creation,[48] falls within the province of the natural law approach to copyright. That it is advisable to vest authors not only with economic but also with moral rights follows particularly from the natural law theory.

In contrast to this individualistic conception, utilitarian arguments in favour of copyright protection rest on a theoretical basis which even requires some kind of community. Utilitarian theory conceives of property as conventionally recognised stability of possession. The convention thereby arises out of the perception of men that individual advantage can be derived from mutual forbearance to interfere with the possessions of others. Any security of possessions stems from the belief that the establishment of a lasting association will be impossible as long as members of the envisioned community trespass against one another.[49] In the course of development towards a permanently ordained association, the evolving practice of mutual forbearance is fortified through an established set of rules. On the basis of utilitarian theory, private property is therefore rooted in the historical evolution of the customary acceptance of certain rules.[50]

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47 Cf. Grosheide 1986, 129-133.

48 Cf. Ulmer 1980, 110-111; Desbois 1978, 538.

49 See the description of utilitarian theories given by Michelman 1967, 1208-1209, who bases his analysis on Hume and Bentham.

50 See Michelman 1967, 1209-1210.

In this framework of ingrained habits, so runs a further argument, a high level of productivity depends on arrangements which assure to every labourer a predictable amount of the fruits of his labour. It is assumed that the time and effort necessary to create a new product will not be spent unless generally accepted rules secure that the labourer is permitted to enjoy a substantial share of the product.[51] In this line of reasoning, the utilitarian approach to copyright relies on the motivating power of the grant of exclusive rights. As these rights afford an author the control of the use and enjoyment of his intellectual work, they offer the possibility of deriving economic profit from a work's creation. Copyright protection, thus, is understood as an incentive to create. The legal assurance that exclusive rights in works of the intellect will be conferred on every author is offered as a bait to encourage intellectual productivity. This theoretical model, for instance, is reflected in the US Constitution which seeks to 'promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries'.[52]

It is to be noted, however, that the outlined mechanism is neutral as to the level of protection granted. If copyright is primarily seen as a useful instrument for spurring intellectual creation, this does not necessarily imply that strong protection will be considered appropriate. A high level of productivity may depend on a high level of copyright protection. The utilitarian approach to copyright, however, must not be confused with the individualistic natural law approach. The person of the author and the act of creation do not occupy centre stage. Utilitarian theory is not primarily concerned with rewarding authors. By contrast, the overall welfare of society constitutes the centre of gravity. Copyright protection can only be justified and is only to be conceded insofar as it can be deemed beneficial for society as a whole. This conception leads to the understanding that there is a specific dualism inhering in the grant of exclusive rights. The US Constitution, for instance, is understood to enshrine the possible grant of monopoly rights to authors not only to enrich the common store of information. Its dissemination is also qualified as an integral part of the overarching objective to foster the welfare of the public.[53] Hence it follows that, besides the beneficial effect of copyright which consists, at least theoretically, of the incentive to authors, the detriment to the consumers of literary and artistic works who have to pay monopoly prices if they are to enjoy a copyrighted work, must be taken into account as well.[54] The dialectic inscribed in copyright law, thus, clearly comes to the fore. The grant of exclusive rights imposes a 'tax on readers for the purpose of giving a bounty to writers'.[55] The utilitarian

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51 Cf. Michelman 1967, 1211-1212.

52 See Article I, Section 8 of the U.S. Constitution.

53 Cf. Weinreb 1998, 1232; Calandrillo 1998, 310.

54 Cf. Weinreb 1998, 1231; Calandrillo 1998, 304. See in respect of the 'deadweight loss' that results from the grant of exclusive rights Fisher 1988, 1700-1702.

55 See the statement by Thomas Babington Macaulay, First Speech on Copyright (Feb.5, 1841). It is also quoted by Weinreb 1998, 1231.

approach to copyright, therefore, brings into focus the balance between grants and reservations of copyright law. Both sides of the coin – the benefit for authors and the detriment to users – must be taken into account when conferring exclusive rights on authors.[56]

Nonetheless, utilitarian theory need not lead to a level of protection that falls below the protection of intellectual works resulting from the natural law approach. Proponents of a utilitarian approach to copyright do not automatically turn a deaf ear to claims for strong exclusive rights. In contrast to the author-centric natural law framework, however, strong copyright protection does not automatically follow from the very nature of things but must be justified by an additional argument that is brought to bear in the course of the required balancing process. Economic, industrial and cultural considerations as well as freedom of expression values can be summoned up to tip the scales in favour of the authors.[57] Like the natural law approach, utilitarian theory, thus, is capable of forming a firm basis for copyright protection.

The first of the aforementioned additional arguments, the economic approach, can be explained by referring to a school of thought that has evolved in the US and leans heavily on neo-classical economic property theory.[58] Embracing the utilitarian notion that society's benefit ought to be promoted through the grant of copyright protection, neo-classicists aim to move works of the intellect to their highest socially valued uses. To realise this objective, they invoke market perfection as a guide for resource allocation and conceive of copyright primarily as a mechanism for market facilitation.[59] In this neo-classical world, a regime of broad exclusive rights serves less as an incentive to spur creative production, than as a means to direct intellectual resources through consensual transfers to the persons in whose hands they will best be employed to satisfy consumer wishes.[60] The reaction to consumer preferences must consequently be equated with the furtherance of the public's welfare.

Within the outlined framework, resources that are not subject to individual control are deprived of their social value because the absence of individual ownership bars them from the market process enabling their efficient allocation. Accordingly, all economic value of a creative production has to be encompassed by universally-applied and clearly-defined property rights.[61] Furthermore, neo-classicists strive for the reduction of transaction costs which play a decisive role within the delineated system. As transaction costs may stifle consensual transfers,

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56 Cf. Nimmer/Brown/Frischling 1999, 76; Elkin-Koren 1997, 113; Ginsburg 1997, 4.

57 See for an overview Hugenholtz 2000b, 483-484.

58 See Netanel 1996, 306-307. The approach also has animated a line of cases. Cf. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) and ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Circuit 1996).

59 See Netanel 1996, 309-310; Gordon 1982, 1612-1613; Bell 1998, 587 and 590.

60 See Gordon 1982, 1605-1606.

61 See Netanel 1996, 312-315.

they have the potential for threatening the envisioned efficient distribution of intellectual goods. In cases where the benefits accruing from a bargain do not outweigh its costs, the parties will refrain from transactions even though they might be desirable for achieving the goal of allocative efficiency.[62] Asserting that property rules will induce market actors to establish institutions capable of diminishing the costs of consensual transfers, neo-classicists reserve for authors not only all actual markets but also potential ones which might take shape in the future.[63]

However, tracing this conclusion on the basis of the neo-classical property theory inevitably entails the necessity to renounce a flourishing public domain bolstered by a wide array of exempted uses. Viewed from the perspective of neo-classicists, a justification for divesting a copyright owner of his market entitlements solely exists when the possibility of consensual bargain is beyond reach – even in respect of potential markets to come. In consequence, copyright limitations, such as fair use, are affected by the dramatic reduction of transaction costs in the digital environment.[64] Ultimately, the copyright balance arising from neo-classical property theory resembles the concept of natural law copyright systems: broad exclusive rights are combined with precisely delimited exceptions. Utilitarian theory, when connected with the outlined neo-classical school of thought, thus, does indeed allow the pursuit of strong copyright protection.

Furthermore, economic arguments can be supplemented with industrial policy objectives. In this line of reasoning, it is posited that society will benefit from strong copyright protection because of its stimulating effect on the rapidly emerging information industry. The social dimension of the growth of copyright industries is emphasised in this context. As economic growth in industrialised countries depends on innovations which allow the creation of new products, the effective protection of intellectual property is considered an engine of new employment. In this vein, the EU Commission argued in the Green Paper 'Copyright and Related Rights in the Information Society' that only if copyright and related rights 'are properly protected will there be the incentive to invest in the development of creative and innovative activity, which is one of the keys to added value and competitiveness in European industry'.[65] It elaborated further that 'European competitiveness depends more and more upon innovative ideas capable of leading to new products and procedures, which in their turn will generate new employment'.[66] As pointed out above, these considerations have finally been given expression in recital 4 of the European Copyright Directive 2001/29/EC.[67]

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62 Cf. Gordon 1982, 1608 and 1613.

63 See Netanel 1996, 313. Cf. Bell 1998, 567-571 and Merges 1997, 131-132.

64 Cf. Gordon 1982, 1615; Bell 1998, 583; Merges 1997, 132.

65 See EU Commission 1995, 11 ('the economic dimension').

66 See EU Commission 1995, 12 ('the social dimension').

67 See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

Besides economic arguments and industrial policy objectives, the utilitarian approach to copyright also permits copyright protection to be placed in a cultural context.[68] One facet of a cultural line of argument is the promotion of knowledge and learning. The 1709 Statute of Anne already evokes considerations of this kind. As an 'Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies', it pursues the objective to spur intellectual creation so that society may profit from the enhancement of the common store of knowledge.[69] Nowadays, this line of reasoning particularly attracts attention in developing countries. The protection afforded by the Berne Convention, for instance, is in this connection regarded as a means to encourage the creation of intellectual works that are indispensable for the training of qualified manpower capable of undertaking development projects.[70] Strong copyright protection is also seen as a vehicle to develop an independent cultural identity and cultivate the national cultural heritage. In this vein, Alikhan elaborates that any country 'wishing to stimulate or inspire its own authors, composers or artists, and thus augment its national cultural heritage, must provide effective copyright protection'.[71]

Finally, an argument can be brought to the fore which is closely connected with the cultural rationale. It can be asserted that the grant of exclusive rights serves as a propelling force as regards freedom of expression and intellectual debate. In Harper & Row v. Nation Enterprises, the US Supreme Court referred to copyright as the 'engine of free expression'.[72] It went on to elaborate that 'by establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas'.[73] This line of reasoning receives an additional connotation when it is traced back to the age of enlightenment when traditional systems of censorship were replaced with the grant of copyright protection.[74] The corresponding argument runs as follows: copyright protection offers authors the opportunity to derive economic profit from their works. It ensures the creators of intellectual works independence from any kind of patronage potentially seeking to restrict their freedom of expression.[75] The users of copyrighted material, in turn, can enjoy works that have been created in the absence of manipulation and censorship. Accordingly, copyright promotes a free and independent intellectual debate.[76]

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68 Cf. Grosheide 1986, 136-139.

69 See Ginsburg 1994, 137; Gieseke 1995, 138-139.

70 Cf. Alikhan 1986, 428-429.

71 See Alikhan 1986, 429-430. Cf. Hugenholtz 2000b, 483.

72 See US Supreme Court, Harper & Row v. Nation Enterprises, 471 US 539 (1985), III B.

73 See US Supreme Court, ibid., III B. Cf. Hugenholtz 1989, 150-151.

74 For a historical analysis of the joint origin of freedom of expression and copyright, see Dommering 2000, 431-439; Netanel 1996, 353-358.

75 Cf. Netanel 1996, 288: 'Copyright supports a sector of creative and communicative activity that is relatively free from reliance on state subsidy, elite patronage, and cultural hierarchy.'

76 Cf. Grosheide 1986, 139-141; Netanel 1996, 288; Hugenholtz 1989, 151.

Although it must be conceded that the freedom of expression argument brings into focus an important further aspect of copyright protection, its ambivalence should not be concealed.[77] A copyright law that provides for exclusive rights confers on authors a monopoly position. As the author is free to control the use and enjoyment of his work, he is also free to (mis)use copyright so as to unduly impede or even prevent access to his work, thereby barring others from freely speaking or freely receiving information.[78] Hence, the freedom of expression argument merely has the potential for complementing the various other reasons for copyright protection. It does not, however, automatically imply that authors should be vested with strong exclusive rights because it also serves as a powerful basis of copyright limitations.

2.1.3 THE CULTURAL RATIONALE AS THE ESSENTIAL FOUNDATION OF COPYRIGHT

For several reasons, it is advisable to draw on the full panoply of arguments in favour of copyright protection. First of all, it is noteworthy that the international framework set out for copyright protection itself rests on a combination of different rationales. As already pointed out, the Berne Convention, being 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',[79] can be understood to emphasise the natural law foundation of copyright law. The TRIPs Agreement, however, primarily desiring to reduce 'distortions and impediments to international trade',[80] points in the direction of utilitarian considerations, such as the economic rationale of copyright and corresponding industry policy.[81] The WIPO Copyright Treaty, ultimately, reflects not only the desire 'to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible' but also underscores 'the outstanding significance of copyright protection as an incentive for literary and artistic creation'.[82] The natural law argument stemming from the Berne Convention and the utilitarian incentive concept are thus intermingled. As all these treaties contain the three-step test,[83] an amalgam of different considerations undergirding copyright protection may be applied instead of focusing solely on one specific argument.

It can also hardly be denied that international copyright law has reached a stage of development which makes it difficult if not impossible to rely on one single line of reasoning. Furthermore, doubt has been cast not only upon the appropriateness of

77 Cf. Grosheide 1986, 139-143; Dommering 2000, 452-455.
78 Cf. Hugenholtz 2000b, 483.
79 See the preamble of the Berne Convention.
80 See the preamble of the TRIPs Agreement.
81 Cf. Reichman 1989, 800-805.
82 See the preamble of the WIPO Copyright Treaty.
83 See articles 9(2) BC, 13 TRIPs and 10 WCT.

the natural law approach to copyright but also upon the utilitarian approach. The critique does not concern isolated aspects of the relevant arguments but aims at its very heart. The concept of authorship, for instance, which is central to the natural law approach to copyright, has come under the attack of postmodern deconstructivism. As Dreier elaborates, it is asserted that

> 'far from speaking with his or her individual inner voice, which expresses in a form proper to the author the eternal truth of the Weltgeist, the discourse of the author emanates from several contexts which historically, socially and philosophically determine the author's personality. Consequently, the author ceases to be a creator in the conventional meaning of the word; instead, he or she becomes an initiator of discursivity, an "instaurateur de discursivité", someone who in turn exercises an influence on, and contributes to, his or her successors' discourse. Thus, the person whom we call an "author" exercises an authorial function rather than being an author.'[84]

As Dreier shows, this philosophical line of argument may be rebutted in the context of legal discourse on the grounds that legal doctrine never denied that a creator builds upon pre-existing material. Copyright protection may furthermore be upheld for socio-economic reasons, such as the aim to compensate the author adequately.[85] What remains however, are uncertainties evolving from new technologies, like digitisation and networking which may herald an era of creative activity tending to confine itself to the rearrangement of pre-existing material. The independent creation of new works on the sole basis of unprotected ideas and principles may increasingly become the exception rather than the rule, thereby degrading authors in the traditional idealistic sense to 'mere contributors'.[86]

Against the backdrop of the aforementioned technical developments, Jaszi draws attention to a further problem. He contends that copyright law, 'with its emphasis on rewarding and safeguarding "originality", has lost sight of the cultural value of what might be called "serial collaborations" – works resulting from successive elaborations of an idea or text by a series of creative workers, occurring perhaps over years or decades'.[87] Indeed, it is to be admitted that the traditional picture of the creative genius working in isolation scarcely provides an adequate portrayal of reality any longer.[88] In the digital environment, intellectual works may also be the outcome of a process in which numerous people have taken part, thereby potentially contributing to the final copyrighted work in very different ways. In this framework, individual contributions may be blurred or even become unidentifiable. In its Green Paper, 'Copyright and Related Rights in the Information Society', the

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84 See Dreier 1994, 54-55, referring to Foucault, Barthes and Derrida.
85 See Dreier 1994, 55.
86 See Dreier 1994, 58.
87 See Jaszi 1992, 304, and 1994 62-63.
88 Cf. the picture drawn by Dreier 1994, 56.

EU Commission referred to the creation of multimedia products in this context. It maintained that 'more and more often the initiative comes from a legal person, in the form of an order for the work, with the same legal person bearing the artistic and financial responsibility'.[89]

The accentuation of an author's personality, as a further ramification of the natural law approach, is questionable as well. The picture of an author who realises his unique form of self-expression in the course of the creative process leading to a work, undoubtedly, is a fascinating one. That a work of art, on this basis, is conceived as a materialisation of its creator's unique personality, moreover, appears as a logical consequence – just like the notion that a bond unites the author with the object of his creation.[90] However, to draw this subtle picture of the relationship between the author and his creation inevitably begs the question of how many works that actually enjoy copyright protection really are capable of meeting the outlined elevated standard of creation.

Undoubtedly, there are certain works, the creation of which followed the maxim '*l'art pour l'art*'. The way in which they were made may indeed correspond to the delineated idealistic concept of an author who imprints his unique personality on the works he creates. In these cases, it is therefore justified to invoke the described line of reasoning. However, it also appears safe to assume that in the majority of cases, the personality of the author is not necessarily transferred to the copyrighted work. The doubt cast on the notion of authorship already points in this direction. Furthermore, it can hardly be overlooked that many copyrighted works resemble design products rather than works of fine art. The personality of the author is often subordinated to consumer tastes in order to ensure an intellectual product's commercial success. The error of lumping together the protection of literary and artistic works on the one hand and the protection of simple databases and computer programmes on the other,[91] further encourages the dismantling of the personality concept. The focus on the author's personality which forms an important facet of the natural law approach to copyright, thus, is far from having the potential for explaining the level of protection reached in international copyright law. Both pillars of the natural law theory, the concept of authorship and the emphasis laid on the author's personality, are therefore incapable of carrying the burden of the international copyright system alone.

Having recourse to utilitarian arguments instead, however, is not necessarily the right solution. There is a move afoot in the US which does not hesitate to throw into doubt the necessity of strong copyright protection. The critique brings the utilitarian foundation of the Anglo-American copyright system itself into focus. As the grant of exclusive rights is primarily understood as a means to enhance the benefits for

89 See EU Commission 1995, 25. The Commission, however, still considers it possible to uphold the concept of authorship. See EU Commission, ibid., 27.

90 Cf. Ulmer 1980, 110-111; Desbois 1978, 538.

91 Cf. Dietz 1985, 72-76; Wenzel 1991, 109-110.

society by offering authors an incentive to create,[92] any extension of copyright protection, so runs the argument, must be regarded as unjustified if it does not have the potential for spurring intellectual productivity.[93] The gradual improvement of the protection of intellectual works is considered incompatible with the utilitarian groundwork laid for copyright insofar as a new detriment to users is not outweighed by benefits accruing from a substantially increased level of creative productivity. In this vein, Sterk contended in the context of US copyright law that,

> 'although some copyright protection indeed may be necessary to induce creative activity, copyright doctrine now extends well beyond the contours of the instrumental justification. The 1976 statute and more recent amendments protect authors even when no plausible argument can be made that protection will enhance the incentive for authors to create.'[94]

This critical line of argument, however, is only a starting point. In fact, the utilitarian reliance on the motivating power of economic incentives as such is questionable. The idea that money can buy a high level of creative productivity is not quite clear. It virtually alleges that creative activity is a somewhat mechanical exercise that can be intensified gradually. An artist who creates a new work, however, is not unlikely to repudiate any profit motive. He will perhaps elaborate instead that the urge for creating works of art is in his very nature, and that he feels like being forced to spend time and effort on the creation of new works by his artistic disposition – irrespective of the promise of monetary reward. By the same token, Calandrillo has pointed out that alternative incentives to create literary or artistic works, besides the prospect of economic rewards, may be personal satisfaction or the desire for respect and esteem.[95] There is substantial reason to doubt that the productivity of authors who are attracted by the outlined alternative incentives, like scientific and artistic authors, will be spurred by offering or enlarging copyright protection. Against this background, it is hard to understand why advocates of a utilitarian approach to copyright do not hasten to give empirical evidence for the correctness of assuming that economic incentives do indeed encourage intellectual productivity. In 1970, Breyer already concluded that 'more empirical work and more thoughtful analysis is needed'.[96]

In the absence of empirical data, what remains is the possibility of venturing one's own best guess regarding the appropriateness of the utilitarian incentive

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92 See the previous subsection.

93 In particular, an extension of the period of copyright protection is traditionally challenged on these grounds. Cf. Breyer 1970, 324-325. Not surprisingly, the recent US Supreme Court decision Eldred v. Ashcroft, 537 US (2003), in which an extension of the term of US copyright protection was challenged, triggered a heated debate. See for an overview van Daalen 2003, 37. See in respect of the critique in particular the dissenting opinion of Justice Breyer, ibid., II C.

94 See Sterk 1996, 1197-1198.

95 Cf. Calandrillo 1998, 316-317.

96 See Breyer 1970, 351.

principle. It seems plausible to assume under these circumstances that economic incentives will have a positive effect solely on the production of works, the creation of which is moved into line with market requirements anyhow. If the aim to achieve commercial success, from the outset, lies at the core of an author's creative activity, it appears likely that the grant or extension of copyright protection will spur his productivity.[97] Therefore, the main beneficiary of the incentive rationale is ultimately the copyright industry, which is afforded the opportunity of flooding the market with products that are perfectly aligned with consumer tastes.[98] The industrial policy objective which is frequently brought advanced in the context of utilitarian arguments,[99] thus, is the most convincing argument in favour of strong copyright protection that can be linked with the incentive rationale.[100] Like the naturalistic authorship concept, however, the incentive rationale does not have the potential for supporting the international copyright system alone. It fails to explain why works, the creation of which cannot be spurred by economic incentives, such as academic and artistic works, are nevertheless protected.

This conclusion recommends a combination of the natural law approach with the utilitarian incentive rationale. Obviously, the two distinct lines of reasoning complement each other. Whereas the natural law argument explains why academic or artistic works are protected even though they would have been created regardless of the prospect of monetary reward, the incentive principle supports the protection of works which have been produced with an eye to commercial success. To interlock both arguments, emphasis can be laid on the cultural dimension of copyright protection.[101] Viewed from this perspective, copyright law can primarily be conceived of as a means to provide an optimal framework for cultural diversity.[102] Arguably, all kinds of works, regardless of whether or not their creation follows predominantly own and independent rules or is primarily due to the prospect of monetary reward, contribute to the attainment of this objective. In international copyright law, the cultural rationale plays a decisive role anyhow.[103]

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97 Cf. Calandrillo 1998, 323-326.

98 See the analysis conducted by Benkler 1999, 400-412. Cf. Netanel 1996, 333.

99 See the previous subsection.

100 Cf. Sterk 1996, 1244-1246.

101 Cf. the previous subsection.

102 Cf. Fisher 1998, 1212-1220, who espouses crafting intellectual property rights so as to promote a 'just and attractive culture'. Within a framework which emphasises the 'democracy-enhancing function' of copyright, similar objectives are brought to the fore by Netanel 1996, 288: 'Copyright provides an incentive for creative expression on a wide array of political, social, and aesthetic issues, thus bolstering the discursive foundations for democratic culture and civic association.' Cf. Netanel, ibid., 347-351.

103 Cf. Alikhan 1986, 428-431; Grosheide 1986, 136-139.

2.2 Justifications for Copyright Limitations

So far, nothing has been said about the scope of the exclusive rights granted. In the context of the three-step test, copyright limitations are of particular importance in this connection.[104] The term 'limitation' is used in this book as a generic term encompassing not only instances where a work may be used without authorisation and payment of remuneration, but also the case of so-called non-voluntary licences – statutory and compulsory licences.[105] The restrictions on protection inhering in the copyright system like the limited term of protection, the requirement of originality, the idea/expression dichotomy and the first sale doctrine, however, are not covered by the term 'limitation', as used here.[106] In article 13 TRIPs and 10 WCT, two different expressions are to be found in connection with the three-step test. These provisions refer not only to 'limitations' but also to 'exceptions'. This double reference makes sense against the backdrop of copyright's two legal traditions.

Broad exclusive rights which, in principle, encompass all conceivable ways of using a work, correspond to the natural law foundation of copyright emphasised in civil law countries. If certain uses are nevertheless exempted within this system, such derogation from the theoretically all-embracing right may arguably be called an 'exception' rather than a 'limitation'. Pursuant to the utilitarian incentive principle that features prominently in common law countries, by contrast, only rights strong enough to induce the desired production of intellectual works are to be granted. In this framework, certain areas might be carved out of the scope of exclusive rights from the very beginning and flexible open-ended provisions may be employed to offer room for unauthorised uses.[107] Hence, copyright appears to be limited and its restriction is not exceptional. The term 'limitation' characterises this situation more accurately than the term 'exception'. The use of both terms in articles 13 TRIPs and 10 WCT thus underlines that the application of the three-step test does not depend on the legislative technique.[108] Common law 'limitations' are subject to the test, just like civil law 'exceptions'. Bearing this in mind, it can be clarified that the generic term 'limitation', as used here, refers to both traditions of copyright law and their specific ways of imposing restrictions on the exclusive rights of authors.

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104 Other limitations on copyright, for instance, are the idea/expression dichotomy, the originality requirement, the first sale doctrine and the fact that copyright protection is only granted for a limited period of time.

105 Cf. for a more detailed description of these different notions Guibault 2002, 20-27. Ficsor proposes to refer to non-voluntary licences as 'limitations' and to understand the term 'exceptions' so as to cover uses that may be made without authorisation and payment of remuneration. See Ficsor 2002a, 257. This distinction is not supported here. In fact, it would just complicate matters. As will be discussed later in more detail in subsection 4.1.3, the three-step test is applicable to both types of limitations.

106 Cf. Guibault 2002, 15-16.

107 Cf. Guibault 2002, 17-20 and the introductory remarks made in section 2.1.

108 This will be discussed in more detail in subsection 4.1.3.

By and large, it can be stated that copyright limitations rest primarily on the defence of fundamental rights and freedoms, such as the guarantee of freedom of expression – including the right to receive information – and the right to privacy.[109] Certain public policy considerations, like the objective of fostering the dissemination of information, can be regarded as corollaries of freedom of expression values. Internationally, the importance of limitations serving educational purposes has also been recognised at an early stage of development. At the time of the inception of the Berne Convention, Numa Droz who presided over the 1884 diplomatic conference enunciated in his closing speech not only that 'limitations on absolute protection are dictated, rightly in my opinion, by the public interest' but also advanced that the 'ever-growing need for mass instruction could never be met if there were reservation of certain reproduction facilities, which at the same time should not generate into abuses'.[110] The 'need for mass instruction' again gained momentum after the Second World War. The collapse of colonial structures, bringing in its wake the birth of independent developing countries, inevitably raised the question of how to convince these countries of the advantages of taking on obligations under the Berne Convention. The fact that the newly independent states faced enormous problems as regards mass education played a decisive role in this context.[111] Ultimately, the 1971 Paris Revision Conference sought to react to the specific needs of developing countries. Approval was given to an appendix to the 1971 Paris Act of the Berne Convention which provides for special faculties as to translations and reproductions of works of foreign origin.[112]

Limitations enabling the unauthorised use of copyrighted material during religious or official celebrations,[113] and for administrative, parliamentary or judicial proceedings give evidence of further objectives underlying copyright limitations. They reflect the aim to promote religious activities and to hinder copyright from interfering with the functioning of a state's legislative, executive and judicial bodies. Limits are moreover set to authors' rights in order to regulate industry practice and competition.[114] The exemption of ephemeral recordings made by broadcasting organisations and compulsory licences concerning broadcasting rights and recordings of musical works can be perceived as examples of this type of limitation.[115] In the field of computer programs, reverse engineering provisions

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109 See for a detailed analysis of these fundamental rights and freedoms Guibault 2002, 29-56.

110 See Ricketson 1999, 61, who quotes the closing speech by Numa Droz. Article 10(2) of the 1971 Paris Act of the Berne Convention permits the free utilisation of literary and artistic works by way of illustration in publications, broadcasts or sound and visual recordings for teaching.

111 Cf. Alikhan 1986, 427-431.

112 Cf. Ulmer 1971, 427-434.

113 The so-called 'minor reservations doctrine' which is an implied limitation recognised under the Berne Convention permits copyright limitations of this kind. See subsection 3.1.1.

114 Cf. Guibault 2002, 56-68; Hugenholtz 1996, 94-95; Lucas 1998, 178-185.

115 See articles 11*bis*(2), 11*bis*(3) and 13(1) BC. Guibault 2002, 56-65, also discusses press reviews, as permitted under article 10(1) BC, in this context.

which allow the decompilation of computer programs to achieve interoperability reflect the objective to ensure free competition.[116]

It is beyond the scope of the present inquiry to discuss all conceivable justifications of copyright limitations. As far as necessary, attention will be devoted to individual facets thereof in the course of the ensuing discussion of the three-step test. For the present purpose of circumscribing the field of application of the three-step test, the examination can be confined to certain elements which have a deep impact on the balance between grants and reservations of copyright law. Freedom of expression by far is the most powerful justification of copyright limitations. Relevant concepts seeking to justify copyright limitations will be inspected closely in the ensuing subsection 2.2.1. Subsequently, the related public policy objective to promote the dissemination of information will be discussed in subsection 2.2.2. In this context, the problem of how to justify the exemption of personal use in the digital environment will be raised. To complete this discussion, the fundamental right to privacy will be brought into focus in subsection 2.2.3. Finally, it will be underlined in subsection 2.2.4 that copyright limitations also have a part to play in the democracy-enhancing function of copyright.

2.2.1 FREEDOM OF EXPRESSION AND INFORMATION

Freedom of expression and the right to receive information can be characterised as concomitant fundamental guarantees undergirding the process of communicative interaction in a democratic society. In the Handyside case, the European Court of Human Rights, for instance, stated unequivocally that 'freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man'.[117] The fundamental guarantee of freedom of expression has two facets. On the one hand, the freedom to seek and receive information must be ensured. It is an indispensable prerequisite for the formation of an opinion. On the other hand, the freedom to impart information must be guaranteed, which allows the final communication once an opinion has been formed.[118]

To conceive of freedom of expression as a concept which enshrines the right to receive information, thus, has the corollary that not only the concerns of the communicator who wants to impart information are considered, but also those of recipients of information.[119] Like two sides of a coin, both aspects of freedom of expression are accordingly reflected in international legal instruments concerning human rights. The Universal Declaration of Human Rights enunciates in article 19

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116 Cf. Guibault 2002, 65-68. At the core of this regulatory scheme for computer programs lies the idea/expression dichotomy of copyright law which has degenerated into an instrument of market regulation in the field of functional expression. Cf. Kerever 1991, 11-15.

117 See the Handyside case, E.C.H.R. Judgement of December 7, 1976, Series A No. 24, § 49.

118 Cf. van Dijk/van Hoof 1998, 558.

119 See Lucas 1998, 182.

that 'everyone has the right to freedom of opinion and expression' and recognises that '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'.[120] Similarly, article 10 of the European Convention on Human Rights underscores that 'everyone has the right to freedom of expression' and clarifies that 'this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'.[121]

To assess the influence which the guarantee of freedom of expression may have on copyright law, an analysis conducted by Benkler can be consulted. His concept does not concern single cases in which it appears advisable to restrict copyright in favour of freedom of expression. Instead, his line of reasoning refers to the public domain as such which, pursuant to his definition,[122] encompasses all kinds of privileged uses that are 'commonly perceived as permissible absent special circumstances'.[123] On this basis, Benkler states that a 'society with no public domain is a society in which people are free to speak […] only insofar as they own the intellectual components of their communication'.[124] Accordingly, he posits that freedom of expression requires a robust public domain and recalls the detriment to users flowing from copyright protection:

> 'An increase in the amount of material one person owns decreases the communicative components freely available to all others… Only an increase in the public domain […] generally increases the freedom of a society's constituents to communicate.'[125]

In this line of argument, his examination of the conflict between copyright and freedom of expression culminates in the assumption that each grant or strengthening of authors' rights will inevitably bar members of society from using or communicating information under certain circumstances.[126] The further conclusions drawn by Benkler on this basis are of particular interest. In the previous section, an approach to copyright has been heralded which seeks primarily to ensure cultural diversity.[127] Undoubtedly, 'the widest possible dissemination of information from diverse and antagonistic sources'[128] plays a decisive role in this context.

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120 Cf. also article 19 of the International Covenant on Civil and Political Rights.

121 See also article 11 of the Charter of Fundamental Rights of the European Union.

122 Functionally, he defines the public domain as 'the range of uses of information that any person is privileged to make absent individualized facts that make a particular use by a particular person unprivileged'. See Benkler 1999, 362.

123 See Benkler 1999, 358 and 363.

124 See Benkler 1999, 358.

125 See Benkler 1999, 393.

126 Cf. Benkler 1999, 393.

127 See subsection 2.1.3.

128 Cf. the formula of the US Supreme Court which is also quoted by Benkler 1999, 358.

Copyright should contribute to the exchange of diverse and different perceptions of the world. In this connection, Benkler contends that an expansion of copyright protection – which automatically entails an enclosure of the public domain – is conducive to diversifying information only if stronger property rights encourage the activities of many small producers. If an expansion, by contrast, leads to concentration among commercial producers, it may stymie cultural diversity rather than fostering it.[129] His ensuing analysis suggests that, in fact, stronger protection is not unlikely to have an adverse effect on the activities of producers who do not pursue market-oriented strategies and may therefore be an important source of cultural diversity. However, it may indeed lead to consolidation among organisations devoted to commercial information production which have already aggregated a large inventory of owned information, the value of which is increased.[130] Hence, Benkler concludes that the

> 'adverse effects on small-scale production relative to large-scale production […] challenges the argument that copyright fosters diversity of information producers and products… Too heavy a focus on the market does not "free" information production. Rather, it concentrates production in the hands of a small number of commercial organisations.'[131]

The specific merit of Benkler's approach, therefore, lies in emphasising that not only the grant of exclusive rights is central to realising the objective to support a wide variety of cultural activities, but also sufficient breathing space for freedom of expression.[132] Whether it is appropriate to conceive of copyright and freedom of expression as antagonistic principles, however, is questionable. Certain rules of copyright law, at least, create space for free speech rather than imposing restrictions. The way in which Melville B. Nimmer embarked on the exploration of the balance between copyright and freedom of expression, for instance, lends weight to the mediating effect which the idea/expression dichotomy has on a potential conflict between copyright and freedom of expression. Consequently, Nimmer's approach nuances the picture drawn by Benkler.[133] He stresses that it is particularly due to the idea/expression dichotomy that copyright is hindered from interfering with the guarantee of free speech: 'the market place of ideas would be utterly bereft, and the democratic dialogue largely stifled if the only ideas which might be discussed were those original with the speakers.'[134]

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129 Cf. Benkler 1999, 400.

130 See the analysis conducted by Benkler 1999, 400-408.

131 See Benkler 1999, 411. Cf. Benkler 2001, 97-105.

132 Cf. as regards the late recognition of the potential conflict between copyright and free speech in Europe Hugenholtz 2002, 248-250.

133 It is to be noted that Benkler 1999, 386-390, also refers to the mediating effect which the idea/expression dichotomy has on the conflict between copyright and freedom of expression. However, it does not become a prominent feature of his own approach.

134 See Nimmer 1970, 1189.

By and large, the principle that authors are free to build upon the ideas of their predecessors, as long as their particular selection and arrangement and the specificity in the form of their expression is not copied, thus, does not only secure that creative processes remain possible, but also that free speech is not unduly curtailed.[135] However, Nimmer also identifies certain areas of overlap where even the idea/expression dichotomy is rendered incapable of reconciling copyright and freedom of expression: 'To the extent that a meaningful democratic dialogue depends upon access to graphic works generally, including photographs as well as works of art, it must be said that little is contributed by the idea divorced from its expression.'[136] He concludes that, in particular for the purpose of news reporting, it may be insufficient to enjoy the freedom of summing up all the facts. In certain cases, it will be necessary to have recourse to copyrighted material, like photographs, to inform the public adequately.[137] In general, it can therefore be inferred from Nimmer's analysis that the concentration of exclusive rights in the hands of the authors encroaches upon the guarantee of freedom of expression in circumstances which necessitate the inclusion of a work's expressive core.[138]

Hence, strong copyright protection does not necessarily threaten the fundamental guarantee of freedom of expression. An expansion of authors' rights need not entail a curtailment of free speech. By contrast, the potential harm flowing from copyright which Benkler has brought into focus can be minimised by imposing certain restrictions on authors' rights. These limitations must be carefully drafted so as to permit the free use of copyrighted material whenever a reference to the mere idea underlying a work is insufficient. If the guarantee of freedom of expression requires the free use of a work's expressive core, an appropriate set of copyright limitations must secure that the relevant forms of use are exempted from the authors' control.[139]

Nimmer's analysis suggests that privileges in favour of the press play a decisive role in this connection. He refers to a situation requiring the use of a work's expressive core to inform the public properly. Internationally, considerable deference has been given to this sensitive area. Article 10*bis*(2) BC allows the free use of literary or artistic works seen or heard in the course of a current event for the purpose of reporting the event. Similarly, article 2*bis*(2) BC seeks to facilitate the work of the press. By virtue of this provision, lectures, addresses and other works of the same nature which are delivered in public may freely be reproduced by the press, broadcast and communicated to the public. Article 2*bis*(1) BC, moreover, permits to exclude political speeches and speeches delivered in the course of legal proceedings from the protection granted by the Berne Convention altogether. Even

135 Cf. Nimmer 1970, 1190-1193. However, see the critique by Hugenholtz 1989, 166-167.

136 See Nimmer 1970, 1197.

137 Cf. Nimmer 1970, 1198-1200.

138 Cf. Benkler 1999, 386-387; Guibault 2002, 30-31; Macciacchini 2000, 683-686.

139 However, see Hugenholtz 1989, 168-170, asserting that the traditional set of limitations may turn out to be insufficient. Cf. Geiger 2002a, 330-333; Griffiths 2002, 256-264; Birnhack 2003, 29 and 32-33.

though the press is not explicitly mentioned in this provision, it is undoubtedly one of its main beneficiaries. Finally, article 10*bis*(1) affords the press the free reproduction, broadcasting and communication to the public of articles or broadcast works on current economic, political or religious topics.

Besides press privileges, limitations which exempt the making of quotations and a work's use for the purpose of parody constitute a focal point in the context of freedom of expression. The academic author and the literary critic quoting a work must ensure that the borrowing is reproduced precisely. Therefore, a quotation typically includes the expressive core of copyrighted material. By the same token, the parodist depends on the use of a work's expressive uniqueness to make the target of his mockery identifiable. The guarantee of freedom of expression, thus, necessitates copyright limitations under these circumstances. This necessity has been realised throughout both legal traditions of copyright law. It is reflected in article 10(1) BC and has been underlined in numerous court decisions – irrespective of whether the court followed the civil law or the common law approach to copyright.[140] To give an example, the ruling of the German Federal Constitutional Court, the Bundesverfassungsgericht, concerning quotations made by Heiner Müller in his play 'Germania 3 Gespenster am toten Mann' can be brought into focus.

Before embarking on a description of the 'Germania 3'-decision of the German Federal Constitutional Court, a comment on the German copyright system is appropriate to lay the groundwork for the ensuing discussion. In article 14(2) of the German Grundgesetz (GG), it is stated that the use of property shall also serve the public good.[141] This constitutionally grounded principle of the 'Sozialbindung' of all property is understood to delimit the discretion of the legislator who has to determine the scope of property rights by virtue of article 14(1) GG.[142] He is expected to establish a balance between the opposite interests deserving protection, while tracing the conceptual contours of property rights.[143] According to the jurisprudence of the Federal Constitutional Court, the exclusive property rights in works of the intellect are guaranteed and safeguarded by article 14 GG.[144] Therefore, the notion of the 'Sozialbindung', laid down in article 14(2) GG, encompasses the field of copyright law. This implies that the public interest mitigates the strict alignment of German copyright law with the author and his interests, which is typical of the civil law approach to copyright.

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140 Cf. the overview given by Guibault 2002, 30-47. See in respect of decisions of European courts Hugenholtz 2002, 253-261.

141 Article 14(2) GG reads as follows: 'Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen.' Cf. Geiger 2002b, 30-31, tracing back this notion to the writings of Kant, von Gierke and Kohler. See in respect of the various functions which property has in the German legal tradition Kirchhof 1987, 1650-1651. The notion of social commitment of intellectual works is rejected in France. Cf. Wistrand 1968, 41-42; Strowel 1994, 250.

142 See Papier 1994, 157, who provides a survey of decisions of the German Federal Constitutional Court (Bundesverfassungsgericht). Article 19(1) GG must also be observed.

143 See Papier 1994, 157; Kreile 1993, 256-257.

144 See the decision 'Kirchen- und Schulgebrauch', BVerfGE 31, 229 (240-241); Papier 1994, 111.

Nevertheless, the Federal Constitutional Court noted that the author need not endure greater exposure to copyright limitations than is required to achieve the socially valuable ends at stake.[145] The inclusion of the public interest thus does not serve as a means to devise a copyright system that yields maximum profits for the good of society.[146] Rather, the concept of the 'Sozialbindung' protects certain isles of user privileges from inundation by the preponderance of authors' exclusive property rights.

With regard to § 51 No. 2 of the German Copyright Act which permits quotations from literary works, the Court underscored the particular importance of this room for free uses in the decision on Heiner Müller's play 'Germania 3 Gespenster am toten Mann'. Müller embedded in his play passages taken from works by Bertolt Brecht. The holders of the rights in Brecht's works accordingly sued for copyright infringement. They contended that Müller had overstepped the boundary lines drawn in § 51 No. 2. Müller's widow and the play's publisher, by contrast, invoked Müller's freedom of artistic expression. They asserted that the quotations were indispensable for the discussion of Brecht's political position, as intended by Müller.[147] The Court, thus, had to decide whether Brecht's copyright inhibited Müller from freely expressing himself artistically. In order to strike a proper balance between the different constitutional rights at stake, it emphasised that copyright limitations must be construed in the light of the freedom of artistic expression, as prescribed in article 5(3) GG.[148] The Court maintained that at least when the possible economic harm flowing from a quotation cannot be perceived as significant, the second author's interest in using a pre-existing work prevails over the exploitation interests of his predecessor.[149] The decision shows how courts seek to provide sufficient breathing space for freedom of expression.[150]

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145 See BVerfGE 79, 29 (40-41). Cf. Kreile 1993, 259-260; Söllner 1994, 372-374.

146 Cf. Dreier/Senftleben 2001, 107-111.

147 See BVerfG, Zeitschrift für Urheber- und Medienrecht 2000, 868.

148 See BVerfG, Zeitschrift für Urheber- und Medienrecht 2000, 869: 'Dem Interesse der Urheberrechts-inhaber vor Ausbeutung ihrer Werke ohne Genehmigung zu fremden kommerziellen Zwecken steht das durch die Kunstfreiheit geschützte Interesse anderer Künstler gegenüber, ohne die Gefahr von Eingriffen finanzieller oder inhaltlicher Art in einen künstlerischen Dialog und Schaffensprozess zu vorhandenen Werken treten zu können.' Cf. von Becker 2000, 864-865.

149 See BVerfG, Zeitschrift für Urheber- und Medienrecht 2000, 869. Cf. Metzger 2000, 925.

150 See for further examples Guibault 2002, 30-40; Hugenholtz 2002, 253-261. In the realm of the Anglo-American copyright tradition, the decision of the US Supreme Court Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985) is of particular importance in this context. See for a more detailed discussion of this decision subsection 4.5.3.3. It is noteworthy that the described 'Germania 3'-decision of the German Constitutional Court is not unlikely to foreshadow a cautious departure from the continental-European dogma that copyright limitations must be interpreted restrictively. See Metzger 2000, 933; Kröger 2002, 18; Hugenholtz 2002, 251. Cf. in general Bornkamm 1996, 650-652. See also the decision 'Elektronische Pressespiegel' of the German Federal Court of Justice, Gewerblicher Rechtsschutz und Urheberrecht 2002, 965-966. Cf. as to the latter decision Dreier 2003, 478; Hoeren 2002, 1023.

In sum, it can be concluded that freedom of expression establishes a firm basis for copyright limitations. It ensures that information diversity is not stifled by excessive copyright protection. Functionally, the guarantee of freedom of expression complements the idea/expression dichotomy known in copyright law. Whenever recourse to the mere facts presented in a copyrighted work is insufficient, the freedom of expression of the speaker can be asserted to allow for the use of a work's expressive core. Typically, this situation arises in the context of news reporting and the use of a work for the purpose of quotation, criticism or parody.

2.2.2 THE DISSEMINATION OF INFORMATION

Limitations which serve the purpose of disseminating information offer members of society the opportunity of receiving the information enshrined in works of the intellect. For this reason, they can be understood as exponents of freedom of expression values.[151] The traditional set of limitations promoting the spread of information – privileges in favour of libraries and archives – will not be examined here in detail.[152] Instead, a phenomenon must be brought into focus which suggests that the importance of the public policy objective to disseminate information will increase dramatically in the near future. It can hardly be overlooked that the evolving information society gives rise to further challenges in respect of the spread of information. As information is transformed into the raw material of economic activity and the origin of wealth in the information society, access to a broad and diverse supply of information is of paramount importance for its citizens.[153] In future, copyright law is not unlikely to be primarily understood as a means to ensure the just distribution of information resources. To deprive segments of the population of information would inevitably raise the spectre of a 'digital divide' of society that might have serious social and political consequences.[154] Against this background, it is not unlikely that the public policy objective to disseminate information will become a central justification for copyright limitations in the digital environment.[155]

A harbinger of this development already occupies centre stage. In the pre-digital era, personal use privileges which exempt the making of private copies could be defended on the grounds that it would be impossible to exert control over the countless number of personal uses anyway. Besides constitutional rights and public policy considerations, market failure has accordingly often been deemed an

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151 The guarantee of freedom of expression comprises not only the freedom of imparting information but also the freedom of seeking and receiving information. Cf. van Dijk/van Hoof 1998, 558. See the previous subsection.

152 Cf. the overview given by Guibault 2002, 69-77.

153 Cf. Lyman 1998, 1069; Dreier/Senftleben 2001, 117-120.

154 Cf. Elkin-Koren 1997, 111-113; Sporn 2000, 540-541. Lucas 1998, 183-184, calls into doubt that these possible developments will necessitate the recalibration of copyright's balance.

155 See, however, the critical remarks by Lucas 1998, 184.

additional basis for limitations and, in particular, for personal use privileges.[156] The market failure approach permits the introduction of copyright limitations in cases where the market is hindered in its efforts to function as a forum for desired consensual transfers of intellectual resources, for example, by prohibitively high transaction costs.[157] Indeed, one of the reasons for the maintenance of private copying privileges in the pre-digital world, frequently supported by the introduction of a home taping levy on blank cassettes and recording equipment, can be seen in the insuperable difficulty of licensing and controlling the myriad individual uses which are encompassed by the user privilege to make copies for personal use.[158]

Market failure, however, has no justificatory substance in an ethical or moral sense. As all concepts that are grounded in nothing but certain circumstances which are qualified as 'failure', the market failure approach is doomed to fail as soon as the abuse can be remedied. Therefore, it is not surprising that technological measures which allow the monitoring of the details of individual uses irrespective of their total number in the digital environment,[159] have unveiled the Janus face of the market failure rationale. Nowadays, it serves more as a strong argument for those espousing the abridgement of copyright limitations than as a basis for their fortification.[160] In light of this development, personal use privileges are on the defensive. The recourse to market failure principles, however, is anything but conducive to recalibrating their scope in the digital environment. It would lead directly to their abolition. Hence, if privileges for personal use shall successfully be sheltered from erosion, another basis must be found which is capable of filling the justificatory vacuum caused by technical developments.[161]

The public policy objective to disseminate information is suitable for accomplishing this task. Undoubtedly, personal use privileges have the potential for contributing substantially to the dissemination of information. A limitation permitting people to learn of intellectual works by taking autonomous decisions on which kind of information they want to access, can be regarded as a powerful decentralised instrument for spreading information. Unrestrained access to literary and artistic productions enables individuals to participate in the intellectual life of society. They allow each individual member of society to consult works of the intellect in order to accumulate a personal store of information. Hence, personal use privileges help to reduce the danger of a 'digital divide' of society.[162]

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156 Cf. Guibault 2002, 78-87.

157 See Gordon 1982, 1614-1615. High transaction costs are seen as the main reason for the appearance of market failure. Cf. Merges 1997, 130-131; Elkin-Koren 1996, 291.

158 Cf. Kirchhof 1988, 27-28; Guibault 2000, 140; Lucas 1998, 177.

159 See for descriptions Koelman/Helberger 2000, 166-169; Wand 2001, 10-22; Bechtold 2002, 19-145; Hugenholtz/Guibault/van Geffen 2003, 3-9.

160 Cf. Bell, 1998, 583; Merges 1997, 132.

161 Cf. Reinbothe 2000, 257.

162 Cf. Elkin-Koren 1996, 265-269.

To justify personal use privileges in the digital environment, it is thus advisable to replace the market failure rationale that has lost its pseudo-justificatory effect with the public policy objective to disseminate information. This change does not only fill the arisen justificatory vacuum but also underlines that personal use privileges have a part to play in the appropriate distribution of information resources in the information society. Besides limitations in favour of libraries and archives, the public policy objective to disseminate information, thus, also supports limitations permitting unauthorised personal uses of copyrighted material.

2.2.3 THE RIGHT TO PRIVACY

The fundamental right to privacy prevents copyright holders from exerting their exclusive rights in the intimacy of the private circle surrounding each individual. Viewed from a historical perspective, the exploitation of a work of the intellect has always stopped short of intruding into the private sphere. The personal use and enjoyment of intellectual works within the private realm escaped the authors' control on the condition that there was no profit motive. The impact of private use on a work's exploitation has traditionally been negligible.[163] In consequence, the exemption of the private sphere is often reflected directly in provisions granting an exclusive right. The right to perform and recite in public, or to communicate a work to the public that can be found in articles 11(1), 11*bis*(1), 11*ter*(1), 14(1)(ii) and 14*bis*(1) BC as well as in article 8 WCT, bear witness to provisions which solely refer to activities carried out in public.

In the context of the reproduction right, the right to privacy can be invoked as a justification for the exemption of private copying.[164] As already explained in the previous subsection, personal use privileges of this kind are on the defensive in the digital environment. They will be eroded if the justificatory vacuum resulting from the inapplicability of the market failure rationale cannot be filled. Against this backdrop, the public policy objective to disseminate information has already been asserted in favour of personal use privileges.

As the envisioned monitoring techniques are designed so as to allow the precise recording of the particulars of private uses, privacy issues are raised in respect of personal data portraying the consumption patterns and on-line behaviour of individuals.[165] The concept of a right to privacy which releases the use and enjoyment of intellectual works in the private sphere from the authorisation of the author accordingly gains in importance in the evolving information society just like the right to receive information. The defence of personal use privileges, thus, can be

163 See Guibault 2000, 131-132.

164 See Hugenholtz 1996, 94; Buydens 2001, 444.

165 Cf. Bygrave/Koelman 2000, 104-108; Guibault 2002, 54-56; Cohen 2003, 576-588. In the US, it has been proposed to give individuals property rights in their personal data. Cf. Samuelson 2000, 1170-1173.

based on two pillars. On the one hand, it can be asserted that limitations of this kind are of crucial importance for disseminating information. In this line of reasoning, they can be qualified as a tribute paid to the constitutionally guaranteed freedom of seeking and receiving information.[166] On the other hand, it can be argued that the right to privacy requires the maintenance of personal use privileges.

2.2.4 THE ENHANCEMENT OF DEMOCRACY

To complete the discussion of justifications for copyright limitations, an aspect of a horizontal nature can finally be brought into focus. The democratic paradigm, as delineated by Netanel, constitutes a comprehensive concept for shaping copyright law so as to support a democratic civil society. In the context of the present inquiry, this concept is of particular interest because of the importance Netanel attaches to copyright limitations. The background to his espousal of the democracy-enhancing function of copyright is in part formed by the economic approach to copyright that leans heavily on neo-classical economic property theory and has already been described in subsection 2.1.2. Neo-classical property theory entails the necessity to renounce a flourishing public domain bolstered by a wide array of exempted uses. Copyright limitations, such as fair use, are affected by the dramatic reduction of transaction costs in the digital environment instead.[167]

Reacting against the neo-classical approach, various scholars have sought to shelter long-standing copyright limitations and, in particular, fair use from the economic purism underlying the neo-classical market model. The critics strive for the redefinition of the market failure rationale by interpolating socially valuable market externalities.[168] Julie Cohen, for instance, elaborated that

> 'market failure, properly understood, encompasses not only cases in which the parties fail to transact, or find it too expensive, but also cases in which consensual, relatively costless transactions nonetheless fail to produce particular outcomes that have been defined to be socially valuable. When market institutions fail, use of the public process of lawmaking to reshape them is entirely appropriate. Market institutions are in and of human society, not a fixed axis around which human society revolves.'[169]

In this vein, the democratic paradigm developed by Netanel 'makes clear that while copyright may operate *in* the market, copyright's goals are not *of* the market. In providing a theoretical framework for a strong, but limited copyright, the democratic paradigm aims to reinvigorate copyright's role in the "preservation of a

166 Cf. the previous subsection.
167 Cf. Gordon 1982, 1615; Bell 1998, 583; Merges 1997, 132.
168 Cf. Cohen 1998, 551-555; Loren 1997, 48-56; Netanel 1996, 341.
169 See Cohen 1998, 555.

free Constitution".'[170] Netanel thus envisions strong but not unbridled copyright protection. In particular, copyright shall be subjected to state involvement insofar as necessary for fulfilling a democracy-enhancing function. It is seen as 'a limited proprietary entitlement through which the state deliberately and selectively employs market institutions to support a democratic civil society'.[171] Netanel maintains that 'no less importantly, by limiting the scope of that proprietary entitlement, copyright constrains owner control over expression, seeking to preserve rich possibilities for critical exchange and diverse reformulation of existing works'.[172]

On this basis, he elaborates that 'copyright will have to be extended to many digital uses' in order to 'provide a robust public subsidy for authors' autonomous creative expression'.[173] In respect of online browsing and personal downloading, he takes the view that the extension of copyright should 'depend on a measured assessment of the extent to which such activities, if permitted on a mass scale, would erode existing copyright markets'.[174] Insofar as collective licensing organisations are coming to administer private use licences, his democratic paradigm would 'prescribe a system of state regulation to ensure that user licence fees remain within reasonable limits'.[175] Transformative uses should 'either qualify as a fair use, with the burden on the plaintiff to show market substitution, or be subject to some form of compulsory licence'.[176] In sum, Netanel thus seeks to soften the outcome of pure economic theory by superimposing a democratic paradigm serving as a corrective.[177] His democracy-enhancing theory, on its merits, has a conciliatory character. The importance of copyright protection is underlined without losing sight of the benefits accruing from certain user privileges. It yields the important insight that not only copyright protection but also an appropriate set of limitations contributes substantially to the enhancement of democracy. This aspect forms an important additional justification for copyright limitations.

2.3 Copyright's Delicate Balance

After discussing the reasons for vesting authors with exclusive rights and devoting attention to justifications supporting the exemption of certain uses, the time is ripe for focusing on the field of application of the three-step test – copyright's delicate balance itself. At the outset, it is to be noted that the balance between grants and

170 See Netanel 1996, 341 (emphases in the original text).
171 See Netanel 1996, 347.
172 See Netanel 1996, 347.
173 See Netanel 1996, 373.
174 See Netanel 1996, 375.
175 See Netanel 1996, 376.
176 See Netanel 1996, 381.
177 See Netanel 1996, 341: 'The democratic paradigm is hostile neither to economic analysis nor to neoclassicist insights regarding the operation of copyright markets.'

reservations established in copyright law is anything but etched in stone.[178] In particular, this is true in the digital environment. Digital technology bestows upon users of copyrighted material a spectacular improvement of the state of the copying art.[179] It thereby alters copyright's balance because an improvement of copying techniques enhances the possibilities of taking advantage of exempted uses. Private copying may serve as an example. While analogue innovations like home taping and sound recordings could be cushioned through the payment of equitable remuneration,[180] the further improvement of reproduction techniques in the digital environment is often perceived as a threat carrying the potential to erode the authors' right of reproduction altogether.[181] The response to developments of this kind in favour of the users of intellectual resources is the application of technological measures allowing right holders to monitor the particulars of individual uses irrespective of their total number.[182] In combination with contractual agreements, such as shrink-wrap or click-wrap contracts, this reaction once again shakes the copyright balance, this time in favour of the authors.[183]

Therefore, the copyright balance can be characterised as shifting. It is embedded in a complex matrix established by copyright, contract and technical developments.[184] Among the elements of this triad, copyright law plays a decisive role. It reflects the delicate balance shaped by the legislator in accordance with his assessment of the opposite interests of authors and users.[185] The remaining elements, contract and technological advances, however, have the potential to disfigure the initial balance beyond recognition. Against this backdrop, the specific merit of the abstract regulatory framework laid down in the three-step test comes to the fore. In times of upheavals within the copyright system, it provides a set of rules which is not affected by shifts within the matrix due to its abstract nature and allows therefore the recalibration of copyright's balance.[186] Viewed from this perspective, the three-step test is of paramount importance in the digital environment.

However, the test can hardly be put to good use if no guidelines can be given as to where the line between grants and reservations of copyright should be drawn. The central question with regard to copyright's shifting balance therefore concerns its correct adjustment. The position between excessive authors' rights protection on

178 Cf. Nimmer/Brown/Frischling 1999, 44; Hardy 1995, 1-3.

179 See Gass 1999, 815-816; Herrigel 1998, 254; Hardy 1995, 3.

180 Cf. Kirchhof 1988, 41-42; Krüger-Nieland 1985, 185-189.

181 Cf. Elkin-Koren 1996, 285-286; Dreier 1997, 141-142 and 165; Lucas 1998, 166-168.

182 Cf. Clark 1996, 139-145; Koelman 2000, 272.

183 Cf. Dreier/Senftleben 2001, 84-120; Hugenholtz 2000a, 77-90.

184 See Hardy 1995, 1-3; Nimmer/Brown/Frischling 1999, 44; Wadle 1987, 203.

185 This assessment, however, often bears little resemblance to a rational process in which the interests at stake are balanced objectively due to the influence of strong interest groups. See for a more appropriate but idealistic conception Wiese 2002, 394-395.

186 Cf. Senftleben 2003, 12-13.

the one hand and piracy in the guise of user privileges on the other must necessarily be determined which reflects a proportionate balance between grants and reservations and, thus, can serve as a reference point for the application of the three-step test. So far, rationales of copyright protection and several justifications for limitations have been discussed. Surveying only the few fragments extracted from the much more complex debate here, however, one is already left to wonder whether a clear response to the question of where to draw the line between grants and reservations of copyright can ever be expected. Depending on which argument in favour or against copyright protection is emphasised, the grant of excessive, strong, moderate and minimal protection alike comes within reach. In the following it will therefore be attempted to circumscribe the necessary reference position for the application of the three-step test by introducing the notion of intergenerational equity. It sheds a different light on copyright's delicate balance and points a sure route through the thicket of arguments. To develop this additional line of reasoning, Locke's elaboration of a natural right to property in his Second Treatise on Government is to be revisited.

As already elaborated earlier, Locke envisions an unrestricted supply of resources in a world of abundance and individuals enjoying the freedom to use that earth's plenty. In this world, so runs Locke's axiom, whenever one mixes his effort with the raw material to be found, he acquires a property right excluding the right of others.[187] As also pointed out above, a certain degree of correspondence with Locke's world of abundance can hardly be denied within the realm of copyright. Later authors are free to ground their own creative activities in the creations of their predecessors without diminishing the intellectual world's supply of ideas and individual expression because of the 'public good' character of the encompassed works.[188] However, the line between the world of copyright and Locke's world of abundance is often drawn too rashly. Guibault, for instance, tersely concludes: 'Although Locke was referring to physical property, his theory undeniably applies to intellectual property.'[189] By hastening to stress the approximation of the world of intellectual works to the one imagined by Locke, however, certain deviations from the shining theoretical example which are of particular interest in the context of copyright's balance inevitably escape one's notice. It is thus advisable to ask the question to which extent the copyright universe of ideas and individual expression really resembles the world in which Locke placed his labour theory.

At first, it is to be noted that, necessarily, a public domain must be interpolated that calls the immeasurable supply of accessible works into existence in order to justify the characterisation of the world of intellectual works as close to the notion

187 See Locke 1698, book II chapter 5 § 27.
188 Cf. Weinreb 1998, 1224; Fisher 1988, 1700.
189 See Guibault 2002, 9.

of a world of abundance.[190] Would all former creators hide the fruit of their labour from others who wish to use and enjoy it, the comparison would inevitably be doomed to fail.[191] No literary or artistic work would ever leave the private sphere and contribute to the common store of ideas and expression. If authors decide to make their intellectual works available to the public, however, the problem is not solved automatically. By contrast, the copyright protection conferred on the authors constitutes a further obstacle hindering the comparison of the world of ideas and individual expression with Locke's world of abundance. Undoubtedly, Locke's labourer does not need to pay before turning to the task of acquiring property. Therefore, a social element in the shape of certain rules that regulate access to and use of literary and artistic works has to enter the equation.[192]

Hence, it can be concluded that it is particularly due to the restrictions imposed on copyright that the realm of literary and artistic productions resembles a world of abundance. The idea/expression dichotomy frees the myriad of ideas underlying copyrighted works from the control of the authors. The fact that copyright protection expires after a certain period of time secures moreover that the individual expression embodied in a work of the intellect becomes a part of the public domain as well. During the limited period for which protection is granted, exemptions from authors' rights, finally, ensure that not only 'antiquated' works contribute to the intellectual world of abundance but also, to a certain extent, new and fresh material. The comparison of copyright with the world of Locke's labour theory rests therefore primarily on three pillars: the idea/expression dichotomy, the expiration of protection and copyright limitations. The inevitable introduction of these elements, which are deviations from the theoretical example given by Locke,[193] is of paramount importance with regard to a further proviso of Locke:

> 'Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is *enough and as good left in common* for others.'[194]

Obviously, Locke did not intend to encourage the plundering of his world of abundance. The natural right to property can only be acquired on the condition that other labourers will find a world of abundance as well. In the world of intellectual works, an author can easily fulfil the task of leaving 'enough and as good' in common with respect to those parts of his work that are based on material to which

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190 In this context, the public domain is understood to comprise not only works that are not or no longer protected by copyright law, but also the range of privileged uses that are exempted from the authors' control by copyright limitations.

191 Cf. Gordon 1993, 1556-1557.

192 Cf. Gordon 1993, 1557-1558.

193 Restrictions, such as the idea/expression dichotomy, the expiration of protection after a certain period of time and a set of limitations, are not imposed on the property which Locke's labourer acquires in the envisioned world of abundance.

194 See Locke 1698, book II chapter 5 § 27 (emphasis added). Cf. Gordon 1993, 1562-1564.

the aforementioned three elements grant access. The common stock of ideas is left untouched due to the idea/expression dichotomy of copyright law. The works of former authors which are no longer protected or have been used by virtue of copyright limitations share the 'public good' nature of all intellectual production and thus cannot be exhausted.[195] The obligation to leave 'enough and as good' in common, however, becomes crucial in respect of the author's own work. Obviously, an essential feature of the world of ideas and individual expression is the fact that fresh ideas and new forms of expression constantly strengthen the already existing stock of intellectual creations. It is not advisable to exclude the public domain established by the idea/expression dichotomy, the expiration of protection and copyright limitations from this process of constant renewal. Otherwise, the intellectual world of abundance would gradually become impoverished and outdated. An antiquated monolith of fascinating ideas and expression of ancient times, however, bears little resemblance to the intellectual world of abundance upon which contemporary authors build their creations. A composer, for instance, may freely use the ideas and individual expression of Bach, Beethoven and Brahms instead of confining himself to Gregorian chant, Perotin and Dufay. He may even, to a certain extent, use the individual expression of his colleagues even though their creations still enjoy copyright protection.

Therefore, contemporary authors, just like their predecessors, have to acquiesce in the subjection of their creations to the idea/expression dichotomy, the expiration of protection and copyright limitations if they want to leave 'enough and as good' in common for later authors. It is only then that they can fulfil the condition put forward by Locke and acquire a natural right to intellectual property. Locke's proviso that no man but the labourer 'can have a right to what that is once joyned to, at least where there is *enough and as good left in common* for others'[196] thus introduces considerations of intergenerational equity into the field of copyright law: later creators ought to be as free to draw on the full panoply of incessantly renewed intellectual resources as their predecessors were.[197] The author is obliged to allow subsequent creators to use and enjoy the fruit of his labour in the same way as he was permitted to access already existing works. The moment the work of an author enters the cultural landscape, for instance through its publication, it must therefore be subjected to the effervescent process of renewal inhering in the world of ideas and expression. This has the corollary that it becomes an independent factor influencing the cultural and intellectual perception of its age which increasingly evaporates in the process of its communication until the time of protection finally expires.[198]

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195 Cf. Weinreb 1998, 1224.

196 See Locke 1698, book II chapter 5 § 27 (emphasis added).

197 Cf. Gordon 1993, 1557-1558.

198 Cf. Kreile 1993, 257-258; Kirchhof 1988, 34-35.

Locke's labour theory thus leads to quite a specific balance between grants and reservations of copyright law. The notion of intergenerational equity necessitates an appropriate balance with regard to those individuals who take part in the process of creation, rather than a balance between authors and all kinds of users for the sake of society's benefit.[199] The focus on intergenerational equity among authors gives rise to the question to which extent certain limits set to copyright are necessary for leaving 'enough and as good' in common for later authors, so that Locke's condition for acquiring a natural right to property is fulfilled.

In the context of the three-step test, this question must be raised in respect of copyright limitations. Exemptions from authors' rights must be viewed through the prism of intergenerational equity. This perspective first of all yields the insight that limitations which exempt transformative[200] uses rank above all other limitations.[201] Undoubtedly, the interest of the later author in using the material of his predecessors is the strongest, if he depends on the use of such material for creating a new work. Furthermore, it appears safe to assume that all generations of authors have shared this strong interest in the possibility of freely using copyrighted material insofar as necessary for freely expressing themselves. References and allusions to already existing literary and artistic works are a feature of works of the intellect which runs all the way through the different epochs of intellectual creation. The notion of intergenerational equity underlines the paramount importance of exempting transformative uses of copyrighted material. The constitutional guarantee of freedom of expression forms the background to this finding.[202] The most important copyright limitations are therefore those which permit quotations and exempt the use of copyrighted material for transformative purposes such as caricature, parody and pastiche.

Besides the exemption of transformative uses, limitations are central which afford authors the opportunity of consulting works of the intellect while creating a work. Authors have always built upon the achievements of their predecessors. The possibility of consulting a wide variety of works serves as a source of inspiration

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199 This aspect is also emphasised in the course of an economic analysis of copyright law by Landes/Posner 1989, 332-333.

200 The notion of transformative use is understood here in the same sense it is used in the context of the US fair use doctrine. Cf. Leval 1990, 1111: 'The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; […] If, on the other hand, the secondary use adds value to the original – if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings – this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.' See also the US Supreme Court decision Campbell v. Acuff-Rose, 510 US 569, A: 'The central purpose of this investigation is to see […] whether the new work merely supersedes the objects of the original creation […] or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative".'

201 Cf. Gordon 1993, 1568-1570.

202 See subsection 2.2.1 above.

and basis for realising one's own expressive potential. It is an indispensable prerequisite for the creation of intellectual works. Like former generations, contemporary authors should be free to learn from already existing works. The postulate of intergenerational equity also shows the particular importance of limitations which exempt the personal use of copyrighted material for the purpose of private study.

Moreover, the aspect of intergenerational equity can be made visible with regard to limitations which serve the dissemination of information or educational purposes. Arguably, opportunities to learn of intellectual creations may induce people to spend time and effort on the creation of a literary or artistic work themselves. The decision to become an author will often result from the chance to study existing works of the intellect in educational institutions or libraries. In general, it can be posited that access to intellectual productions is central to the discovery and development of one's own creative potential. Personal use privileges which are not, like the aforementioned category, directly linked with the creation of a new work but generally permit to explore the cultural landscape play therefore a decisive role as well. The bond of intergenerational equity requires that authors permit the unauthorised use of their works for the purpose of disseminating information and for educational ends because they themselves may have been prompted to create works by learning of already existing intellectual creations in this way.

Considerations of intergenerational equity, therefore, also support limitations in favour of educational institutions, libraries and archives and the exemption of the use of copyrighted material for personal use. This conclusion is of particular interest because it shows that the maxim of intergenerational equity does not only demand the exemption of uses which are directly related to the creation of a new work but also encompasses limitations privileging uses which are of a purely consumptive nature at the moment they take place. Later, some of these uses may turn out to have induced certain beneficiaries to create works themselves. For this reason, it is justified to consider their exemption necessary for securing intergenerational equity. They are an anticipated tribute paid to future authors.

The last group of limitations concerns uses, the exemption of which is not necessitated by considerations of intergenerational equity. The unauthorised use of copyrighted material for administrative purposes, for instance, can hardly be justified on the grounds that it is necessary for ensuring intergenerational equity. However, this need not lead to the conclusion that the limitation is impermissible. It simply means that it does not rank among those user privileges which are of particular importance for leaving 'enough and as good' in common for other authors. It does not belong to the core of limitations which are cornerstones of the edifice erected by copyright law. Other justifications may nevertheless make its existence plausible.

Finally, it is to be noted that the view that considerations of intergenerational equity provide guidance for the adjustment of copyright's balance has an interesting corollary as regards the position of authors and users in copyright law. Obviously, it

is misleading to allege a conflict between these groups.[203] Admittedly, copyright's balance has two sides: the side of authors and the side of users. The concept of intergenerational equity, however, shows that these two 'poles', in reality, are the two sides of the same coin. *Among the users of today are the authors of tomorrow.* On both sides of copyright's balance, authors are to be found – authors who insist on copyright protection but who also quote, consult copyrighted material while creating a work and have potentially been induced to become authors because they had free access to literary and artistic works in libraries or learned thereof in educational institutions.[204] The possibility to make unauthorised use of a work, for instance, for the purpose of private study, is therefore an author's right just like the right to control the use and enjoyment of a work by virtue of exclusive rights. Referring to copyright as the law of authors, rightly understood, is thus a reference to authors as creators and users of intellectual works alike. Hence, copyright limitations on the users' side of copyright's balance which secure intergenerational equity must be qualified as a right of authors just like the exclusive rights conferred on the same authors on the 'other' side of the balance.[205]

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203 Cf. Macmillan 1999, § 42.

204 As Ginsburg 1997, 20, rightly pointed out, 'copyright is a law about creativity; it is not, and should not become, merely a law for the facilitation of consumption'. It is therefore always to be borne in mind, when declaring the opportunity to make certain unauthorised uses a right of authors, that the underlying consideration is one of intergenerational equity among authors and not an end in itself.

205 Whether this right of authors can be qualified as a subjective right or an objective privilege is a dogmatic question that deserves further consideration. Cf. Guibault 2002, 90-110.

Chapter 3

The Contextual Background to the Three-Step Test

The three-step test can be found in several provisions of international copyright law. At the 1967 Stockholm Conference for the revision of the Berne Convention, the test was introduced to pave the way for the formal acknowledgement of the general right of reproduction. In 1994, it reappeared in the TRIPs Agreement. The 1996 WIPO 'Internet' Treaties[206] comprise the three-step test as well. Not surprisingly, its ambit of operation is no longer confined to the right of reproduction. Nowadays, it can be perceived as a clause generally preventing all kinds of copyright limitations from encroaching on the rights of authors. In view of this development, it appears necessary to consider the different connotations the three-step test has received due to the appearance in different areas of international copyright law before embarking on its interpretation in the ensuing chapter 4. Subsequently, the background to its incorporation into the Berne Convention (3.1), the TRIPs Agreement (3.2) and the WIPO 'Internet' Treaties (3.3) will accordingly be examined in some detail.

3.1 The Berne Convention

The Berne Convention for the Protection of Literary and Artistic Works imposes the obligation on each contracting state to meet a certain standard of protection in order to strengthen the position of the authors of protected works through the establishment of a union with a shared set of rules. To achieve this objective, the member countries are not expected to adopt uniform, general laws which apply to foreigners and nationals alike. On the contrary, the Berne Convention is based on the principle of national treatment and ensures authors merely a minimum standard of protection by recognising a number of minimum rights. This system has a privileging effect in favour of foreign authors if national legislation falls short of the minimum standard set out in the Convention. In this case, the guarantee of minimum rights gives authors a stronger position than the principle of national treatment.[207] Considering the steady increase in measures on which general agreement has been reached in this framework, the Berne Convention can be characterised as a limited kind of international copyright codification.[208]

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206 The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

207 See Drexl 1990, 109. Cf. Ficsor 1996, 80, who speaks of a 'delicate balance' between the minimum level of protection and the principle of national treatment.

208 See Ricketson 1987, 41.

To ensure a progressive improvement of the system of the Berne Union, periodic revision conferences have occurred for the most part at roughly 20-year intervals since the adoption of the convention in 1886.[209] In the course of these conferences, amendments aiming at the introduction of new minimum rights have proven to be challenges for the member countries. Objections to the broadening of the set of exclusive rights evolved, in particular, from their reluctance to abandon exemptions which were already imposed on the right in question in domestic legislation. Thus, it proved difficult to find a formula capable of covering the diversity of limitations which the countries of the Union sought to maintain. At the 1967 Stockholm Revision Conference, the outlined problem came to the fore in connection with the formal acknowledgement of the right of reproduction. It was finally solved through the introduction of the three-step test which is supposed to show sufficient deference to the interest of the member states to carry on their various limitations concerning the right of reproduction. Another solution had been found in respect of public performance rights at the 1948 Brussels Conference. Similar to the situation in 1967, the drafters of the Brussels Act had to face a large number of provisions in national laws permitting the unauthorised public performance of works under certain conditions. At the Conference, preference was given to an express mention of the possibility to make 'minor reservations'[210] in the general report instead of inserting a clause allowing the countries of the Union to retain existing exemptions in the text of the Berne Convention.

For two reasons, the examination of these so-called 'minor reservations' precedes the inquiry into the particular circumstances surrounding the incorporation of the three-step test into the Berne Convention in the course of the 1967 Stockholm Conference. On the one hand, the discussion concerning minor reservations served the purpose of finding a solution in a situation comparable to the one existing in 1967, when the three-step test was introduced. The deliberations of the member countries made at the 1948 Brussels Conference form a useful background to the analysis of the Stockholm Conference. On the other hand, it can be shown by drawing a line between the minor reservations doctrine and the three-step test that a common understanding exists between the countries of the Union with regard to the permissibility of copyright exemptions. The three-step test reflects this general understanding, even though its application is limited to the right of reproduction. Viewed from this perspective, the development of the test in the direction of a clause which controls all kinds of copyright limitations becomes understandable.

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209 In 1896, 1908, 1928, 1948, 1967 and 1971. Furthermore, one minor addition was made in 1914. The Berne Convention provides for these periodic revisions. See article 17 of the 1886 Act and article 27 of the 1971 Paris text.

210 This terminology has been criticised as misleading, because the 'minor reservations doctrine' does not constitute reservations within the meaning of Articles 19-23 of Section 2 of the Vienna Convention. Cf. WTO Panel – Copyright 2000, § 6.49. Nevertheless, the terminology is used here because not only the general report of the Brussels Conference but also following conferences referred to relevant implied restriction as 'minor reservations'.

In the ensuing subsection 3.1.1, the so-called 'minor reservations doctrine' will accordingly be brought into focus before subsequently turning, in subsection 3.1.2, to the drafting history of article 9(2) BC and, thus, to the introduction of the three-step test into international copyright law. To further elucidate the circumstances of the introduction of the three-step test, the description of the deliberations at the 1967 Stockholm Conference will be supplemented by a survey of limitations that could be found at the time of the Stockholm Conference in domestic legislation. This survey of national limitations will be conducted in subsection 3.1.3. Some concluding remarks will be made in subsection 3.1.4.

3.1.1 THE 'MINOR RESERVATIONS DOCTRINE' AS A PRECURSOR

Although exclusive public performing rights were reserved to the authors in almost all national laws throughout the Berne Union,[211] they did not belong to the circle of exclusive rights guaranteed by the Berne Convention prior to the 1948 Brussels Act.[212] The member countries apparently feared that their formal acknowledgement *jure conventionis* could hinder them from imposing certain restrictions which they regarded as indispensable.[213] In fact, most national laws permitted the unauthorised public performance of works, for instance, in the course of religious worship, concerts given by military bands, charitable performances or public concerts organised on the occasion of particular festivals.[214] Nevertheless, the drafters of the Brussels Act argued for the introduction of exclusive public performing rights and presented a corresponding amendment to article 11 of the Convention.[215] Therefore, they had to reconcile their proposal with the interest of the member countries to maintain their limitations. To achieve this goal, all permissible limitations could not be listed exhaustively because they were considered to be too varied. The insertion of a general provision, allowing the countries of the Union to continue their current system of limitations, was impossible as well. It was feared that a general provision would 'positively incite' those countries which had not by this time recognised such exemptions to incorporate them in their laws.[216]

In the course of the Conference, the sub-committee on articles 11 and 11*ter* managed to reach an agreement on the introduction of exclusive public performance rights on condition that the legitimacy of exemptions which are limited to clearly defined cases would be pointed out in the general report.[217] Therefore, Marcel Plaisant, the *rapporteur général*, was entrusted to make 'an express mention of the

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211 See Documents 1948, 253.

212 There was only a national treatment obligation. See Documents 1948, 252.

213 Cf. Ricketson 1987, 533.

214 See Documents 1948, 255 and Ricketson 1987, 533.

215 See Documents 1948, 253-255. See furthermore the proposed text, Documents 1948, 257.

216 See Documents 1948, 255 and Ricketson 1987, 533.

217 The proposal of the sub-committee, Documents 1948, 128, speaks of 'cas nettement déterminés'.

possibility available to national legislation to make what are commonly called minor reservations'.[218] He further stated:

> 'The Delegates of Norway, Sweden, Denmark and Finland, the Delegate of Switzerland and the Delegate of Hungary, have all mentioned these limited exemptions allowed for religious ceremonies, military bands and the needs of child and adult education. These exceptional measures apply to articles 11*bis*, 11*ter*, 13 and 14. You will understand that these references are just lightly pencilled in here, in order to avoid damaging the principle of the right.'[219]

The establishment of this implied exemption in respect of performing, recitation, broadcasting, recording and cinematographic rights was consolidated in the course of following conferences under the auspices of WIPO.[220] On the proposal of the Swedish delegate, speaking on behalf of the Nordic countries, a sentence to this effect was included in the general report of the 1967 Stockholm Conference.[221] Furthermore, the 1996 WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions touched upon the upholding of the minor reservations doctrine.[222] In this context, the Australian delegate sought to safeguard the possibility of providing for minor reservations in national laws.[223]

The considerations of the sub-committee on articles 11 and 11*ter* finally leading to the express mention of the possibility to provide for 'minor reservations', can be connected with certain elements of the later three-step test. The intention to allow member countries the possibility to limit public performing rights in 'certain special cases' is given direct expression in the amendments of Austria, Germany and Poland.[224] The proposal of the Nordic countries lists certain occasions on which a limitation should be perceived as permissible. In addition, it insists upon the absence of any aim of profit,[225] thereby calling to mind the second criterion of the later three-step test which forbids a conflict with a work's normal exploitation. Both aspects are reflected in a final remark of the sub-committee, which underlines,

> 'that the limitations should have a restricted character and that, in particular, it did not suffice that the performance, representation or recitation was "without the aim of profit" for it to escape the exclusive right of the author'.[226]

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218 For the original French text, see the general report by Plaisant, Documents 1948, 100. The translation has been taken from that prepared by WIPO 1986, 181.

219 See the general report by Plaisant, Documents 1948, 100.

220 However, see the critical comments made by Brennan 2002, 216-219.

221 See Minutes of Main Committee I, Records 1967, 837 (924); General Report, ibid., 1166.

222 See WIPO Document CRNR/DC/4, §§ 6.01, 12.06 and 12.07.

223 See WIPO Document CRNR/DC/102, 13 (§ 93) and 75 (§ 510).

224 See Documents 1948, 260-261.

225 See Documents 1948, 258.

226 See Documents 1948, 264: 'Les limitations avaient un caractère restreint et qu'en particulier, il ne suffisait pas que l'exécution, la représentation ou la récitation fussent "sans but de lucre" pour

The objective to permit only exemptions of a restricted nature lies accordingly at the core of the 'minor reservations doctrine'. The claim for the preclusion of any profit motive, however, is not expressly mentioned in Plaisant's report[227] The final 'minor reservations doctrine' first and foremost rests on the *de minimis* principle.[228] Other considerations, like the necessity of a non-commercial character, form the context in which this basic notion is embedded.[229] Both the 'minor reservations doctrine' and the three-step test evolved from comparable situations. They are derived from similar reflections on the possible shape of copyright limitations.[230] Why the drafters of the 1967 Stockholm Act preferred the incorporation of the three-step test into the text of the Berne Convention rather than the establishment of another implied limitation, will be discussed in the following subsection.

3.1.2 THE INTRODUCTION OF THE TEST AT THE 1967 STOCKHOLM CONFERENCE

The preparatory work for the 1967 Stockholm Revision Conference was based on the conception that the intended perfection of the system of the Union should be pursued, among other objectives, through the enlargement of the protection granted to authors by the creation of new rights or by the extension of rights which were already recognised.[231] In accordance with this approach, the establishment of the right of reproduction *jure conventionis* was regarded as one of the most important tasks of the Conference. Its accomplishment should redress the anomaly that the Convention showed insufficient deference to reproduction rights while these held a fundamental position in national legislation.[232] The feasibility of the plan to attain the formal recognition of a general right of reproduction, however, depended on whether or not the Conference would succeed in finding a satisfactory formula for permissible limitations.[233]

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qu'elles échappassent au droit exclusif de l'auteur'. The English translation has been taken from Ricketson 1987, 534.

227 The examples given in the report, however, point in the direction of non-commercial uses. See Documents 1948, 100.

228 Cf. Ricketson 1987, 536.

229 WIPO described the concept of the 'minor reservations doctrine' as being close to the notion of 'fair use' or 'fair dealing'. See the note prepared by the International Bureau of WIPO for the Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, GATT Doc. MTN.GNG/NG11/ W/24/Rev.1, 22.

230 In the context of the three-step test, a Committee of Governmental Experts took the view that 'the main difficulty was to find a formula which would allow of exceptions, bearing in mind the exceptions already existing in many domestic laws'. See the preparatory documents for the 1967 Stockholm Revision Conference, Records 1967, Doc. S/1, 113.

231 This conception was based on article 24(1) of the Brussels Act. Cf. Doc. S/1, Records 1967, 80.

232 It can be argued, that the right of reproduction, prior to the 1967 Stockholm Act, was implicitly recognised in the Convention. Cf. Fabiani 1964, 286; Ulmer 1969, 16. This point of view was discussed by the 1965 Committee of Governmental Experts. Cf. Doc. S/1, Records 1967, 81 and 111-112. Furthermore, see Ricketson 1987, 375.

233 This is clearly stated in the Doc. S/1, Records 1967, 113.

In practice, the restrictions on reproduction rights varied considerably throughout the Berne Union. The study group composed of representatives of the Swedish Government and BIRPI which undertook the preparatory work for the Stockholm Conference noted that 'domestic laws already contained a series of exceptions in favour of various public and cultural interests and that it would be vain to suppose that countries would be ready at this stage to abolish these exceptions to any appreciable extent'.[234] The study group's survey of already existing limitations on the reproduction right showed that the most frequent limitations related to

(1) public speeches;
(2) quotations;
(3) school books and chrestomathies;
(4) newspaper articles;
(5) reporting current events;
(6) ephemeral recordings;
(7) private use;
(8) reproduction by photocopying in libraries;
(9) reproduction in special characters for the use of the blind;
(10) sound recordings of literary works for the use of the blind;
(11) texts of songs;
(12) sculptures on permanent display in public places;
(13) artistic works used as a background in films and television programmes;
(14) reproduction in the interests of public safety.[235]

A significant difference to the situation surrounding public performing rights in 1948, when the 'minor reservations doctrine' was expressly mentioned in the general report of the Brussels Conference, can be seen in the diversity of limitations already known in national legislation. In contrast to the restrictions which were imposed on public performing rights prior to the 1948 Brussels Act, the limitations on the right of reproduction did not form a homogeneous group in respect of a shared *de minimis* nature. Thus, it was not sufficient to rely on express mention of the possibility to exempt certain uses from the exclusive right of reproduction in the general report. On the contrary, it was necessary to devise a provision which would accomplish two opposite tasks. On the one hand, it had to safeguard the envisioned general right of reproduction against the corrosive effect of potentially wide-ranging national limitations. On the other hand, it should not encroach upon the margin of freedom which the member countries regarded as indispensable to satisfy important social or cultural needs.[236] To achieve this dualistic goal, the study group presented a preliminary draft in its 1964 Report. It rests on considerations which were also crucial in connection with the 'minor reservations doctrine':

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234 See Doc. S/1, Records 1967, 111-112.

235 See Doc. S/1, Records 1967, 112, footnote 1. That the enumerated limitations 1 to 6 proved to be widespread is not surprising. The earlier 1948 Brussels Act provided for these limitations. See articles 2*bis*, 9(2), 10, 10*bis*, 11*bis*(3) of the Brussels Act of the Berne Convention.

236 See Doc. S/1, Records 1967, 113; Ricketson 1987, 479.

> 'However, it shall be a matter for legislation in the countries of the Union, having regard to the provisions of this Convention, to limit the recognition and the exercising of that right, for specified purposes and on the condition that these purposes should not enter into economic competition with these works.'[237]

According to the explanatory remarks made by the study group, the draft underlines that limitations must serve clearly specified purposes. The group emphasises that limitations for no specified purposes must be perceived as impermissible.[238] This principle is given expression by directly referring to 'specified purposes' in the text of the draft provision – a formulation which already foreshadows the restriction of limitations to 'certain special cases' in the final three-step test. As examples of clearly specified purposes, the study group mentioned 'private use, the composer's need for texts and the interests of the blind'.[239] Moreover, the draft provision reflects the concern that limitations could divest authors of the possibility to derive economic profit from their works. It is stated that limitations should not compete economically with the exploitation of copyrighted works. As regards this principle, the study group stressed that 'all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors'.[240] The prohibition of a conflict with a work's normal exploitation in the later three-step test, thus, is also discernible in the first draft.

Although the proposal of the study group comprises mere abstract criteria which national limitations must fulfil to be deemed permissible, the elements of the draft can be understood to be gathered from existing limitations. The restriction of limitations to specified purposes and the prohibition of economic competition with the work appear as basic principles which can be distilled from already existing limitations. Although the abstract criteria are thus somehow related to the limitations for which the study group sought to make allowance, the function of the construction as a whole is not comparable to a restrictive list of permissible limitations. Such a closed enumeration would have been another solution to the delineated problem of safeguarding the right of reproduction while leaving sufficient freedom to national legislation. The study group, however, rejected this solution. It was feared that the indication of all permissible limitations in the Convention would encourage national legislators to transpose the whole list into their national laws and abolish the right of remuneration which was granted to the authors by some countries.[241] Nevertheless, the idea of a list that mentions at least the most important restrictions had some influence on the further development.

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237 See Doc. S/1, Records 1967, 112.
238 See Doc. S/1, Records 1967, 112.
239 See Doc. S/1, Records 1967, 112.
240 See Doc. S/1, Records 1967, 112.
241 See Doc. S/1, Records 1967, 112, footnote 2 .

The 1965 Committee of Governmental Experts found favour with the proposal of the study group to acknowledge *jure conventionis* the right of reproduction. The approach taken in respect of permissible exemptions, however, gave rise to the remark that the proposal could imperil the author's legitimate interests. Hence, a working group was appointed which added, apart from this aspect, examples of specific limitations and therefore departed from the initial conception of a pure abstract description of criteria.[242] Finally, the Committee gave its approval to the following draft for a separate paragraph of article 9 BC:

> 'It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works
>
> (a) for private use;
>
> (b) for judicial or administrative purposes;
>
> (c) in certain particular cases where the reproduction is not contrary to the legitimate interests of the author and does not conflict with a normal exploitation of the work.'[243]

At the Conference, the criteria provided for under (a) and (b) could not survive the more thorough scrutiny of the members of the Union. Countries which pursued the development of a more restrictive formula than the proposed one sought for the most part either to delineate their scope more precisely or to delete them completely.[244] Italy suggested, for instance, that the term 'private use' be replaced with 'personal use', while France preferred the formulation 'for individual or family use' to inhibit corporate bodies from claiming that their copying served private purposes.[245] In respect of the exemption provided for under (b), the Netherlands proposed the wording 'for strictly judicial or administrative purposes'.[246] Eventually, the United Kingdom spoke up for the abolition of paragraphs (a) and (b) altogether to avert the possible harm to authors and publishers that could flow from mention of 'private use' and 'administrative purposes'. The UK amendment favours a single general clause which is based on the abstract criteria set out in paragraph (c) and, accordingly, permits the reproduction 'in certain special cases where the reproduction does not unreasonably prejudice the legitimate interests of the author and does not conflict with a normal exploitation of the work'.[247]

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242 See Doc. S/1, Records 1967, 112-113.

243 See Doc. S/1, Records 1967, 113.

244 Cf. the observation of Denmark, Doc. S/13, Records 1967, 615.

245 See the observations of Italy, Records 1967, 623 and of France, ibid., 615. Cf. in respect of the latter the comment made by Kerever, Minutes of Main Committee I, Records 1967, 858.

246 See Doc. S/81, Records 1967, 691. Cf. Minutes of Main Committee I, Records 1967, 857.

247 See the observation of the United Kingdom, Doc. S/13, Records 1967, 630.

As an agreement on certain expressly listed limitations was out of reach, the catalogue of abstract criteria, provided for under (c) formed the groundwork for the final three-step test, even though it did not escape criticism either. Israel emphasised the uncertainty resulting from its wording; Italy sought the replacement of the term 'special cases' with 'exceptional cases'.[248] A German proposal aimed at an additional condition, namely that the reproduction does not conflict 'with the author's right to obtain equitable remuneration'.[249] The final success of the rules given under (c) in the shape of the UK proposal becomes understandable in view of the observations made by other countries like Romania and India. They sought instead to extend the coverage of restrictions on reproduction rights rather than to limit their scope.[250] India regarded compulsory licensing as an adequate means to overcome the growth of monopolies and the creation of obstacles to the spread of knowledge and culture, and suggested the incorporation of a fourth paragraph (d), allowing the reproduction 'on payment of such remuneration which, in the absence of agreement, shall be fixed by competent authority'.[251]

A comparison of the various observations made by the member countries elicits the specific quality of the abstract formula set down under (c): due to its openness, it gains the capacity to encompass a wide range of exemptions and forms a proper basis for the reconciliation of contrary opinions.[252] Moreover, it can be argued that sub-paragraph (c) comprises the examples given under (a) and (b) anyhow.[253] Hence, it is not surprising that the working group, to which Main Committee I of the Stockholm Conference assigned the elaboration of a suitable wording for permissible exemptions from reproduction rights, suggested the adoption of the UK proposal with slight alterations.[254] The reaction of the member states underlines that this solution was a compromise. While India perceived the proposed wording as narrower than the initial draft and opposed its adoption, other countries contended that the proposal of the working group was not restrictive enough.[255] Finally, the majority of Main Committee I agreed on the following wording:

> 'It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.'[256]

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248 See the observations of Israel, Records 1967, 622 and of Italy, ibid., 623.

249 See the observation of Germany, Doc. S/13, Records 1967, 618.

250 See Doc. S/86, Records 1967, 692 (India) and Doc. S/75, ibid., 691 (Romania).

251 Cf. the comments by Gae/Singh, Records 1967, 804 and 806. See Doc. S/86, ibid., 692.

252 See Minutes of Main Committee I, Records 1967, 856-858, which show the fundamental differences. Cf. Ricketson 1987, 481.

253 This observation was, for instance, made by Greece, Doc. S/56, Records 1967, 689.

254 See Doc. S/109, Records 1967, 696.

255 Cf. Minutes of Main Committee I, Records 1967, 883-885.

256 See Minutes of Main Committee I, Records 1967, 885 and Doc. S/290, Records 1967, 758.

The condition referring to 'a normal exploitation of the work' was placed before the element dealing with the 'legitimate interests of the author' on the proposal of the Chairman of Main Committee I, Ulmer. He regarded the normal exploitation of the work as the first essential of the three-step test while, from his point of view, the question of prejudicing the legitimate interests of the author constituted merely a secondary one.[257] The report on the work of Main Committee I notes in this vein that the conditions were reversed to 'afford a more logical order for the interpretation of the rule'.[258] It elaborates further:

> 'If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment. A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.'[259]

Accompanied by these remarks, the three-step test was introduced into international copyright law as article 9(2) BC. Ultimately, it was vested with the function to set forth a certain standard, laid down in abstract criteria, which exemptions from the right of reproduction must meet to be considered permissible. At the following 1971 Paris Conference for the revision of the Berne Convention, article 9(2) was maintained without any changes.[260] Thus, the three-step test of article 9(2) forms part of the latest Act of the Convention.

3.1.3 NATIONAL LIMITATIONS AT THE TIME OF THE STOCKHOLM CONFERENCE

Before turning to a discussion of the further stages of development of the three-step test, it is advisable to ask the question which national concepts for limitations the members of the Berne Union sought to shelter from erosion at the 1967 Stockholm Conference. A survey of relevant national limitations further elucidates the

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257 See Minutes of Main Committee I, Records 1967, 885 and Doc. S/238, Records 1967, 720.

258 See Report on the Work of Main Committee I, Records 1967, 1145.

259 See Report on the Work of Main Committee I, Records 1967, 1145-1146.

260 In general, it was decided at the 1971 Paris Revision Conference that articles 1 to 20 and 22 to 26 of the previous 1967 Stockholm Act shall be maintained. This was expressly pointed out in the preamble of the 1971 Paris Act of the Berne Convention. Cf. Ulmer 1971, 424.

background to the introduction of the three-step test in 1967 and yields precious hints for its right understanding. Naturally, an overview of all national systems of Berne Union members lies outside the scope of the present inquiry. Instead, the ensuing examination of national limitations is confined to the laws of certain countries which can be regarded as exemplary and are of specific interest in the context of the three-step test. As regards civil law countries, the framework set out for limitations in the Federal Republic of Germany (3.1.3.1), the Netherlands (3.1.3.2) and France (3.1.3.3) will be brought into focus. On the side of common law countries, the copyright laws of the United Kingdom (3.1.3.4) and India (3.1.3.5) will be examined.

3.1.3.1 THE FEDERAL REPUBLIC OF GERMANY

The changes in the field of copyright law which took place on the eve of the 1967 Stockholm Conference in the Federal Republic of Germany (FRG) are particularly relevant to the introduction of the three-step test into international copyright law. Just before the 1967 Conference, a new Copyright Act entered into force in the FRG on January 1, 1966.[261] Its drafters aimed at paving the way for accession to the 1948 Brussels Act of the Berne Convention, so that German authors could profit from the advanced level of protection granted therein.[262] Nonetheless, the new Act contains certain features which reach beyond the international status quo reflected in the 1948 Brussels Act. Not surprisingly, it was deemed an ambitious and modern landmark piece of legislation.[263] At the 1967 Stockholm Conference, the position of the chairman of Main Committee I was assigned to the German copyright specialist Ulmer. Main Committee I discussed the revision of substantial provisions of the Berne Convention and the introduction of the three-step test. Ulmer's teachings on copyright had a deep impact on the 1965 Copyright Act[264] – a fact which in itself indicates that the solutions found in new German copyright law may have influenced the deliberations of Main Committee I of the Stockholm Conference.

In a certain way, German legislation anticipated the specific mechanism for safeguarding a proper copyright balance which was later embodied in the three-step test. At the time of the 1967 Stockholm Conference, the problem of photocopying as well as sound and visual recordings was emerging. It was feared that the latest state of the copying art could render users capable of eroding the exclusive right of reproduction by taking advantage of traditional limitations, such as private use

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261 Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz) of September 9, 1965; Bundesgesetzblatt Part I No. 51, dated September 16, 1965, 1273-1293. The 1965 Copyright Act is reproduced in Archiv für Urheber-, Film-, Funk- und Theaterrecht 1965-II, Vol. 45, 100.

262 Cf. the different draft versions of the 1965 Copyright Act: BMJ 1954, 61-63; BMJ 1959, 21 and the government draft, Archiv für Urheber-, Film-, Funk- und Theaterrecht (45), 1965-II, 240.

263 Cf. the analysis by Fromm 1965, 52-55.

264 Cf. Fromm 1965, 52.

privileges.[265] The German 1965 Copyright Act sought to solve this problem by securing authors the payment of remuneration. The way to this solution was paved by decisions of the German Federal Court of Justice (Bundesgerichtshof).[266]

In 1955, the Court held that the making of photomechanical reproductions of academic articles for internal use in an industrial undertaking cannot be qualified as personal use. The Court was of the opinion that personal use requires at least that the use, predominantly, serves the personal needs of the user. The photocopying of articles in the interest of an enterprise could not meet this requirement. Hence, the Court concluded a copyright infringement.[267] On account of this decision, the Bundesverband der Deutschen Industrie entered into an agreement with the Börsenverein des Deutschen Buchhandels in 1958 providing for the payment of a lump sum for photomechanical reproductions made in industrial undertakings.[268] The 1965 Copyright Act follows this development in the field of photomechanical reproductions. Under §§ 53 and 54, it exempts not only reproductions for strictly personal use but also, on more restrictive conditions,[269] photocopying for internal use in industrial undertakings which serves commercial purposes.[270] Companies which take advantage of this possibility, however, are obliged to pay an appropriate remuneration pursuant to § 54(2).

Seeking to react adequately to the threat to the authors' reproduction right posed by visual and sound recordings,[271] the German legislator entered unknown territory. Once again, decisions of the Federal Court of Justice served as a signpost for the development of the new German solution.[272] In 1955, the Federal Court refused to qualify private sound recordings as reproductions for personal use. Instead, it held that these recordings endanger the authors' economic concerns. Sound recordings, so ran the argument of the Court, had the potential for entering into economic competition with the sale of records.[273] In practice, however, the right of reproduction now governing private sound recordings turned out not to be realisable. Due to the market imperfections of the pre-digital age, the private user escaped all attempts to register personal recording activities.[274] A way out of these difficulties was shown in another decision of the Federal Court of Justice. In 1964,

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265 This fear was also given expression at the Conference. Cf., for instance, the comments made by Denmark, Doc. S/13, Records 1967, 615 and the FRG, ibid., 618.

266 Cf. the description of the legislative process by Reischl 1965, 7-9.

267 See decision I ZR 88/54 of 24 June 1955, BGHZ 18, 44 (55-56).

268 See for a description of this agreement van Lingen 1969, 1067-1069. Cf. Ulmer 1965, 30; Hubmann 1966, 158.

269 Pursuant to the general clause set out in § 54 No. 4, for instance, only small parts of a work or single articles from a newspaper or periodical may be reproduced.

270 Cf. Ulmer 1965, 30-31.

271 In article 9(3) of the Stockholm Act of the Berne Convention, it has been clarified that any sound or visual recording shall be considered as a reproduction for the purposes of the Berne Convention.

272 Cf. Möhring 1966, 142.

273 See the decision I ZR 8/54 of 18 May 1955, BGHZ 17, 266 (289-290). Cf. Ulmer 1965, 32.

274 Cf. Hubmann 1966, 155; Greuner 1966, 81; Möhring 1966, 142.

the Court took the view that it is justified to call to account the producers of sound recording equipment. The Court's point of departure was the consideration that they furnish the private user with the means necessary for making sound recordings, even though they know that their equipment will predominantly be employed without the necessary permission of the author.[275] The Court assumed that the copyright infringement which a private sound recording entails is causally connected with the sale of recording apparatus. The producers of sound recording equipment, consequently, were deemed responsible for the copyright infringement besides the users themselves.[276] The German legislator brought its reaction to the problem of sound and visual recordings into line with this decision of the Federal Court of Justice.[277] Under § 53(1) of the 1965 Copyright Act, private sound and visual recordings made for personal use, which would have been uncontrollable anyway, are exempted.[278] As a countermove, the producers or importers of relevant recording equipment are obliged by § 53(5) to remunerate the authors for the possibility to make such recordings which is offered by their apparatus.[279]

In sum, the German approach to the problem of photocopying and private sound or visual recordings can be described as follows: users of copyrighted material is afforded the opportunity to profit from the latest technical developments. To compensate for the corrosive effect which the new copying techniques may have on exclusive rights, authors are vested with a right to remuneration. The payment of remuneration, therefore, appears as the key element of the German solution.[280] In this vein, the delegation of the FRG to the 1967 Stockholm Conference, suggested that the initially proposed wording of the three-step test be amended so as to include a direct reference to the author's right to remuneration. Pursuant to the proposal of the FRG, reproductions should have been permissible

> 'in certain particular cases where the permission does not conflict with a normal exploitation of the work or with the author's right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority, and where the permission is not contrary to the legitimate interests of the author'.[281]

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275 See the decision Ib ZR 4/63 of 29 May 1964, BGHZ 42, 118 (121-123). Cf. Ulmer 1965, 32-33.

276 See BGHZ 42, 118 (125-126 and 133). Cf. Hubmann 1966, 155-156; Greuner 1966, 81-82.

277 Cf. Greuner 1966, 82; Möhring 1966, 142.

278 In § 53(4), however, it is clarified that the author's permission is necessary for recording public speeches, presentations or performances.

279 See for a more detailed description of this solution Fromm 1966, 366-368; Reichardt 1965, 85-88 and 94-99.

280 Cf. the discussion of the German solution by Dietz 1978, 166-169. The 1985 amendment of the German Copyright Act underlines the importance of the payment of remuneration. The levy on sound and visual recording equipment has been supplemented by a levy on blank tapes. Moreover, a remuneration system for photomechanical reproductions has been introduced which is no longer confined to reproductions made in industrial undertakings. Cf. Hubmann 1987, 179-183.

281 See Doc. S/13, Records 1967, 618.

Although Main Committee I of the Stockholm Conference did not approve the proposal of the FRG, the notion that the payment of equitable remuneration should be factored into the equation was supported. In particular, Ulmer, the German chairman of the Committee, sought to clarify which role the payment of equitable remuneration plays in the framework of the three-step test. Explaining a draft version of article 9(2) BC, he elaborated that, 'in the case of photocopies made by industrial firms, it could be assumed that there would be no "unreasonable" prejudice to the legitimate interests of the author if the national legislation stipulated that adequate remuneration should be paid'.[282] This statement reflects the solution of the problem of photomechanical reproductions in industrial undertakings laid down in § 54 of the German Copyright Act 1965.

The explanation given by Ulmer made its way into the final report on the work of Main Committee I. Finally, it therefore became the Committee's joint position. To give a practical example of the functioning of the three-step test, it is expressly stated in the report that, if the photocopying implies 'a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid'.[283] The practical example shows that the payment of equitable remuneration was understood to have a mitigating effect in the context of the last criterion of the three-step test. As remuneration is paid, the finding of an unreasonable prejudice can be avoided. This feature of the three-step test,[284] thus, can be traced back to the 1965 Copyright Act of the FRG and the particular importance which had been attached to the author's right to remuneration therein.

Hence, German copyright law influenced the initial understanding of the three-step test. The 1965 Copyright Act of the FRG, however, is also of interest because it comprises a set of copyright limitations which yields many examples of exemptions from the right of reproduction. §§ 50 and 51 of the 1965 Act concern the reporting of current events and quotations. They belong to the group of limitations for which the Berne Convention specifically provides.[285] The German copyright law of 1965, in general, extensively uses the special provisions of the Convention which permit certain limitations: public speeches concerning current affairs as well as articles dealing with current economic, political or religious topics may be reproduced by the press pursuant to §§ 48 and 49. Ephemeral recordings made by a broadcasting organisation are exempted by virtue of § 55. A compulsory licence in respect of the recording of musical works is laid down in § 61. Privileges for teaching purposes, moreover, can be found in §§ 46 and 47. Certain 'minor reservations' are eventually set out in § 52.[286]

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282 See Minutes of Main Committee I, Records 1967, 883.

283 See Report on the Work of Main Committee I, Records 1967, 1146.

284 For a detailed discussion, see subsection 4.6.4.2.

285 See article 10*bis*(2) and article 10(1) BC.

286 Cf. articles 2*bis*(2), 9(2), 11*bis*(3), 13(2) and 10(2) of the 1948 Brussels Act and articles 2*bis*(2), 10*bis*(1), 11*bis*(3), 13(1) and 10(2) of the 1967 Stockholm/1971 Paris Act, and subsection 3.1.1.

Besides these limitations that are based on special provisions of the Berne Convention, the 1965 Copyright Act contains numerous exemptions from the right of reproduction which, after the 1967 Stockholm Conference, fell directly under the three-step test of article 9(2) BC. As already pointed out, § 53(1) allows the making of single reproductions of a work for strictly personal use. Pursuant to § 53(2), the authorised user need not necessarily produce the copy himself but may ask another person to make the reproduction. This personal use concept is embedded in a broader private use system that is set out in § 54.[287] A facet thereof, the internal use of copyrighted material in industrial undertakings, has already been discussed. The particulars of the private use system established in § 54 are as follows: § 54 No. 1 permits reproductions for scientific use. § 54 No. 2 exempts the reproduction of one's own copy of a work serving the inclusion of the work in a personal archive. Therefore, it is predominantly a library privilege. Pursuant to § 54 No. 3, broadcast works may freely be reproduced for one's own information on current affairs. Finally, § 54 No. 4, in general, permits reproductions for one's own use insofar as (a) only small parts of an already published work or single articles from a newspaper or periodical are concerned, or (b) the work is out of print and the right holder not to be found.

The outlined private use privileges, however, are not the only limitations in the German Copyright Act 1965 which are directly subjected to the control of the three-step test. Further user privileges which are directly controlled by article 9(2) BC can be found in §§ 45-46 and §§ 56-60. Under § 45, reproductions for judicial or administrative purposes are exempted. § 46, besides reflecting the special permission given in article 10(2) BC for publications serving teaching purposes, enables the reproduction of copyrighted material in a collection intended for religious use.[288] From § 56, businesses may profit which sell or repair TV sets, radios, recording equipment and blank material supports, such as tapes and cassettes. The provision allows the making of visual or sound recordings, the public communication of such recordings and of broadcasts insofar as necessary for demonstrating or repairing the described equipment.

§ 57 sets forth a general rule: if the reproduction of a work can be regarded as an irrelevant side-effect of the intended reproduction of another object, copyright is not infringed. § 58 privileges the reproduction of artistic works in catalogues which are published for realising their public exhibition or auction. § 59 allows the reproduction of works which are permanently located in public places. Finally, § 60 states that the customer of a portrait and his legal successor as well as the portrayed

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287 Cf. Hubmann 1966, 154-158; Fromm/Nordemann 1966, 204-213.

288 On account of a decision of the German Federal Constitutional Court, this provision of the 1965 Copyright Act was amended in 1972. A new § 46(4) was inserted which provides that the author is to be paid an equitable remuneration for the exempted reproduction and distribution of works. Cf. Dietz 1973, 94-95 and 99-100. See the decision 'Kirchen- und Schulgebrauch', BVerfGE 31, 229. The 1972 Amendment of the 1965 Copyright Act is reproduced in UFITA 1973, Vol. 67, 123.

person and his family enjoy the freedom to reproduce the portrait.[289] As none of these provisions were abolished in 1974, when the FRG became party to the 1971 Paris Act of the Berne Convention, they were obviously deemed compatible with article 9(2) BC. Hence, they illustrate which limitations were considered permissible under the three-step test in the FRG.

3.1.3.2 THE NETHERLANDS

At the time of the 1967 Stockholm Conference, the situation in the Netherlands resembled the one in the FRG insofar as substantial changes of copyright law were under discussion. A draft amendment which aimed at bringing Dutch copyright law into line with the 1948 Brussels Act of the Berne Convention was submitted to parliament in 1964.[290] The legislative process, however, could not be completed before October 27, 1972. The revised text of the Dutch Copyright Act 1912 entered into force on January 7, 1973.[291] The participation of the Dutch delegation in the 1967 Stockholm Conference, thus, underlay the Dutch Copyright Act 1912, as in effect at that time, and the proposed amendments which had already taken shape. These amendments, in particular, concerned copyright limitations. On the one hand, the set of limitations for which the Dutch Copyright Act 1912 provided should be adapted to the rules set out in the 1948 Brussels Act. On the other hand, an appropriate reaction to the problems raised by the latest state of the copying art had to be formulated.[292]

The adaptation of the existing set of limitations led to the introduction of certain new user privileges into Dutch copyright law. The already existing limitation allowing the press to reproduce articles on current economic, political or religious topics,[293] for instance, was supplemented by a further press privilege. The new article 16a permits a short recording, reproduction and public communication of literary or artistic works insofar as this is necessary for the reporting of current events by means of photography, cinematography, radio- or TV-diffusion.[294] The rules for making quotations were also revised. The new article 15a, in line with article 10(1) of the Brussels Act, permits short quotations from newspaper articles and periodicals, as well as their inclusion in press summaries.[295] This specific rule is accompanied by a much broader exemption set out in article 16. Sub-paragraph (b) thereof allows the quotation of parts of already published literary or musical works

289 Cf. in respect of all these provisions Fromm/Nordemann 1966, 215-219.
290 Cf. Cohen Jehoram 1973, 525; Vermeijden 1970, 205.
291 See the law of October 27, 1972 amending the 1912 Copyright Act, Stb. 1972, 579. Cf. Cohen Jehoram 1973, 525-526.
292 Cf. van Lingen 1969, 1112-1113.
293 See article 15 of the Dutch Copyright Act, as in effect at the time of the Stockholm Conference. Cf. Komen/Verkade 1970, 61-62; Pfeffer/Gerbrandy 1973, 154.
294 Cf. Cohen Jehoram 1973, 535; Pfeffer/Gerbrandy 1973, 166.
295 Cf. Cohen Jehoram 1973, 532; Pfeffer/Gerbrandy 1973, 154-156; Komen/Verkade 1973, 16.

and the inclusion of already published artistic works in the text of an announcement, critique, polemic or scientific treatise subject to acceptable social standards.[296] Sub-paragraph (a) exempts moreover the inclusion of already published works or parts thereof in anthologies and other works intended for educational or scientific ends.[297]

The aforementioned exemptions from the right of reproduction rest on special provisions of the Berne Convention which have been maintained at the 1967 Stockholm Conference.[298] Accordingly, they were not discussed in the context of the three-step test. Nevertheless, their examination already brings to light a specific feature of Dutch copyright law which is of particular interest in the context of the three-step test: the last-mentioned limitation, set out in article 16 sub (a), permits the inclusion of already published works or parts thereof in anthologies and other works for educational or scientific ends only on condition that equitable remuneration is paid.[299] Apparently, the Dutch legislator of 1972 endorsed the view taken in the FRG that it is advisable to cushion certain user privileges by ensuring authors the payment of remuneration.

This strategy for balancing the interests of authors and users, in particular, informed Dutch legislation in the field of private use privileges. The Dutch 1912 Copyright Act, as in effect at the time of the 1967 Stockholm Conference, merely contained one provision dealing with private use. Article 17 afforded users the opportunity to make a few copies of literary or artistic works provided that these copies solely serve personal practice, study or use.[300] This rule was considered outdated at the time of the Stockholm Conference. The advances in the field of the copying art, enabling photomechanical reproductions as well as sound and visual recordings, inevitably led to reproduction practices that could hardly be reconciled with the wording of article 17.[301] It was stressed that the legislator of 1912 had envisioned the making of a copy by hand rather than vast numbers of photomechanical reproductions.[302] Furthermore, it was feared that the new copying practices could enter into competition with a work's normal exploitation.[303] To render Dutch copyright law capable of keeping up with the new reproduction techniques, an amendment of article 17 was considered inevitable.

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296 Cf. Cohen Jehoram 1973, 534-535; Pfeffer/Gerbrandy 1973, 164-165; van Lingen 1975, 70-71. Cf. as to the scope of the norm also Ricketson 1987, 489-491.

297 Cf. Pfeffer/Gerbrandy 1973, 160-164; Komen/Verkade 1973, 19; van Lingen 1975, 68-70. This rule can be traced back to article 10(2) of the Brussels Act. Cf. Ricketson 1987, 495.

298 See articles 10(1), 10(2) and 10*bis*(2) of the 1967 Stockholm Act of the Berne Convention.

299 Cf. Cohen Jehoram 1973, 533-534; Komen/Verkade 1973, 17. In 1972, the German Copyright Act 1965 was amended so as to provide for the payment of equitable remuneration in the context of § 46 of the 1965 Copyright Act which contains a similar limitation. Cf. Dietz 1973, 94-95 and 99-100 and the explanations given at the end of the previous subsection.

300 See article 17 of the Dutch 1912 Copyright Act, as amended on May 22, 1958, Stb. 1958, 296.

301 Cf. Hijmans/van Weel 1965, 761-762; Limperg 1965, 940-942; van Lingen 1969, 1061-1062.

302 Cf. Hijmans/van Weel 1965, 760; van Lingen 1969, 1111-1112; Cohen Jehoram 1973, 535.

303 Cf. van Lingen 1969, 1111, who uses the expression 'a normal exploitation of the work'.

The initial proposal which had been submitted to parliament by the government in 1964 sought to solve the outlined problems by ensuring that authors, to a great extent, could exert control over reproductions of their works.[304] The principle that a few copies of literary or artistic works may be made for personal practice, study or use was maintained. However, as regards literary works, only the reproduction of a part of a work should be exempted. Users wishing to make a reproduction of an entire work, therefore, would have had to ask the author for permission. In the case of collections of literary or artistic works, the author of the collection should be offered the possibility of making reasonable stipulations for the reproduction of an entire work included in the collection, as well as preventing such reproductions by providing interested users with copies himself. In general, a concrete order of the private user should be required if the reproduction was made by a third person.[305] In the light of these features, it was concluded that the government proposal strove for restricting the copying practices which, gradually, had become widespread due to technical advances.[306]

In this vein, the Dutch delegation took a restrictive position at the 1967 Stockholm Conference. It aimed to trace the conceptual contours of exemptions from the right of reproduction more narrowly than the study group which had prepared the Conference material. Whereas it was deemed permissible to exempt reproductions 'for private use' and 'for judicial or administrative purposes' pursuant to the official proposal,[307] the Netherlands wanted to allow reproductions only 'for individual or family use' and 'for strictly judicial or administrative purposes'.[308] Similarly, the abstract three-step test was not welcomed by the Dutch delegation. Gerbrandy, speaking on behalf of the Netherlands, wondered whether the three-step test did not give 'too much freedom of action to national legislations at the expense of the Convention'.[309]

Irrespective of the position taken at the 1967 Stockholm Conference, the further development in the Netherlands shows a departure from the initially pursued restrictive approach to private use privileges.[310] The extent to which the introduction of the three-step test influenced the further legislative process in the Netherlands cannot be determined precisely.[311] However, a line can be drawn between certain

304 For the proposed amendment, submitted on 5 November 1964, see Hijmans/van Weel 1965, 769.

305 See article 17 of the 1964 government proposal.

306 Cf. Hijmans/van Weel 1965, 762-764; Limperg 1965, 939.

307 See Doc. S/1, Records 1967, 113. Cf. the explanations given in subsection 3.1.2.

308 See Doc. S/81, Records 1967, 691. The formulation 'for individual or family use' had originally been proposed by France. See Doc. S/13, Records 1967, 615. In 1972, a similar formulation was embodied in article 12(2) of the Dutch Copyright Act. Cf. Cohen Jehoram 1973, 528-529. As this amendment of Dutch copyright law was under discussion at the time of the Stockholm Conference (cf. Vermeijden 1970, 208), it is not surprising that the Netherlands supported the French proposal.

309 See Minutes of Main Committee I, Records 1967, 885.

310 Cf. van Lingen 1969, 1113-1115; Hijmans 1981, 61.

311 Cf. van Lingen 1969, 1112 and 1115-1116 for a description of the further legislative process and, in particular, a new draft tabled in 1969 which already foreshadowed the final provisions.

issues raised at the Conference and the rules on private copying which finally, in 1972, were laid down in two separate provisions: articles 16b and 17 of the Dutch Copyright Act 1912.[312]

In article 16b, at first, the principle is set out that a few copies of small parts of literary or artistic works may be made provided that these copies solely serve personal practice, study or use. The private user may ask another person to make a copy on his behalf insofar as his order does not concern sound or visual recordings. A work may be reproduced in its entirety if it can reasonably be assumed that new copies of the work will not be made available for whatever kind of payment. Short articles, reports or other pieces published in a newspaper or periodical may also be reproduced entirely. In general, copies made for personal use may not be passed on to another person unless for judicial or administrative purposes. Furthermore, it is stated in article 16b that, for administrative purposes, and for the accomplishment of tasks assigned to public welfare institutions, regulatory orders may be issued which deviate from the foregoing rules given for personal practice, study or use.[313]

On this basis, a copyright order completing the Dutch private use system was given in 1974.[314] The beneficiaries of the additional regulations are institutions in the public sector, non-profit libraries, non-profit educational institutions and other public welfare institutions. In line with article 16b, these institutions enjoy the freedom to reproduce small parts of literary works. Articles, reports or other pieces published in a newspaper or periodical, moreover, may generally be reproduced entirely. The aforementioned institutions may make reproductions for internal use of their employees insofar as necessary for the proper accomplishment of their tasks. Libraries may furthermore reproduce works which are no longer available, and articles, reports and other pieces taken from newspapers or periodicals on behalf of users which ask the library itself or another library for a copy. Educational institutions enjoy the additional freedom of making reproductions for their pupils or students provided that such reproductions are necessary for complementing the prescribed or recommended text books. The beneficiaries of the regulatory order are obliged to remunerate the authors. A certain amount of money must be paid per page. A reduced fee applies to educational institutions.[315]

The system established by article 16b and the accompanying regulatory order recalls certain issues addressed at the 1967 Stockholm Conference. As already explained, it was proposed in the programme of the Conference to point out that reproductions 'for private use' and 'for judicial and administrative purposes' may be exempted.[316] The system set out in article 16b seems to reflect the particular importance attached to these cases at the Stockholm Conference. Interestingly, the

312 See the law of October 27, 1972, amending the Dutch 1912 Copyright Act, Stb. 1972, 569.

313 Cf. Cohen Jehoram 1973, 536-537; Pfeffer/Gerbrandy 1973, 167-173.

314 See regulatory order concerning the copying of works which are protected by copyright of June 20, 1974, Stb. 1974, 351.

315 Cf. van Lingen 1975, 77-80; Wink/Limperg 1975, 67-69.

316 See Doc. S/1, Records 1967, 113. Cf. the explanations given in subsection 3.1.2.

rule that copies made for personal use may be passed on to another person for judicial or administrative purposes, was not set out in the initial 1964 government proposal, but entered the picture in 1969.[317] For administrative purposes, allowance was made in the copyright order of 1974. Whereas these parallels merely indicate that, to some extent, the Stockholm Conference may have influenced the drafting of article 16b, a line can obviously be drawn between the debate on the three-step test at the Conference and the last element of the Dutch private use system, separately laid down in article 17.

Article 17 deals specifically with reproductions made in organisations, institutions or industrial undertakings. By virtue of this provision, reproductions of articles, reports or other pieces published in a newspaper or periodical, or small parts of books, pamphlets or other writings are exempted. The works, however, must be of a scientific nature. The beneficiaries of the limitation are obliged to pay equitable remuneration.[318] The provision, therefore, calls to mind the practical example given in the report on the work of Main Committee I of the Stockholm Conference. Pursuant to the example, a rather large number of copies for use in industrial undertakings 'may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid'.[319] As shown in the previous subsection, this example can be traced back to the rules set out in the German Copyright Act 1965. As regards reproductions in industrial undertakings, Dutch copyright law, therefore, was ultimately brought into line with the solution espoused in the FRG which had been countenanced at the international level.[320]

The Dutch private use regime which was established in 1972 is of particular interest for two reasons. Firstly, it is noteworthy that a distinction is made between three groups of users.[321] Article 16b deals with use of copyrighted material for personal practice, study or use. This limitation can be described as a user privilege which concerns strictly personal use.[322] The regulatory order which complements article 16b seeks to react to the specific needs of different public welfare institutions, including instances serving administrative purposes. The separate article 17, finally, establishes special rules for reproductions in enterprises and comparable organisations and institutions. Secondly, it must be underlined that the Dutch private use regime, like the German system, relies on the payment of

317 Cf. van Lingen 1969, 1115.

318 Cf. van Lingen 1969, 1116. The obligation, however, has never been enforced in practice.

319 See report on the work of Main Committee I, Records 1967, 1146.

320 Cf. in respect of the German concept the explanations given in the previous subsection. Indeed, attention was paid to the solution found in the FRG in the course of the debate on the amendment of Dutch copyright law. Cf. van Lingen 1969, 1067-1069.

321 Cf. van Lingen 1975, 74.

322 Cf. Dietz 1978, 181. As Cohen Jehoram 1973, 537, points out, all kinds of users, including employees in industrial undertakings, may profit from article 16b when keeping their copying for personal practice, study or use within the limits set forth therein.

remuneration to strike a proper balance between the interests of authors and users.[323] Institutions which fall under the copyright order of 1974 may make as many reproductions as necessary for the fulfilment of their tasks. Furthermore, they may reproduce articles and similar material published in newspapers and periodicals entirely. As a countermove, the authors must be remunerated. Similar possibilities are offered by article 17. The obligation to pay equitable remuneration, consequently, reappears in this context.

Besides the described private use system, Dutch copyright law, as amended in 1972, contains further examples of limitations which directly fall under the three-step test of article 9(2) BC. Article 18 allows the reproduction of works which are permanently located in public places. However, it is made a condition that the copyrighted work does not constitute the main object of reproduction. Article 19 concerns commissioned portraits. The portrayed person and, after death, the parents, wife or husband, and children enjoy the freedom of reproducing the portrait. Article 22 permits reproductions for judicial purposes which serve public safety, like the search of offences. Article 23, eventually, affords the owner of an artistic work the opportunity to reproduce the work in a catalogue if he wishes to sell it.[324] Neither the described private use system nor these other limitations were changed in 1985, when the Dutch 1912 Copyright Act was amended to pave the way for accession to articles 1 to 21 of the 1971 Paris Act of the Berne Convention.[325] Therefore, these exemptions from the right of reproduction were obviously deemed compatible with article 9(2) BC and illustrate which limitations were considered permissible under the three-step test in the Netherlands.

3.1.3.3 FRANCE

The participation of the French delegation in the 1967 Stockholm Conference was based on the French copyright law of March 11, 1957.[326] Since the end of the 19th century, French copyright law had rested on the groundwork laid by the representatives at the assemblies of the French Revolution. The few concise texts which express their thoughts were slightly enlarged in the course of the following 150 years. During this period, however, several attempts to create a copyright code setting forth detailed rules failed. Thus, the courts had to accomplish the task of ensuring that French copyright law kept pace with the actual needs of a time of substantial changes in the field of expression and diffusion of intellectual works.[327]

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323 Cf. Dietz 1978, 181-183.

324 Cf. van Lingen 1975, 83, 87-88, 91-92.

325 See the law amending the 1912 Copyright Act of May 30, 1985, Stb. 1985, 307. The Netherlands became party to articles 1 to 21 of the 1971 Paris Act on January 30, 1986.

326 Law No. 57-298 of March 11, 1957, published in the official journal on March 14, 1957. The law entered into force on March 11, 1958. For a detailed description of the legislative process, see Vilbois 1957, 51-67.

327 Cf. the description of the development of French copyright law given by Vilbois 1957, 29-35.

In 1957, French legislation finally succeeded in establishing a cohesive copyright code. The law of March 11, 1957, attracts attention because it contains only some few limitations laid down in one single provision: article 41.

As the examination of German and Dutch copyright law has already shown, the problem of private use privileges formed a centre of gravity at the time of the Stockholm Conference where this issue was addressed in the context of the three-step test. The French approach to private use privileges is of particular interest because it varies from the already discussed solutions found in the FRG and the Netherlands. In the latter countries, the problem of advanced copying techniques prompted legislators to establish detailed rules which make allowance for the specific needs of different groups of users, including industrial undertakings.[328] At the Stockholm Conference, the French delegation, by contrast, espoused the restrictive principle which, in 1957, had been set out in article 41-2° of the French Copyright Act: the moment a work has been disseminated, the author cannot forbid *'les copies ou reproductions strictement réservées à l'usage privé du copiste et non destinées à une utilisation collective,…'*[329]

Pursuant to commentaries of the time of the Stockholm Conference, the restriction of copying activities to strictly private use must be interpreted so as to exempt only individual or family use.[330] Exactly the same formula was invoked by the French delegation at the 1967 Stockholm Conference. In the official programme of the Conference, it was proposed to exempt reproductions 'for private use'.[331] France, by contrast, preferred the wording 'for individual or family use' and tabled a corresponding proposal.[332] How were these terms construed in the context of the French 1957 Copyright Act? With regard to individual use, Desbois gives the example of a lawyer who, for his own information, extracts useful passages from books or articles, and a student who compiles an appropriate documentation for his exams.[333] To be deemed permissible under article 41-2°, the individual use, therefore, need not necessarily be for purely private purposes but solely for one's own, personal needs. The second alternative, family use, becomes understandable against the backdrop of article 41-1° of the French 1957 Copyright Act. This provision allows *'les représentations privées et gratuites effectuées exclusivement dans un cercle de famille'*. To refer to family use also in the context of article 41-2° offers the possibility of bringing the rules concerning private copying into line with the principles developed in the framework of a work's representation. The family

328 Cf. the two previous subsections.

329 Furthermore, a special rule concerning reproductions of artistic works is laid down in article 41-2°. The latter works may not be reproduced for private purposes which are identical to those for which the original work was created. Desbois 1966, 278, takes the view that, therefore, only reproductions of artistic works made by other artists to practise and perfect their skills can be exempted.

330 Cf. Desbois 1966, 277.

331 See Doc. S/1, Records 1967, 113. Cf. the explanations given in subsection 3.1.2.

332 See Doc. S/13, Records 1967, 615 as well as Doc. S/70, Records 1967, 690..

333 See Desbois 1966, 277.

circle, pursuant to French doctrine, differs markedly from a gathering of a private nature. In particular, it is not deemed sufficient that the persons present at a meeting are known by name and can be identified individually. Merely a group of persons who unites *'l'esprit de famille'* is regarded as a family circle.[334] The notion, accordingly, does not reach much further than a family's friends. Other meetings are incapable of fulfilling the criterion even though the persons involved potentially share some strong sense of community. Desbois mentions the circle of persons in a hospital, hospice or sanatorium whose meetings are subjected to the authors' control.[335] Furthermore, it is assumed that the family circle loses its specific quality if friends of the family are also business partners and the meeting serves professional ends.[336]

In the context of the right of reproduction, the restriction to individual or family use has the corollary that the conceptual contours of the French private use system must be drawn much more narrowly than, for instance, in the FRG and the Netherlands. In particular, the making of a rather large number of reproductions for internal use in an industrial undertaking is not privileged under article 41-2°.[337] Firstly, this mode of copying can hardly be qualified as individual or family use. Secondly, in article 41-2° itself, it is clarified that reproductions for private use must not be *'destinées à une utilisation collective'*. This passage has been understood to bar industrial or commercial enterprises, trade unions and scientific associations from enjoying the freedom offered by the private use privilege set out in article 41-2°.[338] At the Stockholm Conference, the comments by Kéréver, speaking on behalf of France, reflected this position. He pointed out that the French proposal to permit only 'individual or family use' instead of 'private use' in general aimed at determining the exact scope of permissible limitations in the field of private copying. He maintained that 'it was clear that the phrase 'private use" would cover corporate bodies, which would perhaps be going too far'.[339]

At the time of the Stockholm Conference, the view was also taken that libraries, making reproductions on behalf of their readers, are excluded from the private use privilege laid down in article 41-2°.[340] A later decision of the Tribunal de Grande Instance de Paris of January 28, 1974, however, created some room to manoeuvre. The Court held not only that a copy for private use may be made by employing modern copying techniques, but also that article 41-2° allows the making of a reproduction on behalf of another person as long as the library acts on that person's

334 Cf. Desbois 1966, 315-317.
335 Cf. Desbois 1966, 317-319.
336 Cf. Desbois 1966, 317.
337 Cf. in this regard the practical example of the functioning of the three-step test given in the Report on the Work of Main Committee I, Records 1967, 1146. For the solutions espoused in the FRG and the Netherlands, see the two previous subsections.
338 Cf. Desbois 1966, 277.
339 See Minutes of Main Committee I, Records 1967, 858.
340 Cf. Desbois 1966, 278.

intellectual initiative.[341] To solve the problem of private copying, French legislation, ultimately, took para-fiscal measures. Outside copyright law, in article 22 of the 1976 financial law, it imposed a levy on the sales of book publishers and producers or importers of reproduction apparatus.[342] These future developments, naturally, could not be taken into account by the French delegation at the 1967 Stockholm Conference. Its position in respect of private use privileges can be characterised as very restrictive. Only strictly private use, as delineated by the formula 'individual or family use', was considered permissible. The payment of equitable remuneration, as a means to mitigate the corrosive effect of a broader private use conception, had no influence on the French position. Not surprisingly, later French commentary literature questioned whether allowance could be made for the payment of equitable remuneration in the context of the three-step test of article 9(2) BC.[343]

Interestingly, no substantial objections to the other exemptions from the right of reproduction proposed in the programme of the Stockholm Conference[344] were raised by the French delegation. The plan to permit reproductions 'for judicial or administrative purposes' was supported even though French copyright law did not contain limitations serving these ends.[345] As to the open formula in which the later three-step test was grounded, the French delegation signalled its general agreement. The delegation of the UK whose proposal determined the final wording of the three-step test,[346] was merely asked to explain why it had introduced the phrase 'unreasonably prejudice'.[347] The French 1957 Copyright Act comprised one further limitation which, like the already discussed private use system, was not rooted in a special provision of the Berne Convention and, therefore, fell directly under the three-step test. By virtue of article 41-4°, the author is hindered from prohibiting *'la parodie, le pastiche et la caricature, compte tenu des lois du genre'*.[348] Prior to 1957, French courts, furthermore, had developed a limitation allowing the reproduction of works which, permanently, are located in public places. Similar to Dutch law, as amended in 1972, it was made a condition that the copyrighted work does not constitute the main object of reproduction. The legislator of 1957, however, did not expressly provide for this limitation. At the time of the Stockholm Conference, it was thus concluded that this limitation had been abolished by the 1957 Copyright Act.[349]

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341 Cf. Colombet 1976, 183-184; Dietz 1978, 172-173.

342 Cf. Dietz 1978, 173-174. A further 1995 amendment of the French Copyright Act subjected the reproduction right to licensing by collective societies. See Article L. 122-10 of the French Copyright Act, as amended on 3 January 1995. Cf. Lucas/Lucas 2001, 267.

343 See Desbois/Francon/Kerever 1976, 207. This position will be discussed in subsection 4.3.2.

344 See Doc. S/1, Records 1967, 113.

345 See Doc. S/13, Records 1967, 615. Cf. Dietz 1978, 192.

346 See Doc. S/13, Records 1967, 630 and Doc. S/42, Records 1967, 687. Cf. subsection 3.1.2.

347 See Minutes of Main Committee I, Records 1967, 858.

348 Cf. Desbois 1966, 288-290.

349 Cf. Desbois 1966, 291-292.

The remaining set of limitations in the French 1957 Copyright Act leans on special provisions of the Berne Convention. Under article 41-3°, *« les analyses et courtes citations justifiées par le caractère critique, polémique, pédagogique, scientifique ou d'information de l'œuvre à laquelle elles sont incorporées »* are privileged. This provision can be traced back to articles 10(1) and 10(2) of the 1948 Brussels Act, and to the more complete regulation of quotations in article 10(1) of the later 1967 Stockholm Act. In French literature, it has been asserted that this user privilege cannot be invoked in respect of musical or artistic works.[350] Furthermore, article 41-3° exempts press reviews in line with article 10(1) of the 1948 Brussels Act and the 1967 Stockholm Act. Allowance is also made for the reporting of current events in line with articles 2*bis* and 10*bis* of the 1948 Brussels Act.[351] Article 41-3°, however, does not include a reporting by means of cinematography and photography. As this is declared permissible in article 10*bis*, Desbois took the view that an extension of the limitation to the reporting of current events by means of photography and cinematography may nevertheless be justified. On the basis of principles developed by the courts prior to 1957, he considers it also permissible to include in reports of this nature monuments and other artistic works located in public places.[352] Aside from article 41, article 45(3) provides for a compulsory licence. It permits the recording of a work which is of national interest or has a documentary character. The recording can be preserved in official archives.[353]

Whereas in the FRG and the Netherlands the provisions of the Berne Convention dealing with limitations were used to a great extent, the French legislator confined its legislative actions to some restrictively delineated user privileges. It also largely refrained from imposing compulsory licences even though the 1948 Brussels text of the Berne Convention offered this possibility in articles 11*bis*(2) and 13(2). In the field of private use privileges, France insisted on strict rules instead of seeking to solve the problem by having recourse to the payment of remuneration. It is doubtful whether this restrictive position mirrored the copying practices existing at the time of the Stockholm Conference.[354]

3.1.3.4 THE UNITED KINGDOM

In the case of the United Kingdom, the examination of the relationship between the three-step test and domestic legislation in the field of copyright limitations is an issue of some complexity. Two UK statutes must be taken into consideration. At the

350 Cf. Desbois 1966, 283-284, who argues that, because of the different nature of a literary text on the one hand, and artistic and musical works on the other, a combination of both elements is inappropriate. Moreover, he fears that the moral rights of the authors of artistic or musical works cannot sufficiently be safeguarded.

351 Cf. Desbois 1966, 288.

352 Cf. Desbois 1966, 290-291.

353 Cf. Desbois 1966, 274.

354 Cf. the description of the situation by Desbois 1966, 277 and 279.

time of the 1967 Stockholm Conference, the Copyright Act 1956 determined which uses of copyrighted works are exempted from the authors' control.[355] To establish which limitations were deemed permissible in the UK at the time of the Conference and underlay the participation of the UK delegation, the provisions of the 1956 Copyright Act must be explored. The UK, however, did not accede to the 1971 Paris Act of the Berne Convention before January 2, 1990. The obligation to comply with article 9(2) BC was thus not placed on domestic limitations prior to this date. The piece of legislation paving the way for the ratification of the 1971 Paris Act is the Copyright, Designs and Patents Act 1988 (CDPA 1988).[356] The latter statute, accordingly, informs about the set of limitations which, ultimately, was considered permissible in the light of the three-step test in the UK.

At the 1967 Stockholm Conference, it was especially the UK which spoke up for the adoption of a mere abstract formula to regulate permissible exemptions from the right of reproduction. Mention of 'private use' and 'administrative purposes', as proposed in the programme of the Conference, was not supported.[357] From the beginning, the UK delegation espoused the finally adopted concept: no concrete cases were listed in article 9(2) BC. Instead, three abstract criteria were given, constituting the three-step test. Moreover, it must be underlined that the wording of the three-step test was based on the text submitted by the UK. Whereas it had originally been proposed to allow reproduction 'in certain *particular* cases where the reproduction is *not contrary to* the legitimate interests of the author…', the formulation tabled by the UK referred to 'certain *special* cases where the reproduction does *not unreasonably prejudice* the legitimate interests of the author…'[358] Explaining its preference for a mere abstract formula, the UK stated that

> 'mention […] of "private use" and "administrative purposes" goes too far and carries many dangers for authors and publishers. Most books are intended for private use, and these expressions could allow the wholesale use of copyright material, without payment, by large industrial organisations or for governmental education systems. On the other hand, the formula we propose can take care of legitimate cases of private use and judicial and administrative purposes.'[359]

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355 See for an overview Rubinstein 1958, 5.

356 Cf. Skone James/Mummery/Rayner James/Garnett 1991, vi.

357 See Doc. S/13, Records 1967, 630. Cf. Minutes of Main Committee I, Records 1967, 857.

358 Compare Doc. S/1, Records 1967, 113 with Doc. S/13, Records 1967, 630 (emphasis added).

359 See Doc. S/13, Records 1967, 630. In the programme of the Conference, the use of copyrighted material for judicial purposes was also explicitly mentioned. See Doc. S/1, Records 1967, 113. Cf. as to the UK tradition of crown and parliamentary prerogatives which may have influenced the position taken in respect of the use of copyrighted material for administrative purposes Skone James/ Mummery/Rayner James/Garnett 1991, 381-400.

The reliance on the regulatory potential of a set of abstract principles becomes understandable against the backdrop of the common law tradition of the UK copyright system. The concept of 'fair dealing' deserves attention in this connection. In the UK Copyright Act 1956, the principle that a fair dealing with a work does not constitute an infringement of the copyright in the work is reflected in several provisions. A fair dealing for the purposes of research or private study, criticism or review, and for reporting current events is expressly exempted.[360] The fair dealing provisions, therefore, touch upon areas which are specifically regulated in the Berne Convention, such as quotations and press summaries, or the reporting of current events. The special provisions of the Convention, namely articles 10(1) and 10*bis* of the 1948 Brussels Act, are merged in the fair dealing concept. In the context of the three-step test, the first alternative, a fair dealing for purposes of research or private study, is of particular interest. This facet of the UK fair dealing concept does not lean on special provisions of the Berne Convention. Insofar as reproductions of copyrighted material are concerned, the three-step test of article 9(2) BC, thus, constitutes the relevant control mechanism at the international level.

The application of fair dealing defences is closely related to the question of whether substantial parts of an author's work are taken. Pursuant to UK doctrine, a copyright infringement is not established unless a substantial part of a work is used.[361] Therefore, if the use made of a work concerns merely an insubstantial part thereof, no infringement will be found. Accordingly, the fair dealing defence need not be raised. The fair dealing provisions, thus, are understood to permit even the use of substantial parts of copyrighted material which, otherwise, would constitute an infringement.[362] In consequence, a court must first decide whether a substantial part of a work has been taken before turning to the question of whether the dealing with the work can be deemed fair.[363] In deciding the question of substantiality, numerous factors have traditionally been considered, such as 'the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, direct or indirect, or supersede the objects of the original work'.[364] At the time of the Stockholm Conference, it has been observed that courts are more likely to look at the quality than at the quantity of the amount taken.[365] Furthermore, it has been pointed out that the likelihood of competition with the original work will not necessarily influence the substantiality test. This question, however, was qualified as relevant when considering whether a dealing with a work is fair.[366]

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360 See section 6(1), 6(2), 6(3) of the 1956 Copyright Act in respect of literary, dramatic or musical works and section 9(1) and 9(2) thereof with regard to artistic works.

361 See section 49(1) of the 1956 Copyright Act. Cf. Skone James 1965, 159; Barker 1970, 19.

362 Cf. Barker 1970, 19.

363 Cf. Carter-Ruck/Skone James 1965, 73-74.

364 See Skone James 1965, 160. Cf. also Wilson 1975-1976, 184-187; Griffiths 2002, 250-255.

365 Cf. Skone James 1965, 161; Barker 1970, 19.

366 Cf. Skone James 1965, 161 and 177; Carter-Ruck/Skone James 1965, 76.

The fair dealing provisions, thus, just like the three-step test, call upon the courts to take several abstract criteria into account. The similarity between both regulatory schemes is further enhanced by a shared criterion. The likelihood of competition with the original work is not only a relevant factor when considering a fair dealing defence but also reappears in the context of the three-step test as prohibition of a conflict 'with a normal exploitation of the work'.[367] As the fair dealing concept, accordingly, comes close to the three-step test, it is not surprising that it has been maintained in 1988 when the set of limitations in UK copyright law were moved into line with the 1971 Paris Act of the Berne Convention and thus with the three-step test of article 9(2) BC. Sections 29(1), 30(1) and 30(2) of the CDPA 1988 uphold the principle that a fair dealing with a work for the purposes of research or private study, criticism or review and for reporting current events does not infringe any copyright in the work.

Against the backdrop of advances in the field of copying techniques enabling reprographic reproduction and sound and visual recordings, one is nevertheless left to wonder why the fair dealing privilege for research or private study which falls directly under the three-step test did not undergo substantial changes. The reason for this can be seen in its limited scope. At the time of the Stockholm Conference, Skone James merely gave the example of a student who copies out a book for his own use. He regarded the circulation of copies among other students as impermissible.[368] In this vein, Barker asserted that 'for fair dealing to qualify as "research" it must similarly be done for oneself (or one's employers), and not produced wholesale for others'.[369] On this basis, he doubted whether the 1956 Act authorised the production of multiple copies.[370] Correspondingly, the UK, as already mentioned, warned of the corrosive effect of 'wholesale use of copyright material, without payment, by large industrial organisations' at the 1967 Stockholm Conference.[371] Commenting on the CDPA 1988, Laddie, Prescott and Vitoria conclude that the scope of the fair dealing defence for research or private study 'is fairly limited. Thus, although it is not confined in terms of activities performed by the researcher or student himself, it does not justify the making of multiple copies by a third party for use by a plurality of such persons'.[372] In consequence, it was obviously not deemed necessary to incorporate the response of UK copyright law to the challenges of new reproduction techniques into the fair dealing provisions. Instead, the rules concerning reproductions made by libraries and educational establishments must be brought into focus.

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367 As already elaborated, this criterion of the three-step test was based on the consideration that exemptions should not enter into economic competition with the original work. Cf. Doc. S/1, Records 1967, 112 and subsection 3.1.2.

368 Cf. Skone James 1965, 177.

369 See Barker 1970, 20.

370 Cf. Barker 1970, 32-33.

371 See Doc. S/13, Records 1967, 630.

372 See Laddie/Prescott/Vitoria 1995, 132. Cf. section 29(3) of the CDPA 1988.

Indeed, the issue of technical developments in the field of the copying art has especially been addressed in the context of library privileges. As the 1956 Copyright Act was approaching, it had already been stressed that new facilities were now available for study and research which had not been reflected adequately in the former UK Copyright Act 1911. In particular, the problem of students and research workers who ask public libraries for photocopies of articles or parts of periodicals and books in their possession was raised. Under the rules given in the 1911 Copyright Act, it was doubtful whether the fair dealing defence for the purposes of private study and research would protect a librarian who produces copies by photographic means on behalf of a student or research worker. In consequence, there was a move afoot to make arrangements authorising non-profit organisations to deliver a single reproduction to a person establishing that the copy is solely required for private study or research. To clarify the situation, it was recommended that, under the 1956 Copyright Act, any action which would come within the description of fair dealing if done by the student himself, should be so regarded if done by a librarian acting on his behalf.[373] This approach informed the drafting of section 7 of the 1956 Act which deals specifically with the copying activities of libraries.

Paragraphs 1 and 2 of section 7 of the 1956 Copyright Act concern the copying of articles contained in a periodical publication. By virtue of section 7(1), librarians of libraries which rank among a class prescribed by further regulations to be made by the Board of Trade are entitled to make or supply a copy of an article under certain conditions which again are to be determined by the Board of Trade. Section 7(2) calls upon the Board of Trade to secure in particular that privileged libraries are not established or conducted for profit, that reproductions are only passed on to persons satisfying the librarian that they will solely be used for private study or research, that no person is furnished with more than one copy of the same article, and that no copy extends to more than one article contained in any one publication. Moreover, persons to whom copies are supplied must be made to reimburse the cost of the production of the copy including a contribution to the general expenses of the library. Pursuant to the regulations of the Board of Trade, libraries of schools, universities, public libraries, parliamentary libraries and libraries conducted for the purpose of encouraging the study of certain subjects, for instance, religion, fine arts and science may benefit from section 7 provided that they are of a non-profit nature.[374]

In paragraphs 3 and 4 of section 7 of the 1956 Copyright Act, similar regulations are set out for the copying of parts of published literary, dramatic or musical works. However, the librarian is barred from invoking this privilege if he knows the name and address of a person entitled to authorise the making of the copy. In this case, he cannot produce the copy without prior authorisation irrespective of how difficult it

373 Cf. Skone James 1965, 242-243; Carter-Ruck/Skone James 1965, 93.
374 Cf. Skone James 1965, 243-244; Carter-Ruck/Skone James 1965, 94-96.

may be to obtain. Pursuant to section 7(4), the Board of Trade shall ensure that no copy will extend to more than a reasonable portion of the published work.[375]

The outlined library privileges are supplemented by rules concerning the copying of complete works for use by other libraries. By virtue of section 7(5), the librarian of a library of a class prescribed by regulations to be made by the Board of Trade may make a copy of a work in its entirety if it is supplied to the librarian of another library of the prescribed class. Except for articles in periodicals, the copying privilege may again only be exercised if authorisation cannot be obtained. Pursuant to the regulations made by the Board of Trade, not only the aforementioned libraries may benefit from this privilege but also any library which makes works in its custody available to the public free of charge. It is irrelevant in this respect whether or not such libraries are established or conducted for profit. Moreover, foreign libraries of a similar class are included.[376]

The reproduction of copyrighted works by libraries, thus, is regulated in detail in the 1956 Copyright Act. The rules concerning libraries even include the establishment of a specific system of privileged institutions. Obviously, libraries were perceived as a key element with regard to the application of new reproduction techniques. Certain statements of the UK delegation at the 1967 Stockholm Conference reflect the particular importance attached to the copying activities of libraries. Wallace, speaking on behalf of the UK, stated that the general idea underlying the already described UK proposal was 'that there should be no licensing in cases in which the author normally exploited the work himself'.[377] He maintained that 'with libraries, however, a compulsory licensing system might be desirable, provided that it would not prejudice the author's legitimate interests. If it did, the author should be remunerated'.[378] It is noteworthy that the statement touches upon the payment of remuneration. In contrast to German and Dutch legislation which sought to cushion user privileges enabling the employment of modern copying techniques by providing for the payment of remuneration,[379] the UK library privileges have not been connected with some mechanism ensuring that authors are remunerated. In 1979, merely the Public Lending Right Act was adopted, which provides for payments to authors out of a central fund. The reference point of this law, however, is not the copying of an author's work, but its lending. The annual sum which an author may receive by virtue of the Act is not unlikely to be negligible.[380]

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375 Cf. Skone James 1965, 244; Carter-Ruck/Skone James 1965, 96-97.

376 Cf. Skone James 1965, 244; Carter-Ruck/Skone James 1965, 97-98; Dietz 1978, 179.

377 See Minutes of Main Committee I, Records 1967, 857. See for the UK proposal Doc. S/13, Records 1967, 630. Cf. the explanations given at the beginning of this subsection.

378 See Minutes of Main Committee I, Records 1967, 857.

379 Cf. subsections 3.1.3.1 and 3.1.3.2.

380 Cf. de Freitas 1984, 21-22 and 1990, 48-49; Skone James/Mummery/Rayner James/Garnett 1991, 374.

As the UK delegation to the Stockholm Conference took the view that the authors should be remunerated if an unreasonable prejudice arises, it must be concluded that the outlined library privileges were understood not to unreasonably prejudice the legitimate interests of the author. This is even more true as sections 38-41 of the CDPA 1988 maintain the described library privileges. Departing from the stricter rules given in the 1956 Copyright Act, parts of published works may also be reproduced on behalf of a person who requires the copy for research or private study irrespective of whether authorisation can be obtained or not.[381] As a countermove, it is emphasised in section 40 that multiple copies of the same material are not allowed. In the UK, the making of single reproductions by libraries for purposes of research or private study, thus, was deemed permissible under the three-step test even though the authors are not remunerated.[382]

As to the educational use of copyright material, a more cautious approach was taken. In line with article 10(2) of the 1948 Brussels Act of the Berne Convention, section 6(6) of the UK Copyright Act 1956 allowed the inclusion of short passages from a published work in anthologies intended for the use of schools. Besides other limits, it was made a condition that the work in question was not itself intended for the use in schools. Very similar rules were laid down in section 33(1) of the CDPA 1988. As regards educational use, the 1956 Copyright Act provided in section 41(1) that, where the reproduction is made by a teacher or pupil otherwise than by the use of a duplicating process, copyright shall not be taken to be infringed. 'Duplicating process', in this connection, was defined as 'any process involving the use of an appliance for producing multiple copies'.[383] Similarly, in section 32(1) of the CDPA 1988, the principle has been set out that copyright is not infringed if a work is copied in the course of instruction or of preparation for instruction, provided that the reproduction is done by a person giving or receiving instruction without applying a reprographic process. 'Reprographic process' here is defined as a process for making facsimile copies or involving the use of an appliance for making multiple copies, including electronic means.[384] Essentially, the legislator, therefore, refers instructors or students to the making of copies by hand. However, section 36 of the CDPA 1988 provides that reprographic copies of passages from published works may be made on behalf of an educational establishment for the purposes of instruction. Not more than one per cent of any work may be copied in any quarter of the year. Moreover, the reprographic reproduction is not permitted if licences are

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381 Cf. section 39 of the CDPA 1988; Skone James/Mummery/Rayner James/Garnett 1991, 263.

382 Libraries, however, must take precautions to ensure that infringement of copyright is not tacitly authorised by them if they have available self-service photocopying facilities for their readers. Cf. the case Moorhouse and Angus and Robertson (Publishers) Pty Ltd. v. University of New South Wales brought before the Australian Copyright Council, [1976] RPC 151, 49 ALJR 267. The case is discussed by Wilson 1975-76, 190-198. Cf. for its relevance in the UK Laddie/Prescott/Vitoria 1995, 791-792.

383 See section 41(7) of the 1956 Copyright Act.

384 See section 178 of the CDPA 1988.

available which enable the copying of works to the same extent. For educational ends, the boundary lines of reproduction privileges, thus, have been drawn much more narrowly than in the case of libraries by UK legislation.

Besides the outlined provisions, UK copyright law contains a wide variety of further exemptions from exclusive rights which fall directly under the three-step test of article 9(2) BC. Pursuant to the 1956 Copyright Act, a work could be reproduced for the purposes of a judicial proceeding, or for a report thereof.[385] A corresponding rule was set out in section 45 of the later CDPA 1988. Pursuant to section 45, copyright is not infringed by anything done for the purposes of parliamentary or judicial proceedings or reporting such proceedings. With regard to artistic works which are permanently situated in public places, or in premises open to the public, section 9(3) of the Copyright Act 1956 exempted the making of a painting, drawing, engraving or photograph of a work as well as its inclusion in a film or a television broadcast.[386] A provision to the same effect, including cable programmes, was laid down in section 62 of the CDPA 1988. The Copyright Act 1956 also provided that the copyright in an artistic work is not infringed by its inclusion in a film or a television broadcast if the inclusion is only by way of background or otherwise only incidental to the principal matters represented in the film or broadcast. Section 31 of the CDPA 1988 contains the broader principle that copyright in a work is not infringed by its incidental inclusion in an artistic work, sound recording, film, broadcast or cable programme. As to musical works, the privilege is restricted.[387] The reconstruction of buildings in which copyright subsists is also exempted under UK copyright law. Section 9(10) of the 1956 Copyright Act dealt with this case. In the CDPA 1988, the limitation was maintained in section 65.

Certain new user privileges which are directly controlled by the three-step test also entered the picture when the CDPA 1988 was adopted. Section 63, for instance, provides that it is not an infringement of copyright in an artistic work to copy it, or to issue copies to the public, for the purpose of advertising the sale of the work.[388] Allowance is also made for purposes of time-shifting in section 70. In respect of sound and visual recordings, this provision complements the fair dealing provisions for private study and research. Furthermore, the needs of disabled people are reflected in the CDPA 1988. By virtue of section 74, non-profit bodies designated by the Secretary of State may provide them with programmes that are sub-titled or otherwise modified for their special needs. For this purpose, the making of copies of television broadcasts or cable programmes is exempted. In addition, copies may be issued to the public. The privilege, however, can only be exercised if no appropriate licensing scheme exists.[389]

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385 See sections 6(4) and 9(7) of the UK Copyright Act 1956.

386 See in respect of works of architecture section 9(4) of the 1956 Copyright Act. Cf. Carter-Ruck/Skone James 1965, 80-83.

387 See section 31(3) of the CDPA 1988. Cf. Laddie/Prescott/Vitoria 1995, 138-140.

388 Cf. Laddie/Prescott/Vitoria 1995, 256.

389 See sections 74 and 143 of the CDPA 1988. Cf. Laddie/Prescott/Vitoria 1995, 164.

It can be concluded that in UK copyright law, numerous provisions are to be found which are directly subjected to the control of the three-step test. The freedom which national legislation enjoys because of the introduction of the test at the 1967 Stockholm Conference has largely been used by UK legislation. As to private use privileges, however, it must be emphasised that the UK refrained from exempting the making of multiple copies, for instance, for administrative purposes or internal use in public welfare institutions or industrial undertakings.[390] The fair dealing defence for private study or research and the accompanying library privileges only allow the making of a single copy for strictly personal use. The government expressly proposed to introduce a levy on blank tapes to deal with home taping in the course of the preparatory work undertaken for the CDPA 1988.[391] Finally, the levy scheme did not become part of UK copyright law.

3.1.3.5 INDIA

Until the end of the 1967 Stockholm Conference, the Indian delegation opposed the introduction of the three-step test. In particular, it was not willing to acquiesce in the adoption of article 9(2) BC because, from India's point of view, it offered insufficient possibilities of compulsory licensing. Gae, speaking on behalf of India, stated unequivocally that his delegation 'favored the inclusion in the right of reproduction of a provision for compulsory licensing'.[392] He asserted that

> 'in countries where the need might arise, compulsory licensing was desirable to enable the competent authorities to fix the amount of compensation it would be fair to pay to an author for the use of his work, particularly when the public interest required the reproduction of that work. Although his suggestions had not been accepted by Main Committee I, he would still like to have [article 9(2) BC] amended to include some such provision.'[393]

The position taken by India is of particular interest. It elucidates the limits of the freedom granted by the three-step test. Although the latter has always been understood to allow national legislation great latitude, India urged room to manoeuvre lying beyond its scope.

To assess the Indian position adequately, it must be clarified from the outset that the limitations imposed on exclusive rights in Indian copyright law did not show extraordinary features which are to be considered incompatible with the three-step test. Correspondingly, the Indian delegation was not concerned with specific user

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390 Cf. the previous subsections dealing with the situation in the FRG and the Netherlands.

391 Cf. de Freitas 1990, 46-47. He also summarises the decision CBS Limited and Others v. Amstrad Consumer Electronics PLC and Another 1988 in which Lord Templeman described the situation prior to the CDPA 1988 as 'lamentable' and referred to 'millions of breaches of the law' committed by home copiers every year.

392 See Plenary of the Berne Union, Records 1967, 804.

393 See Plenary of the Berne Union, Records 1967, 804.

privileges but with the approval of far-reaching compulsory licensing in the field of the right of reproduction. The relevant statute in effect at the time of the Stockholm Conference was the Indian Copyright Act 1957 which entered into force on January 24, 1958. It replaced the previous 1914 Act which leaned heavily on the UK Copyright Act 1911. In the Rajya Sabha, the Council of States, the ambitious bill containing the new copyright law had been introduced on October 1, 1955. Finally, it was enacted in less than two years on June 4, 1957.[394] Not only the changed constitutional status of India but also the aim to accord with the 1948 Brussels Act of the Berne Convention had been a propelling force for the adoption of a self-contained copyright law in the seventh year of the Republic of India.[395] As regards copyright limitations, a close connection to UK copyright law can hardly be denied. In section 52 of the Indian Copyright Act 1957, various limitations are enumerated, the majority of which call provisions of the UK Copyright Act 1956 to mind.

Like in the UK, a fair dealing with a copyrighted work is exempted for the purposes of research or private study, criticism or review and reporting current events under section 52 (a) and (b) of the Indian Copyright Act 1957. The factors to be taken into account when considering a fair dealing defence under Indian law resemble those developed in the UK. Commenting on the 1957 Act at the time of the Stockholm Conference, Singhal stressed that allowance must be made for the 'nature, scope and purpose of the works in question'.[396] He maintained that similarity in these respects will lead to a finding of competitiveness, and that the later publication, under these circumstances, 'will interfere with the sale and diminish the profits of the earlier work, and thereby cause substantial injury to the owner of the copyright in the earlier work'.[397] As to the 'extent, value, purpose and effect of the material appropriated', Singhal emphasised that the 'quality, rather than the quantity, of the appropriated material is the real criterion'.[398] Attention has been devoted to these aspects, for instance, in M/S Blackwood & Sons Ltd. v. A.N. Parsuraman. In this decision, judge Rajgopala Iyengar elaborated:

> 'If there were such a motive [to compete with the earlier work and to derive profit from such competition] it would render the dealing "unfair" but I am unable to agree that if the works were not intended to compete, this would set at rest all questions concerning "fair dealing". Here again it appears to me that one has to have regard to the substantiality of the quantity and the quality of the matter reproduced.'[399]

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394 Cf. Baxi 1986, 500-501.

395 Cf. Baxi 1986, 502.

396 See Singhal 1968, 222.

397 See Singhal 1968, 222-223. Cf. Narayanan 1986, 158.

398 See Singhal 1968, 223. Cf. the explanations given with regard to the fair dealing defence under UK copyright law in the previous subsection.

399 See All India Reporter 1959 Mad 410 (428). The quoted part of the decision is also reproduced by Karkara/Chopra/Gyanendra Kumar 1986, 506.

Like in UK copyright law, weight is thus lent to the likelihood of competition – a criterion which is also reflected in the three-step test.[400] Narayanan, accordingly, touches upon article 9(2) BC when discussing the Indian fair dealing provisions.[401]

In section 52 (c) of the Indian Copyright Act 1957, the reproduction of a work for the purpose of judicial proceedings or a report thereof is also exempted. Section 52 (d), moreover, permits a work's reproduction in material prepared by the secretariat of a legislative body exclusively for the use of the members of that body.[402] As regards artistic works permanently situated in public places and architectural works, limitations can be found in section 52 (s), (t), (u) and (x). They resemble those set out in the UK Copyright Act 1956.[403] The complex library system established in UK copyright law, however, does not reappear in the Indian Copyright Act 1957. Instead, section 52 (o) simply allows the making of not more than three copies of a book, pamphlet, sheet of music, map, chart or plan by or under the direction of the person in charge of a public library for the use of the library if such material is not available for sale in India. As to educational use of copyrighted material, section 52 (g), in line with article 10(2) of the 1948 Brussels Act of the Berne Convention, allows the inclusion of short passages from a published work in anthologies intended for the use of educational institutions. The boundary lines of this privilege are drawn as restrictively as in the UK Copyright Act 1956.[404] Section 52 (h) of the Indian Copyright Act 1957, moreover, exempts the reproduction of a work by a teacher or a pupil in the course of instruction.

Besides the outlined limitations, the Indian Copyright Act 1957 permits the free use of texts of a legislative, administrative or legal nature. Section 52 (q) allows the reproduction of material taken from any official gazette, acts of a legislature, reports of any committee, commission, council, board or other like body appointed by the government, as well as of judgements or orders of a court, tribunal or other judicial authority. Additional rules concerning translations of acts of a legislature are set out in section 52 (r). These provisions rest on the rules laid down in the Berne Convention with regard to material produced by the state.[405] Hence, the inspection of limitations for which the 1957 Copyright Act provides does not reveal insurmountable hurdles which would have hindered India from approving the three-step test. By contrast, the fair dealing defence, as construed in India, comes close to notions which are reflected in the three-step test.

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400 The three-step test prohibits a conflict with 'a normal exploitation of the work'. Cf. the more detailed explanations given in the previous subsection.

401 See Narayanan 1986, 156.

402 It has been pointed out in the context of this provision that brochures or pamphlets for the use of members of the different Indian parliaments often reproduce copyrighted material. Cf. Karkara/Chopra/Gyanendra Kumar 1986, 489-490.

403 See for a more detailed description the previous subsection.

404 See section 6(6) of the UK Copyright Act 1956. Cf. Skone James 1965, 179.

405 Cf. in particular articles 2(2) and 2*bis*(1) of the 1948 Brussels Act of the Berne Convention and articles 2(4) and 2*bis*(1) of the 1967 Stockholm Act.

To understand the resistance to the adoption of the three-step test, the particular importance which has traditionally been attached to compulsory licensing in India must be brought into focus. Two exclusive rights, the right of reproduction and the right of translation, play a decisive role in this respect. Under the 1914 Copyright Act, the exclusive right of translation had already been restricted. Pursuant to section 4 of the 1914 Act, it was to subsist only for a period of ten years from the first publication of the work. However, the author was not divested of the translation right if he authorised the translation of his work within this period.[406] As Baxi points out, the language of the 1914 Act 'might suggest a laudable policy of promoting wider diffusion of Indian works in one language into other Indian languages'.[407] The objective to ensure wider diffusion of Indian works reappeared in the 1957 Act – in the shape of compulsory licences. Pursuant to section 31, a complaint can be made to the Indian Copyright Board if the right holder of any Indian work which has been published or performed in public refuses to allow the work's republication, public performance or communication by radio-diffusion.[408] After giving the owner of the copyright a reasonable opportunity of being heard, the Copyright Board is entitled to arrange for the grant of a licence to the complainant if it is satisfied that the grounds for the right holder's refusal are not reasonable.[409] In this case, the Board must determine the compensation to be paid to the right holder. Not only Indian works[410] but literary or dramatic works in any language are furthermore subjected to section 32. The latter provision vests in the Copyright Board the power to grant non-exclusive licences to publish a translation of a work. At the time of the Stockholm Conference, it was made a condition that a translation of the work had not been published within seven years of the first publication of the work, or that such translation was out of print. Moreover, the applicant for the compulsory licence must have unsuccessfully undertaken certain steps to obtain authorisation and satisfy the Copyright Board that he is capable of producing a correct translation and paying the determined royalties. The work must not have been withdrawn from circulation by the author, and the latter must have been given the opportunity of being heard.[411]

Against this backdrop, India tabled a proposal at the 1967 Stockholm Conference that aimed to exempt the reproduction of a work not only

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406 Cf. Baxi 1986, 500.

407 See Baxi 1986, 500.

408 In 1983, section 31 was amended so as to refer to broadcasting instead of radio-diffusion. Cf. Karkara/Chopra/Gyanendra Kumar 1986, 303-304.

409 Section 4 of the UK Copyright Act 1911 contained a similar provision. Cf. Karkara/Chopra/ Gyanendra Kumar 1986, 305. However, under section 4, a compulsory licence was only possible after the death of the author and not generally during the term of copyright.

410 An 'Indian' work, for the purposes of section 31, is a work, the author of which is a citizen of India or which is first published in India. In the case of a firm or record, works made or manufactured in India are included. Cf. Singhal 1968, 143; Narayanan 1986, 102.

411 Cf. Singhal 1968, 143-145.

'(a) for private use';

'(b) for judicial or administrative purposes'; and

'(c) in certain particular cases where the reproduction is not contrary to the legitimate interests of the author and does not conflict with a normal exploitation of the work',

as proposed in the programme of the Conference,[412] but also

'(d): in cases not covered by (a), (b) or (c) above, on payment of such remuneration which, in the absence of agreement, shall be fixed by competent authority'.[413]

Hence, it envisioned the imposition of a compulsory general licence on the right of reproduction beyond the other possibilities offered in the programme of the Conference. To understand the Indian position, it must taken into account that, since the end of the Second World War, the question had been pending whether the newly independent developing countries could be obliged to observe rules in the field of international copyright law on which developed countries had agreed without considering their special needs.[414] As Alikhan points out, the members of the Berne Union were conscious at the time of the Stockholm Conference that

'the developing countries had genuine problems in gaining greater and easier access to works protected by copyright, particularly for their technological and educational needs, from the developed countries, both in respect of formal as well as non-formal educational programmes'.[415]

In this vein, Singh, speaking on behalf of India, enunciated at the Stockholm Conference that his delegation, in general, was of the opinion that 'the protection of author's rights could not be considered apart from the rights of users'.[416] He also suggested that the approach of the Berne Union to the Convention 'should be reorientated as soon as possible, treating it less as a trade matter and more as a question of improving the educational and cultural needs of the less fortunate users and making their existence felt in the fast-changing world'.[417] In Main Committee I, Gae, more specifically, elaborated that Union countries should be entitled to limit the exclusive right of reproduction in the public interest. He asserted that

412 See Doc. S/1, Records 1967, 113.
413 See the text submitted by India, Doc. S/86, Records 1967, 692.
414 Cf. Alikhan 1986, 427.
415 See Alikhan 1986, 425.
416 See Plenary of the Berne Union, Records 1967, 807.
417 See Plenary of the Berne Union, Records 1967, 807.

> 'the author's right should give way to that interest and he should be content with reasonable remuneration. The Indian Government fully supported his right to that remuneration, but it did not think that the author should be allowed to withhold his work from the public.'[418]

He maintained that compulsory licensing is necessary in a multilingual country like India and spoke up for clarifying in the Convention that all references to the reproduction of a work should include translations.[419] The Indian proposal enabling a compulsory general licence was understood to cover both the right of reproduction and the right of translation. Not surprisingly, it was rejected by Main Committee I.

The Indian proposal concerns a point of particular interest. Obviously, a compulsory general licence affecting the whole right of reproduction lies beyond the scope of the three-step test. Nevertheless, the chairman of Main Committee I, Ulmer, conceded that under the three-step test, 'the countries of the Union were, however, entitled to introduce a compulsory license in some cases, as was done by the German legislation'.[420] The three-step test was understood to permit certain kinds of compulsory licensing, but not the general licence on which the Indian delegation insisted. In the framework of the three-step test, the payment of equitable remuneration may be applied as a means to mitigate the corrosive effect of a limitation when it comes to decide whether an unreasonable prejudice is caused. In the report on the work of Main Committee I, it was clarified that the prejudice caused by the making of 'a rather large number of copies for use in industrial undertakings' may be reduced to a reasonable level by providing for the payment of equitable remuneration.[421]

The substantial difference between this mechanism and the compulsory general licence demanded by India lies in the fact that the payment of remuneration solely influences the finding of an unreasonable prejudice and thus only the test's third criterion. The two preceding criteria are not affected. Hence, the limitation must be a 'certain special case' and it must not 'conflict with a normal exploitation of the work' before the introduction of a compulsory licence regime can be taken into account. Furthermore, if the legitimate interests of the author are prejudiced by the limitation to such an extent that a reasonable level even cannot be reached by providing for the payment of equitable remuneration, the limitation is still impermissible. Thus, there is a fine line to be walked between permissible and impermissible compulsory licensing on the basis of the three-step test. For this reason, the three-step test did not meet the expectations of India which sought to subject the right of reproduction as such to a compulsory licence regime.

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418 See Minutes of Main Committee I, Records 1967, 884.

419 See Minutes of Main Committee I, Records 1967, 884.

420 See Minutes of Main Committee I, Records 1967, 884. Cf. subsection 3.1.3.1.

421 See Report on the Work of Main Committee I, Records 1967, 1145-1146. See subsections 3.1.2, 4.3.2 and 4.3.3.

However, the protest articulated by India at the 1967 Stockholm Conference did not remain unheard.[422] The following 1971 Paris Revision Conference, in particular, devoted attention to special provisions reflecting the needs of developing countries. The outcome of the Conference is an appendix to the Berne Convention delineating an exceptional regime concerning the right of reproduction and the right of translation. Non-exclusive compulsory licences may be granted in respect of translations for the purposes of teaching, scholarship and research, and in respect of reproductions for the purposes of systematic instructional activities.[423] In 1983, India paved the way for accession to the 1971 Paris Act of the Berne Convention. In this context, it was expressly stated that this is due to

> 'certain additional facilities to enable the developing countries to grant compulsory licenses for translation and reproduction of works of foreign origin… As a developing country, it will be in our interest to adhere to the [1971 Paris Act of the Berne Convention] so as to avail of the benefits of the compulsory rights.'[424]

On 6 May 1984 India became party to articles 1 to 21 of the 1971 Paris Act.

3.1.4 THE DUALISM INHERENT IN THE THREE-STEP TEST

The previous survey of national limitations known at the time of the Stockholm Conference shows that there was a wide variety of limits to the reproduction right in domestic legislation. In particular, the exemption of the making of quotations, the incidental inclusion of a work in a report on current events, the reproduction of newspaper articles on current topics by the press, the use in schoolbooks, the photocopying in libraries, the personal use for private study, the reproduction of works made to be located permanently in public places, the reconstruction of copyrighted buildings, the use for advertising the public exhibition or sale of an artistic work, and the reproduction in the interests of public safety and for parliamentary, administrative and judicial purposes proved to be widespread.[425]

In sum, it can be gathered from the closer inspection of the situation surrounding the 1967 Stockholm Conference that there is a peculiar dualism inhering in the three-step test. Article 9(2) BC was distilled from typical features of the described

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422 It was feared that India could leave the Berne Union, thereby inducing other developing countries to do the same. Cf. Ulmer 1971, 435.

423 See appendix to the 1971 Paris Act of the Berne Convention, articles II, III and IV. Cf. for a description of these provisions Ulmer 1971, 428-434.

424 See the Statement of Objects and Reasons of the 1983 Act amending the Indian Copyright Act 1957, reproduced by Karkara/Chopra/Gyanendra Kumar 1986, 313. Section 32 of the 1957 Act, dealing with translations, was brought into line with the appendix to the 1971 Paris Act. Furthermore, a new section 32A was inserted which corresponds to the rules laid down in respect of the reproduction right in the appendix to the 1971 Paris Act.

425 See subsection 3.1.3.

extensive set of limitations which existed in 1967. The 1965 Committee of Governmental Experts unequivocally took the view in the course of the preparatory work for the Stockholm Conference that 'the main difficulty was to find a formula which would allow of exceptions, bearing in mind the exceptions already existing in many domestic laws'.[426] On the one hand, allowance was therefore made for those members of the Union seeking to shelter limitations. The three-step test must accordingly be hindered from dismantling the edifice of traditional limitations.[427] On the other hand, the drafters of article 9(2) BC sought to curb limitations on the exclusive right of reproduction. Consequently, the function was assigned to the three-step test to set limits to exemptions from the reproduction right. This dualism characterises the correlation of the three-step test with limitations known in 1967. It was mirrored in the programme of the Stockholm Conference which underlined 'the considerable difficulty of finding a formula capable of safeguarding the legitimate interests of the author while leaving a sufficient margin of freedom to the national legislation to satisfy important social or cultural needs'.[428]

Interpreters of the three-step test ought to be alert to the regulatory dilemma the outlined dualism may bring about. The test's potential for effectively exerting control is impoverished insofar as its regulatory substance, the three criteria, is defined through its regulatory object, the various limitations. The amount of regulatory independence of the three-step test depends on the extent to which influences of traditional limitations on its regulatory framework can be avoided. Against this background, it is to be emphasised that the objective to afford the members of the Berne Union the maintenance of long-standing limitations is directly given expression in the test's open wording itself. It does not amount to a fundamental principle overshadowing the test's application that may be invoked whenever a traditional limitation is affected. In this vein, it has been noted in the preparatory work for the Stockholm Conference that the abstract formula 'would indicate the limits *within* which national legislation could provide for exceptions'.[429] National legislators must ensure compliance with the three criteria irrespective of the existence of a limitation prior to the 1967 Stockholm Conference. It would be a misunderstanding to conclude that the three-step test must necessarily leave long-standing national limitations untouched. This rule has to be borne in mind for the later interpretative analysis.

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426 See Doc. S/1, Records 1967, 113. Cf. subsection 3.1.2.

427 See subsection 3.1.2. At the Conference, the delegate of the UK described this dualism by saying that 'the inclusion in the Convention of a general right of reproduction was only acceptable if the exceptions to it were expressed in terms which, whilst remaining broad enough to cover at least the reasonable exceptions already provided for in domestic laws, were nevertheless sufficiently restrictive to ensure that the author was not worse off than he would have been if the general right of reproduction had never been introduced'. See Minutes of Main Committee I, Records 1967, 857.

428 See Doc. S/1, Records 1967, 113.

429 See Doc. S/1, Records 1967, 81 (emphasis added).

3.2 The TRIPs Agreement

In 1994, the three-step test reappeared in Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights. The Agreement is part of the outcome of the Uruguay Round of Multilateral Trade Negotiations (MTN). The three-step test was therefore embedded in the framework of the General Agreement on Tariffs and Trade (GATT). In contrast to the Berne Convention, the protection of literary and artistic works in this context, does not form an end in itself, but is pursued to 'reduce distortions and impediments to international trade'.[430] Due to this primary objective, the three-step test receives a connotation that markedly differs from the introduction into the Berne Convention. The TRIPs Agreement seeks to ensure the harmonisation of the worldwide standard of intellectual property protection rather than its gradual improvement. Accordingly, article 1(1) TRIPs reflects the concern that extensive protection could 'contravene the provisions of this Agreement'.[431] Moreover, the TRIPs Agreement provides certain safeguards against abusive practices to prevent intellectual property rights from interfering with the freedom of international trade.[432]

Prior to 1994, the world's intellectual property system was placed beyond the GATT altogether by Article XX(d) of the General Agreement under the condition that measures concerning intellectual property protection 'are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'.[433] The reason for the insertion of the intellectual property system into the framework of the GATT can be seen in the growing importance of intellectual property to the stimulation of economic growth in industrialised countries.[434] This development leaves the advanced industrialised nations vulnerable to the application of practices like 'counterfeiting and piracy' in countries which embrace reproduction technology as a means to further local innovation while being loath to defer to legal disciplines dedicated to the protection of foreign proprietary rights.[435] In order to maintain a healthy trade balance, the above-mentioned free-riding practices led to not only unilateral and bilateral initiatives on the part of the industrialised countries, but also growing resistance to trade concessions which could possibly increase the market access of countries that are not willing to impose a ban on 'counterfeiting and piracy'.

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430 This is stated in the preamble of the TRIPs Agreement.

431 Compare in this connection Article 19 of the Berne Convention 1971 (Paris Act) with Article 1(1) TRIPs.

432 See Articles 8(2) and 40 TRIPs. Cf. Katzenberger 1995, 449-450.

433 See Reichman 1989, 829-836 and Drexl 1990, 285.

434 Cf. the analysis by Reichman 1989, 800-805.

435 Cf. Reichman 1989, 762-763 and 754-757; Alikhan 1986, 432.

Therefore, the GATT Uruguay Round offered the possibility to reconcile the concern of advanced industrialised countries about free-riding practices with the interest of less developed countries in broader market access.[436] Ultimately, the less developed countries accepted the incorporation of intellectual property protection into the framework of the GATT as a countermove to the opening of the markets of industrialised countries for their domestic products.[437] Although the outlined bargain bears little resemblance to the concept of the Berne Convention, it served as a vehicle to improve the worldwide protection of literary and artistic works.

3.2.1 THE DOUBLE INSERTION OF THE THREE-STEP TEST

In preparation for the GATT Uruguay Round, several Negotiation Groups were established, among them the 'Group of Negotiation on Goods' which in turn was divided into 14 additional groups. The task to assess the need for new rules and disciplines in respect of an effective and adequate protection of intellectual property rights was assigned to the 11th of these bodies, the 'Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods'.[438] In accordance with the instruction to give weight to 'the relationship between the negotiations in this area and the initiatives in other fora', co-operation with WIPO was qualified as beneficial.[439] In consequence, WIPO was invited to offer supportive guidance in order to further the general understanding of the treaties it administers.[440] The proposals tabled in the course of the 28 meetings of the Negotiation Group reflect this position, in respect of copyright protection, by leaning heavily on the Berne Convention, even though its idealistic underpinning differs significantly from the trade-based approach which prevailed in the drafting process.

On the part of the industrialised countries, several states suggested, on the one hand, the accession of all participants to the 1971 Paris Act of the Berne Convention while, on the other, emphasising the necessity of certain extensions, especially in respect of computer programs and databases.[441] With regard to

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436 See Reinbothe, 1992, 708.

437 Cf. Helfer 1998, 377; Cohen Jehoram, 1995, 123-124.

438 Cf. Gervais 1998, 11.

439 See Gervais 1998, 12. Cf. as to the relationship between GATT and WIPO at this initial stage the studies edited by Beier/Schricker 1989.

440 The Secretariat of WIPO was invited to provide an overview concerning 'the existence, scope and form of generally internationally accepted and applied standards/norms' for intellectual property protection. See Annex to GATT Doc. MTN.GNG/NG11/6. This decision of the Group was welcomed by the representative of WIPO. Cf. ibid., 15. The papers prepared by WIPO can be found in GATT Doc. MTN.GNG/NG11/W/24/Rev.1 and NG11/W/34. See in respect of initiatives pursued by WIPO at this time Ficsor 1996, 79-82.

441 Cf. for instance the Suggestion by Japan, GATT Doc. MTN.GNG/NG11/W/17/Add.1, 5-6 and the Guidelines and Objectives proposed by the European Community, GATT Doc. MTN.GNG/NG11/W/26, 4 and 7-8. See furthermore the similar explanations given by the representative of the United

exemptions from exclusive rights, Japan took the view that limitations on copyright should 'follow the line of the Berne Convention'.[442] A more detailed proposal in this connection was submitted by the United States, claiming that

> 'any limitations and exemptions to exclusive economic rights shall be permitted only to the extent allowed and in full conformity with the requirements of the Berne Convention (1971) and in any event shall be confined to clearly and carefully defined special cases which do not impair actual or potential markets for, or the value of, copyrighted works'.[443]

As the US representative explained, the latter formula aimed to clarify the Berne Convention rather than constitute a substantive change. The inclusion of actual as well as potential markets was considered an element that is consistent with the Berne Convention but clearer than the stipulations thereof.[444]

The delegations of several developing countries cast doubt upon the mandate of the Group to set out norms and standards for the protection of intellectual property and referred to WIPO as the appropriate forum to seek improvements in this respect.[445] They asserted that a protection system which rests on no firmer basis than considerations concerning its 'trade adequacy' would inevitably neglect to devote sufficient attention to the danger evolving from 'abusive uses of monopoly rights in intellectual property'.[446] In this line of reasoning, a submission from Brazil was premised on the assumption that, on its merits, the promotion of growth and development formed the centre of the Group's mandate. Thus, it warned of the restrictive effect on trade which might result from a 'rigid monopoly situation created by excessive protection of intellectual property rights'.[447] India expressed its reluctance to acquiesce in the broadening of the level of protection already granted by the Berne Convention, by stating that the latter is 'more than adequate to deal with copyright protection'.[448] Moreover, it took the view that principles like freedom on scope and level of protection, balance of rights and obligations, and primacy of public interest lie at the core of the Berne Convention.[449]

States, GATT Doc. MTN.GNG/NG11/4, 1-2 and the representative of the European Community, GATT Doc. MTN.GNG/NG11/9, 5.

442 See the Suggestion by Japan, loc. cit., 6. The wording was understood as a reference to the relevant provisions of the Berne Convention. Cf. GATT Doc. MTN.GNG/NG11/14, 15.

443 See GATT Doc. MTN.GNG/NG11/W/14/Rev.1, 8.

444 See the explanation given in GATT Doc. MTN.GNG/NG11/14, 14-15.

445 This was, in particular, stressed by Chile. See GATT Doc. MTN.GNG/NG11/W/72.

446 See GATT Doc. MTN.GNG/NG11/4, 4 and MTN.GNG/NG11/10, 2-3. Moreover, cf. the Communication from India, GATT Doc. MTN.GNG/NG11/W/39 and the corresponding statement of the representative of India pointing out the 'monopolistic and restrictive character' of the intellectual property system, GATT Doc. MTN.GNG/NG11/14, 4.

447 See GATT Doc. MTN.GNG/NG11/W/30, 1-3.

448 See GATT Doc. MTN.GNG/NG11/W/37, 17.

449 Cf. the Communication from India, GATT Doc. MTN.GNG/NG11/W/39, 6-8 and the explanation given by the representative of India, GATT Doc. MTN.GNG/NG11/15, 2.

The aforementioned fundamental differences of opinion remained even when the negotiations entered the stage of first draft agreements proposed by several members of the group.[450] Nevertheless, the tabled proposals gave rise to further considerations which influenced the final shape of the TRIPs Agreement. The proposal which the European Community had submitted, for instance, evoked the suggestion to apply the technique of incorporating provisions of already existing intellectual property conventions by reference.[451] As several participants also expressed their concern about the interpretative uncertainty which might evolve from paraphrasing the Berne Convention,[452] it is not surprising that this concept finally informed the drafting of article 9(1) TRIPs. By virtue of this provision, the member countries are obliged to ensure compliance with articles 1 through 21 of the 1971 Paris Act of the Berne Convention and the appendix thereto, except for the moral rights set down in article 6*bis*. Therefore, the three-step test of article 9(2) of the Berne Convention is incorporated into TRIPs by reference.

Moreover, the three-step test appears in article 13 TRIPs. This second insertion can be traced back to a US draft agreement.[453] The latter document contains in article 6 of its section dealing with copyright and related rights a separate provision concerning copyright limitations. Its wording corresponds, with merely slight alterations, to the already quoted formula which the United States perceived as clarification of the Berne Convention in respect of permissible limitations:

> 'Contracting parties shall confine any limitations or exceptions to exclusive rights […] to clearly and carefully defined special cases which do not impair an actual or potential market for or the value of a protected work.'[454]

The chairman of the negotiating group, Lars Anell, included this article 6 into the so-called 'Composite Draft Text' which he prepared in order to facilitate the consultations after several draft agreements had been presented.[455] He modified and restructured the various proposals so as to afford their arrangement in a single

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450 While the proposals of the European Community, GATT Doc. MTN.GNG/NG11/W/68, 4, the United States, NG11/W/70, 4, Switzerland, NG11/W/73, 5, and Japan, NG11/W/74, 5 sought to establish the set of rules laid down in the Paris Act of the Berne Convention as a common standard of all member countries, the proposal of 12 developing countries, NG11/ W/71, 10 focuses solely on the principle of national treatment.

451 These comments, in particular, were evoked by a proposal which Switzerland had been presented. Cf. GATT Doc. MTN.GNG/NG11/20, 9.

452 See GATT Doc. MTN.GNG/NG11/21, 25. The same problem was discussed in connection with the proposal of the United States, ibid., 8.

453 See GATT Doc. MTN.GNG/NG11/W/70 of May 11, 1990.

454 See GATT Doc. MTN.GNG/NG11/W/70, 6. Compare the wording of this draft provision with the text proposed earlier by the US in GATT Doc. MTN.GNG/NG11/W/14/Rev.1, 8.

455 See the description of Gervais 1998, 17-21. The 'Chairman's draft' was first circulated as informal document number 1404, dated 12 June 1990. It became later document MTN.GNG/ NG11/W/76. The formula of the United States can be found under 8A.2 on page 14.

compilation which facilitated the subsequent informal negotiations.[456] In the course of these meetings, the size of the 'Composite Draft Text' shrank proportionately to the progress made in the discussions on contested points. This process led to the gradual approximation of the formula introduced by the United States to the wording of article 9(2) BC.[457]

In consequence, the three-step test is not only incorporated into the TRIPs Agreement by reference to article 9(2) BC but also embodied in article 13 TRIPs. To understand why the contracting parties of the TRIPs Agreement ultimately favoured this second inclusion of the three-step test as an independent, separate provision, it is necessary to remember the starting point of the debates on copyright limitations. In particular, agreement could be reached on one point: the rules to be laid down in TRIPs should correspond to the principles of the Berne Convention. Against this backdrop, it appears safe to assume that the three-step test was regarded as a kind of materialisation of the standard of protection reached in the Berne Convention,[458] and that its second inclusion, for this reason, met with approval. Furthermore, it must be borne in mind that a specific merit of the three-step test is its openness. The abstract criteria of the test are capable of encompassing a wide range of limitations. Hence, just like at the 1967 Stockholm Conference for the revision of the Berne Convention,[459] it formed a proper basis for the reconciliation of the contrary opinions expressed during the deliberations of the Negotiating Group on TRIPs.

3.2.2 ARTICLE 13 TRIPS AS A BERNE-PLUS ELEMENT

To clarify the effect of article 13 TRIPs on copyright limitations, certain provisions of the Berne Convention to which article 9(1) TRIPs refers must be considered. As already emphasised, article 13 TRIPs is interwoven with the standard of protection reached in the Berne Convention. Which consequences this close connection has can be inferred from article 20 BC in particular. This provision is also encompassed by the reference made in article 9(1) TRIPs. It reads as follows:

> 'The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.'

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456 Cf. the covering page of the 'Chairman's draft', ibid. and Doc. MTN.GNG/NG11/27.

457 See informal documents no. 2341, dated 1/10/1990, 11 (6A.1); no. 2613, dated 25/10/1990, 8 (art. 12); no. 2814, dated 13/11/1990, 7 (art. 12) and no. 2909, dated 22/11/1990, 8 (art. 13).

458 Cf. Reinbothe 1992, 711 and Reinbothe/v. Lewinski 2002, 134.

459 Cf. subsection 3.1.2.

The central question here is the extent to which article 20 BC prevents article 13 TRIPs from serving as an alternative basis for limitations besides relevant provisions of the Berne Convention. This problem will subsequently be approached in stages. In particular, it is necessary to analyse the role which article 20 BC, in general, plays in the framework of the TRIPs Agreement.

The historical background to article 20 shows that its anchorage lies in the endeavour to regulate bilateral agreements between Union countries.[460] Hence, it arguably does not concern the accession of more than two members of the Berne Union to the TRIPs Agreement. This line of reasoning would render article 20 BC incapable of affecting any provision of TRIPs. The argument, however, can easily be rebutted. Article 20 seeks to prevent derogations to the standard of protection reached in the Berne Convention.[461] Therefore, it is inappropriate to set aside article 20 on account of the mere technical finding that TRIPs is not a bilateral agreement. Indeed, more than two participants from among the countries of the Berne Union adopted the TRIPs Agreement. However, instead of inferring from this fact the inapplicability of article 20 BC, it can be argued that there is all the more reason to observe the rules laid down for bilateral agreements when more than two members of the Berne Union accede to an additional agreement. The potential harm to the standard of protection safeguarded by article 20 BC which might flow from an additional agreement is undoubtedly the greater the more members of the Berne Union participate. Viewed from this perspective, the TRIPs Agreement itself, and thus also provisions like article 13 TRIPs, are accordingly subjected to the obligation laid down in article 20 BC.

Against this finding, it could be asserted that the members of the Berne Union enjoy the freedom to alter one treaty by a later one.[462] Theoretically, the establishment of the TRIPs Agreement could have been used to do away with the obligation resulting from article 20 BC. The parties of the TRIPs Agreement, however, obviously did not intend to deviate from the rule set out in article 20, but manifestly countenanced and even underscored the commitment to the standard of protection reached in the Berne Convention. In contrast to article 6*bis* BC, article 20 was not excluded from the reference to provisions of the Convention made in article 9(1) TRIPs. Furthermore, article 2(2) TRIPs underlines the intention of the parties not to derogate from existing obligations under the Berne Convention. It would appear schizophrenic to allege that the TRIPs Agreement, by means of a reference to article 20 BC, places the obligation on its parties to vest authors with more extensive rights when entering into an additional agreement, while at the same time not meeting the standard of protection reached in the Berne Convention itself. Therefore, it can be concluded that article 20 BC does affect the TRIPs

460 Cf. Ricketson 1987, 682-685.

461 Cf. the circumscription of this objective by Ricketson 1987, 687.

462 Cf. Ricketson 1987, 686-687. See Katzenberger 1995, 457, as to the lex posterior-maxim.

Agreement.[463] Its provisions are to be construed in the light of the obligation to safeguard the Berne standard of protection. This obligation is central to the determination of the function of article 13 TRIPs.

When examined separately from article 20 BC, article 13 TRIPs could be employed to impose restrictions which are consistent with the three-step test on all exclusive rights which have been recognised internationally. Limits could not only be set to the right of reproduction, as already enabled by article 9(2) BC, but also to all other exclusive rights – regardless of the specific prerequisites for copyright limitations set forth in the Berne Convention.[464] As the scope of article 13 is delineated in general terms, its wording fails to indicate that allowance must necessarily be made for the system of permissible limitations established in the Berne Convention. It simply calls upon the members of the TRIPs Agreement to ensure generally that limitations on exclusive rights comply with the three-step test:

> 'Members shall confine limitations or exceptions *to exclusive rights* to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.'

When read without considering the context in which article 13 TRIPs is placed, this language suggests that, regardless of Berne provisions, limitations on whatever exclusive right could simply be based on article 13. This would inevitably lead to an erosion of the specific system of permissible limitations for which the Berne Convention provides. If limitations could alternatively be based on article 13 TRIPs, the specific norms of the Convention would become obsolete. This scenario nourishes the fear of a potential destabilising effect on the Berne standard of protection. For instance, it has been contended that the three-step test might erode the authors' right to equitable remuneration which is explicitly guaranteed in article 11*bis*(2).[465] The outlined understanding of article 13 TRIPs is therefore at odds with the objective of article 20 BC to safeguard the standard of protection reached in the Berne Convention. It would trigger a conflict between the Berne Convention and the TRIPs Agreement and contradict the effort made in the drafting process and expressed in article 2(2) TRIPs to harmonise both treaties. The conceptual contours of article 13 TRIPs must therefore necessarily be traced with an eye to the surrounding context and, in particular, article 20 BC.

The objective to circumscribe the scope of article 13 so as to ensure an application which does not cause tension between the Berne Convention and the

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463 See Gervais 1998, 89-90; Katzenberger 1995, 458

464 For that reason, the three-step test contained in article 13 TRIPs might theoretically also be regarded as a Berne-minus element. Cf. Correa 1996, 69; Cohen Jehoram 1995, 127 and 2001, 384. See Gervais 1998, 89-90, as to the creation of new compulsory licences. Francon 1997, 37, elaborates that, when article 13 was adopted, it was indeed feared that the three-step test might lead to new limitations on the performance right beyond those already provided for in the Berne Convention. Cf. also Brennan 2002, 223-224.

465 Cf. Reinbothe/v. Lewinski 2002, 131.

TRIPs Agreement can be realised by two different assumptions. Firstly, the scope of article 13 can be confined to the rights which were newly introduced into international copyright law by the TRIPs Agreement.[466] This interpretation, indeed, leaves the system of the Berne Convention untouched. However, it unduly minimises the scope of article 13 and can hardly be reconciled with its wording. The terms used in article 13 TRIPs do not point towards any such restriction of scope. By contrast, as already elaborated, the wording evokes the impression of universal applicability by simply referring to 'limitations or exceptions to exclusive rights'. Undoubtedly, it would have been possible to lay down the confinement to newly introduced rights in the wording of article 13 itself, if this was really intended. Hence, this line of reasoning must fail.

Secondly, however, article 13 can be conceived as an additional hurdle which exemptions from exclusive rights have to surmount in order to be permissible.[467] Based on this interpretation, limitations which are consistent with the Berne Convention can *additionally* be scrutinised in the light of the three-step test. This approach also inhibits article 13 from eroding the Berne system of permissible limitations. At the same time, it has the merit of preserving the applicability of article 13 to the exclusive rights recognised *jure conventionis*. It corresponds to the wording of article 13 which fails to indicate any restriction to the new rights granted authors in the TRIPs Agreement. Furthermore, it mirrors the deliberations of the negotiating group on TRIPs: article 13 was crafted to universalise the already existing rules in the field of copyright limitations. Against this background, it is consistent to bring all kinds of copyright limitations, in addition to the specific provisions of the Berne Convention, into line with the three-step test.[468] The harmonising effect of this procedure contributes to the realisation of the primary objective of TRIPs to promote international trade by guaranteeing a similar standard of copyright protection worldwide. It is therefore appropriate to posit that article 13 is an additional safeguard. It can be qualified as a Berne-plus element.[469] In consequence, the three-step test reaches the stage of a comprehensive clause controlling all copyright limitations in the framework of the TRIPs Agreement.[470] In the context of the WIPO 'Internet' Treaties, this substantial extension of the test's scope was confirmed.

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466 Namely, the rental rights granted in article 11 TRIPs. Cf. Gervais 1998, 99-100; Katzenberger 1995, 466; Reinbothe 1992, 711, in respect of the possibility to base an additional rental right for authors whose work is embodied in a phonogram on article 14(4) TRIPs. The view that the scope of article 13 TRIPs is reduced to the newly granted rights has been taken by the European Communities in the course of the WTO Panel Decision on United States – Section 110(5) of the US Copyright Act. See WTO Panel – Copyright 2000, 27-28.

467 See Cohen Jehoram 1995, 127 and 2001, 384; Ricketson 1999, 80; Gervais 1998, 90.

468 Cf. Ficsor 1997, 215.

469 Cf. Reinbothe 1992, 711; Katzenberger 1995, 467; Goldstein 2001, 294.

470 See Heide, 1999, 105 and Keplinger, 1996, 57.

3.3 The WIPO 'Internet' Treaties

After the 'twin revisions' of the Berne Convention in Stockholm 1967 and Paris 1971, new challenges for the international copyright community evolved from numerous technological developments like reprography, home taping, satellite broadcasting and cable television, or the growing importance of computer programs and electronic databases.[471] Although these changes necessitated a suitable response, a renewed revision of the Berne Convention seemed out of reach. The predictions in respect of its possible outcome were anything but positive due to the fear of unexpected and undesirable results, such as a decreased level of protection.[472] Against this backdrop, WIPO followed the concept of 'guided development' by preparing various studies and promoting discussions on problem areas. On the basis of these initiatives, guidelines and recommendations to national legislators were offered in order to ensure that similar solutions to the existing problems would be chosen.[473] At the end of the 1980s, however, the need for new norms capable of adjusting the system of international copyright protection to the latest technical innovations could no longer be denied.[474]

With regard to the preparation of new norms and standards, WIPO convened a committee of experts which was later, in September 1992, divided into two separate bodies by the Assembly of the Berne Union – one for the preparation of a possible protocol to the Berne Convention, the second for the consideration of a new instrument on the protection of the rights of performers and producers of phonograms.[475] Even though their preparatory work was initially overshadowed by the measures taken in other fora, namely in the GATT Uruguay Round, their deliberations came to fruition after the adoption of the TRIPs Agreement. In 1996, the WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions was convoked and finally adopted two treaties: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).[476] At the core of these agreements lies the objective to clarify certain issues raised by the application of digital technology, in particular with respect to the internet, which are not specifically addressed in the TRIPs Agreement.[477]

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471 See Ficsor 1997, 197.

472 Cf. Ficsor 1996, 79.

473 Cf. Ricketson 1987, 919-921; Ficsor 1996, 80; Alikhan 1986, 438-439.

474 See Ficsor 1996, 80.

475 For a detailed description of this development, see Ficsor 1996, 80-84. Cf. the introductory notes of WIPO Doc. CRNR/DC/4 and CRNR/DC/5.

476 Cf. Ficsor 1997, 198-199. The protection of databases was also under discussion. In respect of a corresponding *sui generis* right, however, no agreement could be reached at the Conference. Instead, a recommendation concerning databases was issued which expresses 'interest in examining further the possible implications and benefits of a *sui generis* system of protection of databases at the international level'. See WIPO Doc. CRNR/DC/100. Cf. Francon 1997, 3-5.

477 See the preamble of the WCT. Cf. Ficsor 1997, 198.

In connection with limitations and exceptions in the digital environment, the three-step test was embraced as a means to attain the outlined objective. Ultimately, the test has been laid down in article 10 WCT as well as in article 16(2) WPPT. The decision to solve the problem of permissible limitations by simply referring to the three-step test had already been anticipated in the TRIPs Agreement. Moreover, the various debates on copyright limitations during the so-called 'guided development' period had been based on the three-step test. The same is true for the preparatory work undertaken for the initially envisaged protocol to the Berne Convention and the new instrument on the protection of the rights of performers and producers of phonograms. The deliberations of the different committees and groups of experts involved in these preparatory activities show which considerations underlay the final insertion of the three-step test into the WIPO 'Internet' Treaties. For this reason, attention will be devoted to the period of 'guided development' before embarking on a description of the proceedings at the 1996 WIPO Diplomatic Conference itself. The outcome of the various meetings of experts convened prior to the 1996 Conference will be discussed in the ensuing subsection 3.3.1. Subsequently, the debate on the three-step test at the Conference will be brought into focus in subsection 3.3.2.

3.3.1 PREVIOUS DISCUSSIONS BASED ON THE THREE-STEP TEST

The problem of private use privileges formed the centre of gravity in the debates on limitations during the 'guided development' period.[478] As the three-step test was the only guideline issued in this respect at the 1967 Stockholm Conference, it constituted the logical starting point taken by the various committees of experts. A statement made by the participants in a meeting held in June 1984 shows that the new ways of reproduction were considered incompatible with the three-step test. The Group of Experts on Unauthorized Private Copying of Recordings, Broadcasts and Printed Matter pointed out unequivocally that the

> 'cumulative effect of reproduction for private purposes of sound and visual recordings and broadcasts as well as reprographic reproduction for private use of printed works is prejudicial to the author's legitimate interests (in particular, to his claim to derive material benefit from the use of his work by others) and such kinds of reproduction may also conflict with a normal exploitation of the work reproduced.'[479]

These findings, however, did not inhibit the Group from also taking the view that the 'use of modern technology for reproduction of works for private purposes should not be hindered and its adverse effects on the interests of authors and beneficiaries of neighboring rights should be mitigated by appropriate means of

[478] Cf. the overview given by Ficsor 2002a, 304-317.
[479] See Experts on Unauthorized Private Copying 1984, 281.

protection'.[480] What several participants had in mind was the imposition of a levy on reproduction equipment and blank material for recordings.[481] The bargain proposed by the Group of Experts, thus, comes down to permitting the new ways of copying which are prejudicial to the authors' legitimate interests on condition that the prejudice is reduced to a reasonable level by ensuring the payment of equitable remuneration.[482] Similar conclusions were drawn by a WIPO/UNESCO Committee of Governmental Experts which was convened in June 1986. It dealt especially with private recording of audiovisual works. The participants, in principle, endorsed the view taken by the 1984 Group of Experts and recommended the introduction of a charge to be paid by manufacturers or importers of recording equipment and blank material supports, such as tapes and cassettes.[483]

Whereas these considerations are of a general nature, each separate criterion of the three-step test was taken into account by a further committee of governmental experts which met in December 1987 to discuss the implications of reprographic reproduction for what was called the 'printed word'.[484] As regards the first criterion of the three-step test, the restriction of limitations to 'certain special cases', it was pointed out that limitations on the right of reproduction 'should be restricted to precisely defined special cases. The cumulative effects of such limitations should not be allowed to result in generalized or unreasonably wide scope of free reproductions and/or non-voluntary licences.'[485] The question of speciality was thus approached by focusing on the precision of a limitation's definition and the resulting scope. The limitation's purpose was not expressly brought to the fore.

As to the test's second criterion, the prohibition of a conflict with a work's normal exploitation, concrete examples were given. The making of reproductions was found to conflict with a normal exploitation 'at least in cases where:

(i) copies are made for commercial distribution;
(ii) the number of copies made is very large;
(iii) it concerns works whose market is particularly vulnerable to such reproduction (such as sheet music, artistic works of restricted edition, exercise books, other non-use publications, etc.'[486]

480 See Experts on Unauthorized Private Copying 1984, 281.
481 See Experts on Unauthorized Private Copying 1984, 282.
482 This strategy of avoiding an unreasonable prejudice reminds of the solution set out in the 1965 Copyright Act of the FRG which also influenced the deliberations at the 1967 Stockholm Conference. Cf. subsection 3.1.3.1.
483 See Experts on Audiovisual Works and Phonograms 1986, 226.
484 The category of the 'printed word' was understood to comprise any writings included or to be included in books, newspapers, magazines, computer memories or electronic databases. Cf. Ficsor 2002a, 306.
485 See Experts on the Printed Word 1988, 63.
486 See Experts on the Printed Word 1988, 64.

Interestingly, another committee of experts which reviewed the outcome of the 1987 meeting of governmental experts, did not maintain example (ii) which concerns a very large number of copies. The experts stated instead that a conflict with a normal exploitation arises where

'(ii) multiple copies or related and/or systematic single copies are made'.[487]

Moreover, they added an example referring to cases where

'(iv) copies are made of entire works, or of self-contained parts of works'.[488]

To facilitate the assessment of limitations in the light of the last criterion of the three-step test, forbidding an unreasonable prejudice to the author's legitimate interests, the 1987 Committee of Governmental Experts developed a catalogue of criteria to be taken into account. This catalogue leans on the US fair use doctrine.[489] The experts espoused the consideration of

'(i) the purpose of the reprographic reproduction, including whether it serves – directly or indirectly – commercial purposes or is of a non-profit character or not;
(ii) the nature of the work copied;
(iii) the number of copies;
(iv) the substantiality of the portion copied in relation to the work as a whole;
(v) the effect of the reproduction upon the potential market for the work and the remuneration of the author'.[490]

Moreover, the 1987 Committee of Governmental Experts pointed out cases in which the free reproduction of a work was considered permissible even without providing for the payment of any remuneration:

'(a) reproduction of articles or short portions of other works or of very short complete works for nonprofit personal use, including teaching, learning or scientific study;
(b) reproduction by nonprofit libraries and archives for users for the purposes and to the extent mentioned under (a); reproduction by such libraries and archives of works without limitation as to the portion copied for the purposes of preservation or for the replacement of damaged, deteriorated, lost or stolen copies (if an unused replacement copy cannot be obtained after a reasonable effort and at a fair price), including reproduction in the framework of interlibrary arrangements, provided that such reproduction

487 See Experts on the Evaluation and Synthesis of Principles 1988, 452.
488 See Experts on the Evaluation and Synthesis of Principles 1988, 452.
489 See section 107 of the US Copyright Act.
490 See Experts on the Printed Word 1988, 64.

> should not amount to a systematic reproduction or distribution of copies of works and that interlibrary arrangements should not have, as their purpose or effect, the substitution for subscription to or for the purchase of the works concerned.'[491]

This enumeration is of particular interest because the permissibility of the listed cases was subsequently confirmed when the preparatory work eventually leading to the WIPO 'Internet' Treaties entered the next stage and a protocol to the Berne Convention was under discussion. To satisfy the request of a physical person who needs a copy for the purpose of study, scholarship or private research, libraries or archives should moreover enjoy the freedom of reproducing an article or other item published in a collection of works or in an issue of a periodical, or a short extract from a work.[492]

Similarly, it was considered compatible with article 9(2) BC to afford non-profit educational establishments the reproduction of an article or other item published in a collection of works or in an issue of a periodical, or a short extract from a work for face-to-face teaching activities.[493] Other entities, however, such as companies, institutions and educational establishments, the activities of which serve gainful purposes, should be barred from benefiting from free reprographic reproduction. Their copying for internal purposes was considered incompatible with the three-step test. In the field of private reproductions for personal use, the reproduction of entire books should be forbidden as well as the copying of computer programs, electronic data bases or sheet music. In respect of audiovisual works and sound recordings, the Berne Protocol Committee recalled the necessity to avoid an unreasonable prejudice to the author's legitimate interests by providing for the payment of remuneration.[494]

However, the outlined rules did not find their way to the 1996 WIPO Diplomatic Conference. Finally, the view prevailed that the problem of reprographic reproduction could be left to the application of article 9(2) BC instead.[495] The opportunity of tracing the conceptual contours of permissible private use privileges more precisely on the basis of the three-step test was not seized. In this vein, the basic proposal for substantive provisions of the later WIPO Copyright Treaty clearly assigned to the three-step test the task of controlling copyright limitations. The first paragraph of the draft provision which later became article 10 WCT states that limitations may only be imposed on the rights newly granted under the WIPO Copyright Treaty if the three abstract criteria of the test are fulfilled. Its second paragraph explicitly extends the test's ambit of operation to the system of permissible limitations which is set out in the Berne Convention:

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491 See Experts on the Printed Word 1988, 64.
492 Cf. Experts on a Berne Protocol 1992, 70-71.
493 Cf. Experts on a Berne Protocol 1992, 71.
494 Cf. Experts on a Berne Protocol 1992, 73 and Ficsor 2002a, 337-342.
495 Cf. Ficsor 2002a, 340 and 342.

> 'Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.'[496]

As regards exemptions from the right of reproduction, no new item was therefore on the agenda apart from the already known provision laid down in article 9(2) BC.

3.3.2 THE DEBATE AT THE 1996 WIPO CONFERENCE

At the Conference, the intention to ensure limitations a proper ambit of operation occupied centre stage. The aforementioned basic proposal for the later WCT already noted with regard to limitations that,

> 'when a high level of protection is proposed, there is reason to balance such protection against other important values in society. Among these values are the interests of education, scientific research, the need of the general public for information to be available in libraries and the interests of persons with a handicap that prevents them from using ordinary sources of information.'[497]

However, it was also pointed out that formally 'minor reservations' could in the course of a critical review of current limitations turn out to undermine important aspects of protection in the digital environment.[498] Not surprisingly, the concern about sufficient breathing space for socially valuable ends played a decisive role in the deliberations concerning limitations. The Minutes of Main Committee I mirror the determination to shelter exemptions. The US sought to safeguard the 'fair use' doctrine.[499] Denmark feared that the new rules under discussion could become 'a "straight jacket" for existing exceptions in areas that were essential for society'.[500] Many delegations opposed the second paragraph of the draft provision set out in the basic proposal which additionally subjects current limitations under the Berne Convention to the three-step test.[501] Korea unequivocally suggested the deletion of paragraph 2[502] – a proposal which was approved by several other delegations.[503]

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496 See the basic proposal for substantive provisions of the later WCT, WIPO Doc. CRNR/DC/ 4, article 12. The three-step test was also embodied in the basic proposal for the treaty which later became the WPPT. See WIPO Doc. CRNR/DC/5, articles 13 and 20.

497 See WIPO Doc. CRNR/DC/4, § 12.09.

498 See WIPO Doc. CRNR/DC/4, 54 (12.08). Cf. Ficsor 1997, 215.

499 See WIPO Doc. CRNR/DC/102, § 488.

500 See WIPO Doc. CRNR/DC/102, § 489.

501 See, for instance, the statements made by the delegations of Denmark, WIPO Doc. CRNR/DC/102, § 489, New Zealand, ibid., § 495, and Sweden, ibid., § 497. See for the text of the draft provision the end of the previous subsection.

502 See WIPO Doc. CRNR/DC/102, § 491.

503 See, for instance, the statements made by the delegations of Hungary, WIPO Doc. CRNR/DC/102, § 493, and China, ibid., § 500.

Singapore, for instance, elaborated that the second paragraph was 'inconsistent with the commitment to balance copyright laws, where exceptions and limitations adopted by the Conference were narrowed, and protection was made broader'.[504]

Regardless of these critical comments, the structure of the final article 10 WCT confirms expressly the comprehensive applicability of the three-step test to any exemptions from exclusive rights and pursues the aim to universalise its criteria already underlying article 13 TRIPs.[505] In line with the already described basic proposal,[506] the first paragraph of article 10 places the obligation to meet the three-step test on exemptions from the rights newly granted in the WCT, while the second paragraph additionally subjects the system of permissible limitations prescribed in the Berne Convention to the three-step test.[507] That article 10(2) cannot be invoked to impose new limitations on the exclusive rights of the Berne Convention, clearly follows from the context in which it is placed.[508] In article 1(1) WCT, it is unequivocally stated that the WIPO Copyright Treaty is a 'special agreement within the meaning of Article 20 of the Berne Convention'.[509] In contrast to the TRIPs Agreement, where the commitment of the contracting parties to the standard of protection reached in the Convention can only be gathered from the incorporation of article 20 BC by reference,[510] the contracting parties of the WCT, therefore, explicitly emphasise their obligation to leave the Berne standard of protection untouched. This obligation is supplemented by the non-derogation clause of article 1(2) WCT. Article 20 BC itself is incorporated into the WIPO Copyright Treaty by virtue of article 1(4) thereof. Exactly like article 13 TRIPs, article 10(2) WCT is thus incapable of serving as an alternative basis for the creation of limitations on the rights recognised in the Berne Convention besides the specific provisions of the Convention itself. Instead, potential national limitations which already comply with the rules set out in the Convention must *additionally* pass the three-step test pursuant to article 10(2) WCT. The scope of the three-step test is captured in the agreed statement concerning article 10 WCT as follows:

> 'It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

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504 See WIPO Doc. CRNR/DC/102, § 492.

505 See Francon 1997, 35-37; Heide 1999, 105.

506 See the last paragraph of the previous subsection.

507 Cf. Francon 1997, 35. Ficsor 1997, 215, characterises the three-step test in this connection as an 'interpretation tool'.

508 Cf. Reinbothe/v. Lewinski 2002, 130-132.

509 See for the text of article 20 BC subsection 3.2.2.

510 Cf. subsection 3.2.2.

> It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.'[511]

The latter statement dealing specifically with article 10(2) can be regarded as a recognition of the aforementioned concern expressed by several countries that the application of the three-step test to the system of permissible limitations established in the Berne Convention could restrict existing exemptions.[512]

In general, the agreed statement underscores that the three-step test is intended not only for controlling the adjustment of the current set of limitations to the digital environment but also for guiding the development of new exemptions. Its three criteria will therefore determine the shape of the copyright limitations to come. In the WIPO Copyright Treaty, the three-step test thus entered the provisional last stage of development. Its comprehensive applicability to all existing limitations has been consolidated and its crucial importance for future limitations is emphasised. To apply the three-step test appropriately in the digital environment, the preamble of the WCT should be borne in mind. It stresses the necessity

> 'to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention'.[513]

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511 See WIPO Doc. CRNR/DC/96. This statement applies *mutatis mutandis* to article 16 WPPT. See WIPO Doc. CRNR/DC/97.

512 See WIPO Doc. CRNR/DC/102, 71-73. Cf. Francon 1997, 37, who places the statement in the context of article 13 TRIPs.

513 See the preamble of the WCT. The WPPT contains a similar formulation in its preamble. The issue had already been addressed in the basic proposal for the later WCT. See WIPO Doc. CRNR/DC/4, § 12.09. Moreover, it was raised in the course of the deliberations of Main Committee I. See WIPO Doc. CRNR/DC/102, 72 and 74. Cf. as to the reference to the Berne Convention ('as reflected in the Berne Convention'), Francon 1997, 9; Ricketson 1999, 61; Cohen Jehoram 2001a, 382.

Chapter 4

The Interpretation of the Three Criteria

After examining the contextual background to the three-step test, the task of developing an appropriate interpretation of each of its criteria must be fulfilled. This complex problem will be approached in stages. The following section 4.1 deals with the principles of interpretation which underlie the later interpretative analysis. After clarifying these preliminary matters, the two different functions of the three-step test are explained in section 4.2: the direct control function and the additional safeguard function. The ensuing section 4.3 devotes attention to the internal system which is established by the three criteria of the test and defines its specific way of operation. The interpretative analysis follows. The meaning of the expressions 'certain special cases' (4.4), 'conflict with a normal exploitation of the work' (4.5) and 'unreasonably prejudice the legitimate interests of the authors' (4.6) will be examined in depth.

4.1 Principles of Interpretation

The interpretation of international treaties, such as the Berne Convention, the TRIPs Agreement and the WIPO 'Internet' Treaties, is governed by the rules of customary international law, as codified in the 1969 Vienna Convention on the Law of Treaties.[514] To ensure the proper interpretation of the three-step test's criteria, it is therefore necessary to devote attention to these rules before turning to the exercise of a detailed interpretative analysis. Accordingly, the relevant provisions of the Vienna Convention, namely articles 31, 32 and 33 thereof, will be examined in the ensuing subsection 4.1.1. Subsequently, in subsection 4.1.2, the guidelines issued in these articles will be applied to the material available for the interpretation of the three-step test. Finally, a definition of copyright limitations in the sense of the three-step test will be given in subsection 4.1.3 to clarify the terminology used in the course of the later interpretative analysis.

4.1.1 The Vienna Convention on the Law of Treaties

Basically, there are three schools of thought offering different approaches to treaty interpretation. The first, which might be characterised as the objective approach, establishes the precedence of the treaty text as the authentic expression of the

[514] Cf. Ricketson 1987, 134; WTO Panel – Patent 2000, § 7.13; WTO Panel – Copyright 2000, § 6.43; Gervais 1998, 32; Reinbothe/v. Lewinski 2002, 17-18; Ficsor 2002, 54.

intentions of the parties. To guarantee legal certainty and security, it focuses on the terms freely chosen by the parties as external manifestation of their will.[515] Correspondingly, it is posited that the primary goal of treaty interpretation is to ascertain the precise meaning of the text. In contrast to this objective approach, the second school of thought, which might be called subjective, postulates the primacy of the contracting parties' intentions as a subjective element distinct from the text. The mere treaty text, as the primary source for interpretation, is forced to the sidelines insofar as other material, like the *travaux préparatoires*, more clearly provides evidence of the intentions of the parties. Thirdly, proponents of a teleological approach to treaty interpretation seek to interpret treaty provisions so as to give effect to its object and purpose. This approach departs from the orientation by the parties' intentions which, basically, underlies the two other approaches – irrespective of the varying importance attached to the treaty text or extrinsic material. On the basis of the teleological approach, the interpreter may go beyond, or even diverge from the parties' original intentions.[516]

As a matter of course, the outlined strict distinction between objective, subjective and teleological treaty interpretation is of a theoretical nature. In practice, the interpretation of a treaty will scarcely ever follow exclusively one of the three schools of thought. Depending on the particular circumstances of each individual case, the interpreter, by contrast, is likely to apply a specific amalgam of all three approaches. Not surprisingly, section 3 of the Vienna Convention on the Law of Treaties which deals with treaty interpretation is not solely aligned with one of the three approaches, but comprises elements of all of them. Nevertheless, it establishes a certain order of precedence among the different basic approaches. In article 31(1) of the Vienna Convention, the primacy of the text as the basis for the interpretation of a treaty is clearly emphasised. The general rule of interpretation set out in this provision reads as follows:

> '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.'

The principle of good faith is invoked to underline what can be qualified as the most fundamental of all the norms of treaty law: the rule *pacta sunt servanda*.[517] It reminds the contracting parties of their obligation to observe the treaty and guides the entire process of interpretation, thereby precluding an interpretation which leads to manifestly absurd or unreasonable results.[518] After setting forth this fundamental principle of treaty interpretation, article 31(1) unequivocally gives preference to the

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515 Cf. de Visscher 1963, 52-54 ; Bernhardt 1967, 497.

516 Cf. the overview given by Sinclair 1984, 114-115. See also the ILC's commentary to the final draft of the Vienna Convention, presented by Rauschning 1978, 250.

517 Cf. ILC commentary, Rauschning 1978, 251; Sinclair 1984, 119.

518 Cf. Sinclair 1984, 120; de Visscher 1963, 50.

objective, textual approach to treaty interpretation over the subjective or teleological method. The starting point of treaty interpretation, thus, is the elucidation of the meaning of the text. The parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them.[519] These terms, however, are not to be determined in the abstract. Article 31(1) does not demand a purely grammatical or linguistic analysis. By contrast, the interpreter is obliged to consider the ordinary meaning of a term systematically, in the context of the whole treaty, and in the light of its object and purpose.[520]

In article 31(2) of the Vienna Convention, it is specified what the context of a treaty shall comprise for the purpose of interpretation. In addition to the text, including its preamble and annexes, account must be taken of

'(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'.

Article 31(3) maintains that there are three further categories of sources which must be considered together with the context:

'(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.'

The inclusion of the contracting parties' subsequent practice can be explained by the consideration that such practice constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.[521] Furthermore, it enriches treaty interpretation by introducing an important dynamic element. As a treaty may be modified by subsequent practice of the parties, it is consequent to make allowance for the parties' conduct in the course of interpretation.[522] However, it must be pointed out that not any form of subsequent practice is covered by article 31(3). As Sinclair stresses, only 'concordant subsequent practice common to all the parties' enters the picture.[523]

519 Cf. ILC Commentary, Rauschning 1978, 252-253; Sinclair 1984, 115; Bernhardt 1967, 497.
520 Cf. Bernhardt 1967, 498; Sinclair 1984, 121.
521 See ILC commentary, Rauschning 1978, 253-254; de Visscher 1963, 121-122.
522 Cf. Sinclair 1984, 138; de Visscher 1963, 123; Bernhardt 1967, 499.
523 See Sinclair 1984, 138.

To a certain extent, the general rule of interpretation set out in article 31(1) of the Vienna Convention recognises the aforementioned teleological approach to treaty interpretation. Besides the context in which a treaty term is embedded, the light of the object and purpose of the treaty must be shed on the term in question to discern its meaning. It is worth noting that this principle is not meant to encourage departure from the primacy of the treaty text. The reference to the object and purpose of a treaty rather is a secondary or ancillary process to confirm or modify the conclusions drawn on the basis of an inquiry into the ordinary meaning of a treaty term in its context.[524] Moreover, when connected with the principle of good faith, the reference to the object and purpose of a treaty can serve as a vehicle to lend weight to the principle of effectiveness which is missing among the canons of interpretation reflected in the Vienna Convention. The latter principle rests on the maxim *ut res magis valeat quam pereat* and calls on the interpreter to give the provisions of a treaty the greatest effect possible.[525] Commenting on the 1966 final draft of the Vienna Convention, the International Law Commission explicitly mentioned the possibility of attaching some importance to the principle of effectiveness:

> 'When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.'[526]

The general rule set out in article 31(1) of the Vienna Convention that 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', thus, rests on the objective, textual approach to treaty interpretation but also allows the inclusion of teleological considerations. It does not, however, touch upon the subjective method of interpretation, with its focus on the intentions of the parties. This is not surprising insofar as advocates of the subjective approach admit a liberal recourse to the *travaux préparatoires* and to other evidence of the 'real' intentions of the contracting parties (which may not have found adequate expression in the treaty text itself) as means of interpretation.[527] This view can hardly be reconciled with the primacy of the treaty text, as an external manifestation of the parties' intentions, which is emphasised in article 31(1). Nonetheless, the Vienna Convention does not inhibit interpreters from consulting extrinsic material besides the mere terms of the treaty. Separated from the general rule set out in article 31(1), the rules for going beyond the terms of the treaty are laid down in article 32:

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524 Cf. Sinclair 1984, 130; de Visscher 1963, 63.
525 Cf. Sinclair 1984, 118; Bernhardt 1967, 504.
526 See ILC commentary, Rauschning 1978, 251.
527 Cf. ILC commentary, Rauschning 1978, 250; Sinclair 1984, 116.

> 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.'

It has been pointed out by Briggs that no rigid temporal prohibition on resort to the *travaux préparatoires* of a treaty was intended by using the expression 'supplementary means of interpretation'. He maintains that the function of article 32 'is one of guidance rather than of prohibition'.[528] Access to material besides the mere treaty text is allowed, but is subjected to specific guiding principles. Nevertheless, the clear distinction between the general rule of interpretation, set out in article 31, and the rules concerning supplementary means, laid down in article 32, underlines that the supplementary sources should not be misused to establish an alternative, autonomous method of interpretation. Article 32 is no loophole for undermining the primacy of the treaty text by switching to the subjective approach to treaty interpretation. Recourse to supplementary sources may only serve as a means to aid an interpretation governed by the principles set forth in article 31.[529] In this regard, Sinclair has pointed out that

> 'it is clear that no would-be interpreter of a treaty, whatever his doctrinal point of departure, will deliberately ignore any material which can usefully serve as a guide towards establishing the meaning of the text with which he is confronted'.[530]

Hence, the use of supplementary material to determine the meaning of the text is subordinate to the primary goal of treaty interpretation, as defined in article 31.

Besides the described principles, section 3 of the Vienna Convention also provides guidance for the interpretation of treaties which are authenticated in more than one language. In article 33(1), the basic rule is expressed that 'when a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail'. Pursuant to paragraph 3, 'the terms of the treaty are presumed to have the same meaning in each authentic text'. This clause calls upon negotiators to secure that the several language texts are in concordance with one another.[531] The particular difficulty arising from this provision, however, was not overlooked by its drafters. The International Law Commission explicitly noted that the 'different genius of the languages, the absence

528 See Briggs 1971, 709 and 712.
529 Cf. ILC commentary, Rauschning 1978, 255.
530 See Sinclair 1984, 116.
531 Cf. Sinclair 1984, 148.

of a complete *consensus ad idem*, or lack of sufficient time to co-ordinate the texts may result in minor or even major discrepancies in the meaning of the texts'.[532] Therefore, a conflict rule which deals with the potential ambiguity flowing from the plurality of the texts can be found in article 33(4):

> 'Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.'

This rule departs from previous international law practice and doctrine which had developed two different solutions. According to the first, preference should be given to the language version in which the treaty negotiations were conducted and the text first drawn up.[533] Secondly, it was deemed possible to apply the common minimum of all language versions. This solution gives deference to state sovereignty.[534] The Vienna Convention relies on the principle of equal authenticity of the different language texts instead. The interpreter, thus, is expected to apply the standard rules for treaty interpretation first. If the divergence between the texts still persists, the task of reconciling the texts, taking into account the object and purpose of the treaty, must be accomplished.

4.1.2 THE MATERIAL AVAILABLE FOR INTERPRETATION

After clarifying the rules given in the Vienna Convention, they must be applied to the sources which will subsequently be consulted to establish the meaning of the three-step test. This procedure is moved into line with the provisions of the Vienna Convention itself. Starting with the wording of the three-step test (subsection 4.1.2.1), the different sources of interpretation will be discussed corresponding to the weight which may be given to them pursuant to the principles set out in articles 31 and 32 of the Convention. Accordingly, material which constitutes the context of the three-step test, or must be considered together with the context, will be examined first (4.1.2.2). In this connection, the importance which may be attached to WTO panel reports will be discussed separately (4.1.2.3). After that, attention will be devoted to supplementary means of interpretation (4.1.2.4), and the role which the US fair use doctrine, as a source of comparative law, may play in the course of the interpretative analysis (4.1.2.5). Finally, the issue of the different languages in which the treaties containing the three-step test have been authenticated will be addressed (4.1.2.6).

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532 See ILC commentary, Rauschning 1978, 262.

533 Sinclair 1984, 150-152, argues that this solution still should be applied in particular cases.

534 Cf. Bernhardt 1967, 505.

4.1.2.1 THE WORDING OF THE THREE-STEP TEST

As already described, the three-step test is embodied not only in the Berne Convention but also in the TRIPs Agreement and the WIPO 'Internet' Treaties.[535] Although its repeated incorporation into international copyright treaties entailed some slight alterations as to the wording of the relevant provisions,[536] it can be stated that the substantial part of its wording, the three criteria, have remained unchanged. The three-step test forms a uniform element of international copyright law which always consists of the same building blocks. Firstly, it is enunciated that copyright limitations must be 'certain special cases'. Secondly, it is clarified that these limitations may not 'conflict with a normal exploitation of the work'. Thirdly, it must be ensured that the limitations do not 'unreasonably prejudice the legitimate interests of the author/right holder'.[537] These three criteria constitute the object of the subsequent interpretative analysis. Pursuant to the general rule laid down in article 31(1) of the Vienna Convention, the ordinary meaning of the terms used to establish these criteria is the starting point for interpretation.

4.1.2.2 THE CONTEXT SURROUNDING THE THREE-STEP TEST

Arising from the Vienna Convention, the ordinary meaning to be given to the terms of the three-step test *in their context* must be determined.[538] The corresponding systematic interpretation must take into account the complete text of a treaty which contains the three-step test, including its annexes and, in particular, the preamble.[539] Several comments on the situation arising with regard to the three-step test are appropriate before embarking on a systematic interpretation. First of all, it is noteworthy that the report of the 1967 Stockholm Conference expressly refers to the principle *lex specialis legi generali derogat* in connection with article 9(2) BC. It is stated in the report on the work of Main Committee I that it was 'considered superfluous to insert in Article 9, dealing with some general exceptions affecting authors' rights, express references to Articles 10, 10*bis*, 11*bis* and 13 establishing special exceptions'.[540] Article 9(2) BC, thus, must be seen in the context of the explicitly mentioned, somewhat more specific exceptions. As these provisions, in their restricted domain, exclude the application of article 9(2) because of their speciality, they provide guidance as to the test's scope in the Berne Convention.

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535 See chapter 3.

536 Compare articles 9(2) BC, 13 TRIPs and 10 WCT one with another.

537 See articles 9(2) BC, 13 TRIPs and 10 WCT which all comprise these expressions in the given sequence. The reference to authors in articles 9(2) BC and 10 WCT on the one hand and right holders in article 13 TRIPs on the other, does not affect the test's general structure. However, it nuances the meaning of its last criterion. See subsections 4.6.2 and 4.6.3.

538 See article 31(1) of the Vienna Convention.

539 See article 31(2) of the Vienna Convention.

540 See Records 1967, 1134.

Another characteristic feature of the context surrounding the three-step test comes to the fore in the TRIPs Agreement. It might be called the phenomenon of 'interwoven contexts'. Articles 1 to 21 of the Berne Convention, with the exception of article 6*bis*, are incorporated into TRIPs by reference.[541] The included provisions of the Berne Convention form part of the context of article 13 TRIPs which contains the three-step test. Similarly, the three-step test of article 10 WCT is intertwined with the Berne Convention. Like in the TRIPs Agreement, articles 1 to 21 of the Berne Convention are incorporated into the WCT by reference.[542] Again, the context of the three-step test, thus, extends to the Berne Convention. As a result of this specific legislative technique, the substantive provisions of the Berne Convention appear as a kind of common ground. They are always a part of the context in which the three-step tests of international copyright law are embedded.

The contracting parties of the WIPO Copyright Treaty further broadened the context of the three-step test by unanimously adopting an agreed statement concerning article 10 WCT.[543] Pursuant to article 31(2)(a) of the Vienna Convention, 'any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty' forms part of the context for the purpose of interpretation. The agreed statement concerning article 10 WCT is thus a relatively strong source of interpretation. In contrast to statements which can be found in the *travaux préparatoires* and merely rank among the supplementary means of interpretation, it must be considered directly in connection with the treaty text itself.[544] The fact that the contracting parties of the WCT, basically, made the same effort with the preparation and adoption of the agreed statements as with the treaty provisions underlines their specific authority.[545]

In this connection, an interesting question arises as to the influence of the agreed statement concerning article 10 WCT on the interpretation of other three-step tests, in particular, of article 13 TRIPs. In the second sentence of the agreed statement concerning article 10 WCT, it is enunciated that the application of the three-step test 'neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention'.[546] Indeed, article 13 TRIPs and article 10(2) WCT share the substantive provisions of the Berne Convention as a joint field of application. In this regard, they both function as additional safeguards.[547] The agreed statement, therefore, may be relevant to the interpretation of article 13 TRIPs. However, it does not directly form part of the context of article 13 TRIPs. It is to be borne in mind that the 'context' in the sense of the Vienna Convention is primarily constituted by the treaty text itself, its preamble and

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541 See article 9(1) TRIPs.
542 See article 1(4) WCT.
543 See for the full text of this agreed statement section 3.3.
544 Cf. Reinbothe/v. Lewinski 2002, 19.
545 Cf. WIPO Doc. CRNR/DC/102, 144-165; Ficsor 2002a, 61-63.
546 See WIPO Doc. CRNR/DC/96, agreed statement concerning article 10 WCT.
547 See subsections 3.2.2, 3.3 and 4.2.2.

annexes. As pointed out above, the provisions of the Berne Convention must be taken into account in this respect because they are incorporated into the TRIPs Agreement by reference. Article 9(1) TRIPs refers directly to the substantive provisions of the Convention. The WIPO Copyright Treaty, however, is a later instrument of international copyright law. Accordingly, no reference to its provisions, let alone to the agreed statement concerning article 10 WCT, is to be found in the TRIPs Agreement.

Theoretically, it is possible to consider the agreed statement a subsequent agreement regarding the interpretation of article 13 TRIPs. Pursuant to article 31(3)(a) of the Vienna Convention, such subsequent agreements must be taken into account together with the context. However, the outlined construction must fail because the contracting parties of the WCT are not identical with the members of the WTO. Due to the insufficient overlap of the contracting parties, the agreed statement concerning article 10 WCT cannot additionally be qualified as a subsequent agreement between the parties of TRIPs. Nonetheless, as a great number of WTO members adopted the agreed statement, it is justified to treat it as a supplementary means of interpretation in connection with article 13 TRIPs.[548]

4.1.2.3 THE ROLE OF WTO PANEL REPORTS

In two recent WTO panel reports, the three-step test occupied centre stage.[549] In case WT/DS 114, the Canadian patent protection regime of pharmaceutical products was challenged by the European Communities. Accordingly, the Panel did not focus on the three-step test of international copyright law but on the one laid down in the patent section of TRIPs.[550] The second case, WT/DS 160, directly concerned article 13 TRIPs and thus the three-step test of copyright law. This time, the European Communities sought to defeat section 110(5) of the US Copyright Act. Both reports present detailed interpretations of the relevant three-step tests. In particular, the interpretation developed by the Panel in the copyright case may provide guidance for the subsequent interpretative analysis. Before consulting these sources, however, the relative importance which may be attached to them in accordance with the Vienna Convention must be clarified.

The interpretation established by a WTO panel would have paramount effect if it constituted a definitive interpretation in the sense of a subsequent agreement between the members of the WTO regarding the interpretation of the three-step test. Pursuant to article 31(3)(a) of the Vienna Convention, subsequent agreements of this kind must be taken into account together with the context. As they are binding on all contracting parties, they are virtually as strong as the treaty language itself.[551]

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548 Cf. Ficsor 2002a, 60-61; WTO Panel – Copyright 2000, § 6.70.

549 See WTO Panel – Copyright 2000 and WTO Panel – Patent 2000. Cf. Hohmann 2001, 656.

550 See article 30 TRIPs.

551 Cf. Jackson 2000, 128.

It can be argued in favour of the qualification of panel reports as definitive interpretations that at least insofar as a report has been adopted by the Dispute Settlement Body (DSB), the members of the WTO have signalled their principle approval of the findings of the panel. This conclusion can be made on the basis of the rules set out for the procedure of the DSB. Pursuant to article IV(3) of the Agreement Establishing the World Trade Organization (WTO Agreement), the General Council of the WTO discharges the responsibilities of the DSB. As the General Council is composed of representatives of all members of the WTO, all contracting parties are represented when a panel report is to be adopted.[552] The two reports under discussion have passed this procedure.[553] The interpretation of the discussed three-step tests, thus, has been countenanced by the DSB and appears as the shared view of all WTO members.

Nevertheless, this line of reasoning must fail. Even if the DSB had the authority to make definitive interpretations, there is no evidence that the members of the WTO really intend their adoption of a panel report to have this effect.[554] Moreover, the DSB can only decide by consensus to reject the panel report. For its adoption, by contrast, consensus is not necessary.[555] The affirmation expressed through the act of adoption, therefore, has its limits. In fact, however, the authority to make definitive interpretations does not rest with the DSB anyway. The Ministerial Conference and the General Council are exclusively competent to issue definitive interpretations in accordance with the rules set out in article IX(2) of the WTO Agreement. These rules demand a three-fourths majority of the members and a procedure based on a recommendation by the council overseeing the functioning of the relevant agreement.[556] Hence, the two panel reports concerning the three-step test do not have the status of definitive interpretations.

This result, however, is not the end of the actual inquiry. By virtue of article 31(3)(b) of the Vienna Convention, 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' also must be considered together with the context. The key question which arises in connection with this more fluid approach is what constitutes sufficient practice. As the influence of subsequent party practice on treaty interpretation is very high – since it must be taken into account together with the context – not any practice that may have become more or less widespread among the contracting parties can be factored into the equation. By contrast, Sinclair, as already mentioned above, rightly

552 See article IV(2) of the WTO Agreement. For the details of the adoption of panel reports, see article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Annex 2 of the WTO Agreement.

553 Panel report WT/DS114/R, dated 17 March 2000, was adopted on 7 April 2000. The second report, WT/DS160/R, dated 15 June 2000, was adopted on 27 July 2000. Cf. Hohmann 2001, 656.

554 Cf. Jackson 2000, 128.

555 Cf. article 16 DSU.

556 In the case of the three-step test, the Council for TRIPs (cf. article 68 TRIPs) would therefore have to be heard first.

posits that allowance can only be made for 'concordant subsequent practice common to all the parties'.[557] The fact that the two panel reports under discussion have been adopted by the DSB strongly weighs in favour of a qualification as subsequent practice. However, as Jackson points out,

> 'if later panels follow prior panels, this would add to the evidence of practice, and if there were no considered counter-examples in practice among the Contracting Parties, it is likely to be argued that the practice confirms the particular interpretation of the GATT treaty that has been set forth in the adopted panel reports'.[558]

Neither of the two aspects mentioned by Jackson, however, can be invoked to undergird the conclusion that the two panel reports under discussion really reflect subsequent practice of the members of the WTO. As a matter of fact, a kind of 'WTO jurisprudence' is emerging. Panels strive to maintain judicial consistency and frequently ground their decisions in findings of prior panels.[559] A strict doctrine of precedent, however, is not operating. Adopted panel reports do not have a *stare decisis* effect in the sense that their findings cannot be overruled in the course of future dispute settlement procedures.[560] Jackson clearly points out that there are 'several specific instances in the GATT jurisprudence, where panels have consciously decided to depart from the results of a prior panel'.[561] Therefore, it cannot be assumed that the two panel reports under discussion actually amount to what is called 'subsequent practice' in the Vienna Convention. As the two reports are the first decisions in the field of the three-step test, they scarcely constitute established case law. Not until panel reports to come have shown which features of the actual interpretation are lasting and which are not, can those principles which really mirror subsequent practice of the members of the WTO be crystallised. This is all the more true as the actual practice of the WTO members, at least in the copyright case, cannot be said to be in accordance with the panel's findings. The US is still reluctant to amend its copyright law so as to bring it into conformity with article 13 TRIPs, as interpreted by the panel.[562] Instead, it resorted to the arbitration mechanism set out in article 25 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. The outcome of this procedure is an amount of $ 1.100.000 per year compensation for the losses of European performers and composers caused by section 110(5)(B).[563] Hence, US practice, in fact, remains unchanged and does not conform to the panel report.

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557 See Sinclair 1984, 138. Cf. section 4.1.

558 See Jackson 2000, 129.

559 Panel reports might refer to so-called 'dispute settlement practice'. See for instance WTO Panel – Copyright 2000, §§ 6.13, 6.111, 6.162, 6.185, 6.231.

560 See in general Brownlie 1998, 19-22. Cf. Jackson 2000, 127; Geller 1995, 943.

561 See Jackson 2000, 127.

562 Cf. WTO Panel – Copyright 2000, §§ 7.1 and 7.2.

563 Cf. Ficsor 2002b, 237-241.

From these considerations, it can be inferred that the two panel reports under discussion should not be qualified as subsequent practice in the sense of article 31(3)(b) of the Vienna Convention. The practice of the WTO members, as expressed in the panel reports, is not yet sufficiently solidified to speak of 'concordant subsequent practice common to all the parties'.[564] Accordingly, the interpretation developed in the reports need not be considered together with the context surrounding the three-step test – neither pursuant to subparagraph (a) nor on account of subparagraph (b) of article 31(3) of the Vienna Convention. It simply ranks among other supplementary means of interpretation, dealt with in article 32 of the Vienna Convention. Within the hierarchy of these sources, however, a relatively high position may be accorded to the findings of the two panels. After all, they are the outcome of disputes which were settled on the international level with the participation of the members of the WTO.[565] In contrast to decisions of national courts, they do not only reflect the view prevailing in one particular country.

A final remark on the scope of the two panel reports seems appropriate. When consulting the report concerning article 30 TRIPs, and therefore the patent section of TRIPs, attention must be paid to those findings which are inseparably linked with the specific situation existing in patent law. These elements may be inapplicable or, at least, difficult to adapt to copyright law. The second report which concerns the three-step test of article 13 TRIPs is also relevant to the interpretation of article 9(2) BC. As article 9(2) BC is incorporated into TRIPs by reference,[566] it might be the object of a future WTO dispute settlement procedure. Article 10 WCT is not subject to WTO dispute settlement. Nevertheless, the use of the interpretation established by WTO panels as a supplementary means of interpretation can be justified on the grounds that article 13 TRIPs and article 10 WCT are closely connected because of their similar function.[567] It would be inconsistent to ignore the interpretation of article 13 TRIPs when discussing article 10 WCT.

4.1.2.4 THE INTERCONNECTION OF SUPPLEMENTARY SOURCES

Pursuant to article 32 of the Vienna Convention, recourse may be had to supplementary means of interpretation to confirm the meaning which follows from the application of the general rule set out in article 31, or to determine the meaning when the application of article 31 does not contribute to the clarification of the

564 See Sinclair 1984, 138.

565 This participation is not necessarily limited to being represented when the panel report is adopted. By contrast, WTO members may participate in the panel proceedings as third parties. In the patent case, Australia, Brazil, Columbia, Cuba, India, Israel, Japan, Poland, Switzerland, Thailand and the US used this possibility (see WTO Panel – Patent 2000, § 1.1). In the copyright case, Australia, Brazil, Canada, Japan and Switzerland reserved third party rights (see WTO Panel – Copyright 2000, § 1.4).

566 See article 9(1) TRIPs.

567 Cf. sections 3.2 and 3.3 above. See the analysis conducted in section 4.2.

provision under examination or leads to manifestly absurd or unreasonable results. No means of interpretation is expressly excluded by article 32.[568] Therefore, at this stage of an interpretative analysis, diverse materials, like decisions of national courts, commentary literature or articles concerning the three-step test may enter the picture.[569] Two sources, however, are of particular importance and have explicitly been emphasised in article 32: the preparatory work of the treaty and the circumstances of its conclusion. As the three-step test can be found in no fewer than three international copyright treaties, these two expressly mentioned categories encompass a wide variety of documents. By and large, the material which is relevant to the interpretation of the three-step test consists of those documents which have already been sifted in chapter 3. For this reason, its different facets will not again be named and enumerated here.

Instead, an interesting phenomenon shall be brought into focus which inevitably arises when consulting the *travaux préparatoires* of the Berne Convention, the TRIPs Agreement and the WIPO Copyright Treaty. It has already been pointed out in respect of the context surrounding the three-step test that articles 1 to 21 of the Berne Convention constitute a kind of common ground. The substantive provisions of the Berne Convention are always a part of the context in which the three-step test is embedded in international copyright law. A similar effect of interconnection comes to the fore in the field of supplementary sources. As already noted in chapter 3, the drafters of the TRIPs Agreement conceived of the three-step test as a manifestation of the standard of protection reached in the Berne Convention. When reproducing the wording of article 9(2) BC with slight alterations in article 13 TRIPs, they did not aim at establishing completely new principles. By contrast, they bore article 9(2) BC in mind.[570] The preparatory work of the WIPO Copyright Treaty is even clearer with regard to the relation between article 9(2) BC and article 10 WCT. It was unequivocally stated in the basic proposal for substantive provisions of the later WCT that the interpretation of the three-step test 'should follow the established interpretation of Article 9(2) of the Berne Convention'.[571] Furthermore, the explanation of its functioning given in the report on the work of Main Committee I of the 1967 Stockholm Conference is cited.[572]

When wishing to observe the basic rule of article 31 of the Vienna Convention, and interpreting article 13 TRIPs and article 10 WCT in good faith, it is thus inevitable to show considerable deference not only to the *travaux préparatoires* which directly concern these provisions but also to the entire *acquis* relating to

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568 Cf. Bernhardt 1967, 502.

569 Cf. the enumeration of possible sources by Ricketson 1987, 135-142.

570 Cf. section 3.2 and Reinbothe 1992, 711. The fact that the wording of article 13 TRIPs has carefully been shifted into line with article 9(2) BC even though more detailed language was proposed (see GATT Doc. MTN.GNG/NG11/W/14/Rev.1, 8), already bears witness to the close relationship between article 9(2) BC and article 13 TRIPs.

571 See WIPO Doc. CRNR/DC/4, § 12.05.

572 See WIPO Doc. CRNR/DC/4, § 12.05.

article 9(2) BC.[573] The background to article 9(2) BC, including especially the preparatory work undertaken for this first three-step test of international copyright law and the circumstances of its adoption, may thus always serve as a supplementary means of interpretation irrespective of whether article 9(2) BC itself or one of the ensuing three-step tests of article 13 TRIPs and 10 WCT is under discussion. The approach of the two aforementioned WTO panels which dealt with the three-step test confirms this finding. Both panels did not hesitate to trace the development of the three-step test in international copyright law back to the *travaux préparatoires* of the 1967 Stockholm Conference although one of the cases concerned the Canadian protection regime of pharmaceutical products and thus not even copyright but patent law.[574]

4.1.2.5 THE US FAIR USE DOCTRINE

When looking for copyright provisions which are similar to the three-step test, one will inevitably come across the US fair use doctrine.[575] Both provisions have much in common. The fair use doctrine, as delineated in section 107 of the US Copyright Act, concerns the unauthorised use of a copyrighted work for purposes 'such as criticism, comment, news reporting, teaching […], scholarship, or research'.[576] To guide the decision whether a particular use made of a work can be deemed fair, four factors are explicitly listed in section 107 which shall be taken into account among other, potentially relevant considerations:

'(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.'[577]

On the whole, the fair use doctrine is an open norm, the shape and character of which is comparable to the three-step test. Both provisions have the objective to circumscribe in general, abstract terms those occasions on which the use of copyrighted material may be permissible without asking for the prior permission of

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573 Cf. Ficsor 2002a, 55-57.
574 Cf. WTO Panel – Patent 2000, § 7.72; WTO Panel – Copyright 2000, §§ 6.73, 6.179 and 6.181.
575 Cf. Geller 1995, 943.
576 See section 107 of the US Copyright Act. The list is understood as an open, non-exclusive enumeration.
577 The factors provide guidance for the application of the 'equitable rule of reason' which fair use represents. Cf. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984), IV B. Additional factors may be taken into account. Cf. Leval 1990, 1125-1130.

the author. Certain elements of the fair use doctrine inevitably call to mind the criteria of the three-step test. The fourth fair use factor, for instance, deals with the effect of the use upon the potential market for the copyrighted work. The second criterion of the three-step test, similarly, inhibits copyright limitations from coming into conflict with a normal exploitation of the work. These similarities already suggest that, to a certain extent, the same questions will arise in the course of the interpretation of the three-step test which are also begged by the fair use doctrine. The latter, however, has a much longer tradition than the three-step test and operates against the backdrop of a wealth of experience for which established case law gives evidence.[578] Hence, one might be tempted to solve the problems arising in connection with the three-step test with an eye to the fair use doctrine.

In this regard, however, it is necessary to proceed with the utmost caution because, functionally, the three-step test exerts control over the fair use doctrine and not vice versa. As a matter of fact, the question whether or not the fair use doctrine complies with the three-step test is under dispute.[579] The consultation of material concerning the fair use doctrine, therefore, must be conducted in a way which does not anticipate the final decision on the question of its compliance with the three-step test. Material concerning fair use can neither be qualified nor treated as a supplementary means of interpretation. It may simply be used to enrich the discussion of the three-step test, thereby functioning as an element of comparative law. When applied in this sense, references to the fair use doctrine, indeed, will prove to be conducive to placing the problems raised by the three-step test in a broader context and enhancing the knowledge of possible solutions. The function of the fair use doctrine within the following interpretative analysis, thus, is reduced to a reservoir of ideas. In this way, advantage may be taken of the long history of fair use without curtailing the regulatory potential of the three-step test.

4.1.2.6 THE LANGUAGE SITUATION

The use of the languages in which the treaties containing the three-step test have been authenticated must be clarified. The interpretation of provisions of the latest of these treaties, the WIPO Copyright Treaty, may be based on one of the six UN languages. In article 24(1) WCT, Arabic, Chinese, English, French, Russian and Spanish are all declared equally authentic. The number of authentic texts decreases when turning to the TRIPs Agreement. The text of the WTO Agreement ends with the following passage: 'DONE at Marrakesh this fifteenth day of April one thousand nine hundred and ninety-four, in a single copy, in the English, French and Spanish languages, each text being authentic.' As the TRIPs Agreement constitutes

578 The development of the fair use doctrine is often traced back to the year 1841. Cf. Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985), III A.

579 Doubt has been cast upon the compliance of fair use with the three-step test, for instance, by Cohen Jehoram 2001b, 808 and Bornkamm 2002, 21-22.

annex 1C to the WTO Agreement, the same rule applies to its provisions. When looking for an authentic text of article 13 TRIPs, therefore, the English, French or Spanish version of TRIPs may be consulted. The Berne Convention, traditionally, has been authenticated solely in French. Under the 1948 Brussels Act, however, the situation changed and a further authentic text was afforded in English.[580] The actual Paris Act of the Berne Convention still mirrors this development. In article 37(1)(a) thereof, it is stated that the authentic texts of the Convention are to be in French and English. In the case of 'differences of opinion', however, the French text prevails pursuant to article 37(1)(c). Ultimately, preference must therefore be given to the French version of the Convention.[581]

Nonetheless, the subsequent interpretation of the three-step test will take the English and not the French text as a starting point. This decision is rooted in the fact that the English text, just like the French, is authentic and thus authoritative in all treaties embodying the three-step test. The specific advantage of the English text over the French becomes evident when recalling the circumstances of the adoption of the three-step test at the 1967 Stockholm Conference. Initially, the wording of the rule which now constitutes the three-step test was proposed by the UK delegation.[582] Hence, its origin can be said to lie in the sphere of the British tradition. Not surprisingly, it was feared at the 1967 Stockholm Conference that certain elements of the three-step test may be 'too typically British to be easily understood by judges in continental countries'.[583] On account of these findings, it can be assumed that the English language is best suited for expressing accurately what is meant by the three-step test. The deliberations in Main Committee I of the Stockholm Conference testify to the difficulties which, for instance, were posed by the translation of the term 'unreasonably prejudice' into French.[584] It is thus advisable to begin by interpreting the English text. As the French text, at least in the context of the Berne Convention, is accorded the privilege to reign supreme in case of divergence, it is necessary to embark on a comparison of the outcome of the analysis based on the English text with the French text to see if any discrepancies emerge. Only if no interpretation can be found that fits readily with both texts, the meaning which results from the French version, ultimately, must be favoured.[585] In the course of the subsequent interpretative analysis, the French text will accordingly be borne in mind. If it departs from the English text, possible ways of reconciling the French version with the meaning arising from the English text will be examined. The case that all efforts undertaken to reconcile both texts are doomed to failure does not arise in connection with the three-step test.

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580 Cf. Ricketson 1987, 132-133.

581 See article 33(1) of the Vienna Convention on the Law of Treaties.

582 See Doc. S/13, Records 1967, 629(630). Cf. the description in subsection 3.1.2.

583 See the statement of the Dutch delegate, Minutes of Main Committee I, Records 1967, 858.

584 Cf. the discussion in Main Committee I, Records 1967, 883-885.

585 Cf. the approach taken by Ricketson 1987, 133.

4.1.3 THE CIRCLE OF RELEVANT LIMITATIONS

It is indispensable to clarify the terminology that will be used subsequently. In the course of the interpretative analysis, a reference will frequently be made to the 'limitations' controlled by the three-step test.[586] As a general principle, it is to be enunciated here that the circle of relevant limitations must be determined on the basis of the framework set out in international copyright law. Otherwise, national legislation could circumvent the three-step test by simply not granting an exclusive right in a specific area covered by the three-step test.

If member state A of the Berne Union, for instance, exempts sound and visual recordings from the reproduction right, this exclusion falls under the three-step test of article 9(2) BC. In A's domestic copyright law, the exclusion may not be laid down in a provision labelled 'limitation', but directly follow from the way in which the reproduction right is defined. Nevertheless, the three-step test is applicable. The label used at the national level is not decisive. Otherwise, the three-step test could be bypassed easily by drawing the conceptual contours of a right restrictively instead of granting a broad right first and imposing certain limitations afterwards. The legislative technique, however, does not affect international obligations. Hence, all depends necessarily on the international framework. Article 9(3) BC makes plain that 'any sound or visual recording shall be considered as a reproduction for the purposes of this Convention'. Recordings of this kind are thus covered by the general right of reproduction recognised in article 9(1) BC. As this form of reproduction is withheld from the authors in A, the right of reproduction, as granted in A, is limited when compared with the international framework. This limitation in the sense of international copyright law is to be judged in the light of article 9(2) BC because article 9(2) sets forth the rules governing limitations on the reproduction right of article 9(1) BC.[587]

The same rule applies to a case of a less theoretical nature: member state B of the Berne Union, which is also a contracting party to the WIPO Copyright Treaty, defines the right of reproduction so as to exclude transient and incidental temporary acts of reproduction, such as caching. Arguably, this exclusion from protection runs counter to article 9(1) BC which encompasses a work's reproduction 'in any manner or form'. At the 1996 WIPO Diplomatic Conference finally adopting the WIPO 'Internet' Treaties, this kind of temporary reproduction was under dispute.[588] To solve the problem, an agreed statement accompanying article 1(4) WCT was adopted which reads as follows:

> 'The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in

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586 See as to the use of the term 'limitation' the introductory remarks made in section 2.2.

587 Additionally, the limitation is subjected to article 13 TRIPs and 10(2) WCT. Cf. subsections 3.2.2, 3.3.2 and 4.2.2.

588 Cf. Ricketson 1999, 84-85; Fitzpatrick 2000, 219; Hugenholtz 2000b, 487.

particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.'[589]

If this language is understood to indicate that temporary acts of reproduction, as excluded from protection in B, are covered by article 9(1) BC,[590] the definition of the reproduction right in B would thus fall short of the right of reproduction recognised internationally. Viewed through the prism of international obligations, B's definition would thus have to be qualified as a national limitation imposed on the right of reproduction, as granted internationally. It would accordingly be subject to the three-step test of article 9(2) BC[591] – irrespective of the fact that B does not use the label 'limitation', but simply defines the reproduction right more restrictively in national law than at the international level.

The shape of international copyright law may also render the three-step test inapplicable to national limitations: state C, a contracting party to the WIPO Copyright Treaty, provides for an exclusive right of authorising any communication of a work. In the section of C's copyright act dealing with limitations, a work's communication to a private circle of persons is exempted. This national limitation is not subject to the three-step test of article 10(1) WCT because article 8 WCT only confers on authors the right of communication to the public. By granting a broader exclusive right, C goes beyond its international obligations. From the perspective of international copyright law, the exemption of communications to a private circle merely brings C's copyright act into line with the protection granted internationally. Although the relevant provision is labelled 'limitation' in domestic law, it does not fall under the three-step test of article 10(1) WCT.

An interesting question arises in this context as to certain provisions excluding protection. Article 2(4) BC affords countries of the Berne Union the opportunity to determine 'the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts'. Pursuant to article 2(8) BC, the protection of the Convention 'shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information'. Article 2*bis*(1) allows countries of the Union to exclude, wholly or in part, 'political speeches and speeches delivered in the course of legal proceedings' from the circle of protected works. Ricketson argues that these permitted exclusions from protection should be subjected to the three-step test.[592] His analysis of the impact of article 13 TRIPs on the quoted provisions, however, shows the considerable difficulty of applying the test to these cases. He himself notes with regard to article 2(4) BC that the provision 'contains a commonsense recognition of

589 See WIPO Doc. CRNR/DC/96. Cf. Ricketson 2003, 56-60.

590 The European Copyright Directive 2001/29/EC, for instance, approaches the problem in this way. See articles 2 and 5(1) of the Directive. Cf., however, Hugenholtz 2000b, 487-489.

591 Additionally, article 13 TRIPs and 10(2) WCT must be observed. Cf. subsections 3.2.2, 3.3.2, 4.2.2.

592 Cf. Ricketson 1999, 81-82.

[significant] national differences, and it is therefore difficult to see how Article 13 TRIPs, with its reference to "legitimate interests", can be given a meaningful operation with respect to such a provision'.[593] In fact, this result is not surprising. The three-step test is devised so as to be applied to limitations but not to instances where protection may be denied altogether. Articles 2(4), 2(8) and 2*bis*(1) BC further delineate the protection granted by the Berne Convention. They exclude certain areas just as article 8 WCT excludes private communications. The three-step test, therefore, does not affect articles 2(4), 2(8) and 2*bis*(1) BC.[594]

There is substantial reason to believe that inconsistencies within the international copyright system come to the fore when the three-step test is applied to the non-voluntary licences permitted under articles 11*bis*(2) and 13(1) BC. Whereas the broad article 11*bis*(2) BC, for instance, generally allows national legislation to determine the conditions under which the rights of article 11*bis*(1) BC may be exercised, the three-step test offers the possibility to introduce a compulsory licence regime only in certain special cases and on the condition that no conflict with a normal exploitation arises.[595] These two extra hurdles to be passed are not unlikely to curtail article 11*bis*(2) BC which only makes it a condition that the moral rights of the author are observed and equitable remuneration is paid. The three-step test, thus has the potential for impacting deeply on the freedom national authorities explicitly enjoy pursuant to article 11*bis*(2).

Nevertheless, not only Ricketson but also Reinbothe/von Lewinski and Ficsor speak up for the subjection of Berne non-voluntary licences to the three-step test.[596] This position can be supported by the fact that it was pointed out in respect of article 11*bis*(2) BC at the 1928 Rome Conference that 'a country must not make use of the possibility of introducing such limitations unless the need for them has been shown by the country's own experience'.[597] This language seems to indicate that article 11*bis*(2) was perceived as a limitation rather than as part of the definition of the rights in article 11*bis*(1) BC. As the wording of the three-step tests of article 13 TRIPs and of article 10(2) WCT,[598] moreover, suggests a broad ambit of operation, it appears not unreasonable to conclude that article 11*bis*(2) is subject to the three-step test. The same is true as regards article 13(1) BC. The remaining cases, namely articles 2*bis*(2), 10(1) and (2), 10*bis*(1) and (2), 11*bis*(3) BC and the so-called 'minor reservations doctrine', are unproblematic. They constitute limitations on exclusive rights in the sense of the three-step test.

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593 See Ricketson 1999, 81.

594 Theoretically, article 13 TRIPs and 10(2) WCT could be applied to these provisions. Cf. subsections 3.2.2, 3.3.2 and 4.2.2.

595 See the explanations given in subsections 3.1.2, 3.1.3.1, 3.1.3.5 and 4.5.4.4.

596 See Ricketson 1999, 82; Reinbothe/von Lewinski 2002, 130-131; Ficsor 2002a, 257.

597 See Records of the 1928 Rome Conference, 183. The translation from the original French document is taken from Ficsor 2002a, 273. Cf. Ricketson 1987, 523.

598 These three-step tests may be applied to limitations permitted in the Berne Convention. Cf. subsections 3.2.2, 3.3.2 and 4.2.2.

4.2 Two Different Functions

As the scope of the three-step test has constantly been broadened in the course of its development in international copyright law, two distinct functions have evolved which must be distinguished to enable an accurate interpretative analysis. Initially, the scope of the three-step test, laid down in article 9(2) BC, was confined to the general right of reproduction. In this connection, the three-step test controls national limitations directly. In the context of the TRIPs Agreement and the WIPO Copyright Treaty, it functions in the same way when applied to those exclusive rights which are newly granted in these treaties. Article 13 TRIPs and article 10 WCT, however, also concern limitations on the traditional exclusive rights recognised in the Berne Convention.[599] In the context of these rights, the three-step test serves as a means to scrutinise more thoroughly limitations that have been adopted by national legislators. Even though they may already comply with the specific conditions set forth in the Convention, the three criteria of the test must also be fulfilled. Thus, the three-step test constitutes an additional safeguard.[600]

Hence, two different functions are assigned to the three-step test. Firstly, it exerts direct control over limitations within the realm of certain exclusive rights. Secondly, it serves as an additional control mechanism for limitations that are imposed on the rights granted in the Berne Convention. Both functions will be analysed in more detail in the two following subsections. In subsection 4.2.1, those circumstances will be examined in which the three-step test directly controls national limitations. In subsection 4.2.2, the framework set out for functioning as an additional safeguard will be explored.

4.2.1 CONTROLLING LIMITATIONS DIRECTLY

The direct control of national limitations is the original function of the three-step test. At the 1967 Stockholm Conference, the three-step test was enshrined in article 9(2) BC. Therefore, the predominant function of the test was initially the control of already existing and potentially long-standing limitations in the field of the right of reproduction that had originally been drafted by national legislators without any orientation by the three criteria of the test. Distilling a general *modus operandi* from the way in which the three-step test is applied in article 9(2), the following general regulatory scheme comes to the fore:

(a) imposition of a national limitation on an internationally recognised exclusive right;
(b) direct application of the three-step test of international copyright law.

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599 This is clearly stated in article 10(2) WCT. The same conclusion, however, must be drawn in the context of article 13 TRIPs when read against the backdrop of article 20 BC. Cf. section 3.3.

600 See subsections 3.2.2 and 3.3. Cf. Cohen Jehoram 1995, 127 and 2001a, 384.

Article 13 TRIPs and article 10(1) WCT function in the outlined way with regard to the rights newly granted under the corresponding international treaty. This means that national legislators wishing to impose limitations must merely ensure compliance with the three-step test. The latter constitutes the sole constraint placed by international copyright law. Naturally, the situation arising in practice may nuance the outlined general rule. This can already be seen when examining article 9(2) BC, the only function of which is to directly control limitations on the right of reproduction. In this connection, other provisions of the Berne Convention must also be factored into the equation. Limitations on the reproduction right are not only under control of the three-step test laid down in article 9(2), but also of articles 10, 10*bis*, 11*bis* and 13 BC. In these provisions, rules are set out for national limitations concerning diverse issues, such as quotations, illustrations for teaching, press privileges and ephemeral recordings.[601] In the report on the work of Main Committee I of the 1967 Stockholm Conference, articles 10, 10*bis*, 11*bis* and 13 have been qualified as 'special exceptions'.[602] The report explicitly invokes the maxim *lex specialis legi generali derogat* to illuminate their relationship to the three-step test of article 9(2). The latter must be perceived as a general clause which gives way to the surrounding, more specific provisions. National legislators who want to set limits to the right of reproduction set out in article 9(1) must first of all observe articles 10, 10*bis*, 11*bis* and 13. Only if the limitation does not fall under one of these special provisions is the three-step test of article 9(2) directly applicable and functions in the outlined way as a direct control mechanism.[603]

Similar difficulties are not posed by article 13 TRIPs. With regard to the rental rights, for which the TRIPs Agreement provides, article 13 also functions as a direct control mechanism, just like article 9(2) BC. These rights are accorded to the authors of computer programs and cinematographic works in article 11 TRIPs. Moreover, it is arguable that, pursuant to article 14(4) TRIPs, a further rental right is given to authors whose work has been recorded on a phonogram. In article 14(4), it is stated that the 'provisions of Article 11 in respect of computer programs shall apply *mutatis mutandis* to producers of phonograms and any other right holders in phonograms'. According to this argument, the circle of 'other right holders in phonograms' includes the aforementioned group of authors, consisting, for instance, of composers and writers of lyrics.[604] These rental rights were introduced into international copyright law in TRIPs. They are accordingly beyond the system of the Berne Convention altogether. Hence, the various provisions of the Convention concerning exemptions from exclusive rights are inapplicable. What remains is article 13 TRIPs – the norm which deals with limitations in the TRIPs Agreement

601 Pursuant to article 9(3) BC, any sound or visual recording constitutes a reproduction for the purposes of the Berne Convention.

602 See Records 1967, 1134.

603 In practice, courts have not always strictly observed the line drawn between article 9(2) BC on the one hand and articles 10, 10*bis*, 11*bis* and 13 BC on the other. Cf. subsection 4.4.3.

604 Cf. Gervais 1998, 99-100; Katzenberger 1995, 466; Reinbothe 1992, 711.

itself. The three-step test, thus, must be used in this context to control potential national limitations directly. It is the only constraint placed on national legislation.[605]

In article 10 WCT, a separate paragraph is dedicated to each function of the three-step test. For the actual inquiry, only article 10(1) which refers to the rights conferred by the WCT is of interest. In the field of these rights, the three-step test of article 10(1) WCT, as the sole provision of the WCT dealing with limitations, forms the only control mechanism and applies directly to potential national limitations. In the context of the distribution right of article 6(1) WCT,[606] the operation of the three-step test is affected by the flexible rules for the exhaustion of the distribution right set out in article 6(2) WCT. Nevertheless, it is appropriate to subject potential limitations to the direct control of the three-step test. As the right of distribution is closely linked with the right of reproduction, it is advisable to harmonise the conditions for limitations.[607] The rental rights of article 7(1) are in substance identical to those of the TRIPs Agreement.[608] To subject potential national limitations to the three-step test in the WCT, accordingly, does not change the situation but merely reiterates the rules set forth in TRIPs.

The most important field of application of article 10(1) WCT, thus, is the right of communication to the public. As delineated in article 8 WCT, this exclusive right appears universal in scope. It covers numerous more specific provisions of the Berne Convention. Not surprisingly, it was deemed necessary to clarify that the general right of communication to the public of article 8 WCT is granted without prejudice to articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) as well as 14*bis*(1) BC. The fact that article 8 WCT is interlaced with the enumerated provisions of the Berne Convention, also touches upon the ambit of operation of article 10(1) WCT. Insofar as a segment of the general right of communication to the public is concerned which is also recognised in the Berne Convention, the special provisions of the Convention dealing with limitations on these segments must necessarily be taken into account. The free utilisation of a work for teaching under the conditions of article 10(2) BC, the press privileges of article 10*bis* BC, and the regulations for the exercise of broadcasting and related rights and for ephemeral recordings pursuant to article 11*bis*(2) and (3), are of particular importance in this connection. As regards the order of application, it must be assumed that the specific norms of the Berne Convention, due to their speciality,

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605 Cf. Gervais 1998, 91.

606 These exclusive rights can be qualified as new insofar as the Berne Convention does not provide for a right of distribution for all categories of works, but only for cinematographic works. See article 14(1)(i) and 14bis(1) BC. Cf. Ficsor 1997, 209 and 212.

607 The European Copyright Directive 2001/29/EC illustrates the close relationship between the reproduction and the distribution right, in particular, with regard to limitations. Pursuant to article 5(4) of the Directive, the member states may provide for the same limitations in the field of the right of distribution 'to the extent justified by the purpose of the authorised act of reproduction'.

608 Cf. Ficsor 1997, 218; Kerever 1998, 11-12.

precede the general criteria of the three-step test. Therefore, a constellation arises which corresponds to the situation in the field of the reproduction right of article 9 BC: article 10(1) WCT is only directly applicable and functions as a direct control mechanism if no special provisions of the Berne Convention concerning limitations are relevant.

The three-step test of article 10(1) WCT is nonetheless far from being deprived of any practical importance because the general right of communication to the public, granted in article 8 WCT, includes the making available of works to the public 'in such a way that members of the public may access these works from a place and at a time individually chosen by them'. This right of making available governs the on-demand transmission of works on the internet, and is accordingly of crucial importance in the digital environment.[609] As it was granted in the WIPO Copyright Treaty, no special provisions of the Berne Convention are applicable. The three-step test of article 10(1) WCT, thus, is the sole and direct control mechanism which sets limits to potential national limitations.[610] When considering the whole spectrum of instances in which the three-step test may directly be applied to national limitations, the direct control of limitations on the right of making works available on-line (article 8 WCT), besides the examination of exemptions from the right of reproduction (article 9(1) BC), can even be qualified as the most important aspects of the direct control function of the three-step test.

4.2.2 SERVING AS AN ADDITIONAL SAFEGUARD

The additional safeguard function emerged in the course of the three-step test's development in international copyright law.[611] It is a feature of article 13 TRIPs and article 10(2) WCT concerning the exclusive rights of the Berne Convention. When a limitation on these rights already complies with the prerequisites set forth in the Convention itself, the three-step test must additionally be observed. This *modus operandi* leads to the following sequence:

(a) imposition of a national limitation on an internationally recognised exclusive right;
(b) compliance with relevant special provisions of the Berne Convention;
(c) additional application of the three-step test of international copyright law.

In article 10(2) WCT, the additional safeguard function is directly given expression:

> 'Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.'

609 Cf. the explanations given by Ficsor 1997, 207-212.
610 Cf. Kerever 1998, 9; Reinbothe/v. Lewinski 2002, 128-129.
611 Cf. the overview given in chapter 3.

Thus, the application of those provisions of the Berne Convention which allow the adoption of limitations is additionally subjected to the three-step test.[612] Article 13 TRIPs is also furnished with the additional safeguard function. With regard to the rights granted authors in the Berne Convention, article 13 does not serve as an alternative basis for the imposition of limitations besides the specific norms of the Convention itself. This conclusion is to be drawn on account of article 20 BC.[613] Instead, article 13 must be used exactly like article 10(2) WCT.

The canon of limitations countenanced by the Berne Convention[614] commences in article 2*bis*(2) with the reproduction, broadcasting and communication to the public of lectures, addresses and similar works. In article 9(2), the three-step test re-enters the picture. In this case, the control of the three-step test is consequently doubled. Article 10(1) BC allows the use of works for making quotations. If articles from newspapers or periodicals are concerned, these quotations may also take the form of press summaries. The utilisation of works in publications, broadcasts or recordings for teaching purposes is regulated in article 10(2) BC. Article 10*bis* establishes certain press privileges. Paragraph 1 provides for the reproduction, broadcasting or communication to the public of articles or broadcasts on current economic, political or religious topics. Paragraph 2 deals with the reproduction and making available to the public of works seen or heard in the course of the reporting of current events. The exercise of the broadcasting and related rights granted in article 11*bis*(1) can be subjected to conditions which are to be determined by national legislation pursuant to article 11*bis*(2). A right to equitable remuneration is guaranteed in this context. Ephemeral recordings made by broadcasting organisations, and possibly preserved in official archives, may be exempted by virtue of article 11*bis*(3). Finally, article 13(1) allows for compulsory licences with regard to the recording of musical works. Besides these limitations which are laid down in the text of the Berne Convention, implied exemptions must be taken into account. The so-called 'minor reservations doctrine', for instance, has explicitly been considered in connection with the three-step test in the preparatory work for the later WIPO Copyright Treaty.[615] Further implied exemptions can be found in the field of the translation right recognised in article 8 BC. Whereas it appears safe to assume that limitations on the right of reproduction, such as articles 2*bis*(2), 9(2), 10(1) and (2) and 10*bis*(1) and (2), are also applicable to the translation right of article 8 in conformity with fair practice, the situation is contested and unclear as regards articles 11*bis* and 13.[616]

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612 Cf. section 3.3 ; Reinbothe/v. Lewinski 2002, 130-132.

613 Cf. subsection 3.2.2 ; Ficsor 2002a, 302-303.

614 Cf. Ricketson 1987, 477-537 for a detailed description of these limitations.

615 See the basic proposal for substantive provisions of the later WCT, WIPO Doc. CRNR/ DC/4, §§ 12.06-12.08. Cf. subsection 3.1.1 for a more detailed discussion of the 'minor reservations doctrine'.

616 The report on the work of Main Committee I of the 1967 Stockholm Conference reflects the difficult situation in the field of the translation right. See Records 1967, 1165. Cf. the explanations given by Desbois/Francon/Kerever 1976, 207-209; Ricketson 1987, 537-542.

Considering this extensive set of permissible limitations with, at least partially, quite detailed provisions, one is inevitably left to wonder why the three-step test should additionally be invoked, and what its ambit of operation may be. Against the backdrop of the substantial changes which digital technology brings about, the explanation comes to mind that potential extensions of the enumerated traditional limitations in the digital environment shall be curbed. The basic proposal for substantive provisions of the later WIPO Copyright Treaty seems to support this assumption. Therein, it is stated that, 'in the digital environment, formally "minor reservations" may in reality undermine important aspects of protection'.[617] The final outcome of the 1996 WIPO Diplomatic Conference, however, again obscures the task of the three-step test. With regard to article 10(2) WCT, the following agreed statement has been adopted:

> 'It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.'[618]

As already pointed out, this statement is of particular importance, as it forms part of the context in which article 10(2) is placed. It also affects article 13 TRIPs.[619] Thus, it weighs heavily that the additional safeguard function, pursuant to the agreed statement, is not intended to modify the scope of the traditional provisions of the Berne Convention. This has the corollary that the impact of the three-step test on the traditional set of Berne limitations must necessarily be quite limited. Otherwise, there would inevitably be a contradiction between the agreed statement and the operation of articles 10(2) WCT and 13 TRIPs.[620]

Although the additional safeguard function is far from making the three-step test a powerful control instrument, it has nonetheless some merit which shall not be concealed. In a study prepared by the International Bureau of WIPO, dealing with the impact of article 13 TRIPs on the Berne system of permissible limitations, it is stated that

> 'none of the limitations and exceptions permitted by the Berne Convention should, if correctly applied, conflict with a normal exploitation and none of them should, if correctly applied, prejudice unreasonably the legitimate interests of the right holder. Thus, generally and normally, there is no conflict between the Berne Convention and the TRIPs Agreement as far as exceptions and limitations to the exclusive rights are concerned.'[621]

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617 See WIPO Doc. CRNR/DC/4, § 12.08.

618 See WIPO Doc. CRNR/DC/96.

619 Cf. subsection 4.1.2.2.

620 Cf. Ricketson 1999, 90.

621 See WIPO publication number 464 (E), 'Implications of the TRIPs Agreement on Treaties Administered by WIPO', Geneva: WIPO 1996, 22-23.

The study points out the possibility to conceive of the three-step test as a yardstick for the correct application of the Berne Convention. This notion corresponds to the qualification of the three-step test as a materialisation of the standard of protection reached in the Berne Convention.[622] When understood in this sense, the additional safeguard function can help to clarify the scope of those provisions of the Convention, the open wording of which offers a gateway for the criteria of the three-step test.[623] In article 10(1) BC, for instance, quotations from a work are permitted 'provided that their making is compatible with *fair practice*'. Similarly, article 10(2) BC allows the utilisation of works for teaching purposes 'provided such utilisation is compatible with *fair practice*'. These rules referring to 'fair practice' can be concretised with the help of the three-step test. In particular, the prohibition of an unreasonable prejudice to the author's legitimate interests may serve as a useful basis for the necessary balancing of interests. A similar field of application is opened by the implied limitations of the Berne system. The conceptual contours of the so-called 'minor reservations doctrine', for instance, may be drawn more precisely with the help of the three-step test.

The possibility to consult the three-step test in order to clarify certain provisions of the Berne Convention has inclined commentators to speak of the additional safeguard function as a mere interpretation tool.[624] Although this qualification, in principle, appears correct because the three-step test is barred from extending or reducing the scope of Berne provisions by the agreed statement which accompanies article 10(2) WCT, it may nevertheless be misleading. It obscures the fact that a real accumulation of conditions takes place in cases where the wording of the Berne provisions may be concretised by the three-step test. The three criteria of the test must then be observed just like the conditions set out in the relevant provision of the Berne Convention itself and, therefore, are more than a mere interpretation tool.

In general, it is to be noted that the flexible three-step test constitutes an important counterpart of the out-dated edifice of permissible limitations erected in the Berne Convention. It is not unlikely that its abstract criteria will yield precious clues for the adaptation of limitations to the digital environment, and that it will be invoked for exactly that reason by courts and legislators alike – irrespective of the conservative agreed statement concerning article 10(2) WCT that was made in the WIPO Copyright Treaty.[625]

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622 Cf. Reinbothe 1992, 711; Reinbothe/v. Lewinski 2002, 134.

623 Cf. Ricketson 1987, 491-492; Ficsor 2002a, 262 and 269.

624 Cf. Reinbothe 2000, 264; Ficsor 2002a, 519.

625 Not surprisingly, Ricketson 1999, 90, suggests that the agreed statement could be regarded 'as being limited to those exceptions and limitations *presently* allowed and applied by national laws under the Berne Convention'.

4.3 The System of the Three Criteria

The three-step test sets forth three abstract criteria. As a general rule, limitations are allowed in certain special cases (criterion 1). This rule is delineated by the two subsequent criteria determining that there may neither be a conflict with a normal exploitation of the work (criterion 2) nor an unreasonable prejudice to the legitimate interests of the author (criterion 3). Viewed from a structural perspective, the three-step test therefore consists of a basic rule (criterion 1) and two conditions delimiting its scope (criteria 2 and 3).[626] The wording of article 9(2) BC gives evidence of this structural edifice. The basic rule restricting limitations to certain special cases is laid down in the main clause, followed by the two remaining conditions:

> '…permit the reproduction of such works in certain special cases, *provided that* such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.'[627]

Article 13 TRIPs displays the same structure. The two substantial provisions of criteria 2 and 3 appear in a relative clause which is directly related to the 'certain special cases' of criterion 1: '…confine limitations or exceptions to exclusive rights to certain special cases *which* do not conflict […] and do not unreasonably prejudice…'[628] The same is true for the three-step tests embodied in article 10 WCT: 'in certain special cases *that* do not conflict…'[629]

The three criteria of the test have always been understood to be cumulative.[630] The report on the work of Main Committee I of the 1967 Stockholm Conference already reflects this understanding.[631] That limitations have to meet all three criteria to be considered permissible, can also be derived from the wording of the three-step test itself. The basic rule of criterion 1 is laid down in the main clause and inescapable. The two conditions delimiting its scope are linked together with the conjunction 'and'. In the following subsections, the regulatory system which is established by the three criteria will be examined in more detail. In subsection 4.3.1, the importance which may be attached to the basic rule of criterion 1 (certain special cases) will be discussed. In the following subsection 4.3.2, the relationship between criterion 2 (no conflict with a normal exploitation) and criterion 3 (no unreasonable prejudice to legitimate interests) will be analysed. Finally, in subsection 4.3.3, a survey of the system of the three-step test will be conducted.

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626 Cf. Kerever 1975, 331; du Bois 1997, 3.

627 See article 9(2) BC (emphasis added).

628 See article 13 TRIPs (emphasis added).

629 See the two paragraphs of article 10 WCT (emphasis added).

630 Cf. C. Masouyé 1981, § 9.6; Ricketson 1987, 482; Gervais 1998, 90; Reinbothe/v. Lewinski 2002, 124.

631 See Records 1967, 1145-1146.

4.3.1 THE BASIC RULE

The specific structure of the three-step test has given rise to the question whether the general rule of criterion 1, that limitations must be certain special cases, can be qualified as one of the substantial 'tests' of the so called *three*-step test.[632] While Ricketson treats the 'three distinct conditions' of article 9(2) BC equally in the course of his interpretative analysis,[633] early comments on article 9(2) BC do not lend much weight to the restriction of limitations to certain special cases or simply ignore criterion 1 and speak of two conditions, thereby referring to criteria 2 (no conflict with a normal exploitation) and 3 (no unreasonable prejudice to legitimate interests).[634] In this vein, Gervais merely spoke of 'two tests contained' in article 13 TRIPs in 1998, thereby addressing criterion 2 and criterion 3.[635] He did not explain this reduction to a two-step test with the specific background to article 13 TRIPs. On the contrary, he based his interpretation on article 9(2) BC.[636] Indeed, this line of reasoning calls to mind a certain passage of the report on the work of Main Committee I of the 1967 Stockholm Conference:

> 'The Committee also adopted a proposal by the Drafting Committee that the *second* condition should be placed before the *first*, as this would afford a more logical order for the interpretation of the rule. If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment.'[637]

This explication of the mode of operation of article 9(2) BC underlines the importance of criteria 2 and 3 whereas the basic rule that limitations must be certain special cases is merely mentioned in passing. Moreover, the Committee refers to criteria 2 and 3 as the first and the second condition of the three-step test.[638]

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632 Frotz 1986, 120 and 122, for instance, explicitly addresses this issue.

633 See Ricketson 1987, 482-485.

634 Cf. Kerever 1975, 331; Kerever 1976, 189; Desbois 1967, 25; Desbois/Francon/Kerever 1976, 205; Nordemann/Vinck/Hertin 1977, 80.

635 See Gervais 1998, 90. However, see also Gervais 2003, 145-146, where he distinguishes different approaches which seems to indicate that he departed from the position taken earlier. The exclusion of criterion 1 from the circle of relevant tests may be deemed appropriate in the context of the European Copyright Directive 2001/29/EC. Cf. Dreier 2002, 35; Bornkamm 2002, 43. See subsection 5.3.1.2.

636 See Gervais 1998, 90.

637 See Report on the Work of Main Committee I, Records 1967, 1145-1146 (emphasis added).

638 The Chairman of Main Committee I, Ulmer, also referred to these two criteria as 'the conditions restricting the right of reproduction'. See Minutes of Main Committee I, Records 1967, 885.

Nonetheless, it is unlikely that Main Committee I did not regard the restriction of permissible limitations to certain special cases as one of the substantial conditions of the three-step test. Firstly, the fact that it included this criterion in the three-step test weighs heavily against this assumption. Undoubtedly, it would have been possible to devise article 9(2) BC so as to avoid mention of the restriction to certain special cases. The wording of the three-step test, as the primary source of interpretation,[639] thus, does not support the conclusion that the circle of relevant tests is solely constituted by criteria 2 and 3.[640]

Secondly, the foregoing structural analysis contradicts this finding. It has already been pointed out that the restriction to certain special cases represents a general rule within the system of the three criteria. The conceptual contours of this rule are drawn more precisely by the subsequent criteria establishing further conditions. The wording of article 9(2) BC mirrors this structure by placing criterion 2 (no conflict with a normal exploitation) and criterion 3 (no unreasonable prejudice to legitimate interests) into a subordinate clause starting with 'provided that'. Therefore, it makes sense that Main Committee I addressed criteria 2 and 3 as the first and second condition. They are indeed the two conditions which delineate the basic rule set out in the main sentence.[641] Owing to its general nature, Main Committee I probably conceived of the necessity to confine limitations to certain special cases as a matter of course, the specific importance of which need not be stressed expressly in the report on its work. This, however, hardly justifies the exclusion of criterion 1 from the circle of relevant 'tests'. On the contrary, there is substantial reason to observe not only the conditions delineating a certain rule of a general nature but also the basic rule itself. Hence it follows that, in line with Ricketson's approach, all three criteria of the three-step test must be deemed relevant 'tests' deserving the same interpretative effort.[642]

4.3.2 THE TWO CONDITIONS

The above-quoted passage, taken from the report on the work of Main Committee I of the 1967 Stockholm Conference, gives rise to a further question concerning the relationship between criterion 2 (conflict with a normal exploitation) and criterion 3 (unreasonable prejudice to legitimate interests). These two building blocks of the three-step test both serve the purpose of delineating the basic rule of criterion 1

639 See section 4.1.

640 Cf. Frotz 1986, 122.

641 The comments made by C. Masouyé 1981, § 9.6, clearly reflects this understanding. He points out the basic rule that limitations are only permitted in certain special cases. Subsequently, he explains that the freedom which national legislation enjoys pursuant to this rule (limitations in certain special cases instead of no limitations at all) is restricted by two conditions.

642 Cf. WTO Panel – Copyright 2000, 31-69; Collovà 1979, 127 and 131-133; Ricketson 1987, 482-485; Frotz 1986, 122-125; du Bois 1997, 3-4; Reinbothe/v. Lewinski 2002, 121-122; Ficsor 2002a, 516.

more precisely. Nonetheless, Main Committee I was of the opinion that they would have to be arranged in a certain sequence to 'afford a more logical order for the interpretation of the rule'.[643] In the initial draft of article 9(2) BC, criterion 3 preceded criterion 2. The reproduction of works should be permitted 'in certain special cases, provided that such reproduction does not unreasonably prejudice the legitimate interests of the author and does not conflict with a normal exploitation'.[644] The considerations which finally led to the reversion of these elements are of particular interest for an inquiry into their relation to one another. The initiative to restructure the draft came from the chairman of Main Committee I, Ulmer. He asserted that 'the first essential was that the normal exploitation of the work should be safeguarded, and the question of prejudicing the legitimate interests of the author was only a secondary one'.[645] From his point of view, the second step, which inhibits copyright limitations from conflicting with a normal exploitation, obviously constitutes a centre of gravity within the subsystem of the two conditions delimiting the basic rule of criterion 1.[646]

Due to the formulation chosen in the report on the work of Main Committee I, it is not entirely clear which practical consequences the Committee inferred from the reversion of the two conditions delimiting criterion 1. The beginning of the relevant passage, explaining the mode of operation of the three-step test, has already been cited above. The Committee elaborates that reproduction is not permitted at all if it conflicts with a normal exploitation of the work. In the absence of such a conflict, the last criterion of the test would have to be taken into consideration. Accordingly, it must be examined whether the reproduction in question unreasonably prejudices the legitimate interests of the author. The Committee finally concluded that

> 'only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment'.[647]

This statement, when read independently, allows the introduction of a compulsory licence only in the absence of an unreasonable prejudice. The payment of equitable remuneration would accordingly not prevent a limitation from being found to unreasonably prejudice the legitimate interests of the author. By contrast, the payment of equitable remuneration may not be factored into the equation at all when determining whether or not a limitation causes an unreasonable prejudice. The clarity of this statement, however, is obscured by the subsequent practical example given in the report on the work of Main Committee I which deals with photocopying for various purposes. The Committee explains:

643 Report on the Work of Main Committee I, Records 1967, 1145.
644 See Document S/109, Records 1967, 696.
645 See Minutes of Main Committee I, Records 1967, 885.
646 Cf. Desbois/Francon/Kerever 1976, 205.
647 See Report on the Work of Main Committee I, Records 1967, 1145.

> 'If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid.'[648]

This example obviously nuances the foregoing statement. In accordance with the practical example, the payment of equitable remuneration has a mitigating effect on the finding of an unreasonable prejudice. There is no unreasonable prejudice because equitable remuneration is paid. Pursuant to the foregoing statement, by contrast, the absence of an unreasonable prejudice is a prerequisite for the introduction of a compulsory licence regime. A compulsory licence would thus be impossible if the reproduction, when assessed without considering the remuneration paid, unreasonably prejudices the legitimate interests of the author.

In commentary literature, it has been doubted whether article 9(2) BC allows the introduction of compulsory licences at all. Desbois, Françon and Kéréver regard the possibility to provide for compulsory licences as an unjustified interpolation into article 9(2). They reduce the possible outcome of the test procedure to either the permission or prohibition of the reproduction in question.[649] This view cannot be endorsed for various reasons. First of all, it can be gathered from the background to article 9(2) that a compromise solution lies at the core of the introduction of the three-step test into the Berne Convention. It served as a basis for the reconciliation of the contrary opinions expressed by the members of the Berne Union.[650] The possibility to provide for compulsory licences forms an indispensable part of this compromise. In the course of the deliberations of Main Committee I, it was pointed out in Main Committee I that 'the countries of the Union were, however, entitled to introduce a compulsory license in some cases, as was done by the German legislation which the Delegation of India had mentioned'.[651] Not surprisingly, commentators commonly agree with the report on the work of Main Committee I and accept the possibility of introducing a compulsory licence.[652] The rigid approach of Desbois, Françon and Kéréver cannot be followed.

This line of reasoning leads back to the question begged by the unclear report on the work of Main Committee I. Does the payment of equitable remuneration influence the finding of an unreasonable prejudice? An affirmative answer would broaden the ambit of operation of limitations. To illustrate this result, it might be assumed that a certain national limitation unreasonably prejudices the legitimate interests of the author. For this reason, the national legislator decides to mitigate the corrosive effect of the limitation and provides for the payment of equitable

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[648] See Report on the Work of Main Committee I, Records 1967, 1145-1146.

[649] See Desbois/Francon/Kerever 1976, 207.

[650] See subsection 3.1.2. Cf. Desbois/Francon/Kerever 1976, 204-205. Ricketson 1987, 480-481.

[651] See Minutes of Main Committee I, Records 1967, 884. Cf. Ulmer 1969, 17, and subsection 3.1.3.5.

[652] Cf. Kerever 1976, 191; C. Masouyé 1981, § 9.8; Frotz 1986, 128; Ricketson 1987, 484; du Bois 1997, 4-5; Gervais 1998, 89-90; Reinbothe/v. Lewinski 2002, 127.

remuneration. If this payment of equitable remuneration can be taken into account when inquiring into an unreasonable prejudice to the legitimate interests of the author (criterion 3), the limitation can potentially fulfil the third criterion under the new circumstances. If not, the payment of equitable remuneration does not change anything. It is irrelevant to the determination of an unreasonable prejudice. Thus, the limitation would still be incapable of passing the third test.

Apparently, the drafters of the three-step test agreed on the first alternative. The decision on whether a limitation causes an unreasonable prejudice should be influenced by the payment of equitable remuneration. The Minutes of Main Committee I clearly point in this direction. Ulmer, the chairman of the Committee, enunciated in the course of the deliberations that 'in the case of photocopies made by industrial firms, it could be assumed that there would be no "unreasonable" prejudice to the legitimate interests of the author if the national legislation stipulated that adequate remuneration should be paid'.[653] This statement did not provoke any disagreement. Hence, the practical example given in the final report on the work of Main Committee I seems to reflect the opinion of the Committee correctly: a certain reproduction 'may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid'.[654] The statement which precedes the practical example in the report and points in the opposite direction gives the false impression that no allowance should be made for the payment of equitable remuneration. It can be understood to merely underscore that national legislation may either provide for a compulsory licence or for use without payment. Therefore, the payment of equitable remuneration is relevant to the third criterion.[655]

This conclusion defines the relationship between criterion 2 (no conflict with a normal exploitation) and criterion 3 (no unreasonable prejudice to legitimate interests). To understand its impact on the subsystem of these two conditions delimiting the basic rule of criterion 1, a last insight must be taken into account: the payment of equitable remuneration has never been considered capable of averting the finding that a limitation conflicts with a normal exploitation.[656] Solely with regard to an unreasonable prejudice to legitimate interests, the influence of the payment of equitable remuneration was discussed at the 1967 Stockholm Conference and declared permissible in the final report:

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653 See Minutes of Main Committee I, Records 1967, 883. Cf. Ulmer 1969, 17.

654 See Report on the Work of Main Committee I, Records 1967, 1145-1146.

655 Cf. Ricketson 1987, 484-485; du Bois 1997, 4-5; C. Masouyé 1981, § 9.8. Switzerland took the same view in the context of the WTO Panel Report on section 110(5) of the US Copyright Act. See WTO Panel – Copyright 2000, 244.

656 Compulsory licences have always been regarded as impossible in the context of the second criterion. Cf. C. Masouyé 1981, § 9.7. Discussing private copying, P. Masouyé 1982, 86-87, nevertheless favours the payment of equitable remuneration instead of the prohibition of private copying even though he sees a conflict with a normal exploitation. Thereby, however, it has to be taken into account that he pursues the objective to introduce private copying as a new exploitation mode as a response to market failure. Cf. in addition Kerever 1975, 331.

> 'If [photocopying for various purposes] consists of producing a very large number of copies, *it may not be permitted, as it conflicts with a normal exploitation*. If it implies a rather large number of copies for use in industrial undertakings, *it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid*.'[657]

Thus, if a conflict with a normal exploitation arises, this is automatically an end of the matter. The limitation cannot pass the three-step test and is impermissible – regardless of whether or not equitable remuneration is paid. Only an unreasonable prejudice to legitimate interests may be prevented by the payment of equitable remuneration.[658] Against this background, it becomes understandable why Main Committee I placed the prohibition of a conflict with a normal exploitation before the condition that legitimate interests of the author may not be unreasonably prejudiced. Indeed, this reversion of the two conditions affords 'a more logical order for the interpretation of the rule', as the Committee points out in the report on its work.[659] If a conflict with a normal exploitation arises, the limitation is inevitably doomed to failure. It does not comply with the three-step test and cannot be permitted. The test procedure, automatically, comes to an end. Thus, it is logical to examine first whether or not a limitation conflicts with a normal exploitation (criterion 2) before turning to the question of whether an unreasonable prejudice to legitimate interests is caused (criterion 3).[660]

4.3.3 OVERVIEW OF THE REGULATORY FRAMEWORK

The test's regulatory framework can be summed up as follows:

Criterion 1:	basic rule: limitations must be certain special cases
Criterion 2:	first condition delimiting the basic rule: no conflict with a normal exploitation – compulsory licences impossible
Criterion 3:	second condition delimiting the basic rule: no unreasonable prejudice to legitimate interests – compulsory licences possible

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657 See Report on the Work of Main Committee I, Records 1967, 1145-1146 (emphasis added).

658 This conclusion is undisputed in academic literature. See Ricketson 1987, 484: 'It also seems clear from the Report of Main Committee I that "unreasonable prejudice to the legitimate interests of the author" may be avoided by the payment of remuneration under a compulsory licence (although this would not, of course, "cure" a use that conflicted with the normal exploitation of the work – by definition, the receipt of royalties under a compulsory licence could not be regarded as part of the normal exploitation of a work).' Cf. Ricketson 1999, 70; C. Masouyé 1981, 58-59; du Bois 1997, 4; Bornkamm 2002, 46-47; Ficsor 2002a, 288.

659 See Report on the Work of Main Committee I, Records 1967, 1145.

660 Cf. du Bois 1997, 4-5.

That it is correct to delineate the system of the three criteria in this way can be substantiated by a teleological line of argument: the three-step test is located at the interface between the authors' exclusive rights and privileged uses. Its three steps make it possible to approach the core of copyright's balance in stages. The first step is the furthest from the core and correspondingly of a general nature. It sets forth a basic rule, the restriction to certain special cases. Copyright limitations which are incapable of fulfilling this criterion are inevitably doomed to fail. The second step delineates the basic rule of criterion 1 more precisely: a conflict with a normal exploitation is not permissible. This criterion is located halfway to the core. At this stage, no additional instruments for the reconciliation of the interests of authors and users, like the payment of equitable remuneration, are necessary. Limitations which fail to meet this condition cannot be countenanced at all. The third step, however, is the closest to the core. The wording of this condition contains elements that can be applied for the exact calibration of copyright's balance. The prejudice has to be 'unreasonable' and the interests of the author 'legitimate'. In this situation, where the divergent interests of copyright law finally meet, the possibility to provide for the payment of equitable remuneration is indispensable. It serves as a means to establish a balance between the interests at stake. Without the help of this adjusting tool, it might be impossible to deal with certain constellations challenging copyright's balance. In particular, this is true in times of upheavals within the copyright system caused, for instance, by technical developments. The mere decision between permission and prohibition of limitations is then too imprecise.

On this basis, a final comment on the relationship between the two conditions delimiting the scope of criterion 1 can be made. Within the subsystem of the two conditions, the first one which forbids a conflict with a normal exploitation is often perceived as kingpin.[661] This understanding seems to be rooted in statements made at the 1967 Stockholm Conference. As already mentioned, the chairman of Main Committee I, Ulmer, referred to the question of prejudicing the legitimate interests of the author as a 'secondary' essential of the three-step test whereas he qualified the prohibition of a conflict with a normal exploitation as 'first essential'.[662] However, it is wrong to deduce any kind of hierarchy between these two conditions from this statement which merely assigns a subordinate role to the prohibition of an unreasonable prejudice to the author's legitimate interests.[663] As already elaborated, this last criterion is the closest to the core of copyright's balance. The divergent interests of authors and users must ultimately be reconciled with its help. As a success in safeguarding copyright's balance thus finally depends on criterion 3, this last criterion, if any, is the kingpin of the three-step test.[664]

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661 Cf., for instance, Desbois/Francon/Kerever 1976, 205.

662 Cf. Minutes of Main Committee I, Records 1967, 885.

663 Nevertheless, the second step of the test is often brought into focus when applying the three-step test. Cf. Desbois/Francon/Kerever 1976, 205. Ricketson 1987, 482 states clearly: 'As to the second and third conditions, the second is the more important.'

664 Cf. Heide 1999, 106-107.

Ultimately, the system of the three criteria can be described as follows: the basic rule that limitations must be certain special cases and the further condition that they may not conflict with a normal exploitation of the work serve as a gateway to the core of copyright's balance.[665] Copyright limitations, when assessed in the light of these two criteria, can be prohibited or passed to the following step. In particular, the payment of equitable remuneration has no influence on the decision whether or not a limitation conflicts with a normal exploitation. The last criterion, that the legitimate interests of the author may not be unreasonably prejudiced, lies at the core of copyright's balance. Solely those exemptions from exclusive rights reach this stage of the test procedure which already fulfil criteria 1 and 2. Thus, only the 'hard nuts to crack', challenging the balance in copyright law, remain. Accordingly, compulsory licensing as an additional measure besides the mere permission or prohibition of a limitation is offered as an additional possibility. Furnished with this additional instrument, criterion 3 allows the final balancing of the interests at stake.

4.4 Certain Special Cases

In article 9(2) BC, the basic rule of the three-step test finds expression in the following wording: 'It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases…' Similarly, article 10(1) WCT permits 'to provide for limitations of or exceptions to the rights granted to authors […] in certain special cases'. In article 13 TRIPs, it is stated: 'Members shall confine limitations or exceptions to exclusive rights to certain special cases…'[666] In article 10(2) WCT, the same language is used.

In the following subsections, the meaning of the restriction of limitations to certain special cases will be examined in order to develop an appropriate test procedure. Subsection 4.4.1 deals with certainty, subsection 4.4.2 with speciality. In subsection 4.4.3, it will be discussed which impact the resulting test procedure has on internationally recognised limitations set out in the Berne Convention. In the ensuing subsection 4.4.4, certain types of national limitations, namely personal use privileges and open norms, like the US fair use doctrine, will be scrutinised in the light of the developed test procedure.

4.4.1 CERTAINTY

The prerequisite that there must be something special about limitations is central to the first criterion. However, it also comprises the word 'certain'. Limitations are only allowed in '*certain* special cases'. Therefore, the first question is what the

665 Cf. Collova 1979, 133.

666 The existing differences in the wording of article 9(2) BC ('permit […] in certain special cases') and article 13 TRIPs ('confine […] to certain special cases') do not indicate that there are any differences in the meaning of criterion 1. Cf. Heide 1999, 105.

word 'certain' means in this context and how it influences the test procedure. One of its ordinary meanings is 'determined, fixed, settled; not variable or fluctuating'.[667] Associating legal certainty with the word 'certain', it can be posited on this basis that a limitation must be clearly defined. The WTO Panel reporting on section 110(5) of the US Copyright Act took this position. It elaborated that the term 'certain' means that 'an exception or limitation in national legislation must be clearly defined'.[668] The evolution of the three-step test in international copyright gives evidence of several attempts to make a clear definition a separate prerequisite. The draft provision which later became article 13 TRIPs originally contained the formula that limitations should be confined to 'clearly and carefully defined special cases'.[669] Prior to the 1996 WIPO Diplomatic Conference, the view that limitations should be restricted to 'precisely defined special cases' was again taken by governmental experts.[670]

However, the term 'clearly defined' never made its way to the three-step test. The latter allows limitations in 'certain special cases' instead of insisting on 'clearly defined special cases'. For this reason, doubt must be cast upon the assumption that the term 'certain' was really inserted to underline the necessity of an exact and precise definition. The word 'certain' also refers to something 'of positive yet restricted (or of positive even if restricted) quantity, amount, or degree'.[671] Certain cases, therefore, could simply mean 'some definitely, some at least, a restricted or limited number of'[672] cases. The French text of the Berne Convention, which is to prevail in the context of the Berne Convention,[673] clearly indicates that the drafters of the three-step test, indeed, had this meaning of the term 'certain' in mind. Whereas the English text speaks of 'certain special cases', the expression '*certains cas spéciaux*' is used in the French text instead of *cas certains et spéciaux*. The word order of the French text shows that the word 'certain' was not understood to carry a further substantial prerequisite besides the claim for speciality. On the contrary, it appears safe to assume that the word 'certain' was inserted because the drafters of the three-step test bore in mind a number of limitations which existed at the national level at the time of the Stockholm Conference.[674] Hence, the expression 'certain special cases' can be equated with the formula 'some special cases'.

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667 See the Oxford English Dictionary.

668 See WTO Panel – Copyright 2000, § 6.108.

669 This language was proposed by the US. See GATT Doc. MTN.GNG/NG11/W/70, 6. In the course of further deliberations it has gradually been approximated to the wording of article 9(2) BC. Cf. subsection 3.2.1.

670 See Experts on the Printed Word 1988, 63. Cf. subsection 3.3.1.

671 See the Oxford English Dictionary.

672 Cf. the Oxford English Dictionary.

673 See article 37(1)(c) BC. Cf. subsection 4.1.2.6.

674 In the course of the preparatory work for the Stockholm Conference, the 1965 Committee of Governmental Experts, indeed, took the view that 'the main difficulty was to find a formula which would allow of exceptions, *bearing in mind* the exceptions already existing in many domestic laws'. See Doc. S/1, Records 1967, 113 (emphasis added). See the overview given in subsection 3.1.3.

This analysis of the wording does not deny the necessity of a clear definition altogether. By contrast, it is to be posited that a clear dividing line between different limitations must be drawn. Privileged 'special cases' must be distinguishable from each other to become discernible as 'some special cases'. Hence, an incalculable, shapeless provision exempting a wide variety of uses would not be allowed. The comments on article 9(2) BC made by Ricketson point in this direction. He states that 'a broad kind of exemption would not be justified'.[675] In this vein, the prerequisite that a clear definition is necessary can be upheld. However, it is to be noted that it is nuanced by the insight that the formula 'certain special cases' simply means 'some special cases'. This analysis of the wording deprives the requirement of a clear definition of the rigidity which would result from the opposite postulation that 'certain special cases' means 'determined, fixed, settled; not variable or fluctuating'[676] special cases.

To illustrate the potential harm flowing from the latter, rigid approach, certain comments on the three-step test can be brought to the fore which have been made in literature. Reinbothe and von Lewinski, for instance, elaborate in line with Ricketson that 'national law has to contain sufficient specifications, which identify the cases to be exempted from the rights. Unspecified wholesale limitations or exceptions are not permitted'.[677] However, they hasten to add that, 'in essence, exceptions have to be well defined and to be of limited application'.[678] Similarly, Ficsor states that 'the use to be covered must be specific – precisely and narrowly determined'.[679] Apparently, these commentators strive for an alignment of international copyright law with the continental European dogma of restrictively delineated exceptions.[680] The formula that 'exceptions have to be well defined and to be of limited application'[681] as well as the statement that exempted uses 'must be specific – precisely and narrowly determined'[682] point in this direction.

Such an interpretation, however, can scarcely be deemed appropriate in the context of the three-step test. Being loath to make allowance for the characteristics of both legal traditions of copyright law is anything but conducive to interpreting a provision which serves the proper adjustment of copyright's balance at the international level. If the requirement of a clear definition were to be understood in the sense of the civil law approach, open-ended norms evolving from the Anglo-American copyright system would automatically be rendered incapable of surmounting the first hurdle of the three-step test. Espousing this result would

675 See Ricketson 1987, 482. In the context of article 13 TRIPs, this view has been endorsed by Ficsor 2002b, 129.
676 See the Oxford English Dictionary.
677 See Reinbothe/von Lewinski 2002, 124.
678 See Reinbothe/von Lewinski 2002, 124.
679 See Ficsor 2002a, 516.
680 Cf. subsection 2.1.
681 See Reinbothe/von Lewinski 2002, 124.
682 See Ficsor 2002a, 516.

inevitably lead to the suppression of the specific way in which the common law system sets limits to the exclusive rights of authors.

The specific merit of the nuanced approach resulting from the insight that 'certain special cases' simply means 'some special cases' lies in the fact that it thwarts plans to misuse the three-step test as a means to intersperse international copyright law with questionable continental European dogmata. It shows instead that the espousal of a clear definition has its limits. A 'determined, fixed, settled; not variable or fluctuating'[683] set of special cases is not required. The exempted special cases must merely be distinguishable from each other to become discernible as 'some special cases'. Arguably, the task to draw this dividing line between special cases need not necessarily be fulfilled by national legislation but may also be left to the courts. Besides the mere wording of a limitation, the influence which the courts have on the definition of a limitation's scope can therefore be taken into account. Within the realm of the Anglo-American copyright tradition, established case law can accordingly be of influence as regards open-ended limitations.

At the international level, this practice has become widespread. In respect of the expression 'prescribed by law' set out in article 10(2) of the European Convention on Human Rights, the European Court of Human Rights, for instance, elaborated:

> 'It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not "prescribed by law" on the sole ground that it is not enunciated in legislation: this would […] strike at the very roots of [a common-law] State's legal system.'[684]

In the opinion of the Court, two requirements must be met to secure a sufficient degree of legal certainty. Legal rules must firstly be adequately accessible and secondly be formulated with sufficient precision so that the consequences which a given action entail become foreseeable.[685] With an eye to rules evolving from the common law, the Court adds:

> 'Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.'[686]

The WTO Panel reporting on Section 110(5) of the US Copyright Act similarly conceded after emphasising the necessity of a clear definition:

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683 See the Oxford English Dictionary.

684 See the Sunday Times case, E.C.H.R. Judgement of April 26, 1979, Series A No. 30, §47.

685 See the Sunday Times case, E.C.H.R. Judgement of April 26, 1979, Series A No. 30, §49.

686 See the Sunday Times case, E.C.H.R. Judgement of April 26, 1979, Series A No. 30, §49.

> 'However, there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal certainty.'[687]

Embracing these findings, the following conclusions can be drawn: the expression 'certain special cases' can be equated with the formula 'some special cases'. National copyright limitations must accordingly be distinguishable from each other. An incalculable, shapeless provision exempting a wide variety of different uses is impermissible. Instead, privileged special cases must be known and particularised so that it becomes foreseeable whether or not a given use of a work is subjected to the authors' control. The task of making privileged special cases distinguishable need not necessarily be accomplished by national legislation, but may also be left to the courts. Hence, copyright limitations need not be precisely and narrowly defined in the sense of copyright's civil law tradition.

4.4.2 SPECIALITY

A 'special case' can be understood to be 'of such a kind as to exceed or excel in some way that which is usual or common; exceptional in character, quality, or degree'.[688] Thus, two distinct boundary lines come to the fore.[689] Firstly, it can be understood to require that a limitation has 'an individual, particular, or limited application, object, or intention; affecting or concerning a single person, thing, circumstance'.[690] This is the quantitative aspect of speciality. It requires that a limitation has a limited scope so that it enables only a limited number of privileged uses. Secondly, the term 'special' refers to the state of being 'marked off from others of the kind by some distinguishing qualities or features; having a distinct or individual character'.[691] This is the qualitative aspect of speciality which refers to a distinctive, exceptional objective.[692] In this vein, it can be posited that a sufficiently strong justification must be given for a limitation.

In the ensuing subsections, the question must be asked how these two distinct aspects of speciality – the quantitative and the qualitative connotation – can be applied so as to establish a suitable test procedure. To lay groundwork for an appropriate response, some remarks of a general nature will be made first in the following subsection 4.4.2.1. Subsequently, the concept will be discussed in subsection 4.4.2.2 which has been developed by the WTO Panel reporting on section 110(5) of the US Copyright Act. The Panel laid an emphasis on the

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687 See WTO Panel – Copyright 2000, § 6.108. Cf. Hugenholtz 2000d, 200.
688 See the Oxford English Dictionary.
689 Cf. Gervais 2003, 146.
690 Cf. the Oxford English Dictionary.
691 Cf. the Oxford English Dictionary.
692 Cf. WTO Panel – Copyright 2000, § 6.109; Ricketson 1987, 482; Lucas 2001, 430.

quantitative connotation of the word 'special'. It will be seen that this approach must be rejected for various reasons. A qualitative concept which is suitable for identifying special cases will be developed in subsection 4.4.2.3. The resulting definition of special cases in the sense of the three-step test will be given in subsection 4.4.2.4. To establish the qualitative test procedure, reference will be made to the 'legitimate interests of the author' to which the third criterion of the three-step test refers. Therefore, it is advisable to clarify the relationship between the first and the third criterion in the final subsection 4.4.2.5.

4.4.2.1 Assessing Quantitative and Qualitative Considerations

At the core of the quantitative aspect of speciality lies the consideration that a limitation, if it has only a restrictively-delineated ambit of operation, enables merely a limited number of unauthorised uses. Due to their small number, these privileged uses appear special when compared with the potentially countless number of normal uses made in the course of 'a normal exploitation of the work'.[693] A corresponding inquiry would have to focus on the circumstances under which the limitation in question permits the use of copyrighted material. Does the limitation allow for multiple ways of application? Will it be invoked repeatedly in respect of the same work? What is the impact of the limitation on different kinds of works? How many beneficiaries will potentially profit from the limitation?

Responses to these questions are inevitably doomed to vagueness and insecurity. The precise number of beneficiaries profiting from a private use privilege, for instance, is hard to ascertain. The moment additional factors are taken into account, such as the various ways of using a work which the privilege exempts, and the wide array of works which it concerns, the problems are multiplied. Further difficulties arise if the quantitative element is also applied to the size of the work itself. Should the question of whether a limitation permits to use the whole of a work or solely portions thereof be factored into the equation as well? Must the quantity of the freely used material in relation to the work as a whole be taken into consideration? Should a distinction be made between substantial and insubstantial portions of a work? How should the line between these two categories be drawn?[694]

On account of the outlined difficulties, it will be impossible in almost all cases to ascertain the exact number of privileged uses enabled by a specific limitation. A concrete number or an exact percentage of uses which could be exempted without jeopardising the approval of the three-step test would thus be presented in vain. The regulatory capacity of the quantitative meaning of the term 'special' is therefore quite limited. Refuge must be taken in a rough assessment of a limitation's potential

693 Cf. WTO Panel – Copyright 2000, § 6.109; Collova 1979, 127; Ricketson 1987, 482.

694 Cf. the US Supreme Court decision Harper & Row v. Nation Enterprises, 471 U.S. 539, section IV, where the question of the amount and substantiality of the used material was answered in the context of the fair use doctrine. See Fisher 1988, 1675-1678, for a discussion of the Court's considerations.

for sanctioning free uses. That such a superficial assessment constitutes a firm basis for the identification of special cases is at least doubtful.

The qualitative meaning of the term 'special' refers to a distinctive or exceptional objective which is pursued with the limitation in question.[695] The initial draft of the three-step test of article 9(2) BC indeed referred to 'specified purposes' instead of 'certain special cases'.[696] The study group which prepared the material for the 1967 Stockholm Conference emphasised that 'exceptions should only be made for clearly specified purposes, e.g., private use, the composer's need for texts, the interests of the blind'.[697] Although this enumeration appears unsystematic, it gives evidence that qualitative considerations influenced the drafting process of the three-step test. This is in line with the general framework in which the first three-step test of international copyright law was enshrined. The Berne Convention makes allowance for numerous socially valuable ends. The exemption of quotations as an integral part of intellectual activity, the permission of the utilisation of works for teaching purposes, press privileges promoting the free flow of information and reservations for religious ceremonies may serve as examples.[698] Not surprisingly, it was underlined with regard to the three-step test in the preparatory work for the 1996 WIPO Diplomatic Conference that

> 'when a high level of protection is proposed, there is reason to balance such protection against other important values in society. Among these values are the interests of education, scientific research, the need of the general public for information to be available in libraries and the interests of persons with a handicap that prevents them from using ordinary sources of information.'[699]

Against this backdrop, the specific merit of the qualitative aspect of speciality can hardly be denied: in international copyright law, considerations of a qualitative nature traditionally play a decisive role in the field of limitations.[700] The notions underlying internationally recognised limitations, as reflected in the Berne Convention, provide guidance for the development of a suitable qualitative test procedure. Therefore, it appears advisable to base the identification of special cases on a qualitative inquiry. This is all the more true as it can already be foreseen that a quantitative test procedure is not unlikely to give rise to insoluble problems.

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695 Cf. Ricketson 1987, 482; Ficsor 2002b, 133; Reinbothe/von Lewinski 2002, 124.

696 See Doc. S/1, Records 1967, 112.

697 See Doc. S/1, Records 1967, 112.

698 See articles 10(1) and 10(2), 10*bis* and 2*bis*(2) BC. Cf. in respect of the so-called 'minor reservations doctrine' subsection 3.1.1.

699 See WIPO Doc. CRNR/DC/4, § 12.09.

700 The deliberations at the 1884-1886 diplomatic conferences which preceded the formation of the Berne Convention already bear witness to the influence of qualitative considerations. Numa Droz who presided over the first diplomatic conference in 1884, for instance, reminded that 'limitations on absolute protection are dictated, rightly in my opinion, by the public interest'. Cf. Ricketson 1999, 61; Cohen Jehoram 2001b, 807-808. In the WIPO 'Internet' Treaties, considerations of this kind are directly reflected in the preamble. Cf. subsection 3.3.2.

4.4.2.2 REJECTING THE QUANTITATIVE CONCEPT OF THE WTO PANEL

The way in which the WTO Panel reporting on section 110(5) of the US Copyright Act dealt with the two aspects of speciality contradicts this conclusion. The Panel did not rely on qualitative considerations. Instead, it posited that 'an exception or limitation should be narrow in quantitative *as well as* a qualitative sense. This suggests a narrow scope as well as an exceptional or distinctive objective'.[701] Hence, the starting point of the Panel is the postulation that both facets of speciality are cumulative conditions. Obviously, the Panel did not fear the substantial problems evolving from a quantitative examination of limitations.

The way in which the Panel proceeded confirms this impression. Instead of preferring qualitative considerations to circumvent the problems raised by the quantitative connotation of the term 'special', the Panel did the exact opposite. It refused to judge the legitimacy of the public policy objective underlying section 110(5) of the US Copyright Act and rebutted the argument of the EC that the term 'certain special cases' requires a special purpose.[702] The Panel took the view that

> 'it is difficult to reconcile the wording of Article 13 [TRIPs] with the proposition that an exception or limitation must be justified in terms of a legitimate public policy purpose in order to fulfill the first condition of the Article'.[703]

The qualitative aspect of speciality was therefore de facto ignored. Accordingly, the Panel departed from its initial postulation that the two aspects of speciality must be applied cumulatively by stating that 'a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned'.[704]

Obviously, the Panel eschewed the subjection of national public policy decisions to the qualitative aspect of speciality. In an international trade context, this refusal to judge the legitimacy of a nation state's policy choices may be deemed appropriate.[705] Too big an interference with national sovereignty certainly poses its own threat to the acceptance and efficiency of an international dispute settlement system heavily depending on voluntary compliance by participating members.[706] The qualitative minimum requirement which remains pursuant to the Panel's approach, however, only necessitates the mere existence of any public policy and has no regulatory substance. The qualitative aspect of speciality, therefore, was de facto sacrificed on the altar of national sovereignty. This begs the question whether

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701 See WTO Panel – Copyright 2000, § 6.109 (emphasis added).
702 Cf. WTO Panel – Copyright 2000, §§ 6.105 and 6.111.
703 See WTO Panel – Copyright 2000, § 6.111.
704 See WTO Panel – Copyright 2000, § 6.112. Cf. Davies 2002, 282.
705 Cf. Oliver 2002, 150.
706 Cf. Jackson 2000, 160.

the Panel, fearing to infringe too much upon national policy decisions, has not gone too far down the road of deference to national actors[707] – an issue that will be dealt with in more detail in the ensuing subsection. Virtually, the applied test procedure is a quantitative inquiry excluding any qualitative considerations. This means that the Panel had to run the risk of focusing on the problematic quantitative connotation of the expression 'special cases'.

In the course of the following quantitative inquiry, the Panel agreed with the EC that 'it is the scope in respect of potential users that is relevant for determining whether the coverage of the exemption is sufficiently limited to qualify as a "certain *special* case"'.[708] For the identification of relevant normal cases, the Panel relied on the preparatory works for the 1948 Brussels Conference and concluded that 'Article 11*bis*(iii) of the Berne Convention (1971) was intended to provide right holders with a right to authorize the use of their works in the types of establishments covered by the exemption contained in Section 110(5)(B)'.[709] It failed to see

> 'how a law that exempts a major part of the users that were specifically intended to be covered by the provisions of Article 11*bis*(1)(iii) could be considered as a *special* case in the sense of the first condition of Article 13 of the TRIPS Agreement'.[710]

When viewed superficially, the Panel's quantitative inquiry does not lack powers of persuasion. Apparently, the Panel succeeded in solving the specific problem raised by the quantitative aspect of speciality. In the previous subsection, it was assumed that it would be impossible in almost all cases to ascertain the exact number of privileged uses enabled by a specific limitation. On account of this assumption, it has been concluded that the regulatory capacity of the quantitative connotation of the term 'special' is quite limited, and that refuge would ultimately have to be taken in a rough assessment of a limitation's potential for sanctioning free uses. The Panel, by contrast, was provided with factual information on the beneficiaries of section 110(5)(B) which, even though the presented figures were estimations, led to a clear finding. The Panel elaborated that

> 'the factual information presented to us indicates that a substantial majority of eating and drinking establishments and close to half of retail establishments are covered by the exemption contained in subparagraph (B) of Section 110(5) of the US Copyright Act. Therefore, we conclude that the exemption does not qualify as a "certain special case" in the meaning of the first condition of Article 13.'[711]

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707 Cf. Lucas 2001, 430.

708 See WTO Panel – Copyright 2000, § 6.127 (emphasis in the original text).

709 See WTO Panel – Copyright 2000, § 6.131.

710 See WTO Panel – Copyright 2000, § 6.131 (emphasis in the original text).

711 See WTO Panel – Copyright 2000, § 6.133. See also §§ 6.118-6.124.

Has the Panel thus solved the problem of a quantitative inquiry convincingly? To answer this question, it must be borne in mind that the Panel based its quantitative inquiry on article 11*bis*(1)(iii) BC. It chose a small exclusive right. Using this restricted reference point, the Panel was capable of drawing the aforementioned conclusions. However, it was obviously not aware of the additional difficulties entailed by a reference to an individual exclusive right, as delineated at the international level. The Berne Convention, for instance, reflects compromise solutions and responses to technical developments rather than a system of exclusive rights without areas of overlap.[712] The right of cinematographic reproduction, enshrined in article 14(1) BC, for instance, coexists with the general right of reproduction of article 9(1) BC although allowance is also made for the specific circumstances of cinematographic reproductions in article 9(3) BC.[713] The right of mechanical reproduction of musical works, initially embodied in article 13(1) BC, by contrast, was abolished at the 1967 Stockholm Conference. It was asserted that it is included within the general right of reproduction of article 9(1) anyway.[714] If the reference point of a quantitative inquiry is chosen in the way in which the Panel proceeded, exemptions from cinematographic reproduction rights would have to be assessed in the light of the small exclusive right granted separately in article 14(1). Limitations to mechanical reproduction rights, by contrast, could be assessed in the light of the broad general right of reproduction, set out in article 9(1). The establishment of a different standard of comparison, however, appears arbitrary.[715]

As a matter of course, it could be contended that the overlap between exclusive rights in the field of the right of reproduction is a special case itself which does not justify deprecating the concept of the Panel altogether. However, the exclusive right chosen by the Panel is anything but exempted from the outlined dilemma. As article 8 WCT demonstrates, a general right of communication is emerging in international copyright law which already overlaps with article 11*bis*(1)(i) and (ii) BC. Admittedly, article 11*bis*(1)(iii) BC itself which was used by the Panel as a reference point is not covered yet. If an exemption from article 11*bis*(1)(i) or (ii) BC is to be examined, however, a decision must be taken. Should the corresponding number (i) or (ii) of article 11*bis*(1) be chosen as a reference point, or the general article 8 WCT instead? If preference is given to the cases listed separately in article 11*bis*(1) BC, a compelling argument must be presented for choosing a reference point which differs markedly in scope from article 8 WCT. The reference point for cases which solely fall within article 8 WCT, like the making available of a work online, is obviously the broad article 8 WCT itself. The cases dealt with in article 11*bis*(1) BC, by contrast, would have to be assessed in the light of a substantially

712 Cf. the description of the Convention's development given by Ricketson 1987, 81-125.

713 Cf. Ricketson 1987, 384.

714 Cf. Ricketson 1987, 382.

715 Cf. Ricketson 1987, 384, concluding that 'article 14(1), insofar as it refers to reproduction by means of cinematography is strictly unnecessary, but that it serves a useful purpose in making the existence of this right more explicit'.

smaller reference point. As all these cases concern the communication of a work to the public, the outlined differences appear arbitrary. Inevitably, the question would arise whether article 11*bis*(1) BC would really have survived, had the WCT not complemented the Berne Convention, but become part of the Convention itself, incorporated in the course of a 1996 Geneva Conference for the revision of the Berne Convention.[716]

Besides the described dilemma, the quantitative approach of the Panel poses insuperable difficulties if a limitation does not concern only one individual exclusive right. Besides the so-called 'minor reservations doctrine' which was invoked as the basis of section 110(5) of the US Copyright Act,[717] the Berne Convention permits limitations which are neither necessarily linked with individual exclusive rights nor even shifted into line with the system of exclusive rights.[718] Their mechanism rather consists of the delineation of the specific circumstances portraying the kind of use which is to be exempted. The number of exclusive rights involved might differ significantly. For instance, an exemption allowing the use of articles on current economic, political or religious topics, and of broadcast works of the same character might touch upon the general right of reproduction (article 9(1) BC), the right of broadcasting (article 11*bis*(1) BC) and the right of communication to the public (article 11*ter*(1) BC) in accordance with article 10*bis*(1) BC. Correspondingly, the number of potential uses empowered by such a horizontal limitation would have to be assessed against the backdrop of a combination of exclusive rights. How this task could ever be accomplished, is hard to imagine.

Would the Panel undertake a quantitative inquiry in the field of each individual right that is affected? And, if so, what would be the outcome? The number of unauthorised reproductions of an article on current topics which are made by other newspapers is not unlikely to exceed the number of reproductions made by the newspaper which first published the article. Should the three-step test, therefore, erode the privilege laid down in article 10*bis*(1) BC? Is the same true for publications, broadcasts or sound or visual recordings of a work for teaching purposes which are made in accordance with article 10(2) BC? In this case, the number of reproductions of a poem in a school book might go beyond the number of reproductions made by the original publisher.

The approach of the Panel leaves the interpreter in the dark in these cases. If the legitimacy of the purpose which underlies a limitation, in the aforementioned cases the utilisation of a work for teaching purposes and for the information of the public,

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716 At the time of the WCT's inception, a renewed revision of the Berne Convention was out of reach. The predictions in respect of its possible outcome were anything but positive due to the fear of unexpected and undesirable results, such as a decreased level of protection. Cf. Ficsor 1996, 79. Therefore, the participants of the 1996 WIPO Diplomatic Conference, held in Geneva, focused on the adoption of instruments which complement the Convention. One of the new treaties is the WIPO Copyright Treaty. Cf. section 3.3 above.

717 See WTO Panel – Copyright 2000, §§ 6.56-6.70 and §§ 6.92-6.96.

718 Cf. Dreier 1997, 143-145, with regard to limitations laid down in the Berne Convention.

are barred from entering the picture, its speciality cannot be assessed appropriately. A mere quantitative inquiry is manifestly unsuitable. In cases where a limitation serves socially valuable ends, the first criterion would be blinded to the crucial importance of the limitation and the legitimacy of the underlying public policy considerations. Instead, the limitation would probably not survive the quantitative scrutiny and be rendered incapable of fulfilling the first criterion.

A further objection to the quantitative approach of the Panel must be raised. On its merits, the Panel divests the test's first criterion of any independent meaning. By relying on quantitative findings, the Panel reduces the meaning of the expression 'special cases' to an anticipated inquiry into a conflict with 'a normal exploitation of the work'. Such an inquiry, however, is necessitated by the second criterion anyhow. Not surprisingly, the Panel's conclusion that section 110(5)(B) of the US Copyright Act 'exempts a major part of the users that were specifically intended to be covered by the provisions of Article 11*bis*(1)(iii)'[719] seems to be a response to the question whether the limitation conflicts with a normal exploitation rather than to the problem of speciality.[720] On account of the outlined difficulties, the approach of the Panel must be rejected. Instead of demonstrating how the problems of a quantitative analysis can be solved, it poses numerous additional difficulties. It multiplies the problems in the context of the first criterion.

4.4.2.3 BRINGING QUALITATIVE CONSIDERATIONS INTO FOCUS

As the closer inspection of the quantitative approach of the WTO Panel has shown, the quantitative connotation of the term 'special' does not constitute a firm basis for an examination of limitations in the light of the first criterion.[721] It is thus advisable to bring the qualitative connotation of the term 'special' into focus instead. In this respect, the comments which Ricketson made on article 9(2) BC can serve as a useful starting point. Besides other prerequisites,[722] Ricketson emphasises that there must be something special about the purpose of the privileged use in question. He elaborates that 'special' here means that the purpose 'is justified by some clear reason of public policy or some other exceptional circumstance'.[723] This view is widely shared. In the context of article 13 TRIPs, Ficsor follows Ricketson's approach.[724] Seeking to clarify the formula given by Ricketson, he underlines that more is necessary

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719 See WTO Panel – Copyright 2000, § 6.131 (emphasis in the original text).

720 Viewed from this perspective, it is not surprising that section 110(5)(B) also failed the second criterion, as interpreted by the Panel. See WTO Panel – Copyright 2000, § 6.211.

721 Cf. Lucas 2001, 430.

722 See Ricketson 1987, 482. Cf. subsection 4.4.1.

723 See Ricketson 1987, 482. It is to be noted that Ricketson departed from this position recently. See Ricketson 2003, 22, stating that 'the preferable view is that the phrase "certain special cases" should not be interpreted as requiring that there should also be some "special purpose" underlying it'.

724 See Ficsor 2002b, 129.

> 'than that policy makers wish to achieve any kind of political objective. There is a need for a clear and sound political justification, such as freedom of expression, public information, public education; it is not allowed to curtail author's rights in an arbitrary way.'[725]

Similarly, Reinbothe and von Lewinski explain in respect of article 10 WCT that

> 'limitations and exceptions should be based on a specific and sound policy objective. […] Such policy areas of concern or relevance to limitations and exceptions may be public education, public security, freedom of expression, the needs of disabled persons, or the like.'[726]

Before further clarifying the qualitative standard of review on this basis, it is to be emphasised that a fine line must be walked here. As already indicated in the previous subsection, it can be assumed that the WTO Panel had reason to elude a judgement on the legitimacy of the policy objective underlying a national limitation. The international treaties governing copyright law are devised so as to serve as minimum standard regimes.[727] National actors are not compelled to create a rigidly uniform intellectual property code. Broad discretion is particularly enjoyed in the field of limitations. The possibility to impose certain restrictions on copyrights allows states to strike their own unique balance between authors' rights and competing cultural, social and economic interests. From the debates at the 1967 Stockholm Conference, it can be inferred that especially the three-step test can be perceived as an exponent of the freedom traditionally conceded to national policy makers in this field.[728]

WTO panels would be ill-advised to do away with this freedom. As Croley and Jackson point out, 'inappropriate panel "activism" could well alienate members, thus threatening the stability of the GATT/WTO dispute settlement procedure itself'.[729] Drawing a line between the WTO dispute settlement mechanism and the practice of the European Court of Human Rights (ECHR), Helfer stresses by the same token the importance of the so-called 'margin of appreciation doctrine'.[730] The latter gives evidence of the ECHR's willingness to grant national decision makers a certain degree of discretion. This breathing space permits the balancing of the protection of civil and political liberties against other pressing societal concerns.[731] The ECHR has particularly made plain that it will refrain from 'taking the place of

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725 See Ficsor 2002b, 133. The same position is taken by Ficsor with regard to article 10 WCT. See Ficsor 2002a, 284 and 516.

726 See Reinbothe/von Lewinski 2002, 124.

727 Cf. Helfer 1998, 387-388; Oliver 2002, 132. See the overview given in chapter 3.

728 See subsection 3.1.2. Cf. Helfer 1998, 370-373.

729 See Jackson 2000, 160.

730 See for a description of the doctrine Harris/O'Boyle/Warbrick 1995, 411-414.

731 Cf. Helfer 1998, 404.

the competent national authorities'.[732] Helfer's analysis suggests that the margin of appreciation doctrine is 'an essential ingredient of the ECHR's success in fashioning an effective system of adjudication'.[733]

Against this backdrop, it can be concluded that the qualitative standard of review to be developed here, in any case, should not interfere too much with national policy decisions. Instead, a prerogative must be given to national authorities. Helfer even contends that 'states should enjoy the most deference when they seek to strike a balance between exclusive rights of authors and the rights and interests of the public and future authors in obtaining access to copyrighted works'.[734] However, it must be borne in mind that the quantitative connotation of the term 'special' has proven to be manifestly unsuited for identifying special cases. The remaining qualitative standard of review will therefore ultimately form the sole hurdle to be surmounted by national limitations when it comes to decide on compliance with the three-step test's first criterion. That the WTO Panel reporting on section 110(5) of the US Copyright Act, basically, was ready to accept any public policy invoked by a member state,[735] can thus hardly be considered an appropriate solution. It would deprive the first criterion of any regulatory potential. The standard of review discussed by Croley and Jackson, by contrast, points in the right direction:

> 'So long as a member's interpretation of the [TRIPs] Agreement is permissible – within the realm of the plausible, in some general sense – deference on the part of the reviewing panels may be sensible.'[736]

When the necessity to justify a limitation by some clear reason of public policy is seen in this light, it can be posited that the legislative decision to set limits to author's rights must be plausible considering the reasons given for the limitation's adoption. The three-step test itself offers further guidance with regard to the task that national policy makers must accomplish. The third criterion of the test prohibits an unreasonable prejudice to the legitimate interests of the author. If a line is drawn between this criterion and the prerequisite that limitations must be special cases, the conceptual contours of the required policy decision can be traced more precisely: a legislative process in which the legitimate interests of authors are carefully weighed against competing interests is central to securing that a limitation forms a special case. To give some clear reason of public policy for a limitation, the national legislator must clearly refer to an interest which constitutes a rational basis for a limitation and makes it plausible why the scales were finally tipped to the side of the users. As a minimum requirement, it is thus inevitable that there exists a conflict of interests. Otherwise, there is no need to enter into the weighing process at all.

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732 See Helfer 1998, 402, quoting the decision Grigoriades v. Greece.
733 See Helfer 1998, 404.
734 See Helfer 1998, 432.
735 See WTO Panel – Copyright 2000, § 6.111.
736 See Jackson 2000, 154. Cf. Oliver 2002, 150.

To ensure compliance with this standard of review, national legislation may invoke a wide variety of justifications. Considerations that are of particular importance, such as the defence of fundamental rights and freedoms, and the aim to disseminate information or to enhance democracy, have been discussed in chapter 2. Guidelines were also given at the 1996 WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions. In the preparatory work for the Conference, it is underlined with regard to the proposed three-step test that

> 'when a high level of protection is proposed, there is reason to balance such protection against other important values in society. Among these values are the interests of education, scientific research, the need of the general public for information to be available in libraries and the interests of persons with a handicap that prevents them from using ordinary sources of information.'[737]

In this vein, the need 'to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention', is expressly recognised in the preamble of the WIPO Copyright Treaty. These statements show which justifications may be regarded as a firm basis for limitations in the context of the three-step test.

Considerations of intergenerational equity which are used here as a signpost for the application of the three-step test,[738] also provide guidance. To be able to create a work, an author may depend on the possibility of building upon the works of his predecessors.[739] This is evident when a work is quoted or used for purposes such as criticism and review, or caricature, parody and pastiche. However, in line with the broad concept of intergenerational equity developed above, numerous further limitations are to be taken into account as well. Privileges for private study and consumptive private use, as well as for library and teaching activities also contribute to the realisation of intergenerational equity. They grant access to diverse sources of information.[740] In this context, the legitimate interests of the author must be reconciled with the specific needs of other authors who take the position of users under the given circumstances.[741] A limitation which is drafted so as to react adequately to this conflict of interests can be considered a special case.

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737 See WIPO Doc. CRNR/DC/4, § 12.09.

738 See section 2.3.

739 See the 'Germania 3'-decision of the German Federal Constitutional Court that has been discussed in subsection 2.2.1.

740 Cf. section 2.3. It is noteworthy in this context that the study group which prepared the material for the 1967 Stockholm Conference emphasised that 'exceptions should only be made for clearly specified purposes, e.g., private use, the composer's need for texts, the interests of the blind'. See Doc. S/1, Records 1967, 112. From the qualification of the 'composer's need for texts' as a clearly specified purpose, it may be inferred that the use of copyrighted material in the course of the creation of a new work was considered a special case.

741 See subsections 2.2.1 and 2.3.

The drafting history of article 9(2) BC and 10 WCT[742] is a reservoir of further examples of special cases. The original draft of article 9(2) BC explicitly permitted free reproductions 'for private use' and 'for judicial or administrative purposes'.[743] At the 1967 Stockholm Conference, no agreement on the precise delineation of these cases could be reached.[744] Hence, it was finally decided to refrain from their explicit enumeration. This decision, however, was not meant to indicate that the formerly listed cases are not permissible. By contrast, the conviction was expressed that the remaining abstract formula which now constitutes the three-step test would comprise those cases anyhow. The UK delegation, for instance, underscored that the three abstract criteria 'can take care of legitimate cases of private use and judicial and administrative purposes'.[745] The question whether corresponding limitations should be adopted or maintained on the national level, and how their scope should be delineated was confidently left to national legislation.[746] The exemption of reproductions for private use and for judicial or administrative purposes, therefore, has been regarded as a special case in the sense of the three-step test at the 1967 Stockholm Conference. Moreover, the general report of the Conference expressly mentions the exemption of scientific use of copyrighted material. The practical example given therein with regard to article 9(2) BC refers to 'individual or scientific use'.[747] As scientific use, thus, was chosen to explain the functioning of the three-step test, it was obviously also qualified as a special case. The deliberations at the Stockholm Conference, furthermore, concerned libraries. The UK stressed that

> 'the general idea of the United Kingdom amendment was that there should be no licensing in cases in which the author normally exploited the work himself. With libraries, however, a compulsory licensing system might be desirable, provided that it would not prejudice the author's legitimate interests. If it did, the author should be remunerated.'[748]

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742 This does not mean that they are incompatible with article 13 TRIPs. In the course of the debates on TRIPs, however, permissible special cases were not discussed in detail. The drafting history of article 13 TRIPs does not yield further examples that could be listed here.

743 See Records 1967, 113 (Doc. S/1).

744 See subsection 3.1.2.

745 See Records 1967, 630 (Doc. S/13). Cf. the observations of Greece, ibid., 689 (Doc. S/56) and Denmark, ibid., 615 (Doc. S/13). See also the statement which the Danish delegate made in Main Committee I, ibid., 857.

746 See Collova 1979, 125-127, who elaborates in respect of private use: 'La disparition, dans le texte définitif, de l'expression usage privé signifie, à notre avis, que le législateur international n'a pas voulu maintenir cette notion en tant que catégorie dogmatique autonome. En d'autres termes, il a manifesté par là l'intention de ne pas donner au legislateur national d'indications spécifiques et a préféré laisser à ce dernier la faculté de déterminer si l'usage privé peut être considéré ou non comme faisant partie des cas spéciaux, en lui indiquant également les limitatives à suivre.' Cf. Ricketson 1987, 485-487.

747 See report on the work of Main Committee I, Records 1967, 1146.

748 See Minutes of Main Committee I, Records 1967, 857.

As it was the UK amendment which finally determined the wording of the three-step test,[749] this statement is of particular importance. The UK espoused a solution of the problems raised by library activities on the basis of the third criterion of the three-step test. Obviously, it was therefore convinced that limitations in favour of libraries are a special case in the sense of the first criterion.[750] Besides the UK, the delegation of Italy sought to bring the needs of libraries into focus. It envisioned

> 'a compromise solution which would involve finding a general formula […] while making provision for certain exceptions which would allow reproduction for judicial or administrative purposes and, where applicable, for the internal use of libraries and record libraries and for private use'.[751]

Further examples of concerns forming a rational basis for limitations can be found among the circle of traditional limitations which were already known in 1967. The freedom of reproducing a portrait which is traditionally offered the portrayed person by some members of the Berne Union[752] reconciles the personality right of the portrayed person with the legitimate interest of the author in controlling the reproduction of the portrait. The widespread limitation which allows the owner of an artistic work the work's reproduction in a catalogue if he wishes to sell it,[753] reacts to the conflict between the author's copyright and the owner's property right in the work's physical manifestation. Naturally, the circle of special cases is not restricted to the traditional limitations known in 1967. Otherwise, the three-step test would be rendered impervious to technical advances requiring new limitations to solve an emerging new conflict of interests.[754] The technical developments which have occurred since 1967, including the spectacular growth of the internet, can serve as an example in this context. In the digital environment, there is substantial reason to qualify the exemption of temporary transient or incidental reproductions as a special case.[755] This exemption, in contrast to traditional limitations, is rooted in technical necessities. By allowing temporary acts of reproduction, such as caching, the efficient functioning of internet transmission systems can be safeguarded.[756] Ultimately, the survival and continuing growth of the internet can be perceived as the plausible policy objective underlying this special case.[757]

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749 Cf. subsection 3.1.2.

750 Otherwise, the third criterion would not be reached. See subsection 4.3.3.

751 See Minutes of Main Committee I, Records 1967, 858.

752 See subsections 3.1.3.1 (FRG) and 3.1.3.2 (Netherlands).

753 See subsections 3.1.3.1 (FRG), 3.1.3.2 (Netherlands) and 3.1.3.4 (UK).

754 Cf. the agreed statement concerning article 10 WCT. It is underlined therein that article 10 WCT should be understood 'to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment'.

755 A corresponding limitation, for instance, can be found in article 5(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001.

756 Cf. recital 33 of Directive 2001/29/EC.

757 Cf. Hugenholtz 2000b, 482.

So far, only examples of limitations have been given which can be qualified as a special case. The developed standard of review, however, also excludes certain types of limitations. Section 110(5)(B) of the US Copyright Act may serve as an example. The WTO Panel reporting on section 110(5) concluded on the basis of a quantitative inquiry that subparagraph B of the provision cannot be regarded as a special case. Although the quantitative approach of the Panel had to be rejected,[758] it must be conceded that the Panel nevertheless drew the right conclusion. Section 110(5)(B) is not a special case. Under this so-called 'business exemption', commercial establishments such as bars, shops, and restaurants which do not exceed a certain size or which meet certain equipment requirements, may play radio and TV music without paying any royalty fees to collecting societies. In the course of the dispute settlement procedure, the US claimed that 'the specific policy objective pursued by this exemption is fostering small businesses and preventing abusive practices of CMOs'.[759] It contended that

> 'small businesses play a particularly important role in the American social fabric. They foster local values and innovation and experimentation in the economy. Small businesses also create a disproportionately greater number of economic opportunities for women, minorities, immigrants, and those formerly on public assistance, and thus are an essential mechanism by which millions enter the economic and social mainstream.'[760]

Against this backdrop, it is not surprising that the WTO Panel avoided an inquiry into the legitimacy of the outlined public policy purpose and focused on quantitative findings instead.[761] It is not evident why a copyright limitation was chosen to pursue the delineated policy objective. Undoubtedly, there are more effective ways of fostering small businesses. Moreover, it is not apparent why the purpose of preventing these businesses from abusive practices of collecting societies led to a copyright limitation. Instead, as the applied practices are abusive, better control could be exerted on the societies. The furtherance of small businesses and their protection against abusive practices consequently cannot be qualified as a clear reason of public policy. At the core of the limitation lie merely considerations of political usefulness.[762] Hence, section 110(5)(B) is not a special case.

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758 See the description and discussion of the Panel's concept in the previous subsection.

759 See WTO Panel – Copyright 2000, § 6.115.

760 See Responses of the US to written questions from the panel – first meeting, WTO Doc. WT/DS160/R, attachment 2.3, Q.17. The background to the adoption of the provision, however, reveals that it might also be regarded as the result of the intervention of certain interest groups. Cf. Goldmann 1999, 505-506.

761 Cf. WTO Panel – Copyright 2000, §§ 6.111-6.112. In particular, Lucas 2001, 430, criticised the accentuation of the quantitative aspect of speciality.

762 Cf. Oliver 2002, 150, asserting that 'the "policy" basis of § 110(5) (the fostering of "mom and pop" businesses) was an economic trade-off made by the U.S. in response to lobbying by those groups'. In the course of the WTO dispute settlement procedure, Australia also took the view that section 110(5) cannot be qualified as a special case. In its written submission, WTO Doc. WT/160R/R,

Certain European limitations, however, also cannot meet the developed qualitative standard of review. In the European Copyright Directive 2001/29/EC, it is deemed permissible to exempt the use of copyrighted material in connection with the demonstration or repair of equipment.[763] A long-standing limitation for these ends can be found in German legislation. Businesses which sell or repair TV sets, radios, recording equipment and the like as well as blank material supports, such as tapes and cassettes, can profit from § 56 of the German Copyright Act. The provision allows the making of visual or sound recordings, the public communication of such recordings and of broadcasts insofar as necessary for demonstrating or repairing the described equipment. This provision helps to explain the functioning of the proposed qualitative test procedure because a distinction must necessarily be made between aspects which are special and those which are not capable of meeting this standard.

Insofar as the proprietor of a shop selling and repairing relevant equipment is hindered from running his business due to the control exerted by the authors, the limitation can be qualified as a special case. Under these circumstances, the legislator reacts to a conflict between the interest in running a business without being straitjacketed by the author's control and the interest of the author in controlling any performance of his work. It can easily be imagined that, while demonstrating a radio for sales purposes, some copyrighted piece of music might become audible.[764] Similarly, it is not unlikely that copyrighted material will be heard or seen when a repaired TV set is switched on in order to show that the repair has been successful and the client will get value for money. In these cases, where the use of copyrighted material is incidental, it is justified to speak of a special case.[765] If the proprietor of a shop would have to obtain the authorisation of the authors even for the described incidental performance of a work that can furthermore hardly be avoided in the normal course of events, he could rightly assert that copyright interferes with his business. The legislator is thus free to react to the resultant conflict of interests.

Another aspect of the limitation, however, can hardly be regarded as special. If the possibility of freely using copyrighted works to demonstrate equipment leads to a permanent performance of works throughout the hours that a shop is open, the boundaries of a special case are overstepped. Taking advantage of the limitation in this way is certainly not necessary to enable the proprietor of the shop to run his business. It simply facilitates his commercial activity. The permanent playing of music or showing of copyrighted works on TV may be perceived as a useful

attachment 3.1, Australia elaborates: 'There is no indication that the criteria chosen to define this exception were driven by public policy objectives, comparable to use in research, educational or religious context'. It maintains that 'there does not appear to be any identification of "special use" or "exceptional circumstances" behind the S.110(5) exemption […]. Rather, the threshold applied is justified by contingent considerations about the practicalities of collecting royalties.'

763 See article 5(3)(l) of the Copyright Directive.

764 This is an example given by Fromm/Nordemann 1966, 216.

765 Cf. Melichar in: Schricker 1999, 903.

background to the sale of equipment and attracts passers-by in the street outside. The interest in these positive side effects of a permanent performance of works, however, does not call for reconciliation with the legitimate interests of the author. The legislative decision to impose a limitation, thus, does not become plausible. It is not a special case.[766]

4.4.2.4 DEFINING A SPECIAL CASE

On the basis of the preceding inquiry, the following conclusions can be drawn: it is not advisable to rely on the quantitative connotation of the term 'special' when seeking to identify special cases in the sense of the three-step test.[767] Instead, preference should be given to a qualitative test procedure. Some clear reason of public policy must underlie the adoption of a copyright limitation.[768] To give some clear reason of public policy, the national legislator must enter into a careful weighing process. The legitimate interests of the author, to which the third criterion of the three-step test refers, must be weighed carefully against the competing interests at stake. The legislative decision to set limits to the author's exclusive rights must be a reaction to an understandable need for the reconciliation of the user interests at stake with the author's legitimate interests. That the national legislator considers the imposition of a limitation politically useful, is not sufficient.[769] In sum, a limitation that rests on a rational justificatory basis making its adoption plausible constitutes a special case in the sense of the three-step test.

4.4.2.5 CLARIFYING THE INTERPLAY WITH THE THIRD CRITERION

Against the quantitative approach of the WTO Panel, it has been contended that the Panel divests the test's first criterion of any independent meaning. By eschewing a qualitative judgement of a limitation's legitimacy, the Panel reduces the meaning of the expression 'special cases' to an anticipated inquiry into a conflict with a normal exploitation of the work – an inquiry which is necessitated by the second criterion of the three-step test. It has been asserted that any response to the question of a limitation's speciality which is given on the basis of the Panel's quantitative approach, already determines the outcome of the limitation's examination in the light of the second criterion. In consequence, the prohibition of a conflict with a normal exploitation of the work would be rendered meaningless. To avoid this result, the quantitative approach of the WTO Panel has been rejected.[770]

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766 See the decision Performing Right Society Ltd. v. Harlequin Record Shops Ltd., All England Law Reports 1979 Vol. 2, 828. Cf. de Freitas 1984, 27; Melichar in: Schricker 1999, 902.

767 Cf. subsection 4.4.2.2.

768 Cf. Ricketson 1987, 482.

769 Cf. Ficsor 2002b, 133.

770 See subsection 4.4.2.2.

Pursuing the establishment of a suitable qualitative test procedure, however, the third criterion of the three-step test has been factored into the equation. It has been enunciated that the user interests at stake must be capable of competing with the legitimate interests of the author to which the third criterion refers. A very similar objection can therefore be raised here: would an inquiry into the speciality of a limitation which is based on the developed qualitative test procedure not anticipate an examination in the light of the third criterion, just as the Panel's quantitative approach anticipates an examination in the light of the second criterion?

The response to this question depends particularly on the fact that the prejudice to the author's legitimate interests is qualified in a specific way in the context of the third criterion. As some harm to the author's legitimate interests will inevitably flow from any limitation, the third criterion does not forbid a prejudice as such. It only forbids an *unreasonable* prejudice.[771] This formulation can be understood as a reference to the principle of proportionality: although strong user interests may underlie a limitation, the prejudice to the legitimate interests of the author must be proportionate.[772] In the framework of the third criterion, the legislator's weighing process which is necessitated by the first criterion is scrutinised more thoroughly. The central question, then, is whether the legislator succeeded in striking a proper balance between the interests at stake. In particular, it must be decided whether it is necessary to provide for the payment of equitable remuneration.[773]

Hence, the qualitative test procedure of the first criterion merely ensures that a basic requirement is fulfilled which is indispensable to the more thorough scrutiny required by the third criterion. If a limitation's adoption is not plausible, it makes no sense to proceed further. Ultimately, it would inevitably have to be concluded that the limitation is not permissible because a proportional relation to the legitimate interests of the author is out of reach. Thus, it is appropriate to secure in the context of the first criterion that a plausible argument supports the limitation. There is a mutual relationship between the first and the third criterion but no area of overlap. The mere *existence* of a plausible competing user interest indicating that a careful weighing process has taken place on the national level is central to the first criterion. In the context of the third criterion, the *content* of the weighing process is controlled.

4.4.3 THE IMPACT ON INTERNATIONALLY RECOGNISED LIMITATIONS

The question of the relationship between the open-formulated three-step test as the general norm and other, more specific limitations was already addressed at the 1967 Stockholm Conference. The Conference report expressly referred of the principle *lex specialis legi generali derogat* to clarify the relationship between article 9(2)

771 Cf. Ricketson 1987, 483-484; Desbois/Francon/Kerever 1976, 205.

772 For a detailed discussion of this concept, see subsection 4.6.2.

773 See subsections 4.3.2 and 4.3.3.

BC and articles 10, 10*bis*, 11*bis* and 13 BC.[774] The drafters of the first three-step test in international copyright law sought to draw a clear boundary line between the general three-step test and more specific provisions of the Berne Convention. Within the ambit of operation of these provisions, the three-step test should have no role to play.[775] Consequently, the question of the impact of its abstract criteria on one of the other internationally recognised limitations did not have to be raised.

In practice, however, courts were attracted by the general guidelines given in the three-step test and did not hesitate to apply an amalgam of the test's abstract criteria and more specific provisions of the Berne Convention. In the case 'Zienderogen Kunst' of June 22, 1990, for instance, the Dutch Supreme Court, the Hoge Raad, had recourse to the three-step test of article 9(2) BC even though the case concerned quotations made in a schoolbook and thus the domain of the more specific article 10 BC. The publisher Malmberg distributed a schoolbook in which works of art were reproduced. As these reproductions were unauthorised, the Dutch collecting society Stichting Beeldrecht sued for payment of equitable remuneration. It took the view that the reproductions fell under the schoolbook privilege laid down in article 16 sub (a) of the Dutch Copyright Act, as in effect at that time. This provision leaned on article 10(2) BC and provided for the payment of equitable remuneration.[776] To justify the unauthorised reproduction even though no remuneration had been paid, Malmberg invoked the right of quotation, as delineated in article 16 sub (b) of the Dutch Copyright Act in accordance with article 10(1) BC.[777] Article 16 sub (b) did not oblige beneficiaries to pay equitable remuneration.

If the Hoge Raad had strictly observed the boundary line drawn between the three-step test and more specific limitations of the Berne Convention in the report of the 1967 Stockholm Conference, it would merely have been possible to refer to article 10 BC. The first paragraph of article 10 deals specifically with quotations, the second with a work's utilisation by way of illustration in publications for teaching. Instead, the Hoge Raad elaborated that the right of quotation, as delineated in article 16 sub (b) of the Dutch Copyright Act of that time, only allows an unauthorised taking which does not substantially impair the right holder's interest in a work's exploitation, as protected by copyright law.[778] Seeking to concretise this formula, the Court held that the free reproduction of a work of art must be subjected to the text, with which it is connected, in such a way that it can no longer be regarded as a form of exploitation of the artistic work involved.[779] This standard of control was not derived from the international rules given in article 10

774 See Records 1967, 1134. Cf. subsection 3.1.2 for a preliminary draft of the later three-step test tabled in 1964 which already reflected the intention to leave more specific provisions of the Berne Convention untouched. Cf. subsection 4.1.2.2 for a more detailed description.

775 See Records 1967, 1134.

776 See for a description of this provision subsection 3.1.3.2.

777 See subsection 3.1.3.2. Cf. Cohen Jehoram 1991, 678.

778 See Hoge Raad, Nederlandse Jurisprudentie 1991, 268, § 3.3.

779 See Hoge Raad, Nederlandse Jurisprudentie 1991, 268, § 3.3.

BC but from article 9(2) BC. Accordingly, the Hoge Raad intermingled the rules governing quotations and illustrations for teaching with the general rule enshrined in article 9(2) BC.[780]

Nowadays, this way of applying the three-step test to situations for which the Berne Convention provides specific rules is reflected in international copyright law. Article 13 TRIPs and article 10(2) WCT serve as additional safeguards.[781] They carry on where the specific provisions of the Berne Convention left off. If a national limitation already complies with the prerequisites set forth in the Berne Convention, it must *additionally* fulfil the three criteria of the test.[782] If a national legislator nowadays wants to exempt the making of quotations or the utilisation of a work by way of illustration for teaching, it is no longer sufficient to ensure compliance with article 10 BC. Additionally, the national legislator must secure that the envisioned limitation is capable of fulfilling the abstract criteria of the three-step test. The application of an amalgam of specific provisions of the Berne Convention and the general three-step test, as anticipated by the Hoge Raad, has become a necessity.

Accordingly, the question arises what impact the rule that limitations must be confined to special cases has on more specific provisions of the Berne Convention. One might think of a national legislator who is about to introduce a press privilege facilitating the reporting of current events. Aiming to fulfil international obligations, the national legislator consults the Berne Convention and comes across article 10*bis*(2) which deals specifically with this kind of copyright limitation. In accordance with the rules set forth in article 10*bis*(2), the national legislator determines that copyrighted material seen or heard in the course of a press report concerning a current event may only be reproduced and made available to the public to the extent justified by the informatory purpose. Afterwards, however, the legislator also learns of the additional safeguard function fulfilled by the three-step tests of article 13 TRIPs and article 10(2) WCT. Studying article 10(2) WCT, he learns that he 'shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases…' Has the legislator still not done enough? Does article 10(2) WCT call upon him to form a special case of article 10*bis*(2) BC? Is the national legislator therefore barred from enjoying the full freedom offered by article 10*bis*(2) BC? Or is the restriction of limitations to special cases in article 10(2) WCT de facto rendered meaningless because the specific Berne provisions and thus also article 10*bis*(2) BC are already special cases in the sense of the three-step test?

Various arguments can be advanced in favour of the latter assumption. In the context of article 10 WCT, Reinbothe and von Lewinski point out that 'some guidance on the question as to which "special cases" international legislators have had in mind, and which ones might qualify under Article 10 WCT, is revealed in

780 See Hoge Raad, Nederlandse Jurisprudentie 1991, 268, § 3.4. Cf. Cohen Jehoram 1991, 678.
781 See subsections 3.2.2, 3.3.2 and 4.2.2.
782 See subsection 4.2.2.

the explicit exceptions listed in the Berne Convention'.[783] Hence, they recommend orienting the decision whether a national limitation is a special case in the sense of the three-step test towards the other, more specific limitations set out in the Berne Convention.[784] This position implies that the Berne limitations themselves are special cases in the sense of the three-step test. As to article 13 TRIPs, Ficsor similarly seeks to align the decision whether a national limitation constitutes a special case with the set of limitations laid down in the Berne Convention. Agreeing with Ricketson that some clear reason of public policy is necessary to consider a limitation a special case,[785] he elaborates that

> 'if one looks at the text of the provisions of the Berne Convention on special cases of exceptions to the right of reproduction and other rights, one may find that the revision conferences have always introduced exceptions on the basis of, as Ricketson puts it, some clearly identified reasons of "public policy"'.[786]

Pursuant to the qualitative standard developed above, a limitation can be qualified as a special case in the sense of the three-step test if it rests on a rational basis making its adoption by national legislation plausible.[787] Arguably, this hurdle will always be surmounted if national authorities shape a limitation so as to comply with a specific provision of the Berne Convention which explicitly permits the limitation's adoption. It can hardly be considered not to be plausible to use the room to manoeuvre especially created at the international level for fashioning an appropriate national copyright balance. This postulation has the merit that it avoids a conflict between the general three-step test and more specific limitations approved by the Berne Convention. It is in line with the agreed statement concerning article 10(2) WCT: 'Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.'[788] From this statement, it can be inferred that the additional safeguard function was not intended to cause any tension between the existing set of Berne limitations and the three-step test. As a national limitation is subjected to the three-step test only after already fulfilling the requirements set out in the Berne Convention in this connection, approval has already been given to the objective underlying the limitation in the context of the Convention. The additional claim for some justifying clear reason of public policy in article 13 TRIPs or article 10(2) WCT is tautological.[789] Against

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783 See Reinbothe/von Lewinski 2002, 125.

784 They explicitly refer to article 2*bis*(2), 10(1), 10(2), 10*bis*(1) and 10*bis*(2) BC. Cf. Reinbothe/von Lewinski 2002, 125.

785 Cf. subsection 4.4.2.3.

786 See Ficsor 2002b, 129.

787 See subsection 4.4.2.4.

788 See WIPO Doc. CRNR/DC/96, agreed statement concerning article 10 WCT. This statement is applicable *mutatis mutandis* to article 16 WPPT. See WIPO Doc. CRNR/DC/97.

789 The agreed statement concerning article 10 WCT is also to be taken into account in the context of article 13 TRIPs. Cf. subsection 4.1.2.2.

this background, it can be enunciated that the relevant provision of the Berne Convention itself forms the necessary rational basis making the limitation's adoption plausible. To doubt the legitimacy of a corresponding national limitation, could be equated with calling the legitimacy of the underlying specific provision of the Berne Convention as such into doubt.

Hence, it is to be concluded that all limitations for which the Berne Convention specifically provides[790] are special cases in the sense of the three-step test. A national limitation which complies with the Berne Convention, therefore, always constitutes a special case in the sense of the three-step test and passes the first step of article 13 TRIPs and article 10(2) WCT *automatically*. The claim for speciality is nothing but a reminder for national legislation in this context. It calls on the national legislator to use Berne provisions permitting copyright limitations with sense and reason. Instead of thoughtlessly exhausting the room to manoeuvre offered by the Convention, the national legislator should moderately use the existing freedom. A careful analysis of the specific needs of the user group which is to be privileged must precede the adoption of a limitation. In the context of the additional safeguard function, the expression 'special cases' therefore underlines the particular responsibility of national legislation. As posited in subsection 4.4.2.3, it is always expected to carefully weigh the legitimate interests of the author against competing user interests. The outcome of this procedure must be a limitation drawing only those resources away from authors' rights which are necessary for reacting adequately to the existing conflict of interests.

4.4.4 THE IMPACT ON REMAINING NATIONAL LIMITATIONS

After clarifying in how far the restriction of limitations to special cases influences the set of limitations for which the Berne Convention specifically provides, certain types of national limitations must finally be discussed. In literature, it has been contended that, particularly in the digital environment, private use has become too broad a category to be regarded as a special case in the sense of the three-step test any longer. Moreover, it has been called into doubt whether copyright limitations that are laid down in open-ended norms, such as the US fair use doctrine, comply with the three-step test's first criterion. Subsequently, it will therefore be examined whether or not the basic rule that copyright limitations must be confined to special cases really abridges these types of limitations. In subsection 4.4.4.2, the question will be raised in how far personal use privileges can be qualified as special cases in the sense of the three-step test. In subsection 4.4.4.3, it will be examined whether copyright limitations which are laid down in open-ended norms, like the US fair use doctrine, are nonetheless compatible with the requirement that such provisions, pursuant to the three-step test, must be confined to special cases.

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[790] See the overview given in subsection 4.2.2 above. Cf. subsection 4.1.3.

4.4.4.1 PERSONAL AND INTERNAL USE

In academic literature, it has been doubted whether limitations which exempt the personal use of copyrighted material can be qualified as a special case in the sense of the three-step test. Ricketson, for instance, has stated that, to be considered a certain special case, the privileged use 'must be for a specific, designated purpose: a broadly framed exemption, for example, for private or personal use generally, would not be justified here.'[791] Reinbothe draws similar conclusions on the grounds that the market failure argument supporting the exemption of personal use in the analogue world loses weight in the digital environment.[792] He contends that the digital reproduction for the purpose of personal use, consequently, can no longer be regarded as a 'certain special case' unless it is defended on another basis but the market failure rationale.[793]

Neither Ricketson's view nor the one taken by Reinbothe is endorsed here. Instead, it has already been pointed out that private use privileges have obviously been perceived as a 'certain special case' at the 1967 Stockholm Conference.[794] The survey of traditional limitations which has been conducted in chapter 3 corroborates this finding. From a historical perspective, there is thus substantial reason to rebut the argument that private use is not a special case.[795] As regards the market failure rationale, it has already been enunciated in chapter 2 that considerations of this kind are manifestly unsuited for justifying limitations anyway.[796] Personal use privileges affording the use and enjoyment of copyrighted material in privacy can be justified on the grounds that they contribute to the dissemination of information instead. Additionally, the right to privacy supports this type of limitation.[797] Hence, personal use privileges rest on a firm justificatory basis irrespective of whether or not the market failure argument still is relevant in the digital environment. This is all the more true as considerations of intergenerational equity also call for the exemption of the use of intellectual works for the purpose of private study.[798]

Nevertheless, the critique must be taken seriously. In particular, Ricketson's comment that a broadly framed exemption for private or personal use would not be permissible gives rise to a final review of personal use privileges. At the 1967 Stockholm Conference, a broad private use concept was under discussion. Against the initial proposal to list 'private use' explicitly as a permissible exemption from

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791 See Ricketson 1999, 69. Cf. Ginsburg 1997, 14: 'Note also that as more and more works are marketed directly to end users, private copying should no longer be characterized as "certain special cases": it will become the leading mode of exploitation.'

792 See Reinbothe 2000, 257. Cf. subsection 2.2.2.

793 See Reinbothe 2000, 257.

794 Cf. subsections 3.1.2 and 4.4.2.3.

795 See subsection 3.1.3. Cf. Collova 1979, 125-127; Bornkamm 2002, 46.

796 Cf. subsection 2.2.2.

797 See subsections 2.2.2 and 2.2.3.

798 See section 2.3.

the reproduction right,[799] Kerever, speaking on behalf of France, asserted that 'it was clear that the phrase "private use" would cover corporate bodies, which would perhaps be going too far'.[800] Obviously, the conceptual contours of private use were not traced narrowly at the Conference. Irrespective of Kerever's critique, the inclusion of industrial undertakings, ultimately, has even been reflected in the final report on the work of Main Committee I:

> 'If [photocopying for various purposes] implies a rather large number of copies *for use in industrial undertakings*, it may not unreasonably prejudice the legitimate interests of the author, provided that […] equitable remuneration is paid.'[801]

As already elaborated above, this statement can be traced back to the solution of the problem of photomechanical reproductions espoused in the 1965 Copyright Act of the FRG.[802] As the statement places copies made in enterprises in the context of the third criterion prohibiting an unreasonable prejudice to the author's legitimate interests, 'use in industrial undertakings' was obviously regarded as a special case in the sense of the test's first criterion at the Stockholm Conference.[803]

The different facets of the agreement reached at the 1967 Stockholm Conference can be gathered from ensuing Dutch legislation. As pointed out above, three different groups of users can be identified when analysing the Dutch private use regime established in 1972. These groups can be sketched as follows: the first group uses copyrighted material solely for personal study, learning and enjoyment. The use can accordingly be called strictly personal use. The second category is formed by non-profit organisations, such as public welfare institutions, including instances serving administrative purposes. The third category comprises enterprises and comparable profit organisations. This somewhat oversimplified[804] characterisation of the three distinct groups is a useful starting point for shedding the light of the three-step test's first criterion on different facets of personal use.

As to the first group, it can clearly be stated on the basis of the explanations already given that the use of copyrighted material for personal study, learning and enjoyment in privacy undoubtedly constitutes a certain special case in the sense of the three-step test. Limitations of this kind contribute substantially to the dissemination of information. They rest on the fundamental right to receive information, are necessitated by considerations of intergenerational equity and were widespread throughout the countries of the Berne Union at the time of the 1967

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799 See Doc. S/1, Records 1967, 113.

800 See Minutes of Main Committee I, Records 1967, 858.

801 See Report on the Work of Main Committee I, Records 1967, 1146 (emphasis added).

802 See subsection 3.1.3.1.

803 The three criteria of the three-step test are cumulative conditions. The third criterion, thus, can only be reached if the first (special cases) is already fulfilled. Cf. subsection 4.3.3.

804 For a detailed description, see subsection 3.1.3.2.

Stockholm Conference.[805] A legislator who exempts the outlined strictly personal use reconciles the authors' interest in the exploitation of their works with the user interest in free pathways through society's cultural landscape which allow the participation in cultural life as well as the discovery and development of one's own creative potential.[806]

With regard to the second group, encompassing non-profit organisations such as public welfare institutions and instances accomplishing administrative tasks, it must be borne in mind that it is insufficient to adopt a limitation just because it is considered politically useful.[807] National legislation may particularly be tempted to follow the dictates of political usefulness if the envisioned limitation serves charitable ends or helps to reduce the costs of administration. On account of these tendencies, it is to be reiterated that, pursuant to the qualitative standard developed above, the legislative decision to set limits to authors' rights must be a reaction to an understandable need for the reconciliation of the user interests at stake with the authors' legitimate interests.[808] Such a rational basis exists especially where non-profit organisations are involved in the dissemination of knowledge and would potentially be hindered from fulfilling their tasks properly were authors to exert control over their activities. Against this backdrop, privileges for libraries, archives and educational institutions can easily be qualified as a special case in the sense of the three-step test.[809]

Limitations exempting non-commercial uses made in hospitals or prisons can also be deemed a special case.[810] The German Federal Constitutional Court once defended the playing of radio and TV music without paying royalties in prisons on the grounds that the isolation of prisoners entails the danger of intellectual impoverishment. It considered a copyright limitation exempting this kind of use an appropriate means for preventing prisoners from losing contact with cultural life outside prison.[811] Although it is arguable that the limitation, at least in part, rests on considerations of political usefulness because it helps to reduce the costs of running prisons and hospitals, its adoption nevertheless becomes plausible on the basis of the explanation given by the Court. Prisons are obliged to offer prisoners the chance of participating passively in cultural life outside. If they want to fulfil their tasks properly, they therefore depend on the use of intellectual works.[812] Viewed from this perspective, an understandable need for the reconciliation of this user interest with the author's legitimate interest can indeed be ascertained.

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805 See subsections 2.2.2, 2.2.3, 2.3, 3.1.2 and 3.1.3.

806 Cf. subsections 2.3 and 4.4.2.3.

807 See subsection 4.4.2.3. Cf. Ficsor 2002b, 133.

808 See subsection 4.4.2.3.

809 Cf. subsections 2.2.2, 2.3 and 4.4.2.3.

810 A limitation of this kind can be found in article 5(2)(e) of the European Copyright Directive 2001/29/EC.

811 See BVerfGE 79, 29 (42-43).

812 Cf. BVerfGE 79, 29 (42-43).

As to the use of copyrighted material for administrative purposes, however, it must be stressed that the exemption is not a special case insofar as it merely serves the facilitation of administrative tasks and is considered politically useful for this reason. Only if the control exerted by authors would interfere with the proper fulfilment of the administrative tasks at stake is a copyright limitation appropriate and can be qualified as a special case. If an administrative body depends on access to copyrighted material so that it would be rendered incapable of accomplishing its tasks if the required use is denied, this condition is met.[813] Here, legislative action becomes plausible. A broadly framed exemption for administrative purposes in general, however, simply helps to reduce the costs of administration. This objective does not constitute a rational basis. A limitation of this type is not a special case.

To answer the question whether the last category – use of copyrighted material in industrial undertakings – is a special case in the sense of the three-step test, it is advisable to consider the German solution of the problem of photomechanical reproductions in industrial undertakings which impacted on the position taken at the Stockholm Conference. The 1965 Copyright Act of the FRG exempted not only reproductions for strictly personal use but also the internal use of works in industrial firms on condition that the authors are remunerated.[814] This development must be viewed through the prism of the market imperfections of the pre-digital world. At the time of the Stockholm Conference, an effective control mechanism enabling the control of internal uses of intellectual works in industrial undertakings was out of reach. The payment of equitable remuneration was best suited for safeguarding that the authors receive at least some reward. It appears safe to assume that the solution found in the FRG was countenanced at the Stockholm Conference for this reason. As the market failure rationale is no longer available, however, the time is ripe for a reassessment of the exemption. The appropriate standard of control once again forms the qualitative concept developed above: a limitation must rest on a rational justificatory basis so that its adoption becomes plausible.[815]

Numerous arguments which support the exemption of strictly personal use can also be invoked in favour of internal use in industrial undertakings. It can be asserted that corresponding user privileges serve the dissemination of information, thereby facilitating and promoting the creation of new works. Considerations of this kind also have overtones of intergenerational equity between authors employed by a company and the authors upon whose work they want to build their intellectual production.[816] However, it can hardly be overlooked that all these arguments are overshadowed by the fact that the use serves commercial ends. On its merits, the exemption redistributes profits. The author must content himself with a lump sum.

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[813] In the field of judicial purposes, this situation arises in the context of the search of offences. If the reproduction of copyrighted portraits or photos for this end could be denied, the search of offences would be hindered.

[814] See for a more detailed description subsection 3.1.3.1.

[815] See subsection 4.4.2.3.

[816] Cf. subsections 2.2.2 and 2.3.

The economic activities of industrial undertakings, by contrast, are fostered. The profit motive underlying internal uses in enterprises silences arguments supporting its exemption. That there is an understandable need for privileging the internal use of works in industrial undertakings, is questionable. In the digital environment, it appears preferable not to consider this facet of personal use a certain special case in the sense of the three-step test insofar as digital technology enables its control. Hence, Reinbothe's view that personal use privileges are affected by the redress of market failure in the digital environment[817] can be endorsed in this connection.

In sum, the following conclusions can be drawn: limitations exempting the use of copyrighted material for personal study, learning and enjoyment in privacy can be qualified as a special case. Ricketson's argument that broadly framed exemptions for private or personal use are impermissible must be rebutted as regards this area of strictly personal use. Further ramifications of the personal use concept, however, must be scrutinised thoroughly in the light of the developed qualitative standard. As to limitations for administrative purposes, it can be stated in line with Ricketson that broadly framed limitations are not special cases. Ultimately, the internal use of copyrighted material in industrial undertakings should not be deemed a special case insofar as digital technology enables the exertion of control. Corresponding limitations must be restricted to the analogue environment.

4.4.4.2 FAIR USE

Doubt has also been cast upon the permissibility of open-ended norms, such as the US fair use doctrine. Cohen Jehoram, for instance, is of the opinion that fair use undermines any legal security by leading to open court decisions taken on a case-by-case basis.[818] For this reason, he considers the US fair use doctrine incompatible with the basic rule that copyright limitations must be 'certain special cases'. From his point of view, particularly the requirement of legal certainty laid down in the word 'certain' militates against the approval of fair use under the three-step test because of the great latitude allowed the courts.[819] Similarly, Bornkamm opposes the qualification of open norms like the fair use doctrine as a 'certain special case'. His point of departure, however, is not an insufficient degree of legal security. Instead, he argues that a 'special case' requires that a limitation is delineated so as to privilege only the use for a specific purpose. Any regulatory scheme which is not sufficiently confined to a narrow and specific purpose, consequently, is not a special case and is impermissible. In this context, Bornkamm gives the example of fair use.[820]

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817 See Reinbothe 2000, 257.

818 See Cohen Jehoram 2001b, 808.

819 See Cohen Jehoram 2001b, 808. Cf. also Cohen Jehoram 1991, 677; 1998, 174-175.

820 See Bornkamm 2002, 45-46. Cf. Ricketson 2003, 68: '"Fairness" is an insufficiently clear criterion to meet the first part of the three-step test'.

Insofar as these lines of reasoning aim to subvert the mechanism traditionally serving the determination of copyright limitations in common law countries – court decisions taken case by case – they must be rebutted. The three-step test must not be misused to divest common law countries of regulatory models rooted in their specific copyright tradition. Anyhow, it is not an appropriate means for eroding open-ended limitations. The three-step test itself constitutes such an open-ended norm. Like the US fair use doctrine, it is established by a set of abstract criteria.[821] At the 1967 Stockholm Conference, it was particularly the UK delegation which espoused the adoption of an abstract formula.[822] The three-step test is thus an element of international copyright law which stems from copyright's common law tradition. As such, it constitutes an important link between continental European and Anglo-American copyright. Being loath to make allowance for the characteristics of both legal traditions of copyright is therefore anything but conducive to developing an appropriate interpretation of the three-step test.

In this vein, it has already been pointed out above that the requirement of certainty, as part of the expression, 'certain special cases', must not be misconstrued so as to necessitate an exact and precise definition of copyright limitations in the sense of the civil law tradition. By contrast, a careful analysis of the wording brings to light that copyright limitations must merely be distinguishable from each other to be sufficiently 'certain' in the sense of the three-step test. The task of making different privileged uses discernible need not necessarily be accomplished by the legislator. It may confidently be left to the courts instead.[823]

Hence, there is ample room to factor established case law into the equation when scrutinising the US fair use doctrine in the light of a claim for certainty. Its long tradition can be emphasised.[824] Courts and commentators alike do not hesitate to invoke the decision Folsom v. Marsh, dating back to the year 1841, as a basis for the doctrine's application.[825] A wealth of court decisions thus forms the background to rulings on fair use. In 1976, the US legislator embedded the fair use doctrine in the Copyright Act. Fair use which had hitherto been entirely a judicial doctrine was explicitly mentioned in section 107. To offer some guidance to the courts, four factors, stated in abstract terms, were listed in section 107. They were distilled from the set of criteria developed by the courts. It was recognised in this context that,

> 'since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts… The bill endorses the purpose and general scope of the judicial doctrine of fair use […] but there is no disposition to freeze the doctrine in the statute… Beyond a very broad statutory explanation of what fair use is and

821 Cf. subsection 4.1.2.5.
822 See subsections 3.1.2 and 3.1.3.4. Cf. Senftleben 2003, 14.
823 See subsection 4.4.1.
824 See subsection 4.4.1. Cf. Hugenholtz 2000d, 202; Senftleben 2003, 14.
825 Cf. Campbell v. Acuff-Rose Music, Inc., 510 US 569 (1994), II A; Leval 1990, 1105.

> some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.'[826]

In this vein, US courts sought to preserve the doctrine's flexibility rather than using section 107 to confine fair use to a fixed and settled framework. The Supreme Court enunciated that the task of determining whether a use is fair 'is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis'.[827] The specific problems which this conception raises have been addressed frankly in academic writing. Litman elaborates that the

> 'invitation for particularized examination gives fair use its flexibility, and permits it to seem to be all things to all people. Cases that appear to come out the right way are rightly decided; cases that seem to have gone astray can be minimized or ignored on the ground that the particular facts in the case led the court to some unfortunate, overbroad language that surely won't govern the next case to arise on similar facts.'[828]

The crucial question, then, is whether this flexible disposition forms an obstacle to qualifying the doctrine as sufficiently 'certain' in the sense of the three-step test. Cohen Jehoram answers in the affirmative.[829] The response given here, however, is no. The case-by-case analysis is a typical feature of the common-law approach to copyright limitations. Each holding of a US court rendered on the basis of the fair use doctrine clarifies whether or not a given, specific use under examination can be deemed fair. Therefore, the determination of 'certain cases' is anything but alien to the fair use concept. Each court decision accepting the fair use defence particularises a new case and makes it known. Considering a case's specific circumstances, US courts thus constantly delineate 'certain cases' on the basis of the fair use doctrine. The outcome of this procedure differs from the civil law approach in that it leads to numerous clearly identified cases. For this reason, a clear path may sometimes be difficult to find. It is to be conceded, however, that continental European judges are groping for solutions in times of upheavals within the copyright system just like their colleagues in the US. That the continental European system of a small number of restrictively-delineated limitations is better suited for informing court decisions when copyright's delicate balance is shaken is thus questionable. In favour of the fair use doctrine, it can moreover be asserted that a flexible set of abstract criteria has a much larger potential for reacting to new and unexpected constellations.[830]

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826 See Senate and House Committee Reports, as quoted by Seltzer 1978, 19-20.
827 See Campbell v. Acuff-Rose Music, Inc., 510 US 569 (1994), II. Cf. Litman 1997, 612.
828 See Litman 1997, 612.
829 Cf. Cohen Jehoram 2001b, 808.
830 Cf. Alberdingk Thijm 1998b, 176

If copyright's balance is shaken, US courts will seek to recalibrate it on the basis of the fair use doctrine. Relevant decisions will trigger a heated debate. In the course of ensuing discussions, the fair use doctrine will occupy centre stage and diverse solutions as to its correct application will be espoused. Complaints will potentially also be made about its flexibility. In continental European countries, a comparable centre of gravity and an identifiable scapegoat are missing. Instead, policy makers will simply call for an amendment of the existing set of restrictively-delineated limitations. The fact that the fair use doctrine is brought into focus and possibly criticised whenever difficult situations arise should therefore not be overestimated. In the normal course of events, the groundwork laid for applying the fair use doctrine, reaching back to the year 1841, yields a sufficient supply of well-known cases. It offers the possibility of foreseeing the consequences resulting from a given action. The position taken by Cohen Jehoram must therefore be rejected. The US fair use doctrine is a limitation that can be qualified as sufficiently 'certain' in the sense of the three-step test.

This conclusion does not leave Bornkamm's position untouched. He opposes the qualification of the fair use doctrine as a 'certain special case' on the grounds that a 'special case' requires that a limitation is delineated so as to privilege only the use for a specific purpose.[831] On its merits, this line of reasoning points towards the necessity of specific, precisely and narrowly determined limitations in the sense of the civil law tradition just like Cohen Jehoram's argument and must consequently also be rejected.[832] Bornkamm, however, chooses the requirement of speciality as a starting point instead of focusing on certainty. His critique makes it necessary to scrutinise the US fair use doctrine not only in the light of the claim for legal certainty but also as regards its speciality.

Before turning to the US fair use doctrine in this context, a comment on fair dealing provisions which can be found in the UK and India seems appropriate. In both countries, a fair dealing with a copyrighted work for the purposes of research or private study, criticism and review, and for reporting current events is exempted.[833] The fair dealing provisions, therefore, touch upon areas which are specifically regulated in the Berne Convention, such as quotations and press summaries, or the reporting of current events. The special provisions of the Convention, namely articles 10(1) and 10*bis* BC, are merged in the fair dealing concept. In consequence, it can profit from the automatism in favour of national limitations resting on special provisions of the Berne Convention. Insofar as the making of quotations for criticism and review and the reporting of current events are concerned, the fair dealing provisions automatically constitute a special case in the sense of the three-step test.[834] As to the remaining purposes of research or

831 See Bornkamm 2002, 45-46.

832 Cf. also the view taken by Ficsor 2002a, 516, which has been discussed in subsection 4.4.1.

833 See subsections 3.1.3.4 and 3.1.3.5.

834 Cf. subsection 4.4.3.

private study, it must be borne in mind that the scope of this defence has traditionally been considered fairly limited. The making of 'multiple copies by a third party for use by a plurality of such persons' for instance, is qualified as unjustified.[835] It can therefore be assumed that, by and large, privileged dealings with a work for the purpose of research or private study will fall under the category of 'strictly personal use' that has been declared a special case in the sense of the three-step test in the previous subsection. The outlined fair dealing provisions, thus, do not pose difficulties in the context of the test's first criterion.

As regards the US fair use doctrine, this analysis is of particular interest because section 107 of the US Copyright Act which enshrines the doctrine enumerates certain purposes that are most appropriate for a finding of fair use. The statute refers to 'purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research',[836] thereby inevitably calling to mind the aforementioned UK fair dealing provisions. Like the latter provisions, the fair use doctrine may therefore profit from the automatism in favour of national limitations resting on special provisions of the Berne Convention, such as articles 10(1), 10(2) and 10*bis*. Moreover, 'scholarship or research' – just like 'research or private study' – can be considered a special case in line with the rules concerning personal use privileges which have been developed in the previous subsection. Hence, the preamble's enumeration is unproblematic.[837] Further ramifications, however, may nonetheless stymie the qualification of fair use as a special case. As the words 'such as' indicate, the enumerated purposes should be taken into account by the courts among others that are not specifically listed. It has even been held that it would be an error for the trial court to refrain from considering the four fair use factors on the ground that the use did not fall within the enumeration.[838] This feature lends the fair use doctrine the air of incalculability. It can hardly ever be said precisely which set of purposes is privileged under the statute. To do justice to the very nature of the fair use doctrine, however, compliance with the three-step test must not be denied before consulting analyses of case law elucidating the doctrine's ambit of operation.

In this respect, Seltzer pointed out in 1978 that fair use 'has always had to do with the use by a second author of a first author's work'.[839] If this were still true, the fair use doctrine could readily be declared a special case. A concept which, first and foremost, exempts transformative uses corresponds to the considerations of intergenerational equity which are embraced here as a guideline for the application of the three-step test.[840] The more recent survey of case law conducted by Nimmer

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835 See Laddie/Prescott/Vitoria 1995, 132. Cf. subsection 3.1.3.4.

836 See section 107 of the US Copyright Act.

837 Cf. Goldstein 2001, 295. It is also to be noted that the purposes listed in the preamble, in general, do not reach beyond those countenanced internationally. Cf. subsection 4.4.2.3.

838 Cf. Nimmer 2002, § 13.05[A][1][a], 13-155.

839 See Seltzer 1978, 24. Cf. Ginsburg 1997, 5.

840 Cf. subsections 2.3 and 4.4.2.3.

shows that the question of whether a productive use is made of a copyrighted work is still of crucial importance to the fair use analysis.[841] In Campbell v. Acuff-Rose Music, Inc., the US Supreme Court elaborated that

> 'the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright.'[842]

As an intruder into the fair use world of privileged transformative uses, Seltzer perceived photocopying for private use: 'It is this "copying for private use" that is at the crossroads of traditional fair use notions and the intrinsic-use questions of infringement posed by photocopying.'[843] Later, in the decision Sony Corporation of America v. Universal City Studios, Inc., the US Supreme Court really deemed the practice of time-shifting and thus a facet of private use fair.[844] For this reason, an uncompromising alignment of the fair use doctrine with transformative use cannot be concluded. However, strictly personal use has already been qualified as a special case in the sense of the three-step test in the previous subsection – regardless of whether it is of a productive or consumptive nature. This departure from the transformative use requirement is thus compatible with the three-step test.

Naturally, it is beyond the scope of the present inquiry to dive into the depths of established case law in order to plumb exactly the extent to which the US fair use doctrine fully complies with the requirement of speciality set out in the three-step test. Potentially, some decisions are to be found which do not seem to comply with the qualitative standard developed above. On the basis of the findings at hand, it nevertheless appears not unreasonable to assume that on balance, the fair use doctrine meets this qualitative standard. The purposes explicitly enumerated in the doctrine do not militate against this conclusion. The particular importance attached to transformative uses fits into the framework of intergenerational equity in which the three-step test ought to be interpreted.[845]

A pragmatic argument additionally supports the qualification of fair use as a 'certain special case'. When the US finally adhered to the 1971 Paris Act of the Berne Convention in 1989, they were not obliged to amend section 107 in order to bring the fair use doctrine into line with article 9(2) BC. Apparently, it was understood that the doctrine complies with the three-step test.[846] Later, at the 1996 Diplomatic Conference, Kushan, speaking on behalf of the US, underscored that

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841 Cf. Nimmer 2002, § 13.05[A][1][b], 13-157 - 13-162.
842 See Campbell v. Acuff-Rose Music, Inc., 510 US 569 (1994), II A.
843 See Seltzer 1978, 26.
844 Cf. Sony Corporation of America v. Universal City Studios, Inc., 464 US 417 (1984), IV B.
845 Cf. section 2.3.
846 Cf. Alberdingk Thijm 1998a, 152-153; Samuelson 1999, 582-583.

> 'it was essential that the [WIPO "Internet" Treaties to come] permit the application of the evolving doctrine of "fair use", which was recognized in the laws of the United States of America, and which was also applicable in the digital environment'.[847]

He went on to stress that the three-step test 'should be understood to permit Contracting Parties to carry forward, and appropriately extend into the digital environment, limitations and exceptions in their national laws which were considered acceptable under the Berne Convention'.[848] Shall it really be deemed pure chance that just this language – used by Kushan with an eye to the US fair use doctrine – finally made its way to the agreed statement which accompanies the three-step tests of article 10 WCT?[849]

4.5 Conflict with a Normal Exploitation

Limitations which are 'certain special cases' may furthermore not 'conflict with a normal exploitation of the work'. This language is used in articles 9(2) BC, 13 TRIPs and 10 WCT alike. The term 'normal' offers two possibilities.[850] Firstly, it means 'regular, usual'.[851] The expression 'a normal exploitation' can accordingly be understood as a reference to the usual or regular course of events. It connotes normality in an empirical sense. Secondly, the term 'normal' can be understood as a reference to a state 'constituting, conforming to, not deviating or differing from, the common type or standard'.[852] It has accordingly a normative connotation as well.

In the following subsections, the precise meaning of the prohibition of a conflict with a normal exploitation will be examined along the lines of these two different connotations. In subsection 4.5.1, the historical approach of Bornkamm will be discussed before turning to Ricketson's empirical approach in subsection 4.5.2. It will be seen that neither Bornkamm nor Ricketson traces the conceptual contours of a 'normal exploitation' appropriately. As their rather empirical approaches prove to be unsuited, an emphasis must be laid on the normative meaning of the term 'normal' instead. Hence, a normative concept will be developed in subsection 4.5.3. Its impact on special provisions of the Berne Convention will be discussed in subsection 4.5.4. National limitations that are directly based on the three-step test will finally be examined in subsection 4.5.5. In this context, the problem of private use in the digital environment will be addressed.

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847 See Minutes of Main Committee I, WIPO Doc. CRNR/DC/102, 70.

848 See Minutes of Main Committee I, WIPO Doc. CRNR/DC/102, 70. Cf. Ricketson 1999, 88.

849 For the full text of the agreed statement concerning article 10 WCT, see subsection 3.3.2.

850 Cf. WTO Panel – Copyright 2000, § 6.166, and WTO Panel – Patent 2000, § 7.54.

851 Cf. the Oxford English Dictionary.

852 Cf. the Oxford English Dictionary.

4.5.1 THE HISTORICAL APPROACH OF BORNKAMM

Inquiring into the meaning of the prohibition of a conflict with a normal exploitation of the work, Bornkamm focuses on the initial understanding of the three-step test at the 1967 Stockholm Conference. In particular, he consults the comments made by Ulmer, the chairman of Main Committee I, on the outcome of the Conference. Ulmer elaborates that article 9(2) BC clarifies that limitations to the right of reproduction are impermissible in the realm of a normal exploitation of the work.[853] He regards the reproduction of literary works by letterpress printing and the production of a new edition of a work by means of photomechanical reproduction as parts of a normal exploitation. The making of single photocopies, however, is not a normal way of exploitation according to Ulmer:

> 'The formulation [chosen in article 9(2)] clarifies that exceptions to the right of reproduction, on principle, are impermissible in the area of a normal exploitation of the work. This applies for instance to the reproduction of literary works by way of letterpress printing or to the production of a new edition by means of photomechanical reproduction. No normal way of exploitation, however, is for instance the making of single photocopies. In this regard, it depends on whether the legitimate interests of the author are unreasonably prejudiced.'[854]

Embracing this explanation, Bornkamm draws the conclusion that a conflict with a normal exploitation shall only be assumed if the exempted use in question enters into direct competition with traditional forms of exploitation.[855] He maintains that a detrimental indirect effect on a work's exploitation which, for instance, may result from photocopying for personal use, is to be considered only in the framework of the ensuing third criterion prohibiting an unreasonable prejudice to the author's legitimate interests.[856] The ambit of operation of the second criterion is consequently confined to direct inroads made into the field of traditional forms of exploitation, such as letterpress printing. According to Bornkamm, the specific merit of this approach lies in the possibility of drawing a clear boundary line between the second (conflict with a normal exploitation) and the third (unreasonable prejudice to legitimate interests) criterion of the three-step test.[857]

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853 Cf. subsections 3.1.2, 4.3.2 and 4.3.3.

854 See Ulmer 1967, 17: 'Die [in Artikel 9(2) gewählte] Formulierung stellt klar, daß im Bereich der normalen Auswertung des Werkes Ausnahmen vom Vervielfältigungsrecht grundsätzlich unzulässig sind. Dies gilt beispielsweise für die Vervielfältigung literarischer Werke durch den Buchdruck oder für die Veranstaltung einer Neuauflage im Wege der fotomechanischen Vervielfältigung. Keine normale Verwertungsart ist dagegen z.B. die Herstellung einzelner Fotokopien. Hier kommt es darauf an, ob den berechtigten Interessen der Urheber ein unzumutbarer Schaden zugefügt wird.'

855 See Bornkamm 2002, 34.

856 See Bornkamm 2002, 34.

857 Cf. Bornkamm 2002, 46.

Admittedly, a clear distinction between the field of application of the second and the third criterion is of particular importance. Whereas limitations which cannot fulfil the second criterion must definitely be qualified as impermissible – irrespective of whether or not equitable remuneration is paid – the third criterion allows for a much more flexible solution: an unreasonable prejudice to the author's legitimate interests can be avoided by providing for the payment of equitable remuneration.[858] The clear boundary line which can be drawn between the second and the third criterion on the basis of Bornkamm's approach, therefore, constitutes a strong point of his concept. Nonetheless, certain shortcomings can hardly be denied. The confinement of the scope of the second criterion to traditional ways of exploitation will gradually deprive the three-step test of one of its elements. Should the digital revolution really take place, the importance of letterpress printing and the production of a new edition of a work by means of photomechanical reproduction will dwindle. In the information society, the possibility of making digital copies towers above all other means of reproducing copyrighted material. To the same extent to which traditional, pre-digital forms of exploitation lose their importance, the prohibition of a conflict with a work's normal exploitation will lose its field of application under Bornkamm's approach. Ultimately, it could even be rendered meaningless. A two-step test would remain.

This result would probably be welcomed by commentators casting doubt upon the appropriateness of the three-step test because of the inflexibility of its second criterion.[859] Indeed, the fact that a conflict with a normal exploitation cannot be avoided by securing the payment of equitable remuneration is a relic mirroring the market imperfections of the analogue world which turns out to be a serious flaw inhering in the functional system of the three-step test in the digital environment.[860] Nevertheless, Bornkamm's historical approach cannot be considered an appropriate means for bypassing this problem. The three-step test is to be interpreted so as to give meaning to each of the three criteria. It should accordingly not be deprived of the second criterion by assigning to it an out-dated field of application. Any problem posed by one of the criteria, by contrast, must be solved by redefining its function within the system of the three criteria. In this vein, it has already been pointed out that it is wrong to conceive of the second criterion as the kingpin of the three-step test as has frequently been done in the analogue environment.[861]

A further objection to Bornkamm's historical approach must be raised. It is to be feared that the reduction of the scope of the second criterion to traditional forms of exploitation, ultimately, will lead to an unequal treatment of different categories of works. Potentially, analogue and digital possibilities of marketing a work will be

858 Cf. subsection 4.3.2.

859 Cf. Alberdingk Thijm 1998a, 153-154; Koelman 2003, 7-8.

860 This issue will subsequently be discussed in more detail in the context of the development of a normative standard for identifying a conflict with a normal exploitation of the work.

861 See subsection 4.3.3.

combined in the future. A novel, for instance, may be made available online but still be placed on the shelves of booksellers. It is foreseeable, however, that the attractiveness of the digital environment for commercialising copyrighted material will differ from product to product. Whereas the digital environment may become important for the exploitation of newspaper articles, academic writings and dictionaries, the analogue world will potentially still constitute the centre of gravity as regards the marketing of the aforementioned novel. If the prohibition of a conflict with a normal exploitation, in this situation, is restricted to traditional, analogue forms of exploitation, this decision favours authors of works, the commercialisation of which still rests primarily on analogue distribution channels. They will profit from the rigidity of the second criterion which is unaffected by the payment of equitable remuneration. Authors whose works are coming to be exploited predominantly in the digital environment, however, is denied the protection arising from the prohibition of a conflict with a work's normal exploitation. This unequal treatment is unjustified.

Thus, Bornkamm's historical approach must be rejected. By reducing the field of application of the second criterion to limitations which directly compete with traditional forms of exploitation, such as letterpress printing, the prohibition of a conflict with a work's normal exploitation is rendered meaningless in the digital environment. To the same extent to which traditional, pre-digital forms of exploitation lose their importance, the second criterion loses its field of application. Ultimately, Bornkamm's approach could even lead to a two-step test. Insofar as analogue and digital possibilities alike will be used for deriving profit from a work in the future, Bornkamm's approach, moreover, entails the danger of an unequal treatment of authors. The less a work's commercialisation still depends on traditional, analogue ways of exploitation, the weaker the work's protection in the context of the second criterion.

4.5.2 THE EMPIRICAL APPROACH OF RICKETSON

Ricketson has suggested focusing on the author and his usual way of deriving profit from a work. Thus, he lays an emphasis on the empirical connotation of the term 'normal' when tracing the conceptual contours of a normal exploitation as follows:

> 'However, common sense would indicate that the expression "normal exploitation of a work" refers simply to the ways in which an author might reasonably be expected to exploit his work in the normal course of events. Accordingly, there will be kinds of use which do not form part of his normal mode of exploiting his work – that is, uses for which he would not ordinarily expect to receive a fee – even though they fall strictly within the scope of his reproduction right.'[862]

[862] See Ricketson 1987, 483.

The specific problem this approach entails comes to light the moment a survey of various modes of exploiting intellectual works is conducted in order to identify an author's normal way of exploitation. Uses which are exempted by virtue of a limitation do not form part of an author's normal mode of exploiting a work. Naturally, authors are not expected to exploit their work in areas which are placed beyond their control by a copyright limitation.[863] Their normal way of deriving economic value from creative works is strongly influenced by the limits set to exclusive rights. Ricketson's empirical approach, thus, leads to a circular argumentation sheltering copyright limitations.[864] Not surprisingly, the US made the following statement on the basis of Ricketson's concept in the course of the WTO Panel proceedings concerning article 110(5) of the US Copyright Act:

> 'In the case of Section 110(5)(B), a significant portion of the establishments exempted by that section had already been exempted, for almost a quarter of a century, by the homestyle exception. Owners of copyrights in nondramatic musical works had no expectation of receiving a fee from these establishments.'[865]

Following Ricketson's line of reasoning, it can therefore easily be contended that a limitation does not conflict with a normal exploitation because the authors, normally, do not gather revenue in the exempted area. The reason for the authors' reticence is the limitation itself. Due to its existence, they refrain from exploiting their works in the privileged cases and concentrate on other areas.[866] Their mode of exploitation simply mirrors the specific national system of grants and reservations of copyright law. Focusing on the author and his normal way of exploitation thus means etching the actual status quo of copyright law in stone.

To avoid the described regulatory dilemma, recourse may be had to the situation existing before the relevant limitation was introduced. The corresponding argument runs as follows: if, prior to the adoption of the limitation, the work was not exploited in the area which is now exempted, the limitation does not conflict with a normal exploitation because the authors voluntarily refrained from exploiting their

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863 Cf. WTO Panel – Copyright 2000, § 6.188, elaborating that 'where a particular use of works is not covered by the exclusive rights conferred in the law of a jurisdiction, the fact that the right holders do not license such use in that jurisdiction cannot be considered indicative of what constitutes normal exploitation'. Cf. Lucas 2001, 432; Goldstein 2001, 295.

864 Cf. Hugenholtz 2000d, 201. Ricketson 2003, 23, himself is alert to this obvious circularity. As a way out, he seeks to interpolate normative considerations 'as to what the copyright owner's market *should* cover'. See Ricketson, ibid., 24 (emphasis in the original text). Cf. Ginsburg 2001, 23; Oliver 2002, 158. However, Ricketson, ibid., 26, admits that this solution 'leaves the application of the second step of Article 9(2) more open-ended and uncertain'. It is therefore preferable to make allowance for the considerations, which Ricketson, ibid., 25, wants to include, in the context of the first criterion, as is proposed here. See subsection 4.4.2.3.

865 See WTO Panel – Copyright 2000, first written submission of the US (attachment 2.1), § 32. Cf. the critical assessment by the WTO Panel – Copyright 2000, §§ 6.190, 6.196 and 6.198.

866 See the examples given by Ricketson 1999, 70. Cf. WTO Panel – Copyright 2000, § 6.198.

works in the now exempted area before the limitation was introduced. The inquiry into normal ways of exploitation is based on the situation existing prior to the introduction of the limitation. Consequently, it is not subverted by the limitation under examination itself. Once again, the line of argument developed by the US in the course of the WTO Panel proceedings can serve as an example. The US asserted that, when section 110(5)(A) was adopted,

> 'Congress intended that this exception would merely codify the licensing practices already in effect by the right holders and their licensing organizations… Since 110(5)(A) only affected establishments that were not likely otherwise to enter into a licence, or would not have been licensed under the practices at that time, it did not conflict with the expectations of right holders concerning the normal exploitation of their works.'[867]

This solution, however, merely shifts the problem. Its flaw is the concentration on historical facts. In the case of a limitation which was introduced into national copyright law 50 years ago, an inquiry into the authors' normal mode of exploitation only yields insights into the situation at that time. Current data are not available because the limitation superimposes the potential area of exploitation. A judgement based on the circumstances existing 50 years ago would have the effect of setting the relevant historical situation in stone – instead of today's status quo of copyright.[868] As this situation led to the adoption of the limitation under examination, it is likely that no conflict with the authors' normal mode of exploitation at this time is to be found. The outlined way of escaping the regulatory dilemma thus does not solve the problem. Moreover, it will be impossible to ascertain the historical situation in cases where a limitation has a venerable tradition rendering the objective observer incapable of tracing the authors' normal way of exploitation back to the time of its inception. Even if it is possible to bring to light some insights into the situation existing long ago, the suitability of the historical findings for actual decisions in the field of copyright law is doubtful.

At the international level, a comparative analysis might present a further possibility of solving the problem of a circular argumentation. References to countries with a similar level of socio-economic development could serve as point of comparison.[869] The corresponding argument runs as follows: if uses exempted in a certain country do not form part of the authors' normal way of exploitation in other countries, which serve as reference point for the comparative analysis, the limitation does not conflict with a normal exploitation. The envisioned comparative analysis, however, raises more problems than it solves. First of all, it has to be stressed that its applicability is quite limited. To a certain extent, the same

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867 Cf. WTO Panel – Copyright 2000, first written submission of the US (attachment 2.1), § 30.

868 Cf. WTO Panel – Copyright 2000, § 6. 198, also fearing that 'any current state and degree of exercise of an exclusive right by right holders could effectively be "frozen"'.

869 This notion has also been discussed by the WTO Panel – Copyright 2000, § 6.189.

limitations will be found in all countries with similar level of socio-economic development, even though they may be given different expression in the respective national laws. Limitations which are recognised in the Berne Convention or which were discussed in the course of the 1967 Stockholm Conference mirror the achieved degree of harmonisation. Exemptions for research, teaching, private use or administrative and judicial purposes, for instance, will prove to be widespread.[870] The outlined approach is inapplicable to these cases.

It is furthermore to be noted that national legislation enjoys the freedom of estimating the necessity of copyright limitations differently. The formulation 'It shall be a matter for legislation in the countries of the Union…', which is often used in the Berne Convention,[871] reflects this freedom. Whether and how a corresponding limitation is incorporated into national law, is left to the national legislator. This freedom of varying responses to national needs and traditions could easily be eroded by inferring a conflict with a normal exploitation from a comparative analysis. For instance, such an analysis could threaten the press privilege to reproduce articles on current economic, political or religious topics set out in article 10*bis*(1) BC. According to the analysis conducted by Guibault, limitations of this type differ substantially in scope in France, Germany, the Netherlands and the US. Whereas the limitation has remained of rather limited significance in France and the US, the Dutch and German copyright acts traditionally provide for a broad exemption.[872]

A comparative analysis would therefore yield the following results: insofar as the limitation does not exist, or has a narrow scope in France and the US, the reproduction of articles on current topics forms part of the authors' normal mode of exploitation in these countries. Consequently, it must be concluded that the broader limitations known in Dutch and German copyright law conflict with a normal exploitation of articles on current topics. The comparative analysis thus leads to maximum protection among countries with a similar level of socio-economic development. Existing differences are levelled out without considering the particularities of a country's copyright balance. The specific system of permissible limitations, set out in the Berne Convention, would moreover be eroded. According to the given example, the Dutch and German limitation would fail the second step of article 9(2) BC, even though article 10*bis*(1) BC explicitly provides for the possibility of exempting the described use of articles on current topics.[873] Insofar as the limitation permitted by article 10*bis*(1) BC does not become widespread among countries with a similar level of socio-economic development, a comparative analysis bars national legislation from its adoption.

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870 Cf. subsection 3.1.2 and the overview given in subsection 3.1.3.

871 For example, this wording can be found in articles 9(2), 10(2), 10*bis*(1), 10*bis*(2) BC.

872 Cf. Guibault 2002, 57-65. See also subsection 3.1.3.

873 See in respect of the latter provision Ricketson 1987, 504-506.

Hence, a comparative analysis, just like recourse to the historical situation existing prior to a limitation's introduction, is manifestly unsuited to alleviating the problem of circularity inhering in Ricketson's approach.[874] A regulatory dilemma thus prevents the application of an empirical concept in connection with the second criterion: the three-step test functions as a control mechanism for limitations and encompasses long-standing exemptions. Its potential for exerting control, however, is impoverished insofar as its regulatory substance, the three criteria, is defined through its regulatory object, the various limitations. To enable the test to effectively control currently existing limitations, influences of these limitations on its regulatory framework must be avoided to the greatest extent possible.[875] The empirical approach developed by Ricketson, however, allows currently existing limitations to inform the regulatory substance of the three-step test. As authors are not expected to exploit their work in areas which are placed beyond their control by a copyright limitation, their normal way of deriving economic value from creative works is strongly influenced by the current set of limitations. The moment a limitation is incorporated into national law, the empirical approach aligns the second criterion of the three-step test with the authors' normal mode of exploiting a work, as modified by the now existing limitation.

The potential harm flowing from this automatism can finally be elucidated by reviewing Ricketson's approach from the perspective of right holders and users alike. On the side of right holders, it is to be feared that Ricketson's empirical concept could lead to the gradual and uncontrolled abridgement of exclusive rights in cases where technical advances offer new possibilities for taking advantage of a limitation.[876] In the basic proposal for substantive provisions of the later WIPO Copyright Treaty, this danger was clearly pointed out in connection with the proposed adoption of the three-step test:

> 'It bears mention that this Article is not intended to prevent Contracting Parties from applying limitations and exceptions traditionally considered acceptable under the Berne Convention. It is, however, clear that not all limitations currently included in the various national legislations would correspond to the conditions now being proposed. In the digital environment, formally "minor reservations" may in reality undermine important aspects of protection.'[877]

On the side of users, it is to be feared that legislators could be hindered from imposing new limitations that are appropriate in the digital environment.[878] As the current exploitation scheme of the authors is safeguarded by Ricketson's approach,

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874 Cf. WTO Panel – Copyright 2000, § 6.189.

875 Cf. subsection 3.1.4.

876 See section 2.4 above. Cf. Hardy 1995, 1-3.

877 See WIPO Doc. CRNR/DC/4, § 12.08.

878 This possibility, however, has explicitly been reflected in the agreed statement concerning the three-step tests of article 10 WCT. See subsection 3.3.2.

new restraints might be placed on exclusive rights solely in areas which are not actually exploited by the authors in the normal course of events. Otherwise, a conflict with a normal exploitation inevitably arises. This postulation renders the current exploitation scheme of authors somewhat sacrosanct. Normally exploited segments of the authors' reproduction right are automatically removed from the national legislator's sphere of influence. Legislation in the field of copyright law would accordingly be dictated by the actual shape of the market for literary and artistic works. This outcome can hardly be reconciled with the picture of a national legislator pursuing certain public policy objectives. Empirical findings may underlie his decisions. He might even favour the codification of widespread licensing practices. This decision, however, ought to be the consequence of normative considerations, like the conviction that the alignment of the system of grants and reservations of copyright law with actual markets is best suited for shaping the national copyright balance. Depriving the legislator of the freedom to intervene in actual licensing practices prevents him from actively safeguarding copyright's balance.

The danger evolving from Ricketson's approach can clearly be seen in the digital environment. Digital technology improves not only the state of the copying art, but also offers new possibilities of controlling the particulars of individual uses of a work. As a result, new ways of contracting and new markets emerge.[879] If new areas of normal exploitation were to be automatically put beyond the reach of the national legislator, his ability to react adequately, in pursuit of his specific public policy concept, to the new situation would be unduly curtailed. The real sovereign would be the market which does not lend weight to the necessity of copyright protection on the one hand and justifications for limitations on the other in order to strike a proper balance. This result raises the spectre of national copyright systems being subject to market powers without an initial decision of the legislator and beyond his control.[880] Furthermore, it erodes a basic feature of the three-step test. The latter has always been understood to allow national legislation great latitude.[881] This finding is irreconcilable with the picture of the national legislator in the straitjacket of the dictates of the market. On account of these findings, Ricketson's empirical approach, focusing on the authors' normal mode of exploitation, must be rejected. Preference should be given to a standard of control based on normative considerations instead.

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879 Cf. Dreier/Senftleben, 2001, 117-120. See Bell's concept of 'fared use', 1998, 596-609, and Merges 1997, 118. Cf. subsection 2.1.2.

880 As a matter of course, the legislator himself might draw the conclusion that the copyright balance evolving from free market powers is exactly what he wants to enact. In this case, however, the corresponding decision is initially based on his public policy objective. The approach to copyright, which has evolved in the US from neo-classical economic property theory, could underlie such a decision. Cf. subsections 2.1.2 and 2.2.4.

881 See Kerever 1975, 331: 'Cette disposition conventionnelle se caractérise par la grande latitude laissée aux législations nationales…' Cf. Collova 1979, 125-127; Heide 1999, 105.

4.5.3 THE DEVELOPMENT OF A NORMATIVE CONCEPT

The background to the three-step test does not provide much guidance in respect of normative concepts. The test's drafters allowed national legislation great latitude and confined themselves to a few observations of a general nature. Indications given at the 1967 Stockholm Conference, nevertheless, can serve as a starting point for the development of a normative standard. They will be discussed in the following subsection 4.5.3.1. On account of the technological changes which have occurred since 1967, the meaning of the normative guideline taken from the materials of the Stockholm Conference must be clarified. It will be adapted to the advances in the field of digital technology in subsection 4.5.3.2. In subsection 4.5.3.3, a comparative analysis of the fourth factor of the US fair use doctrine on the one hand, and the second criterion of the three-step test on the other, will be conducted to solve the problems arising from this adaptation. In the ensuing subsection 4.5.3.4, the correct reference point for the application of the normative concept resulting from this comparable analysis must be determined. The question will be asked whether preference should be given to each individual exclusive right as a reference point or the overall commercialisation of a work enabled by the whole bundle of exclusive rights. A final definition of a conflict with a normal exploitation will be given in subsection 4.5.3.5.

4.5.3.1 THE GUIDELINE GIVEN AT THE STOCKHOLM CONFERENCE

According to the preparatory work for the 1967 Stockholm Conference, the second criterion reflects the concern that the utilisation of a work might enter into economic competition with normal ways of exploitation. The study group which tabled the proposals for revising the substantive provisions of the Berne Convention initially proposed the following formulation:

> 'However, it shall be a matter for legislation in the countries of the Union, having regard to the provisions of this Convention, to limit the recognition and the exercising of that right, for specified purposes and on the condition that these purposes should not enter into economic competition with these works.'[882]

According to the explanation by the study group, the latter condition is intended to give expression to the principle that

> 'all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors'.[883]

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[882] See Records 1967, Doc. S/1, 112.
[883] See Doc. S/1, Records 1967, 112.

This statement provides a useful guideline for the development of a normative standard. As it forms the background to the prohibition of a conflict with a normal exploitation in the final the three-step test, it shows that not only actual markets, on which the empirical concept put an emphasis, but also potential ones, which might emerge in the future, should constitute the object of the second criterion.

The reference to both actual and potential forms of exploitation is an important dynamic element.[884] If a currently exploited market loses its considerable economic or practical importance, it no longer numbers among those forms of exploitation which are safeguarded by the second criterion. The exemption of this area of exploitation, therefore, becomes possible on the condition that it does not unreasonably prejudice the legitimate interests of the author, as set forth by the third criterion. The emergence of a new form of exploitation, however, which is likely to acquire considerable economic or practical importance, renders an already existing limitation which covers the corresponding potential market, incapable of fulfilling the test's second criterion any longer. The respective limitation must be amended or abolished. The outlines of a normal exploitation, therefore, do not depend on the actual status quo of copyright law. Neither the problem of an out-dated field of application inhering in Bornkamm's approach, nor the problem of circularity which led to the rejection of the empirical approach of Ricketson,[885] thus, arises in the context of the guideline given at the Stockholm Conference. Not surprisingly, the WTO Panel reporting on Section 110(5) of the US Copyright Act also embraced the quoted statement as a normative guideline and drew similar conclusions:

> 'Thus it appears that one way of measuring the normative connotation of normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance.'[886]

The Panel, dealing with the three-step test of article 13 TRIPs, adopted the statement of the preparatory work for the Stockholm Conference even though it concerns article 9(2) BC. The identical wording of the second criterion of article 9(2) BC and article 13 TRIPs supports this procedure.[887] The drafting history of article 13, however, was not invoked by the Panel although its examination shows further lines of intersection between both provisions. In the course of the meetings of the negotiation group, dealing with copyright in preparation for the GATT Uruguay Round, the US proposed a formulation which was later transformed into the three-step test of article 13 TRIPs and touched upon the question of the effect on actual and potential markets:

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884 Cf. WTO Panel – Copyright 2000, §§ 6.178-6.182.

885 See subsections 4.5.1 and 4.5.2.

886 See WTO Panel – Copyright 2000, § 6.180. Cf. Hugenholtz 2000d, 201.

887 See the introduction given in section 3.2.4 above and WTO Panel – Copyright 2000, § 6.74.

> 'Any limitations and exemptions to exclusive economic rights […] in any event shall be confined to clearly and carefully defined special cases which do not impair actual or potential markets for, or the value of, copyrighted works.'[888]

Explaining the proposal, the US representative pointed out that 'although he recognised that the US proposal used language a little tighter than that in the text of the Berne Convention, he believed that the proposal constituted a clarification of the Berne Convention rather than a substantive change'.[889] Indeed, the US proposal reflects considerations which are also given expression in the statement taken from the preparatory work for the Stockholm Conference. The concern that limitations could enter into competition with normal ways of exploitation reappears, as well as the dynamic element embodied in the reference to actual and potential markets. In general, the participants of the GATT Uruguay Round sought to follow the line of the Berne Convention with regard to copyright limitations.[890] Against this backdrop, it is not surprising that the formulation of the United States was finally replaced with the wording of article 9(2) BC to enshrine the outlined shared considerations in the TRIPs Agreement. In view of the similar undercurrent and identical wording of both provisions, the utilisation of the guideline given at the Stockholm Conference is appropriate in the context of article 13 TRIPs.

Moreover, its use can be justified with regard to the three-step test of article 10 WCT. The drafting history of article 10 elicits that it was intentionally moved into line with article 9(2) BC.[891] The basic proposal for substantive provisions of the later WCT explicitly recommended in respect of the proposed three-step test to 'follow the established interpretation of article 9(2) of the Berne Convention'.[892] Against this background, the statement made in the preparatory work for the Stockholm Conference can also be adopted as a normative guideline in the context of article 10 WCT. Therefore, the development of a normative standard, affording the determination of a conflict with a normal exploitation of intellectual works, can be based on the guideline given at the Stockholm Conference with regard to all three-step tests of international copyright law. A normal exploitation encompasses all forms of exploiting a work, which have already acquired, or are likely to acquire considerable economic or practical importance.

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888 See GATT Doc. MTN.GNG/NG11/W/14/Rev.1, 8. Cf. subsection 3.2.1.

889 See the explanation given in GATT Doc. MTN.GNG/NG11/14, 15.

890 See subsection 3.2.1 above.

891 See section 3.3 above.

892 Cf. WIPO Doc. CRNR/DC/4, § 12.05. See Doc. CRNR/DC/5, comments on articles 13 and 20, in respect of the corresponding three-step test of article 16 WPPT.

4.5.3.2 ADAPTING THE GUIDELINE TO THE DIGITAL ENVIRONMENT

To understand the meaning of this definition of 'a normal exploitation' properly, the background to the Stockholm Conference must be taken into consideration. The pre-digital world of 1967 created various practical difficulties of ensuring authors adequate reward for their expressive work. The fact that market failure was often considered a basis for limitations in the analogue world mirrors the degree of market imperfection.[893] At the Conference, importance was attached to the latest state of the copying art. In particular, the problem of photocopying was discussed. The intention to expressly declare private use privileges permissible in article 9(2) raised objections. Ultimately, the drafters of the three-step test refrained from explicitly mentioning private use as a permissible limitation and left this issue to national legislation instead.[894] The moment reprography as well as sound and visual reproduction became widespread, the potential danger from private use privileges as a mass phenomenon came to the fore. In 1981, Ficsor noted that

> 'it very soon became evident that the Diplomatic Conference had been wise to eliminate a direct provision on reproduction for private use. Technological progress has accelerated and in the cases of reprography and of sound and visual reproduction private use has become such a mass phenomenon that it obviously conflicts with the normal exploitation of protected works and unreasonably prejudices the legitimate interests of authors.'[895]

It was feared that private copying could even erode the reproduction right.[896] Against this backdrop, the statement that 'all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors',[897] simply clarifies that the right of reproduction is indeed due to the authors and should not be sacrificed for user privileges even though they may be socially valuable.

The digital environment, however, sheds a different light on the guideline given at the Stockholm Conference. Digital technology affords authors the opportunity of monitoring precisely the particulars of individual uses. New forms of exploitation evolve from the combination of digital rights management systems with new ways of contracting, like click-wrap licences.[898] Owing to the dramatic reduction of

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893 Cf. subsection 2.2.2.

894 Cf. Collova 1979, 124-126. See the explanations given in subsection 3.1.2 above.

895 See Ficsor 1981, 60-61.

896 Cf. P. Masouyé 1982, 84-86 and Kerever 1975, 340. An observation of Germany articulated this fear already at the Conference. See Doc. S/13, Records 1967, 618: 'The rapid development of these modern processes of reproduction in the private sector is liable to deprive the author's right of reproduction of its substance'. Similarly, Denmark feared an 'unjustified limitation of the author's right to normal exploitation of his works'. Cf. Doc. S/13, Records 1967, 615.

897 See Doc. S/1, Records 1967, 112.

898 Cf. the analysis of the discussion concerning the UCITA by Dreier/Senftleben 2001, 92-106.

transaction costs in the digital environment, market failure is not unlikely to be largely redressed in the long run. In particular, private use privileges are rendered vulnerable to this development.[899]

The new possibilities offered by digital technology could lead to the understanding that a normal exploitation, defined as a reference to all forms of exploitation of considerable economic or practical importance, encompasses nearly all ways of using and enjoying works of the intellect. In particular, advocates of the neo-classical approach to copyright described in chapter 2 seek to vest authors of literary and artistic works with *all* actual and potential markets in order to ensure the entry of intellectual resources into the market process to the greatest extent possible.[900] The threshold for showing considerable economic or practical importance would be extremely low according to neo-classicists. The mere fact that a market as such, regardless of its profitability, currently exists or will potentially take shape in the future, would have to be deemed sufficient to answer the question of considerable importance in the affirmative.[901] Only those areas where a market is hindered from emerging because of the personal resistance of the authors, are placed beyond the control of the second criterion and can be exempted.[902] The authors' resistance to placing specific applications of their work on the market, however, scarcely represents a source of numerous user privileges. Merely the utilisation of copyrighted works for objectionable uses, such as criticism and parody, might escape the pervasive market power of the authors.[903] The corrosive effect of such an interpretation on the system of the three criteria has been described by Heide as follows:

> 'In an environment where few, if any, practical problems prevent contracting directly with the end user for the user's desired use of a work and where on-line contracts and technological devices enable an author to monitor the use of his work, such an interpretation potentially transforms the three-step test into a one-step test.'[904]

Therefore, a normal exploitation cannot be equated with full use of all exclusive rights. If authors were to draw on the full panoply of digital exploitation forms, the second step of the test would be insuperable for almost all limitations, and provisions containing the three-step test would be rendered meaningless. Instead, it could simply be enunciated that limitations are not permissible at all. The mere existence of three distinct criteria suggests that there are indeed 'certain special cases' causing no conflict. Something less than full use of all exclusive rights

899 Cf. Bell 1998, 583; Merges 1997, 132.
900 See subsection 2.1.2.
901 Cf. Gordon 1982, 1620-1621.
902 Cf. Gordon 1982, 1618-1619 and 1632-1635.
903 Cf. Patry/Perlmutter 1993, 688-689 and Bell 1998, 592-596, who would even subject these uses to the control of the authors.
904 See Heide 1999, 106. Cf. also Lucas 2001, 432.

constitutes a normal exploitation.[905] The practical example given in the general report of the 1967 Stockholm Conference to explain the functioning of the three-step test, strengthens this line of reasoning:

> 'If [the photocopying] consists of producing a *very large* number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a *rather large* number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a *small* number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.'[906]

The second criterion merely has the function to sort out the category of limitations which exempt 'a very large number of copies'. The remaining cases of a 'rather large' and a 'small number of copies' are subjected to the control of the third criterion. Copyright's adaptation to digital technology should not be misused to erode these conceptual contours. This conclusion can be undergirded by a further observation. It concerns the guideline given in the preparatory work for the Stockholm Conference itself. When explaining the conditions on which limits may be set to the right of reproduction,[907] the study group merely referred to the principle that actual and potential markets of considerable importance must be reserved for the authors. Initially, this principle was embedded in a framework which underlined the necessity of a compromise solution to make allowance for the interest of the members of the Berne Union in the maintenance of traditional limitations.[908] In this broader context, the study group elaborated that,

> 'on the one hand, it was obvious that all the forms of exploiting a work, which had, or were likely to acquire, considerable economic or practical importance, must in principle be reserved to the authors; exceptions that might restrict the possibilities open to authors in these respects were unacceptable. On the other hand, it should not be forgotten that domestic laws already contained a series of exceptions in favour of various public and cultural interests and that it would be vain to suppose that countries would be ready at this stage to abolish these exceptions to any appreciable extent.'[909]

This statement underlines that a normative concept tracing the outlines of a normal exploitation must create sufficient room for balancing the divergent interests of authors and users. The quoted passage refers not only to 'all the forms of exploiting a work, which have, or are likely to acquire, considerable economic or

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905 Cf. WTO Panel – Copyright 2000, § 6.167.
906 See Report on the Work of Main Committee I, Records 1967, 1145-1146 (emphases added).
907 See Doc. S/1, Records 1967, 112.
908 Cf. Doc. S/1, Records 1967, 111. See subsection 3.1.2 above.
909 See Doc. S/1, Records 1967, 111-112.

practical importance', but also to 'various public and cultural interests' which should not be threatened by the three-step test.[910] Similarly, the necessity of striking a proper copyright balance was underscored at the 1996 WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions. In the basic proposal for substantive provisions of the later WCT, the following comment was made in respect of the proposed three-step test:

> 'When a high level of protection is proposed, there is reason to balance such protection against other important values in society. Among these values are the interests of education, scientific research, the need of the general public for information to be available in libraries and the interests of persons with a handicap that prevents them from using ordinary sources of information.'[911]

By the same token, the preamble of the WCT recognises 'the need to maintain a balance between the rights of authors and the larger public interest'. These statements are of particular importance because the WCT is a reaction to the challenges of the digital environment.[912] Obviously, it was not intended to dismantle the existing edifice of permissible limitations by incorporating the three-step test into the WCT. Its adaptation to the digital environment should accordingly not lead to this result. By contrast, it can be stated that sufficient room must be provided for public and cultural interests.

Hence, concepts like the neo-classical model are unsuitable for informing the interpretation of the expression 'a normal exploitation'.[913] In contrast to neo-classical convictions, the conceptual contours of 'all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance'[914] must not be drawn too widely. Otherwise, it will be difficult to ensure sufficient flexibility for the establishment of a proper copyright balance. Some room to manoeuvre is offered by the developed definition of a normal exploitation itself. The reference to exploitation forms of *considerable* economic or practical importance clarifies that not necessarily each and every market segment has a share in a normal exploitation. The hurdle of considerable importance need not be surmounted by all parts of the overall commercialisation of a work.

Thus, the question arises where the line should be drawn between exploitation forms of considerable importance and those which do not meet this standard. A response to a similar problem can be found in the Anglo-American copyright tradition. Just as the three-step test requires an inquiry into a conflict with a normal

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910 Cf. Doc. S/1, Records 1967, 113, and the remarks of the WTO Panel – Copyright 2000, § 6.181.

911 See WIPO Doc. CRNR/DC/4, § 12.09. Cf. Heide 1999, 106.

912 See the preamble of the WCT. Cf. Ficsor 1997, 198.

913 Not surprisingly, the neo-classical approach to copyright has triggered a heated debate in the US. In particular, the imperviousness to public and cultural needs is chosen as a starting point by the critics of the neo-classical model. See subsection 2.2.4. Cf. Cohen 1998, 551-555; Loren 1997, 48-56; Netanel 1996, 341.

914 See Doc. S/1, Records 1967, 112.

exploitation, the fourth factor of the US fair use doctrine requires that the impact which a limitation has on a work's market be considered. Whether the line drawn in the context of the fair use doctrine can serve as a basis for the establishment of a normative concept for the determination of a conflict with a normal exploitation, will be examined in the following subsection.

4.5.3.3 BRINGING THE ECONOMIC CORE OF COPYRIGHT INTO FOCUS

The question of the extent to which the exemption of a certain use impairs the market for a creative work, is central to the fair use doctrine.[915] Its fourth factor explicitly calls on the courts to consider 'the effect of the use upon the potential market for or the value of the copyrighted work'.[916] In Sony Corporation of America v. Universal City Studios, Inc., a firm position was taken by the US Supreme Court in respect of the tolerable degree of market impairment. Justice Stevens, who delivered the opinion of the Court enunciated that, to successfully challenge the exemption of a certain use,

> 'actual harm need not be shown […]. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists.'[917]

According to this rigid principle, the mere possibility of any potential market impairment is sufficient for eroding a user privilege. The practice of time-shifting enabled by home videotape recorders, which was at stake in this decision, could only survive the corresponding scrutiny because Justice Stevens embraced the District Court's conclusion that 'no likelihood of harm was shown at trial, and plaintiffs admitted that there had been no actual harm to date'.[918] Thus, it was deemed a fair use.[919] Justice Blackmun, however, disagreed. He took the view that the advent of home videotape recorders created a potential market:

> 'That market consists of those persons who find it impossible or inconvenient to watch the programs at the time they are broadcast, and who wish to watch them at other times. These persons are willing to pay for the privilege of watching copyrighted work at their convenience.'[920]

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915 In Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985), IV, the fourth factor of the fair use doctrine was deemed 'undoubtedly the single most important element of fair use'. However, cf. Leval 1990, 1124, elaborating that 'the Supreme Court has somewhat overstated its importance'.

916 See Section 107 of the US Copyright Act.

917 See Sony Corporation of America v. Universal City Studios, Inc., 464 US 417 (1984), IV B. (emphasis in the original text).

918 See Sony v. Universal, ibid., IV B.

919 See Sony v. Universal, ibid., IV B. Cf. Fisher 1988, 1669.

920 See Sony v. Universal, ibid., dissenting opinion of Justice Blackmun, IV B.

In accordance, Justice Blackmun contended that the studios can show harm from videotape recorders use 'simply by showing that the value of their copyrights would *increase* if they were compensated for the copies that are used in the new market. The existence of this effect is self-evident.'[921] Hence, he drew the outlines of an inquiry into market impairment even more rigidly.

The same problem which has already been brought to the fore in the context of the three-step test, therefore, also arises in connection with the fair use doctrine. If a normal exploitation is understood to encompass each and every possibility of deriving pecuniary profit from a work, the room for the satisfaction of user interests is exceedingly limited. Not surprisingly, this issue is also raised in comments on the fair use doctrine. Patry and Perlmutter, for instance, emphasise that

> 'too broad an interpretation of the potential market, however, presents its own dangers. If taken to a logical extreme, the fourth factor would always weigh against fair use since there is always a potential market that the copyright owner could in theory license.'[922]

Irrespective of the potential danger from an unduly broad definition of the potential market, however, Justice Blackmun's dissenting opinion influenced the decision Harper & Row v. Nation Enterprises.[923] Justice O'Connor, writing for the Court in Harper & Row, took the position that 'fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied'.[924] This view triggered substantial criticism. Fisher asserted that Justice O'Connor failed to recognise that, 'in almost every case in which the fair use doctrine is invoked, there will be *some* material adverse impact on a "potential market" as Justice Blackmun – and now the Court – define that phrase'.[925] He therefore concluded that

> 'the market-impact factor adopted in *Harper & Row* will almost always tilt in favour of the plaintiff – and is therefore nearly useless in differentiating between fair and unfair uses of copyrighted materials. To be helpful, it must be modified. […A] court confronted with a fair use defense must estimate the *magnitude* of the market impairment caused by privileging the defendant's conduct; merely ascertaining the *existence* of adverse impact will not suffice.'[926]

To determine the extent of market impairment which is relevant in the context of the fair use doctrine, the core of the authors' exploitation right is brought into focus.

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921 See Blackmun, ibid., VI. (emphasis in the original text).
922 See Patry/Perlmutter 1993, 688. Cf. Patry 1995, 557.
923 Cf. Fisher 1988, 1670-1671.
924 See Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985), IV.
925 See Fisher 1988, 1671 (emphasis in the original text).
926 See Fisher 1988, 1672 (emphasis in the original text).

Patry and Perlmutter ask the question of 'how to circumscribe the scope of the relevant potential market so as to ensure that the fourth factor has independent meaning and does not become circular, while still protecting the core economic interests of the copyright owner'.[927] Ultimately, they embrace a concept which Leval developed by focusing on the utilitarian goals of copyright.[928] He elaborates:

> 'By definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties. Therefore, if an insubstantial loss of revenue turned the fourth factor in favor of the copyright holder, this factor would never weigh in favor of the secondary use. […] The market impairment should not turn the fourth factor unless it is reasonably substantial. When the injury to the copyright holder's potential market would substantially impair the incentive to create works for publication, the objectives of the copyright law require that this factor weigh heavily against the secondary user.'[929]

The critique did not leave the practice of the US Supreme Court unaffected. In Campbell v. Acuff-Rose Music, Inc. – a case concerning a rap version of Roy Orbison's and William Dees' song 'Oh, Pretty Woman' which the rap group 2 Live Crew had composed to satirise the intact world built up in the original – Justice Souter, who delivered the Courts's opinion, first of all sought to create some room to manoeuvre. As the legitimacy of a free use of copyrighted material for the purpose of parody was challenged, he elaborated that when the unauthorised use is transformative, 'market substitution is at least less certain, and market harm may not be so readily inferred'.[930] Although the Court did not suggest that a parody may not harm the market at all, it nevertheless unequivocally stated that 'when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act'. Justice Souter concluded that 'the role of the courts is to distinguish between biting criticism that merely suppresses demand and copyright infringement, which usurps it'.[931] To undergird its line of reasoning, the Court furthermore presented an argument concerning the market for potential derivative uses. Justice Souter elaborated that this market includes only those uses

> 'that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.'[932]

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927 See Patry/Perlmutter 1993, 689. Cf. Patry 1995, 558.

928 See Patry/Perlmutter 1993, 697-698. See Leval 1990, 1107-1110. The focus on the utilitarian premises of US copyright law is criticised by Weinreb 1990, 1140.

929 See Leval 1990, 1124-1125.

930 See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), II D.

931 See Campbell v. Acuff, ibid., II D.

932 See Campbell v. Acuff, ibid., II D.

On the basis of these explanations, parody was placed beyond the scope of the fourth factor of the fair use doctrine. The exemption of parody, however, is not the sole outcome of the examination of fair use by the Court in Campbell v. Acuff. As parody, in this case, appeared in the guise of rap music, Justice Souter also devoted attention to an impairment of the derivative market for rap music. However, he did not demand, in line with the decision of the Court in Sony v. Universal, merely '*some* meaningful likelihood of future harm'[933] as a threshold for denial of fair use. On the contrary, he stated that only 'evidence of *substantial* harm to [the derivative market for rap music] would weigh against a finding of fair use'.[934] This statement calls to mind Fisher's proposal to estimate the magnitude of the market impairment caused by a privileged use instead of merely ascertaining the existence of adverse impact on the market,[935] as well as Leval's postulation that the market impairment should not turn the fourth factor unless it is reasonably substantial.[936]

With regard to the question of a normal exploitation, which arises in the context of the three-step test, the decision Campbell v. Acuff yields two important insights. Firstly, it suggests that a conflict with a normal exploitation should only be assumed if the limitation causes a substantial market impairment. Markets that authors would in general neither develop nor license others to develop would be irrelevant in this context. Secondly, the way in which a limitation affects the market for a work might justify not considering the market impact of the limitation at all. If a corrosive effect on the market for a work evolves indirectly from the exempted use, for instance, owing to its criticism of the original work, the market impairment would not be factored into the equation. Whether these assumptions are suitable for informing the interpretation of the prohibition of a conflict with a normal exploitation must be examined separately.

Lines of intersection between the three-step test and the first assumption that a substantial market impairment is necessary, can be brought to light by surveying the materials of the Stockholm Conference. As already pointed out in the previous subsection, the practical example given in the general report of the Conference delineates the ambit of operation of the second criterion as follows: 'If [the photocopying] consists of producing a *very large* number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work.'[937] Thus, the prohibition of a conflict with a normal exploitation has the function to sort out limitations which exempt 'a very large number of copies'.[938] Against this backdrop, it appears appropriate to devote attention only to limitations which deprive authors of a major source of revenue, thereby causing a substantial market impairment.

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933 See Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417 (1984), IV B (emphasis in the original text).

934 See Campbell v. Acuff, ibid., II D (emphasis added).

935 See Fisher 1988, 1672 (emphasis in the original text).

936 See Leval 1990, 1125.

937 See Report on the Work of Main Committee I, Records 1967, 1145-1146 (emphasis added).

938 See in this regard also the explanations given by Ulmer 1967, 17.

The comments made by Ulmer, the chairman of Main Committee I, on the outcome of the Conference, point in the same direction. As already explained in the context of Bornkamm's historical approach,[939] Ulmer regards the reproduction of literary works by letterpress printing and the production of a new edition of a work by means of photomechanical reproduction as parts of a normal exploitation.[940] These ways of exploiting a work undoubtedly constitute major sources of income. Their exemption would lead to piracy in the guise of a copyright limitation and substantially impair the market. The making of single photocopies, however, is not a normal way of exploitation according to Ulmer.[941] In this regard, it must be borne in mind that the problem of photocopying was just emerging at the time of the Stockholm Conference. Due to the market imperfections of the pre-digital world, the exertion of control over photocopying for personal uses was out of reach. It did not form a potential major source of revenue. The authors were incapable of either developing the market for personal use or of licensing others to do so. Therefore, Ulmer's comments are in line with the assumption that only those limitations are to be considered which cause a substantial market impairment by depriving the authors of a major source of income.

There is thus substantial reason to endorse the view that substantial harm, flowing from a limitation to a market that authors would in general develop or license others to develop, is necessary.[942] It can be posited that the prohibition of a conflict with a normal exploitation only protects the economic core of copyright from erosion.[943] It concerns those ways of using an intellectual work from which major royalties accrue. If a minor source of royalty revenue is eroded, the market is not substantially impaired and a conflict with a normal exploitation does not arise.

This postulation can be undergirded by the system of the three criteria. Criteria 1 and 2 serve as a gateway to the core of copyright's balance. They function as a filter before copyright's balance is finally recalibrated in the light of the third criterion which forbids an unreasonable prejudice to the author's legitimate interests.[944] A limitation which conflicts with a normal exploitation and thus does not fulfil the preceding second criterion, inevitably fails the three-step test. The limitation must be abolished and cannot be used for the final balancing of interests.[945] Hence, from

939 See subsection 4.5.1.

940 See Ulmer 1967, 17.

941 See Ulmer 1967, 17.

942 Cf. Campbell v. Acuff, ibid., II D; Fisher 1988, 1672; Leval 1990, 1125.

943 Cf. Patry/Perlmutter 1993, 689. In the German civil law tradition, the principle of the 'Institutsgarantie des Eigentums' could potentially be invoked in this connection. See Stern/Sachs 1988, 754-876 for a detailed discussion of this principle. The German Constitutional Court (Bundesverfassungsgericht) emphasises on the basis of this principle that on its merits, private property is characterised by the possibility of use for private benefit and at the owner's disposal. See BVerfGE 24, 367 (389); 31, 229 (240); 49, 382 (394). Cf. Badura 1984, 552-560; Herzog 1987, 1422-1426; Wendt 1985, 255-258. However, see also the critical comments made by Kutschera 1990, 118-123.

944 See section 4.3.

945 Cf. subsection 4.3.2.

a functional perspective, a conflict with a normal exploitation should only be assumed if a market is affected by a limitation which, because of its particular importance, is not available for the final balancing of interests anyway. Otherwise, resources may be drawn away that are necessary for the establishment of a proper balance. It is thus consistent to posit that the second criterion only protects those parts of the authors' exploitation right which cannot be used for socially valuable ends because they constitute the economic core of copyright.[946] The first assumption of the US Supreme Court in Campbell v. Acuff can be embraced in the context of the second criterion of the three-step test.

What remains is the second assumption of the US Supreme Court concerning uses which indirectly encroach upon the exploitation of a work, for instance, by criticising or ridiculing the original work.[947] However, the time for discussing certain kinds of using copyrighted material, like parody, in more detail has not yet come. Before embarking on such an inquiry, it is indispensable to further clarify the prohibition of a conflict with a normal exploitation. So far, it has only been stated that the economic core of copyright is to be sheltered from erosion. The outline of the core, however, has not been traced yet. The reference point for an inquiry into a conflict with a normal exploitation is of particular importance in this respect.

4.5.3.4 DETERMINING THE CORRECT REFERENCE POINT

In the previous subsection, it has been concluded that only an encroachment upon the economic core of copyright is relevant when it comes to decide whether a limitation conflicts with a normal exploitation. As to the delineation of the core area, the reference point chosen constitutes a focal point. Is it sufficient that a potentially small exclusive right is affected by a limitation, or must a limitation, to conflict with a normal exploitation, substantially impair the market for a work as such? In other words: should an encroachment upon copyright's core be determined separately for each individual exclusive right recognised in international copyright law? Or does a work's overall commercialisation, enabled by the whole bundle of exclusive rights, constitute the right reference point?

Pursuant to the first alternative – each individual exclusive right as a reference point – the core of copyright would have to be subdivided along the lines of the international system of exclusive rights. For assuming a conflict with a normal exploitation, a substantial impairment of the market reserved to the authors by one of the internationally recognised exclusive rights would accordingly already suffice. The scope and economic importance of the exclusive right at stake would be irrelevant. Pursuant to the second alternative – the whole bundle of exclusive rights as a reference point – the overall commercialisation of different categories of works

946 The approach of Ulmer 1967, 17, points in the same direction. He focuses on those technical processes from which the lion's share of revenue accrues.

947 Cf. Campbell v. Acuff-Rose Music, Inc., 510 US 569 (1994), II D; Leval 1990, 1125.

would have to be factored into the equation instead. The crucial question would not be whether a limitation substantially impairs a specific sub-market for a work, as delineated by the separate grant of a certain exclusive right, but the possibility of marketing a work as such – offered by the whole bundle of exclusive rights. Copyright's economic core, thus, would have to be subdivided along the lines of different categories of works. To conflict with a normal exploitation, a limitation would have to deprive the authors of affected works of a major source of income.

The WTO Panel reporting on Section 110(5) of the US Copyright Act dealt with the question of the correct reference point in the context of article 13 TRIPs. It clearly stated that 'whether a limitation or an exception conflicts with a normal exploitation of a work should be judged for each exclusive right individually'.[948] Dealing with article 11*bis*(1) BC, the Panel even refused to conceive of the three subparagraphs of this provision as parts of only one exclusive right comprising three different and separately-mentioned aspects. Instead, it elaborated:

> 'If it were permissible to limit by a statutory exemption the exploitation of the right conferred by the third subparagraph of Article 11*bis*(1) simply because, in practice, the exploitation of the rights conferred by the first and second subparagraphs of Article 11*bis*(1) would generate the lion's share of royalty revenue, the "normal exploitation" of each of the three rights conferred separately under Article 11*bis*(1) would be undermined.'[949]

Therefore, the Panel followed meticulously the approach which focuses on each individual exclusive right. Within the realm of an exclusive right, the Panel saw a conflict with a normal exploitation arising,

> 'if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work […] and thereby deprive them of significant or tangible commercial gains'.[950]

An inescapable dilemma evolves from this alignment of an inquiry into a conflict with a normal exploitation with the inconsistent system of internationally recognised exclusive rights. Were the Panel to approach the general right of reproduction, as set out in article 9(1) BC, with the same meticulousness as article 11*bis*(1), its broad scope would have to be subdivided into small portions – a procedure creating insuperable difficulties. It could be attempted to achieve an appropriate subdivision by distinguishing between the technical processes enabling a reproduction. This procedure, however, is unlikely to yield portions which are comparable in respect of their sizes. In the digital environment, the existing variety

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948 See WTO Panel – Copyright 2000, § 6.173.

949 See WTO Panel – Copyright 2000, § 6.173.

950 See WTO Panel – Copyright 2000, § 6.183. Accordingly, the Panel focused on major potential sources of royalties accruing from the exercise of each individual exclusive right. Cf. also § 6. 206.

of methods, moreover, dwindles. The digital reproduction occupies centre stage. A distinction between the purposes underlying a reproduction is unlikely to lead to portions of comparable sizes as well. Furthermore, any arrangement of possible purposes would appear arbitrary. The undertaking to subdivide the right of reproduction is therefore doomed to failure. Even if this task could be accomplished, doubt would have to be cast upon the appropriateness of the outcome. It is not unlikely that many limitations would be held to conflict with a normal exploitation after subdividing the formerly broad exclusive right into small portions comparable with article 11*bis*(1)(iii). In consequence, the approach of the WTO Panel would resemble the neo-classical approach to copyright which is manifestly unsuited for informing the interpretation of the second criterion.[951]

Therefore, it must be assumed that the general right of reproduction as a whole would constitute the reference point in accordance with the Panel's approach. In consequence, limitations could, proportional to its broader scope, draw more resources away from the reproduction right than from a small exclusive right. Even a limitation, the scope of which exceeds the ambit of operation of a small exclusive right, could potentially be countenanced. Thus, the approach tends to shelter small exclusive rights more effectively from erosion than broad ones. This result could become acceptable when embarking on an assessment based on percentages instead of absolute numbers. Theoretically, it could be stated that the authors can be divested, for instance, of 25% of each exclusive right to supply public and cultural needs. Differences in profitability within the bundle of exclusive rights, however, cannot be factored into the equation irrespective of an orientation by absolute numbers or percentages. Exempting only 10% of a highly profitable broad exclusive right obviously has a more corrosive effect on the exploitation of a work than the withdrawal of 90% of a small exclusive right which does not yield appreciable revenue. The approach of the WTO Panel bars the economic reality from entering the picture. Instead, it exaggerates the international system of exclusive rights.

To strengthen the Panel's position, it could be asserted that the establishment of a separate small exclusive right underlines that the relevant way of using a work is of particular importance. However, this argument must fail. Instead of the endeavour of erecting a consistent edifice of exclusive rights, from which the particular esteem for each of the separately recognised elements could be inferred, the international system of exclusive rights, as set out in the Berne Convention, testifies to a century of compromise solutions and responses to technical challenges.[952] Prior to the 1967 Stockholm Conference, the general exclusive right of reproduction, for instance, was not explicitly recognised in the Berne Convention. Instead, the members of the Berne Union could merely reach an agreement on small portions thereof, like the right of mechanical reproduction of musical works. This former exclusive right,

[951] Cf. subsections 2.1.2 and 2.2.4.
[952] Cf. Ricketson 1987, 39-125.

which was set out in article 13(1) of the 1948 Brussels Act, is now included within the general right of reproduction.[953] Pursuant to the actual appearance of the Berne Convention, exemptions from the former separate right of mechanical reproduction of musical works, would thus merely have to be assessed against the backdrop of the general right of reproduction of article 9(1) BC. In the context of the 1948 Brussels Act, by contrast, the small exclusive right itself would have constituted the basis for the examination of a limitation.

The general rule of article 8 WCT demonstrates that the distinct subparagraphs of article 11*bis*(1) BC could be influenced by a similar development in the field of rights concerning the communication to the public. The circumstances of uses which are actually explicitly listed in the three subparagraphs of article 11*bis*(1) could be encompassed by a comprehensive clause to come. On the basis of the Panel's approach, this change would have the corollary that the particular importance which the Panel currently attaches to each of the three subparagraphs would immediately vanish. Limitations on one of the small rights explicitly listed in article 11*bis*(1) would have to be assessed in the light of the newly introduced general right of communication instead. The replacement of several small exclusive rights with one general exclusive right, however, obviously leaves the economic importance of the corresponding sub-markets unaffected. The actual shape of the international system of exclusive rights does not indicate reliably economic importance. The introduction of small exclusive rights does not necessarily reflect the crucial importance of their voice within the choir of all rights. By contrast, it is not unlikely that no agreement on the adoption of a broad exclusive right could be reached at the international level. For this reason, merely those facets of the envisioned broad exclusive right were recognised in a number of small exclusive rights to which approval was given. It is to be reiterated that the approach of the WTO Panel turns a deaf ear to the economic reality. This deafness is anything but conducive to the determination of a conflict with a work's normal exploitation.

Apparently, the WTO Panel felt obliged to interpolate the international system of exclusive rights into the framework of the second criterion. It stressed that 'a copyright owner is entitled to exploit each of the rights for which a treaty […] provides'.[954] This statement is a truism. The necessity to align the second criterion of the three-step test with the inconsistent international system of exclusive rights, however, need not be inferred therefrom. It is sufficient when the three-step test as a whole gives deference to the framework set out in international copyright law. The second criterion is followed by a third one which offers the possibility of lending weight to those parts of the spectrum of exploitation forms which were not previously taken into account. The already examined relationship between the second and the third criterion strengthens this line of reasoning. It is wrong to allege a hierarchy between these two conditions. The inquiry into a potential conflict with

953 Cf. Ricketson 1987, 382.
954 See WTO Panel – Copyright 2000, § 6.175.

a normal exploitation of the work is not at all the kingpin of the test. By contrast, the final decision on compliance with the three-step test can confidently be left to the third step of the test. Due to the possibility of factoring the payment of equitable remuneration into the equation, this last step is better equipped for striking a proper copyright balance.[955] In this context, the interest of the authors in profiting from each individual exclusive right recognised in international copyright law can be considered. Hence, an inquiry into compliance with the second criterion need not be burdened with the inconsistent international system of exclusive rights. Preference can be given to an approach focusing on those aspects of the authors' exploitation rights which really are economically important. Each individual exclusive right should not be chosen as a reference point for an inquiry into a conflict with a normal exploitation.

The rejection of each individual exclusive right as a reference point predicts the final response to the question of compliance with the second criterion: the profitability of a market plays a decisive role. The share which a specific form of exploitation has in the overall commercialisation of a work must be taken into account. Careful analysis is required to identify the areas in which the authors of works affected by a limitation typically reap the lion's share of royalty revenue. The second criterion of the three-step test, thus, necessitates an economic inquiry of considerable complexity. A careful market analysis is to be conducted in the field of different categories of works.[956] On this basis, the limitation's impact on the exploitation of affected works must be estimated. A limitation only conflicts with a normal exploitation of a copyrighted work if it substantially impairs the overall commercialisation of that work by divesting the authors of a major source of income. If this condition is fulfilled, it encroaches upon the economic core of copyright and fails to fulfil the second criterion of the three-step test.

4.5.3.5 DEFINING A CONFLICT WITH A NORMAL EXPLOITATION

On the basis of the preceding discussion, the following conclusions can be drawn: a conflict with a normal exploitation arises if the authors are deprived of an actual or potential market of considerable economic or practical importance.[957] The circle of these actual or potential markets is solely formed by those possibilities of marketing a work which typically constitute a major source of income and, consequently, belong to the economic core of copyright.[958] For determining these major sources of income, the overall commercialisation of works of a category affected by the limitation in question must be considered instead of focusing on the international

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955 See subsections 4.3.2 and 4.3.3.

956 See for an examination that reflects the complexity of this task for instance the economic analysis conducted by Fisher 1988, 1698-1744.

957 Cf. subsections 4.5.3.1 and 4.5.3.2.

958 Cf. subsection 4.5.3.3.

system of exclusive rights with all its inconsistencies.[959] In sum, a conflict with a normal exploitation arises when authors are divested of an actual or potential, typical major source of royalty revenue that carries weight within the overall commercialisation of works of the relevant category.

4.5.4 THE IMPACT ON INTERNATIONALLY RECOGNISED LIMITATIONS

Pursuant to the rules developed in the previous subsection 4.5.3, an inquiry into a conflict with a normal exploitation is a matter of some complexity. In particular, a careful market analysis is central to an appropriate examination of limitations. Needless to say, such a detailed economic analysis is beyond the scope of the present inquiry. The ensuing discussion of several types of limitations which are permitted under the Berne Convention will merely yield a rough assessment of the limitation's permissibility. Nonetheless, the method is not without value. Firstly, it at least gives an outline of the problems raised by the limitation under discussion and may serve as a starting point for more detailed economic analyses. Secondly, it leads to a better understanding of the relationship between the three-step test and limitations for which the Berne Convention specifically provides. The identification of problem areas might encourage a critical review of Berne limitations that is conducive to the further development of international copyright law. Thirdly, it illustrates the abstract standard of control that has been developed above. Particularly this illustrative nature of the ensuing discussion should be borne in mind. In the following subsection 4.5.2.1, the exemption of the use of copyrighted material for the purposes of criticism and parody will be discussed. Subsequently, the utilisation of works for teaching will be examined in subsection 4.5.4.2. The so-called 'minor reservations doctrine' will be scrutinised in the light of the second criterion in subsection 4.5.4.3. Compulsory licences based on article 11*bis*(2) BC will finally be discussed in subsection 4.5.4.4.

4.5.4.1 CRITICISM AND PARODY

Pursuant to article 10(1) BC, 'it shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose…' Arguably, the use of portions of a work for purposes such as criticism or parody can be regarded as a specific form of quotation.[960] In this line of reasoning, it falls under article 10(1) BC.[961] The time has therefore come to

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959 Cf. subsection 4.5.3.4.

960 Cf. Quaedvlieg 1992, 24 (footnote 50).

961 If this assumption is called into doubt, corresponding limitations can alternatively be based on the three-step test of article 9(2) BC. Whether article 10(1) or 9(2) BC is invoked as a basis has no influence on the further conclusions drawn here. Merely the point of departure changes.

return to the decision Campbell v. Acuff-Rose of the US Supreme Court. As already elaborated above, two assumptions of the Court are of particular interest in the context of the prohibition of a conflict with a normal exploitation. Firstly, the Court assumed that a substantial market impairment must be caused by a limitation to justify its abolition. This condition has already been discussed and countenanced above. The second assumption, however, concerns uses which encroach upon the exploitation of a work indirectly by criticising or ridiculing the original work. The corrosive effect of these uses on the market, so runs the Court's argument, is irrelevant because the free utilisation of the work merely suppresses demand for the original instead of usurping it.[962]

Before turning to the crucial question of whether the indirect market harm flowing from criticism and parody is relevant, it is to be noted at the outset that the exemption of criticism and parody as such does not conflict with a normal exploitation of copyrighted material in the sense of the three-step test. As elaborated in the previous subsection, only those segments of the overall commercialisation of an intellectual work which typically yield major royalties are to be factored into the equation in this connection. However, authors will most often refrain from developing or licensing others to develop a market for criticism or parody.[963] It can therefore be concluded that there simply is no market – let alone one of considerable economic or practical importance. Even if authors were to license the utilisation of their works for purposes such as criticism and parody,[964] this market would not have to be counted as being part of the economic core of copyright. It cannot be expected to typically become a major source of royalty revenue. Its exemption does not cause a substantial market impairment.

As to the corrosive indirect effect which criticism or parody may have on the economic core of copyright, it is to be emphasised that the specific rule which the US Supreme Court developed in Campbell v. Acuff-Rose is unnecessary in the context of the three-step test. A distinction between uses which merely suppress demand for the original and others which usurp it, as proposed by the Court,[965] is superfluous in respect of criticism and parody. Pursuant to the standard of control developed above, the impact which a limitation, in general, has on the overall commercialisation of works of a certain category must be considered. Admittedly, biting criticism or parody have the potential for depriving authors of substantial sources of income. Sometimes, they might even kill demand for the original work,

962 Cf. Campbell v. Acuff-Rose Music, Inc., 510 US 569 (1994), II D; Leval 1990, 1125.

963 Cf. Campbell v. Acuff, ibid., II D.

964 By contrast to the US Supreme Court in Campbell v. Acuff, ibid., II D, Bell 1998, 595-596, indeed takes the view that right holders should license criticism and parody. On the basis of neo-classical property theory (cf. subsection 2.1.2), he argues: 'Requiring payment in such circumstances arguably makes more sense, for the same reasons that support the spread of licensing generally. Furthermore, excusing non-payment might encourage over-production of reuses that aim, for purely economic reasons, to offend copyright owners.'

965 Cf. Campbell v. Acuff, ibid., II D; Leval 1990, 1125.

thereby depriving the author of the fruit of his labour altogether. A general rule, however, can hardly be inferred from single occurrences. That unauthorised uses of this kind, in general, prove to destroy markets cannot be posited so readily. A critique or parody may also induce people to purchase a copy of the original or go to its public performance. A corrosive effect reaching a level that justifies speaking of an impairment even of the overall commercialisation of the original work is unlikely to be found in the majority of cases. It seems to be an exception rather than the rule. Criticism or parody, thus, does not generally encroach upon the economic core of copyright. The potential indirect market harm is irrelevant just like the exemption of the use as such. Limitations of this type do not conflict with a work's normal exploitation either directly or indirectly.

It is noteworthy that this finding corresponds to the concept of intergenerational equity developed in chapter 2. On the basis of Locke's labour theory, it has been posited that an author acquires a copyright only on the condition that he leaves enough and as good in common for later authors. Viewed from this perspective, a normal exploitation of intellectual works can only be a way of deriving economic profit from a work that stops short of marketing areas which must necessarily be left in common to ensure that later authors, just like their predecessors, find a world of constantly renewed intellectual resources.[966]

As explained above, these considerations of intergenerational equity support particularly the exemption of transformative uses of copyrighted material. They allow later authors, depending on the use of existing works for freely expressing themselves, the creation of new works. The making of quotations as well as the use of a work for purposes such as caricature, parody and pastiche lie at the core of this category of limitations.[967] On account of their paramount importance for attaining intergenerational equity, these limitations must be left in common and should not constitute part of a work's normal exploitation. Otherwise, it is to be feared that the aforementioned limitations, which are virtually the right of later authors to be asserted against their predecessors, could be unduly curtailed in favour of the authors of existing works.[968] Therefore, it is right to enunciate that the exemption of the use of copyrighted material for purposes such as criticism and parody does not conflict with a normal exploitation. That this conclusion is to be drawn on the basis of the developed standard of control confirms its appropriateness.

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966 See subsection 2.3. Cf. Dreier 2001, 51-81, who generally discusses and gives guidelines for the division of markets for innovative goods, such as works of the intellect.

967 Cf. section 2.3.

968 Cf. section 2.3. It is to be noted that the strict distinction between 'authors of already existing works' on the one hand, and 'later authors' on the other, is chosen here to make the point. In practice, it will be impossible to draw such a line. In the normal course of events, authors of intellectual works will be found on both sides. The author who exerts control over the use and enjoyment of already created works becomes a 'later author' the moment he embarks on building the creation of a new work upon the works of predecessors and so forth.

4.5.4.2 UTILISATION FOR TEACHING

Article 10(2) BC permits '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'.[969] A conflict with a normal exploitation arises if the authors of relevant works are deprived of a typical major source of royalty revenue. As to the circle of relevant works, it is to be noted that article 10(2) BC may be universally applied to a wide variety of intellectual productions. For the purpose of teaching, literary, musical and artistic works alike are relevant. Within these categories, a restriction on certain kinds of works is unlikely. Novels, essays, poems, plays and articles, symphonies, string quartets, pop songs and jazz, paintings, sculptures, installations and buildings alike may be used for teaching purposes.

That the authors of works included in a publication, broadcast or recording for teaching are deprived of a major source of royalty revenue, however, cannot so readily be assumed. It is to be borne in mind that the work's overall commercialisation must be taken into account.[970] If a passage from a famous pop song is included, it appears safe to assume that the potential royalty revenue is negligible when compared with the income accruing from the sale of CDs and the song's playing on the radio. Similarly, a major source of income need not be expected when passages are taken from a novel, play or symphony. Here, the sale of copies, scores and the work's public performance occupy centre stage. However, the teaching privilege might indeed deeply impact on the exploitation of certain works. If, for instance, paintings or poems, that are well known only among experts, are included in schoolbooks, this may divest the author of a potential major source of royalty revenue. The poem will possibly be reproduced more often than in the original publication. The painting may even be reproduced for the first time.

Nonetheless, it need not be concluded that the inclusion triggers a conflict with a normal exploitation under these circumstances. In the majority of cases, including poems and paintings, the utilisation of a work for teaching is not a typical source of income. Not each and every work makes its way into schoolbooks. Only some works are picked in the end. The large majority of intellectual productions will never become illustrative material employed for education. The use of a work for the purpose of teaching, thus, can hardly be regarded as a pillar of a work's exploitation that, in general, forms part of its overall commercialisation. If a work is finally chosen, this may be a welcome extra income. However, it does not necessarily constitute a typical, reliable potential source of royalty revenue. Hence, it can be posited that article 10(2) BC, by and large, is unlikely to conflict with a normal exploitation for two reasons: firstly, the utilisation of a work for teaching will often not constitute a potential major source of income when compared with

969 Cf. in respect of the reference to fair practice subsection 4.6.5.
970 Cf. subsection 4.5.3.3.

other possibilities of exploiting the relevant work. Secondly, even if the use for teaching theoretically ranks among the circle of potential major sources of income, a conflict with a normal exploitation nevertheless does not arise because it does not constitute a typical source of royalty revenue.

This is not to say, however, that the use for teaching never conflicts with a work's normal exploitation. A limitation to be found in the UK, serving the educational use of copyrighted material, helps to make the point here. As regards the inclusion of short passages from a published work in anthologies intended for the use of schools, UK legislation makes it a condition that an affected work is not itself intended for the use in schools.[971] This additional condition is appropriate. If a work is intended for the use in schools, like a schoolbook, the utilisation for teaching constitutes a major source of royalty revenue. It even forms the centre of the work's overall commercialisation. Moreover, the utilisation for teaching is not atypical but normal. In contrast to the writer of a novel or poem who cannot foresee whether his work will finally be used for teaching, the author of a schoolbook particularly aims at such use and relies thereon. Thus, both arguments supporting article 10(2) BC – not a major source of income and not a typical source of income – do not carry weight with regard to schoolbooks.

Hence, a differentiated result comes to the fore. By and large, article 10(2) BC does not conflict with a normal exploitation. The utilisation of a work for the purpose of teaching, in many cases, will not constitute a potential major source of income from the beginning. Where a potential major source of royalty revenue can hardly be denied, the envisaged extra money cannot so readily be qualified as a typical facet of a work's overall commercialisation. Only in the case of works that are specifically intended for teaching purposes does a conflict with a normal exploitation arise. Here, the utilisation for teaching forms the centre of the work's overall commercialisation and constitutes the normal way of using the work instead of being atypical.

4.5.4.3 THE 'MINOR RESERVATIONS DOCTRINE'

The more precise delineation of the so-called 'minor reservations doctrine' has explicitly been left up to the three-step test. Forming an implied limitation accepted by the members of the Berne Union, the doctrine's conceptual contours are vague. This issue has been addressed in the context of the proposal to incorporate the three-step test into the later WIPO Copyright Treaty:

> 'It bears mention that [the proposed three-step test] is not intended to prevent Contracting Parties from applying limitations and exceptions traditionally considered acceptable under the Berne Convention. It is, however, clear that not all limitations currently included in the various national legislations would

[971] See subsection 3.1.3.4.

> correspond to the conditions now being proposed. In the digital environment, formally "minor reservations" may in reality undermine important aspects of protection. Even minor reservations must be considered using sense and reason.'[972]

The 'minor reservations doctrine' is traditionally restricted to public performance rights.[973] The analysis conducted by Ficsor suggests that, nowadays, it covers articles 11(1), 11*bis*(1), 11*ter*(1), 14(1) and 14*bis*(1) of the 1971 Paris Act of the Berne Convention.[974] At the 1948 Brussels Conference, where the doctrine was invented and finally expressly mentioned in the general report, a reference was made to 'exemptions allowed for religious ceremonies, military bands and the needs of child and adult education'.[975] For present purposes, it is sufficient to concentrate on the public performance of copyrighted material during religious ceremonies. Pursuant to the test procedure developed above, a conflict with a work's normal exploitation arises if a limitation encroaches upon the economic core of copyright by depriving authors of works of a category affected by the limitation of a typical major source of royalty revenue.[976]

So far, little has been said about the envisioned process of forming different categories of works to determine major sources of revenue. The example of 'minor reservations' for use during religious ceremonies can serve to elucidate this process. Consulting the definition of the exclusive rights affected by the 'minor reservations doctrine', it becomes obvious that a wide variety of works may be subjected to corresponding limitations. Article 11 BC covers dramatic, dramatico-musical and musical works, article 11*ter* BC is applicable to literary works and article 14*bis*(1) BC, finally, concerns cinematographic works. As to public performances during religious ceremonies, musical works seem to constitute the centre of gravity.[977] In respect of their exploitation, the US elaborated in the framework of the WTO Panel proceedings concerning article 110(5) of the US Copyright Act that the rights most important to copyright owners of works of this category 'include the right to reproduce their work in copies and phonorecords, the right to distribute and sell those copies and phonorecords, and the right to perform their music publicly'.[978]

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[972] See the basic proposal for substantive provisions of the later WCT, WIPO Doc. CRNR/DC/4, § 12.08.

[973] Cf. subsection 3.1.1.

[974] See Ficsor 2002a, 291-294.

[975] See the General Report, Records 1948, 100. Cf. subsection 3.1.1.

[976] See subsection 4.5.3.4.

[977] The public recitation of literary works may also play an important role. The following inquiry would therefore also have to be undertaken with regard to works of this category. As the outcome, however, would be very similar to the conclusions that will subsequently be drawn in the field of musical works, such a separate analysis is not conducted here.

[978] See WTO Panel – Copyright 2000, first written submission of the United States (attachment 2.1), § 28.

The exemption of public performances in the course of religious ceremonies, thus, apparently touches upon one of the major sources from which the income of authors of musical works typically flows. The crucial question, then, is how to draw the circle of relevant musical works so as to permit an appropriate evaluation of the limitation's impact on the market for public performances of musical works. Referring to musical works in general is obviously inappropriate. The majority of musical works will never even be considered for a public performance during religious ceremonies. A distinction between popular and classical music does not lead any further. On the contrary, the exempted use itself must govern the process of determining the relevant section of musical works. As the 'minor reservation' under examination serves religious purposes, it is therefore necessary to focus on works which are of a religious nature or otherwise related to religious activities. If musical works not belonging to this circle are nevertheless publicly performed during a religious ceremony from time to time, this clearly seems to be an exception rather than the rule.[979] These exceptional cases will hardly ever become a form of exploitation from which authors of musical works, typically, derive major profits.

As to the outlined circle of works that are somehow related to religious activities, the following observations can be made: public performances of these works during religious ceremonies need not necessarily feature prominently in the work's overall commercialisation. A piece written for organ, for instance, may primarily aim at affording the player the opportunity of demonstrating virtuosity and the spectacular range of organ sounds. First and foremost, the piece will accordingly be performed in organ concerts. Further pillars of the work's exploitation might be the sale of scores and its recording. Although it cannot be excluded that the work will also be performed in the framework of religious ceremonies, it appears nevertheless safe to assume that this potential market covered by the 'minor reservation' does not constitute a major source of income. The market impairment, thus, is insubstantial. The same is true as regards oratorios. Musical works of this kind often involve contributions of an orchestra, choir and several soloists. Their performance during religious ceremonies will accordingly hardly ever become widespread. If single parts of an oratorio, for instance a certain tune, are nevertheless used in religious ceremonies, these public performances can hardly be qualified as a potential major source of income which typically forms part of the exploitation of oratorios.

The prohibition of a conflict with a work's normal exploitation, however, becomes crucial with regard to works that are specifically written for use during religious ceremonies. If the composer of a song or a piece written for organ or choir particularly aims at enriching religious ceremonies and, therefore, creates the work with an eye to use during a mass, it would be inconsistent not to conclude that the 'minor reservation' under examination divests this author of a major source of

[979] Admittedly, Wagner's famous tune taken from his opera 'Lohengrin' which occupies centre stage whenever people dare to marry, is an exception to this rule. However, this is a special case. Hence, a *typical* major source of royalty revenue is not at stake. Cf. subsection 4.5.3.5.

income. What he intends is precisely the work's public performance during a religious ceremony. In consequence, other possibilities of marketing the work are hard to imagine. The piece is not written for attracting attention in concerts. Admittedly, the sale of scores may play a role besides the work's public performance during religious ceremonies. Nonetheless, the fact remains that a potential market of paramount importance for this type of musical work is covered by the 'minor reservation'. Insofar as a national limitation privileging religious ceremonies exempts the public performance of musical works that are specifically written for such ceremonies, it thus conflicts with a normal exploitation of these works and does not fulfil the second criterion of the three-step test.[980] A corresponding proviso is necessitated by the three-step test when limitations serving religious ceremonies are based on the 'minor reservations doctrine'. As pointed out in the previous subsection, a similar rule governs the educational use of copyrighted material.

4.5.4.4 COMPULSORY BROADCASTING LICENCES

There is substantial reason to doubt whether article 11*bis*(2) BC is compatible with the three-step test's second criterion. Admittedly, both provisions, article 11*bis*(2) and the three-step test alike, allow compulsory licences. Whereas article 11*bis*(2) generally permits national legislation to determine the conditions under which the broadcasting and related rights granted by article 11*bis*(1) may be exercised,[981] the three-step test, however, offers the possibility of providing for compulsory licences solely in the context of its third criterion. An unreasonable prejudice to the author's legitimate interest can be avoided by ensuring the payment of equitable remuneration.[982] Before reaching the third criterion, a limitation must pass the two preceding steps. It may therefore not conflict with a 'normal exploitation of the work'. The introduction of a compulsory licence is therefore not at all declared generally permissible, like in article 11*bis*(2).

The potential incompatibility of compulsory licences based on article 11*bis*(2) with the three-step test thus results from the great latitude allowed to national legislation. Article 11*bis*(2) fails to make it a condition that the economic core of copyright is to be left untouched, as required by the second criterion of the three-step test.[983] There is no safeguard preventing national legislation from encroaching upon the core when determining the conditions under which the rights granted in article 11*bis*(1) BC may be exercised. That particularly broadcasting, subjected to the authors' control by article 11*bis*(1)(i), constitutes a major source of income,

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980 The broad article 5(3)(g) of the European Copyright Directive 2001/29/EC which permits 'use during religious celebrations' is thus not in line with the three-step test.

981 Cf. for a more detailed description Ricketson 1987, 522-527; Ficsor 2002a, 273-275.

982 Cf. subsections 4.3.2 and 4.3.3.

983 Cf. subsection 4.5.3.

however, can hardly be denied, for instance, in the field of cinematographic works. The fact that article 11*bis*(2) obliges national legislation to ensure the payment of equitable remuneration, is irrelevant in the context of the prohibition of a conflict with a normal exploitation. It does not reconcile the two provisions.[984]

At the international level, the substantial difference between the three-step test and article 11*bis*(2) came to the fore at the 1967 Stockholm Conference. India espoused the imposition of a compulsory general licence on the right of reproduction, as permitted in the field of broadcasting by article 11*bis*(2). As already explained in some detail in subsection 3.1.3.5, this proposal was finally rejected. Instead, only the limited possibilities of compulsory licensing offered by the three-step test were approved. Speaking on behalf of India, Singh opposed this outcome of the Conference by stating that it appeared 'odd to him that while compulsory licensing was accepted as normal in recording and broadcasting, it should evoke opposition in regard to reproduction'.[985] The fact that the three-step test is irreconcilable with a compulsory general licence, as permitted by article 11*bis*(2), thus was clearly brought to light at the Stockholm Conference. Nonetheless, the ambit of operation of the three-step test was extended to article 11*bis*(2) when the additional safeguard function was assigned to article 13 TRIPs and article 10(2) WCT.[986] Nowadays, the great latitude allowed to national legislation by article 11*bis*(2), thus, is hanging by the thread of the agreed statement concerning article 10(2) WCT which hinders the three-step test from reducing the scope of applicability of article 11*bis*(2).[987]

4.5.5 THE IMPACT ON REMAINING NATIONAL LIMITATIONS

Turning to national limitations not resting on special provisions of the Berne Convention, the issue of personal use and library activities must be addressed. In the digital environment, limitations in this field raise substantial problems. The impact of private copying and library activities on a work's exploitation depends on the state of copying techniques. Over the last decades, technical innovations have markedly increased the attractiveness of limitations of this kind.[988] Nowadays, they have the potential for blocking the development of promising future markets. In the following subsection 4.5.5.1, strictly personal use will be discussed against this backdrop. Subsection 4.5.5.2 concerns the role which libraries may play in the future. As the issue is an extremely complex one, it is to be emphasised at the outset that the ensuing discussion cannot be expected to deal with the problem of private

984 Cf. subsections 4.3.2 and 4.3.3.

985 See Plenary of the Berne Union, Records 1967, 806.

986 Cf. subsections 3.2.2, 3.3.2 and 4.2.2.

987 See WIPO Doc. CRNR/DC/96, agreed statement concerning article 10 WCT.

988 See subsection 2.2.2, section 2.3 and the survey conducted in subsection 3.1.3. Cf. Ficsor 1997, 197; Gass 1999, 815; Herrigel 1998, 254; Hardy 1995, 3.

copying and library activities in depth. The determination of a conflict with a normal exploitation always requires a careful market analysis. An inquiry of this kind in the complex field of private copying and library activities is clearly beyond the scope of the present examination and must confidently be left to academic treatises to come. The following discussion merely seeks to give guidelines so that future, more comprehensive analyses do not go astray.

4.5.5.1 STRICTLY PERSONAL USE

The facet of personal use which is of interest for the present inquiry has been described as 'strictly personal use' above. In contrast to the internal use of copyrighted material in public welfare institutions, administrations and industrial undertakings, strictly personal use can generally be qualified as a 'certain special case' in the sense of the three-step test, regardless of whether it occurs in the analogue or digital environment.[989] It can be defined as the personal use of a work for the purposes of study, learning and enjoyment in privacy. There are personal use privileges of this type which are unproblematic. The practice of time-shifting, for instance, does not divest the authors of a major source of income. In the case of cinematography, the showing in cinemas, later TV broadcasts and the sale of copies constitutes the economic core of a work's overall commercialisation. Time-shifting, however, does not encroach upon any of these ways of exploitation. The film's showing in cinemas precedes the TV broadcast offering the chance to make a copy for personal use. The royalty revenue for the broadcast itself is left unaffected as well. That the value of further broadcasts is substantially reduced because of time-shifting can hardly be assumed. Moreover, it would have to be demonstrated first that rebroadcasts typically constitute a major source of income.

That the possibility of time-shifting substantially impairs the market for selling copies of the work cannot readily be inferred as well. That consumers profiting from time-shifting would otherwise be prompted to purchase a video cassette or DVD is a view which cannot be endorsed for lack of empirical evidence. Admittedly, it can hardly be ruled out that some beneficiaries might be tempted to purchase a copy and finally refrain from doing so because of the possibility of time-shifting. That these potential purchasers amount to a number that would justify speaking of a substantial impairment of the sale of copies, however, is questionable. What remains is the possibility that the potential market for time-shifting itself forms a potential major source of income.[990] When compared with the showing and broadcasting of a film and the sale of copies thereof, however, this conclusion can hardly be drawn. If beneficiaries of exempted time-shifting were made to pay, it is

989 Cf. subsection 4.4.4.1.

990 The importance of this potential market was underlined in the framework of the decision Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) by Justice Blackmun. See his dissenting opinion, IV B.

likely that they would reduce their activity. A major source of income need therefore not necessarily be expected. In the analogue environment, the existing market imperfections must furthermore be considered. On balance, time-shifting does therefore not fall within the scope of the prohibition of a conflict with a normal exploitation. The issue may be left to the ensuing third criterion of the three-step test.

Copyright limitations for strictly personal use, thus, need not necessarily have a deep impact on a work's overall commercialisation. Nonetheless, it is to be conceded that there remain numerous 'hard nuts to crack'. If a specific privilege, like the exemption of time-shifting, does not pose substantial difficulties, a broad limitation generally privileging strictly private use in the digital environment certainly does. As already pointed out above, it has been questioned in the analogue world whether unauthorised private copying as a mass phenomenon complies with the prohibition of a conflict with a normal exploitation.[991] How will it be possible to cope with this situation in the digital environment (which offers even more possibilities for taking advantage of private use privileges)? To approach this problem, the aspect of intergenerational equity will subsequently be factored into the equation. As argued above, particularly considerations of this kind provide guidance for the right application of the three-step test.[992] As to the present inquiry, this guidance is strongly needed. It helps to arrive at more balanced results instead of lumping all forms of strictly private use together and hastily declaring them impermissible. As there is a whole universe of different activities to determine, this cautious approach appears appropriate.

When viewed through the prism of intergenerational equity, the problem of private copying receives an additional connotation.[993] First of all, it is to be noted that the exemption of strictly personal use may assist in the creation of a new literary or artistic work. By virtue of private use privileges, an author can, while creating a new work himself, access certain works to receive fresh ideas and impulses for his own creativity and to study the technique of his predecessors. In the digital environment, he may wish to browse the internet and download for personal use. If an unauthorised private use is of a purely consumptive nature at the time it occurs, it may nevertheless pave the way for creative processes taking place in the future. A pupil learning of Schönberg's music at school, for instance, may be induced to search the internet for recordings and scores of his pieces and explanations of the underlying compositional theory. If these activities were to be covered by the personal use privilege, this could have a positive effect on his own creativity. Being fascinated by Schönberg's work, he may decide to intensify his musical activities and potentially embark on the creation of musical works himself in the future.

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991 See Ficsor 1981, 60-61. Cf. subsection 4.5.3.2.

992 Cf. subsection 2.3.

993 Cf. subsection 2.3.

The problem here is not the personal use as such. It appears safe to assume that uses of this kind are rare enough not to rank among the circle of potential major sources of royalty revenue. The problem is, however, that these uses are not distinguishable from others that, in the end, turn out to contribute neither directly (author) nor indirectly (pupil) to the creation of intellectual works. It is not foreseeable whether a consumptive use of today will ultimately lead to an intellectual production of tomorrow. The aforementioned pupil, for instance, need of course not necessarily become a composer himself just because he came in contact with Schönberg's music. At the best of times, this may happen. In the majority of cases, however, it cannot be precluded that the interest will simply flag.

The point is that considerations of intergenerational equity necessitate the opening of free pathways through the cultural landscape serving, for instance, the sketched forms of strictly personal use irrespective of whether or not these uses are distinguishable from others.[994] If only one in a thousand uses, sooner or later, proves to be somehow related to the creation of a new work, it would be wrong to erode the user privilege. The 999 fruitless uses are an investment in the rare talent of the one creative user in a thousand. It may turn out to be a good investment. Just this sole use may ultimately contribute to the creation of intellectual works of particular importance – either in terms of commercial success or the promotion of knowledge and culture.[995] In the digital environment, however, the fact must faced that the 999 other uses, undoubtedly, deeply impact on a work's overall commercialisation. As digital technology allows for the establishment of corresponding markets, it would be self-delusion not to conclude that there is a promising potential market for the 999 uses not contributing to the realisation of intergenerational equity. This market may even become a major source of income for authors of a wide variety of different works. Hence, it is necessary to reconcile two opposite findings: on the one hand, intergenerational equity can only be realised by leaving open free pathways through the cultural landscape. On the other hand, personal use is a promising potential market in the digital world that should not be withheld from the authors.

Obviously, the central problem here, thwarting the reconciliation of these opposite principles, is the fact that personal uses serving intergenerational equity, *ex ante*, are not distinguishable from the vast majority of other, fruitless uses. If it were to become possible to sort out those transformative or consumptive uses that, sooner or later, prove to be somehow related to the creation of a new work, intergenerational equity could be ensured by exempting just these few uses not constituting a major source of income. As this solution is out of reach, however, a digital personal use system must be devised which at least aims at privileging specific uses supporting intergenerational equity. A personal use framework ought to be established online which to the greatest extent possible, is aligned with the use

994 See subsections 2.2.2 and 2.3.
995 See subsection 2.1.2.

of copyrighted material for ends serving intergenerational equity. The general exemption of personal use in the digital environment is unsuitable for achieving this goal. It privileges uses regardless of whether or not they are likely to contribute sooner or later to the creation of new works.

Two conclusions can therefore be drawn. Firstly, it is inevitable to conclude that the broad privileges serving strictly personal use which are known from the analogue world[996] are likely to conflict with a normal exploitation of copyrighted material in the digital environment. If the digital revolution really takes place and more and more works are directly marketed to end-users, this emerging 'leading mode of exploitation'[997] will be threatened by the general exemption of private copying. That the privilege would then erode the economic core of a wide variety of works can hardly be denied. It would encroach upon a typical major source of income.

Secondly, however, it is to be underlined that there are certain facets of strictly personal use that must not fall prey to the prohibition of a conflict with a normal exploitation. The example of uses supporting intergenerational equity has been given above. On the basis of other rationales, further aspects can easily be brought to light. It may for instance be asserted that personal use privileges contribute substantially to the appropriate distribution of information resources in the information society.[998] Moreover, it may be posited that they serve the enhancement of democracy.[999] Against this background, it becomes obvious that traditional limitations serving private use should not be 'adapted' to the digital environment by simply abolishing them altogether. Instead, those areas must be carved out from existing broad privileges which are indispensable for realising the aforementioned objectives. Remaining smaller privileges are to be enshrined in appropriate new limitations to come. One hurdle that is to be surmounted in order to succeed in restructuring private use in the digital environment has already been pointed out above. As regards uses serving intergenerational equity, it is the problem that the latter can hardly be distinguished from other, fruitless uses. Potentially, however, recourse to library activities is conducive to taking this hurdle.

4.5.5.2 LIBRARIES

Typical tasks to be accomplished by libraries are the collection, preservation, archiving and dissemination of information. In the framework of the prohibition of a conflict with a work's normal exploitation, solely the latter aspect is of interest. The preservation and archiving of information can neither be qualified as a potential major source of royalty revenue nor does it encroach upon one. To illustrate the

996 Cf. for instance subsections 3.1.3.1 (FRG) and 3.1.3.2 (Netherlands).
997 Cf. Ginsburg 1997, 14.
998 Cf. subsection 2.2.2.
999 Cf. subsection 2.2.4.

potential harm flowing from the dissemination of information in the digital environment, a decision of the German Federal Court of Justice can be cited. The decision concerned the copying practice of the Technical Information Library Hannover (TIB). The TIB specialises in literature on technology/engineering, chemistry, informatics, mathematics and physics. On request by single persons and industrial undertakings, the library effectuates copies of articles published in periodicals which it dispatches via mail or fax. To facilitate the choice of articles, the TIB makes an electronic catalogue of its holdings accessible online.[1000]

Discussing this library practice, the Court had recourse to the three-step test. It took the view that the reproduction and dispatch of articles on demand, as undertaken by the TIB, constitutes a 'certain special case' owing to its connection with personal use, and the importance of the affected public interest in unhindered access to information.[1001] As to the market impact of the TIB's practice, the Court elaborated that the dispatch of copies, in view of the technical and economic developments of recent years, is functionally capable of complementing the regular way of communicating a work through its publishing.[1002] It maintained that the practice of dispatching copies made by the library itself tends to come close to a publisher's activity.[1003] Nonetheless, the Court refrained from assuming a conflict with a work's normal exploitation. Instead, it pointed out that part of an author's legitimate interests which the three-step test seeks to protect, at least, is his appropriate participation in each form of exploiting his work which, because of the technical and economic development, can be considered an economically important way of exploiting the work.[1004] On this basis, it held that the TIB's practice may be placed beyond the author's control of the reproduced articles provided that equitable remuneration is paid in future.[1005] In view of technical and economic developments in recent years, the Court deemed a claim to equitable remuneration necessary to fulfil the requirements of the three-step test.[1006] It solved the problems raised by the practice of the TIB in the framework of the third criterion of the three-step test. An unreasonable prejudice to the author's legitimate interests can be avoided by ensuring the payment of equitable remuneration. A conflict with a normal exploitation, however, cannot be averted by remunerating the authors.[1007]

[1000] Cf. BGH, Juristenzeitung 1999, 1000-1001. The Court clarified expressly that its decision does not concern the practice of making articles themselves available online. See BGH, ibid., 1000.

[1001] See BGH, ibid., 1004. This view confirms the qualitative standard developed above. Cf. subsections 4.4.2.3 and 4.4.4.1.

[1002] See BGH, ibid., 1004.

[1003] See BGH, ibid., 1004: 'Durch die Übersendung selbst hergestellter Vervielfältigungsstücke übt der Kopienversanddienst eine Funktion aus, die nicht nur die Tendenz in sicht trägt, sich der Tätigkeit eines Verlegers anzunähern, sondern die auch mit der Werkvermittlung durch Abrufdatenbanken verglichen werden kann.'

[1004] See BGH, ibid., 1004. Cf. subsection 4.5.1.2.

[1005] See BGH, ibid., 1002.

[1006] See BGH, ibid., 1003. Cf. Baronikians 1999, 130-131.

[1007] Cf. subsections 4.3.2 and 4.3.3.

For present purposes, it is noteworthy in particular that the practice of the TIB was not deemed permissible on account of a copyright limitation which specifically exempts library activities of this kind.[1008] By contrast, the Court held that § 53(2) No. 4(a) of the German Copyright Act is applicable to the TIB's practice of dispatching copies. This provision concerns personal use. The authorised user, however, need not necessarily produce the copy himself but may ask another person to make the reproduction.[1009] The Court took the view that a library, albeit offering additional services like the TIB, can be such 'another person' in the sense of § 53(2).[1010] This finding shows that a library is apparently capable of fulfilling an intermediary role. The Court permitted the TIB to provide a framework within which the personal user can take advantage of his user privilege.

The merit of this construction becomes evident when considering the difficulties posed by strictly personal use in the digital environment. In the previous subsection, it was concluded that the maintenance of a general personal use privilege in the digital environment is not advisable. Such a limitation would have a deep impact on the exploitation of a wide variety of works. Instead, those areas should be carved out from traditional broad private use privileges which are indispensable for the realisation of certain objectives of paramount importance, like the promotion of intergenerational equity. Instead of permitting private users to knock down all fences around the cultural landscape by generally exempting personal use in the digital environment, a refined system of digital pathways through the cultural landscape, thus, is to be established.

The TIB decision of the German Federal Court of Justice suggests that libraries could play a decisive intermediary role in this connection. The crucial advantage of a library system in comparison to a broad personal use privilege is that the circle of beneficiaries can be confined to a certain group of users which the library can identify and individualise. Libraries may thus become guards at the entrance of the cultural landscape giving access to the different free pathways.[1011] The assignment of this task to libraries would entail an enhancement of their powers. Instead of merely supporting the dispatch of copyrighted material electronically by making a catalogue available online, libraries should be entitled to make works directly available online. Users of the new digital service should have the possibility of sifting through the online catalogue and downloading material that attracts their attention. As a countermove, libraries would have to drastically reduce the circle of users profiting from the digital service. From the TIB's practice of dispatching articles, not only single persons, but also industrial undertakings may profit.[1012] This ambit of operation is much too broad. Considerations of intergenerational equity,

[1008] Specific library privileges can be found in UK Copyright Law. Cf. subsection 3.1.3.4.
[1009] Cf. subsection 3.1.3.1.
[1010] See BGH, ibid., 1001.
[1011] Cf. the analysis conducted by Krikke 2000, 152-156
[1012] See BGH, ibid., 1000.

for instance, would merely justify to offer the envisioned digital service to private individuals who are not unlikely to use works in a way that contributes – sooner or later – to the creation of new works.

To give an example of how the outlined private use infrastructure could operate, university libraries can be brought into focus. Pursuant to the developed concept, they would be entitled to make copyrighted material available online so that users can choose and download works they want to use personally. A university library is capable of controlling access to its holdings. It can confine the circle of beneficiaries to students and researchers. Moreover, the access to works can be restricted. A student or researcher need not be given access to works that are not related to his subject. While generally allowing browsing, downloads can moreover be confined to a small number.[1013] In the case of a university library, the group of beneficiaries is not unlikely to engage in the creation of a new work themselves. With regard to researchers, this effect is self-evident. As for students, it is to be noted that they are the generation of researchers to come. The knowledge accumulated by them today may assist in the creation of works tomorrow.[1014] A similar library system could be maintained by other educational institutions. It may furthermore be established for certain groups of users. Viewed from the perspective of intergenerational equity, it can be posited that especially authors of intellectual works should feature among the circle of beneficiaries.

These few observations of a general nature show that a refined library system has certain merits indeed. If libraries were to play an intermediary role, they could potentially steer and bridle strictly personal use in the digital environment so as to avoid a conflict with a normal exploitation. It may therefore be advisable to assign the task of providing sufficient breathing space for private study, learning and enjoyment of intellectual works to a refined digital library system. In particular, a library's potential for reacting to the specific needs of certain groups of users is important in this context. It qualifies libraries for the task of specifically privileging the beneficiaries of indispensable facets of personal use, like the promotion of intergenerational equity. Preference should therefore be given to the library option rather than thoughtlessly transferring undifferentiated personal use privileges known from the analogue world to the digital environment.[1015]

[1013] Cf. as to the appropriate confinement of limitations in the digital environment Xalabarder 2003, 165-168, who discusses digital distance education.

[1014] See for a more detailed discussion of this notion subsection 2.3.

[1015] The complex UK library system could serve as a starting point for the development of an appropriate digital library system which administers personal use. Cf. subsection 3.1.3.4. See also the conclusions drawn by Krikke 2000, 163-170. In the US, Netanel has taken into consideration a collective licensing system administering private use licences. He envisions a 'system of state regulation to ensure that user licence fees remain within reasonable limits'. See Netanel 1996, 376.

4.6 Unreasonable Prejudice to Legitimate Interests

If a limitation does not conflict with a normal exploitation, it may furthermore 'not unreasonably prejudice the legitimate interests of the author'. This last criterion was formulated differently in international copyright law. Whereas article 9(2) BC and article 10 WCT enunciate that limitations are permissible in certain special cases that do not 'unreasonably prejudice the legitimate interests of the *author*', article 13 TRIPs refers to 'the legitimate interests of the *right holder*'. The lack of consistency shows that the different contexts in which the three-step test has been placed in international copyright law impacted on the formulation of the third criterion.[1016]

The regulatory framework of the third criterion is established by three elements: firstly, it refers to the interests of authors and right holders, but not to their rights. Authors and users of intellectual works thus meet on an equal footing. Secondly, the circle of relevant interests is reduced to 'legitimate' ones. Not each and every conceivable concern must be considered. Thirdly, prejudices to the circle of legitimate interests are permissible insofar as they are not 'unreasonable'. Every copyright limitation causes some detriment to the authors. This result is accepted as long as the arising harm does not reach an unreasonable level.[1017]

At the 1967 Stockholm Conference, it was feared that the three-step test was 'too typically British to be easily understood by judges in continental countries'.[1018] Its final wording can be traced back to the proposal tabled by the UK.[1019] In particular, the terms used in the framework of the third criterion may have triggered the quoted comment. All criteria of the three-step test comprise abstract, open formulations. What is a *special* case? How is a *normal* exploitation to be defined? However, it can hardly be overlooked that expressions of this kind are accumulated in the context of the third criterion. Even the term 'interests' which is the reference point of the third criterion has the air of vagueness. Furthermore, the author's interests must be 'legitimate'. The prejudice thereto may not be 'unreasonable'.

However, if all these terms are understood as a reference to the principle of proportionality, a useful functional concept for the final balancing of interests comes to the fore: as already mentioned, every limitation causes some detriment to the authors. For this reason, the third criterion insists on a qualified, unreasonable prejudice. It requires the distinction between permissible, reasonable losses and forbidden, unreasonable damages. Insofar as the objective underlying a limitation justifies the entailed prejudices to the author's legitimate interests, it can be approved. Excessive, disproportionate harm, however, cannot be countenanced and constitutes an unreasonable prejudice. Authors need not endure exposure to an interference with their legitimate interests beyond the limits of what is appropriate

[1016] Cf. Ricketson 1999, 69-71; 80-83 and 86-90.
[1017] Cf. Ricketson 1987, 483-484; Desbois/Francon/Kerever 1976, 205.
[1018] See the statement of the Dutch delegate, Minutes of Main Committee I, Records 1967, 858.
[1019] Cf. subsections 3.1.2 and 3.1.3.4.

and necessary for achieving the aim underlying a limitation. It can be posited that the detriment to the authors must be reasonably related to the benefit of the users. In other words, it must be proportionate.[1020] The open terms 'interest', 'legitimate', and 'unreasonable' all point in this direction.

The assumption that the prohibition of an unreasonable prejudice to legitimate interests requires a proportionality test can be supported by developments in British law itself. As EC law gradually infiltrates British administrative law, a line has been drawn between the traditional concept of unreasonableness and the continental principle of proportionality. The EC law principle of proportionality has been described by Beatson as requiring that 'there be a reasonable relationship between the end achieved and the means used to achieve it'.[1021] It has been suggested that proportionality be conceived of as manifestation and clear indicator of so-called Wednesbury reasonableness.[1022] In this vein, Slynn stated that

> 'the notion of proportionality is not so far away from unreasonableness when it comes to deciding whether a decision has been exercised properly, or whether excessive means have been adopted to attain a permissible objective. To strike down a decision which is "disproportionate" would seem to be one aspect of "unreasonableness".'[1023]

Birnhack elaborates that, in recent years, the 'traditional Wednesbury reasonableness test which usually applied to the administrative decisions has been replaced with the test of proportionality'.[1024] As a matter of course, the use of the term 'unreasonable' in the three-step test need not be equated with the British concept of unreasonableness. At the international level, the expression acquires an independent meaning. The aforementioned considerations, however, elicit that the notion of unreasonableness, as construed in UK administrative law, can indeed be understood as referring to a proportionality test.

Furthermore, the postulation that the elastic expressions establishing the third criterion refer to a proportionality test corresponds to the system of the three criteria. The third criterion is the last regulatory element of the three-step test. It serves the final balancing of interests. With its help, copyright's delicate balance must ultimately be recalibrated. Limitations which, finally, are to be scrutinised in

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[1020] The requirement to engage in a balancing exercise between the injury to individual rights and the corresponding gain to the community, for instance, forms part of the principle of proportionality in Germany (Angemessenheit) and France (le bilan coût-avantages). Cf. the analyses by Jowell/Lester 1988, 52-56 and Emmerich-Fritsche 2000, 153, 166-167 and 171.

[1021] See Beatson 1988, 180.

[1022] The so-called Wednesbury-Test has been developed in Associated Provincial Picture House Ltd. v. Wednesbury Corporation (CA) [1948] 1 K.B. 223. The discussion about the inclusion of the principle of proportionality in British law focuses on this test. Cf. Marauhn 1994, 74. The proposal was made by Woolf L.J. in connection with R. v. Brent L.B.C., ex parte Assegai, The Times, June 18, 1987. Cf. Beatson 1988, 181.

[1023] See Slynn 1987, 400-401.

[1024] See Birnhack 2003, 28.

the light of the prohibition of an unreasonable prejudice to the author's legitimate interests, have already fulfilled the two preceding criteria. They have passed through the gateway to copyright's balance.[1025] Hence, it appears safe to assume that they are either of a *de minimis* nature or 'hard nuts to crack'. In the latter case, a refined solution must be sought.

In this situation, the political prerogative of the legislator plays a decisive role.[1026] It is up to the national legislator to shape a country's copyright balance. The freedom national legislation enjoys pursuant to the three-step test can be used to react adequately to a country's individual situation. In this vein, Heide stated that 'the adopted formulation was intended to be flexible enough […] to provide a sufficient margin of freedom to craft inevitable exceptions in order to address important social or cultural needs'.[1027] The three-step test is not intended to determine in each individual case whether preference should finally be given to the concerns of authors or users. In view of the complex framework in which copyright law is embedded,[1028] it would be counterproductive to dictate a specific balance of grants and reservations anyhow. Accordingly, the three-step test merely provides guidelines facilitating the task of striking a proper balance. Against this backdrop, it is consistent to assume that the last signpost should be the widely-accepted[1029] principle of proportionality. If a limitation fulfils the two requirements established by criteria 1 and 2, national legislation may decide either way. It may favour the authors or the users. The decision, however, must be proportionate.

It is thus right to conceive of the different abstract terms establishing the third criterion as elements of one final proportionality test. In the following subsections, attention will be devoted to each of its elements. In the following subsection 4.6.1, the preliminary question will be raised why the third criterion refers to interests instead of rights. Subsequently, relevant interests will be examined in more detail. Subsection 4.6.2 deals with economic interests. Subsection 4.6.3 concerns non-economic interests. The proportionality test to be carried out will be explained in subsection 4.6.4. Its two elements – the reduction of relevant interests of the authors to legitimate ones and the prohibition of unreasonable prejudices – will be discussed in detail. In the light of the proportionality test, a final comment will be made on the relationship between the three-step test and special provisions of the Berne Convention permitting limitations in subsection 4.6.5. The system of the three criteria of the three-step test will be revisited in subsection 4.6.6.

[1025] Cf. the detailed description of the system of the three criteria given in section 4.3.

[1026] In this vein, the European Court of Human Rights underscores the margin of appreciation left to the contracting states of the European Convention on Human Rights by article 10(2) thereof. However, it also points out that 'the domestic margin of appreciation […] goes hand in hand with a European supervision'. See the Court's Sunday Times decision, ECHR Judgement of April 26, 1979, Series A No. 30, § 59. Cf. Hugenholtz 2002, 246-247.

[1027] See Heide 1999, 105. Cf. Kerever 1975, 331; Collova 1979, 125-127.

[1028] Cf. chapter 2 and particularly subsection 2.3.

[1029] Cf. Jowell/Lester 1988, 52-56 and Emmerich-Fritsche 2000, 153, 166-167 and 171.

4.6.1 THE REFERENCE TO INTERESTS INSTEAD OF RIGHTS

The term 'interest' encompasses a wide variety of ordinary meanings. In connection with intellectual property, it may be understood as 'the relation of being objectively concerned in something, by having a right or title to, a claim upon, or a share in', and thus as a reference to a 'right or title to property, or to some of the uses or benefits pertaining to property'.[1030] However, the term also implies a much broader reference to 'the relation of being concerned or affected in respect of advantage or detriment'.[1031] The recourse to 'interests' in the third criterion, thus, begs numerous questions. As one possibility of construing the word is to understand it as a reference to a 'right or title to property, or to some of the uses or benefits pertaining to property',[1032] it must be clarified first why the drafters of the three-step test preferred this term rather than directly forbidding an unreasonable prejudice to the rights of the author.

To answer this question, it must be borne in mind that the Berne Convention, pursuant to its preamble, is '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'.[1033] Against this background, the compromise character of article 9 BC, in which the first three-step test was enshrined, can hardly be overlooked. Indeed, the broad general right of reproduction is conferred on the authors in its first paragraph. The highly flexible three-step test of the second paragraph, however, expressly offers the possibility of drawing resources away from this exclusive right. The particularity of this solution can especially be gathered from a comparison with the treatment of public performing rights. In this respect, the members of the Union contented themselves with the 'minor reservations doctrine' which was expressly mentioned in the general report of the Brussels Conference.[1034] Although this limitation is merely an implied one that does not form part of the text of the Convention, Marcel Plaisant, the *rapporteur général* of the Brussels Conference, hastened to stress when it came to mentioning the 'minor reservations doctrine' that 'these references are just lightly pencilled in [the general report], in order to avoid damaging the principle of the right'.[1035]

[1030] See the Oxford English Dictionary.

[1031] See the Oxford English Dictionary.

[1032] See the Oxford English Dictionary.

[1033] The alignment of the Convention with the authors' interests can primarily be explained by the historical situation at the time of its adoption. Cf. Ricketson, 1999, 61: 'The Berne Convention was the culmination of a long series of efforts to bring about a multilateral arrangement for the protection of authors' rights that would replace the previous piecemeal and incomplete network of bilateral agreements.'

[1034] The treatment of public performing rights, in particular, is suitable for comparison because the 'minor reservations doctrine' and the three-step test evolved from comparable situations arising at the 1948 and 1967 revision conferences. See subsections 3.1.1 and 3.1.2.

[1035] See the general report of the Brussels Act, Documents 1948, 100. The translation has been taken from that prepared by WIPO. See WIPO 1986, 181.

Due to the strong public interest, the same reserve could not be exercised in the field of the right of reproduction. The Study Group preparing the programme for the 1967 Stockholm Conference noted that the incorporation of the reproduction right into the Convention would have to be accompanied by a satisfactory formula sheltering 'the inevitable exceptions to this right'.[1036] It maintained that 'it would be vain to suppose that countries would be ready at this stage to abolish [the exceptions in favour of various public or cultural interests] to any appreciable extent'.[1037] To understand these comments, it must be remembered that limitations on the right of reproduction did not form a homogeneous group in respect of a shared *de minimis* nature. Express mention of the possibility to exempt certain uses in the general report of the 1967 Stockholm Conference could not be deemed an adequate reaction to the claim of the members of the Berne Union for the maintenance of limitations. A cautious approach comparable to the fine line walked at the 1948 Brussels Conference when the 'minor reservations doctrine' was mentioned in the general report was out of reach.[1038]

On the basis of this finding, several conclusions can be drawn. In the words of the Berne Convention's preamble, it can be stated that the most effective and uniform manner of protecting the authors' reproduction right was merely a far-reaching compromise solution. The wide array of traditional limitations on the right of reproduction had to be sheltered in order to pave the way for its recognition *jure conventionis*. The picture of the author underlying article 9 BC is that of an author on the defensive. By contrast to the situation in the field of other exclusive rights of the Convention, like public performing rights, he could not be vested with an almost absolute exclusive right of reproduction, the permissible limitations to which are just 'lightly pencilled in the general report'.[1039] Instead, great latitude was allowed national legislators wishing to set limits to that right, even though the already-known, traditional limitations did not share a *de minimis* nature.[1040] Moreover, the pre-digital world of the 1967 Stockholm Conference placed practical difficulties of ensuring authors adequate reward for their expressive work. The fact that market failure was often considered a basis for limitations in the analogue world mirrors the degree of market imperfection.[1041] The moment reprography as well as sound and visual reproduction became widespread, the potential danger from private use privileges as a mass phenomenon beyond the authors' control revealed the insecurity of their position within the realm of the right of reproduction. Not surprisingly, it was feared that private copying could erode the reproduction right.[1042]

[1036] Cf. Records 1967, 111 (Doc. S/1). See subsection 3.1.2 above.
[1037] See Records 1967, 112 (Doc. S/1).
[1038] Cf. subsections 3.1.1, 3.1.2 and 3.1.3.
[1039] Cf. the general report of the 1948 Brussels Act, Documents 1948, 100.
[1040] See subsections 3.1.2 and 3.1.3. Cf. Kerever 1975, 331; Collova, 1979, 125-127; Heide 1999, 105.
[1041] Cf. subsection 2.2.2.
[1042] See subsection 4.5.3.1. Cf. Ficsor 1981, 60-61; P. Masouyé 1982, 84-86; Kerever 1975, 340.

The background to article 9 BC makes the particular accentuation of the authors' interests understandable. As an absolute exclusive right of reproduction was out of reach, the drafters of the three-step test sought to at least safeguard the authors' interest in the right of reproduction. From the beginning, they envisioned an author as being incapable of reigning supreme over the use and enjoyment of his work. Limits had to be set to the author's faculties on account of the public interest. Furthermore, the problem of market imperfections appeared insoluble. A typical situation arising in the field of the reproduction right was therefore that the author cannot control the utilisation of a work. What the drafters of the three-step test, nevertheless, sought to safeguard in this situation, are the mere interests which the author might have besides the right to prohibit and control the use of a work. It can be assumed that, for this reason, it was made a condition that a limitation does not unreasonably prejudice the legitimate interests of the author.

If an author, due to strong competing public interests, is deprived of the control of a work's use, allowance must consequently at least be made for the mere interest which the author might have in the exploitation of that work. In this vein, Collova elaborated that

> 'the interest only represents an element, namely, the teleological element of the content of the subjective right. The interest may benefit from protection but always less specific than the protection accorded to the subjective right. […] If the international legislator effectively envisaged that, in special cases to be determined, the author's subjective right could be weakened, he nevertheless wanted to maintain the protection of the author's interest – the economic basis of his right – in circumstances where that right finds itself confronted with other competing interests of the collective.'[1043]

An example of the application of this principle can be found in the jurisprudence of the German Federal Constitutional Court, the Bundesverfassungsgericht. In the decision 'Kirchen- und Schulgebrauch', the Court took the position that an author may be hindered from exerting his right to prohibit the utilisation of a work in order to enable the inclusion of this work, for instance, in a schoolbook. However, the Court also stated that, in this case, it is not justified to deprive the author of, besides the right to control the utilisation of a work, the economic interest which he may have in the exploitation of the right of reproduction. The Court asserted:

> 'The public interest in having access to cultural works is given satisfaction by excluding the right to prohibit a work's use to the discussed extent; this

[1043] See Collova 1979, 129-131: 'L'intérêt ne représente qu'un élément, à savoir, l'élément téléologique du contenu du droit subjectif. L'intérêt peut bénéficier d'une protection, mais toujours moins spécifique que celle qui est accordée au droit subjectif […] Si le législateur international a effectivement envisagé que, dans des cas spéciaux à déterminer, le droit subjectif de l'auteur puisse être affaibli, il a voulu pourtant maintenir la protection de son intérêt, c'est-à-dire du fond économique de son droit, lorsque des circonstances où ce droit se trouve confronté à d'autres intérêts concurrents de la collectivité se vérifient.'

> exclusion concretises the social commitment of copyright as regards the area that is relevant here. A claim that the author has to place his intellectual work at the public's disposal free of charge, however cannot be inferred from article 14(2) GG.'[1044]

Hence, the reference to interests instead of rights confirms that the third criterion is located at the core of copyright's balance.[1045] When the divergent interests of authors and users finally meet, it makes no sense to insist on the right to control the use of a work by allowing or prohibiting, for instance, its reproduction. Instead, room to manoeuvre for the reconciliation of the divergent interests must be created. Against this backdrop, it is consistent that the third criterion does not emphasise an author's subjective right but merely his interest. Criteria 2 and 3 have different reference points:[1046] the second criterion, forbidding a conflict with a normal exploitation of the work, concerns the sphere of the authors' exclusive rights. If a limitation encroaches upon the economic core of copyright, an author may prohibit the corresponding way of using a work, thereby subjecting it to his control. The third criterion, which is closer to the heart of copyright's balance deals with the authors' interests. If the author must be prevented from prohibiting a certain use because of its fundamental importance for the satisfaction of social, cultural or economic needs, his remaining interest must be brought to bear.

4.6.2 ECONOMIC INTERESTS

From the given description of the situation surrounding the Stockholm Conference, in which the concept of legitimate interests appears as a bulwark against the erosion of the right of reproduction by traditional limitations, it can be concluded that, first and foremost, the authors' economic interests must be brought into focus in the context of the third criterion. The interest which remains if an exclusive right in its entirety, encompassing the faculty to prohibit a certain use, cannot be safeguarded on account of strong competing interests, is primarily of an economic nature. The pecuniary interest which the author can assert under the given circumstances must be secured. By the same token, Collova spoke of the protection of an author's interest in the sense of the economic foundation of the corresponding right, and the German Federal Constitutional Court stressed that the author is not obliged to acquiesce in the utilisation of a work in schoolbooks free of charge.[1047]

[1044] See BVerfGE 31, 229 (244-245): 'Dem Interesse der Allgemeinheit, Zugang zu den Kulturgütern zu haben, ist mit dem Ausschluß des Verbotsrechts in dem erörterten Umfang Genüge getan; dieser Ausschluß konkretisiert die soziale Bindung des Urheberrechts für den hier maßgeblichen Bereich. Aus Art. 14 Abs. 2 GG kann dagegen nicht die Forderung hergeleitet werden, dass der Urheber in diesen Fällen seine geistige Leistung der Allgemeinheit unentgeltlich zur Verfügung stellen müßte.' Cf. Badura 1984, 556-558 and subsection 2.2.1.

[1045] Cf. subsections 4.2.2 and 4.2.3.

[1046] Cf. subsections 4.3.2 and 4.3.3.

[1047] Cf. Collova 1979, 129 and BVerfGE 31, 229 (244-245).

When tracing the conceptual contours of the authors' economic interests, the specific relationship between the third and the second criterion must be considered. The prohibition of an unreasonable prejudice to the legitimate interests of the author complements the prohibition of a conflict with a normal exploitation. It has been stated above that a conflict with a normal exploitation arises only if a limitation deprives authors of a way of exploiting a work which, typically, carries weight within the overall commercialisation of works of a relevant category.[1048] After reducing the ambit of operation of the second criterion to the economic core of copyright in this way, sufficient weight must now be given to *all* ramifications of the author's exploitation right in the context of the prohibition of an unreasonable prejudice. Those exploitation forms which were not previously considered form the substance of the authors' economic interests in the context of the third criterion. Moreover, market segments for which allowance has already been made in connection with the second criterion reappear in the context of the third criterion if the limitation under examination was not found to be in conflict with a normal exploitation so that it could pass the second step.

In accordance with the normative concept which has been developed for determining a conflict with a work's normal exploitation,[1049] the interest in actual and potential future markets, regardless of their economic or practical importance, must be considered when seeking to prevent an unreasonable prejudice to the legitimate interests of the author.[1050] On its merit, the term 'interest' accordingly encompasses each and every possibility of deriving economic value from a work which is granted to an author by the recognition of exclusive rights.[1051] If the author is inhibited from exerting control over the utilisation of a work on the grounds that allowance is made for competing user interests instead, he can assert the pecuniary interest in the exploitation of a work which he has under the given circumstances.

It is noteworthy that in the field of economic interests, the reference to the author's interests need not necessarily be construed so as to comprise solely the group of the creators of literary or artistic works. On the contrary, the interests of licensees, such as publishers, record companies or film distributors, enter the picture as well. This is clearly reflected in article 13 TRIPs where preference was given to the expression 'legitimate interests of the right holder'. This neutral formulation indicates that the circle of beneficiaries is not confined to the authors but also encompasses other right holders, like the aforementioned licensees. In the context of the Berne Convention and the WIPO Copyright Treaty, where the expression 'legitimate interests of the author' is used, article 2(6) BC solely forges a

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[1048] Cf. subsections 4.5.3.3 and 4.5.3.4.

[1049] Cf. subsection 4.5.3.

[1050] In respect of the inclusion of potential markets, see subsection 4.4.2.1 above.

[1051] In this connection, it is thus appropriate to enunciate that 'a copyright owner is entitled to exploit each of the rights for which a treaty […] provides'. This statement was made by the WTO Panel – Copyright 2000, § 6.175. The view of the Panel, however, could not be endorsed in the context of the second criterion. Cf. subsection 4.5.3.4.

link to 'successors in title'.[1052] The interests of licensees, thus, are not to be factored into the equation in this context. As article 13 TRIPs, however, is a horizontal provision applicable to all kinds of limitations on the rights granted under the Berne Convention and the TRIPs Agreement alike – including limitations based on article 9(2) BC –,[1053] the only area not covered by the reference to right holders in article 13 TRIPs is formed by the exclusive rights newly granted in the WIPO Copyright Treaty, like the right of making a work available online reflected in article 8 WCT.

Particularly in the framework of the three-step test, it makes sense to consider the interests of a broader group of right holders including publishers and so forth. The second criterion prohibits a conflict with a work's normal exploitation. In the majority of cases, this exploitation will not be organised and carried out by the authors themselves but by publishers, record companies, film distributors, etc. This group of licensees, moreover, will be affected by copyright limitations just like the author. When photocopying became a mass phenomenon soon after the 1967 Stockholm Conference, the enhanced attractiveness of personal use privileges undoubtedly concerned not only authors but also the calculations of publishers who had obtained a licence at a time when this development was not foreseeable. Similarly, digital 'MP3' technology has caused a massive drop in CD sales impacting on record companies.[1054]

In the context of the third criterion, the finding that not only the legitimate interests of the author but also those of licensees must be factored into the equation has important practical consequences. The three-step test has always been understood to allow compulsory licensing in the framework of the third criterion.[1055] National legislation can avoid an unreasonable prejudice to legitimate interests by providing for the payment of equitable remuneration. The harm flowing from a limitation can be reduced to a reasonable level by ensuring adequate monetary reward.[1056] In this connection, the outlines of the group of beneficiaries becomes crucial. If the three-step test were to operate solely for the benefit of the authors, the detriment to other right holders, such as publishers and record companies, would not have to be considered. Accordingly, it would be sufficient for national legislation to secure that the prejudice to the legitimate interests of the authors themselves does not reach an unreasonable level. Licensees, however, would end up with nothing, even though the harm flowing from a limitation affects them just like the authors.

[1052] Article 2(6) BC is included in the WCT by the reference to provisions of the Berne Convention made in article 1(4) WCT. Pursuant to article 3 WCT, contracting parties, moreover, 'shall apply mutatis mutandis the provisions of Articles 2 to 6 of the Berne Convention in respect of the protection provided for in this Treaty'.

[1053] See section 3.2.

[1054] Cf. Mönkemöller 2000, 665; Wandtke/Schäfer 2000, 187; Bortloff 2000, 665.

[1055] Cf. subsections 3.1.2, 3.1.3.1 and 3.1.3.5.

[1056] Cf. subsections 3.3.1, 4.3.2 and 4.3.3.

If the three-step test, however, is understood to operate for the benefit of a broader circle of right holders, as pointed out in article 13 TRIPs, national legislation must ensure that the prejudice to each different group of right holders, including the authors themselves, is reduced to a reasonable level. It would thus, for instance, be insufficient to vest only authors with some extra income accruing from a national levy system. This would mean that only the unreasonable prejudice to the authors is avoided. The unreasonable prejudice to other right holders, such as publishers would remain. On balance, the national system would thus fail the three-step test because the unreasonable prejudice to economic interests is not redressed completely.

For the reasons given above, it must be concluded that this latter scenario is appropriate. It is not only the economic interests of the author that enter the picture, but also those of other right holders, such as publishers. The third criterion of the three-step test thus calls upon the national legislator to ensure that, insofar as these interests are legitimate under the given circumstances, neither the economic interests of the author nor the economic interests of other right holders are unreasonably prejudiced. This task becomes crucial when equitable remuneration is paid to prevent the prejudice caused by a limitation from reaching an unreasonable level. In this case, national legislation must distribute the monetary reward appropriately among the different groups of affected right holders. Otherwise, the unreasonable prejudice is not remedied completely and the established national remuneration system fails the three-step test.

4.6.3 NON-ECONOMIC INTERESTS

The question of moral rights protection divorces copyright's legal traditions. The notion of authors' moral rights is strong in the civil law tradition resting on natural law theory. The notion that a work of art represents a materialisation of the unique personality of the creator entails the espousal of personal intellectual interests.[1057] France is often regarded as the 'mother country' of *droit moral*.[1058] Provisions on moral rights are widespread throughout continental Europe.[1059] Common law copyright systems, by contrast, are traditionally impervious to the claim for moral rights protection. The economic orientation of common law systems opposes the elaboration of a work of art as the materialisation of the author's personality.[1060] Nevertheless, a minimalist approach[1061] to the protection of non-economic interests was countenanced internationally. Article 6*bis* BC grants the right 'to claim authorship of the work and to object to any distortion, mutilation or other

[1057] Cf. Ulmer 1980, 110-111; Desbois 1978, 538; Quaedvlieg 1992, 40 and 55. See section 2.1
[1058] See Dietz 1995, 201. Cf. Ricketson 1987, 457-458.
[1059] Cf. Dietz 1995, 203-206.
[1060] See section 2.1 above. Cf. Ricketson 1987, 459; Peifer 1993, 327; Ginsburg 1991, 593.
[1061] Cf. Dietz 1995, 200.

modification of, or other derogatory action in relation to, the said work, which would be prejudicial to [the author's] honour or reputation'. The right of attribution and the integrity right, therefore, are recognised at the international level. However, the background to the introduction of moral rights in the Berne Convention at the 1928 Rome Conference and renewed discussions of the issue at later revision conferences,[1062] as well as the way how common law countries deal with these non-economic interests,[1063] reveal that they are far from enthusiastically approving the inclusion of moral rights protection into copyright law.

Common law countries, in particular, sought to ensure that the protection granted by torts, such as passing off, injurious falsehood and defamation – although not part of copyright law – could be asserted to demonstrate the fulfilment of the Convention's obligations.[1064] In 1988, the Australian Copyright Law Review Committee, in this vein, concluded that Australia's existing laws were sufficient to comply with article 6*bis*.[1065] A similar position was taken by the US in connection with their adherence to the Berne Convention. The Berne Convention Implementation Act 1988 bypassed the moral rights problem on the grounds that US law at that time met the requirements of article 6*bis*.[1066] This conviction did not hinder the US from considering it necessary to explicitly bestow moral rights protection upon the authors of a restrictively defined group of works in the Visual Artists Right Act 1990.[1067] Legislation on the matter, and even a detailed and complex moral rights code, can be found in the UK.[1068] In the Copyright, Designs and Patents Act 1988, authors are accorded moral rights in principle.[1069] This response to article 6*bis*, however, is interspersed with compromise solutions, like the requirement of formalities, to such an extent that the provisions appear cynical, or at least half-hearted.[1070] Ginsburg elaborates that this 'may be because their drafters seem to have lacked real conviction in the desirability of moral rights'.[1071]

1062 1948 in Brussels and 1967 in Stockholm. Cf. Ricketson 1987, 459-467.

1063 Cf. the survey conducted by Dworkin 1995, 242-263.

1064 Cf. Ricketson 1987, 462; Dworkin 1995, 234-235; Cornish 1989, 449. Ricketson 1987, 459, is of the opinion that these forms of protection are 'piecemeal in their operation'. Insufficiencies are also pointed out by Peifer 1993, 337.

1065 Cf. Dworkin 1995, 238-239. Meanwhile, Australian copyright law has been amended and contains provisions on moral rights protection.

1066 Cf. Dworkin 1995, 239-242; Ginsburg 1991, 595; Peifer 1993, 329-330. In the US, section 43(a) of the Lanham Trademark Act, 15 U.S.C. §1125(a), in particular, serves as a vehicle to lend weight to privacy and personality concerns of authors. Cf. Dworkin, ibid., 235-236; Ginsburg, ibid., 596-597; Peifer, ibid., 332-333.

1067 Cf. Ginsburg 1991, 598-600; Peifer 1993, 347-351.

1068 See Dworkin 1995, 245-257 and Cornish 1989, 449-452.

1069 See CDPA, 1988, §§ 77-89, 94-95 and 103.

1070 Cf. Ginsburg 1991, 604; Dworkin 1995, 257-258.

1071 See Ginsburg 1991, 604. Cornish 1989, 452, nevertheless, takes a slightly optimistic view: 'While the new statutory provisions lay very considerable constraints on the operation of the new law, there also remains room for manoeuvre by the courts.'

Owing to the missing agreement on strong moral rights' protection throughout copyright's legal traditions, the authors' position in the field of non-economic interests is weakened at the international level. Nonetheless, Ricketson argues in favour of moral rights protection in connection with the expression 'legitimate interests': 'In light of the obligation to protect moral rights under Article 6*bis*, it follows that the expression "legitimate interests" must extend to both the pecuniary and non-pecuniary interests of authors.'[1072] In the following, it will accordingly be examined whether non-economic interests are encompassed by the third criterion. In subsection 4.6.3.1, attention will be devoted to the three-step tests in the Berne Convention and the WIPO Copyright Treaty. Subsection 4.6.3.2 deals with TRIPs.

4.6.3.1 ARTICLE 9(2) BC AND ARTICLE 10 WCT

From the formal recognition of the right of attribution and the integrity right in article 6*bis* BC, it need not necessarily be inferred that allowance must be made for moral rights protection when interpreting the expression 'legitimate interests'. Instead, it is arguable that sufficient weight is lent to the authors' non-economic interests in article 6*bis* itself. Exceptions to the right of attribution or the integrity right reflected in article 6*bis* are not allowed under the Berne Convention anyway. Therefore, why should they additionally be taken into account in the context of the three-step test? The latter is an instrument for setting limits to limitations on exploitation rights. Correspondingly, it could be asserted that solely the economic interests of the authors should enter the picture.

As to the latter argument, it is to be pointed out, however, that the strict boundary line often drawn between economic and non-economic rights of the author is an artificial construct anyway. In practice, the distinction is blurred. If the integrity right is invoked to prevent colours from being added to a film originally in black and white,[1073] this claim for the protection of moral interests, undoubtedly, has economic ramifications. The same is true when the integrity right is brought to the fore to hinder broadcasting companies from interrupting the showing of a film on TV by commercials.[1074] Monistic copyright theory, as espoused, for instance, in Germany, explicitly recognises that the economic and moral concerns of authors are limbs of one uniform body of interests protected by copyright.[1075]

To explain the monistic concept of copyright, Ulmer used the picture of a tree. Copyright constitutes the tree's unitary trunk. The economic interests of the author on the one hand and his moral interests on the other are the two roots. The different faculties of authors are the tree's branches and twigs extracting their force

[1072] See Ricketson 1999, 70.
[1073] See for a description of this almost 'classical' case in which moral rights are brought to the fore for instance de Souza/Waelde 2002, 278.
[1074] Cf. Boiron/Duchevet 2002, 123-124.
[1075] Cf. Dietz 1995, 207.

sometimes solely from one root, sometimes from both.[1076] The situation may change from case to case. It is not deemed inconsistent if moral rights are invoked to assert monetary interests. The exercise of pecuniary rights, on the contrary, may serve personal and intellectual interests.[1077] As Dietz concludes,

> 'what are commonly called moral rights, on the one hand, and pecuniary rights, on the other hand, are not so unequivocally moral or economic as it would generally appear. Rather, these designations are based on terminological convenience; taken together, all of these faculties cover the whole spectrum of interests protected by copyright as a whole.'[1078]

To cover the whole spectrum of potential legitimate interests in the framework of the three-step test, it appears accordingly appropriate not to exclude moral interests of the author. This is even the more advisable as the absolute right rhetoric often to be heard in the context of *droit moral*,[1079] when scrutinised more thoroughly, turns out not to portray reality correctly. As Quaedvlieg has shown, the allegedly absolute moral rights of the author are frequently subjected to a weighing process, in the course of which competing interests may be favoured.[1080] In particular, employment contracts or the need for functionality which, for instance, is strong in the case of buildings, are capable of forcing the author's moral rights onto the sidelines.[1081] Even in France, the 'mother country' of *droit moral*, authors – and particularly employed authors – must endure exposure to certain restrictions imposed on their moral rights.[1082] Against this backdrop, Quaedvlieg's view can be endorsed that moral rights are not absolute. In practice, the conceptual contours of the right of integrity, for instance, are not unlikely to be traced along the lines of principles like fairness and equity.[1083]

Therefore, it makes sense to include the moral interests of the author in the proportionality test inhering in the third criterion of the three-step test. This offers the chance of factoring an author's personal and intellectual interests into the equation – with all their economic ramifications. The balancing exercise may ultimately lead to more effective protection[1084] than reiterating the mantra of the absoluteness of moral rights while tacitly compromising them. Besides the traditional example of parody, which deeply impacts on an author's interest in the integrity of his work,[1085] the threat posed to moral rights protection in the emerging

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[1076] See Ulmer 1980, 116.
[1077] Cf. the examples given by Dietz 1995, 211-212.
[1078] See Dietz 1995, 211.
[1079] Cf. the examples given by Quaedvlieg 1992, 19.
[1080] See the overview given by Quaedvlieg 1992, 19-38. Cf. Goldstein 2001, 292.
[1081] Cf. Quaedvlieg 1992, 26-31.
[1082] Cf. Boiron/Duchevet 2002, 122-125; Lucas-Schloetter 2002, 3-7.
[1083] See Quaedvlieg 1992, 42.
[1084] Cf. the examples given by Quaedvlieg 1992, 45-53.
[1085] Cf. Goldstein 2001, 292.

information society can be brought to the fore to fortify this line of argument. The digital environment shows that both facets of article 6*bis* BC, the right of integrity and the right of attribution, constitute a serious and substantial concern of the authors which is of particular importance, for instance, with regard to reproductions. The integrity right serves as a weapon against manipulations of the work.[1086] Digital reproduction techniques encourage the encroachment upon the interest in accuracy of reproduction. They afford users, profiting from limitations, almost unrestricted possibilities of distorting, mutilating and modifying an author's expression. The work or parts thereof can easily be restructured, remodelled or combined with other material.[1087] The easiness of manipulations might furthermore lead to carelessness in respect of the author's right of attribution.[1088] Therefore, the need for proper acknowledgement of authorship can scarcely be underestimated in the digital environment as well.

In the Berne Convention and the WIPO Copyright Treaty, an identical framework is set out for the protection of non-economic interests in connection with the three-step test. The WCT is closely linked with the Berne Convention. Article 1(1) of the WCT provides that it is a special agreement within the meaning of article 20 BC. Therefore, contracting parties may not fall short of the level of protection reached in the Berne Convention.[1089] Furthermore, article 1(4) WCT ensures compliance with articles 1 to 21 of the Convention and its appendix. Article 6*bis* BC is encompassed by this reference.[1090] Moreover, the proximity to the Berne Convention was emphasised in the basic proposal for the later article 10 WCT. It was pointed out that the interpretation of the three-step test in the context of the WCT should follow 'the established interpretation of Article 9(2) of the Berne Convention'.[1091] Therefore, the expression 'legitimate interests' can be given the same meaning as in the Berne Convention. Besides the authors' economic interest, the third criterion of the three-step tests of article 9(2) BC and article 10 WCT, therefore, refer to the non-economic interest in the acknowledgement of authorship and a work's integrity, as set out in article 6*bis* BC.

4.6.3.2 ARTICLE 13 TRIPS

The TRIPs Agreement sheds a somewhat different light on copyright than the Berne Convention. The protection of literary and artistic works does not form an end in itself. By contrast, the preamble of the Agreement expresses the members' desire to

[1086] Cf. Schricker 1997, 80. De Souza/Waelde 2002, 281, are of the opinion that an author might already consider a work's translation into digital form a violation of his moral right of integrity.
[1087] Cf. Schricker 1997, 80; Ricketson 1999, 89; Boiron/Duchevet 2002, 124.
[1088] Cf. Ricketson 1999, 89; Schricker 1997, 81.
[1089] Cf. Ficsor 1997, 199-200.
[1090] Cf. Francon 1997, 11.
[1091] See WIPO Doc. CRNR/DC/4, § 12.05.

'reduce distortions and impediments to international trade'.[1092] The trade orientation has left its mark in the third criterion of the three-step test of article 13 TRIPs. Instead of calling on the legislator, in line with article 9(2) BC, to make allowance for 'the legitimate interests of the author', article 13 devotes attention to 'the legitimate interests of the right holder'. The difference in wording is the more striking, as article 11 TRIPs refers to the 'authors and their successors in title'. This formulation corresponds to the use of the word 'author' in the Berne Convention. Article 2(6) BC enunciates that the protection granted in the Convention 'shall operate for the benefit of the author and his successors in title'. The documents of the GATT Uruguay Round leave the interpreter in the dark as regards the change of wording in article 13 TRIPs. Nevertheless, its meaning can be inferred from the general context in which the three-step test has been placed in TRIPs.

First of all, the term 'right holder' reflects the general orientation of the TRIPs Agreement. The protection of copyright is subjected to the primary objective to foster international trade. Accordingly, the Agreement is not concerned with the person of the author, as creator of literary and artistic works. First and foremost, it simply focuses on those instances allowing a work to enter the market and take part in international trade.[1093] Viewed from this perspective, the reference to the interests of the right holder in article 13 appears logical. Article 11 introduces rental rights in international copyright law. Hence, its drafters had to make clear who is initially vested with these new rights. The author could hardly be replaced with the right holder. Mention of the authors not only in article 11 but also in article 13, however, would have ensured consistency in wording throughout TRIPs' copyright section. The reason for sacrificing the consistency of wording can be seen in TRIPs' imperviousness to moral rights protection.[1094] Article 9(1) TRIPs unequivocally excludes article 6*bis* BC and the rights derived therefrom from the incorporation of provisions of the Berne Convention into the TRIPs Agreement.

However, the clarity of this exclusion is endangered by the reference to article 20 BC. This provision is encompassed by article 9(1) TRIPs and permits the members of the Berne Union to enter into special agreements among themselves only 'in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention'. As already elaborated above, there is substantial reason to assume that the TRIPs Agreement itself is to be qualified as a special agreement in the sense of article 20

[1092] Cf. section 3.1.2 above.

[1093] This need not be and, in most cases, will not be the creator of the work himself. Instead, it is more likely that an assignee or licensee places the work on the market. Common law copyright systems, furthermore, do not necessarily regard the physical creator of a work as the author. Pursuant to the 'work made for hire' doctrine, the author may also be the employer of the work's creator. Cf. Ginsburg 1991, 596.

[1094] The US, as one of the driving forces behind the TRIPs Agreement, opposed the inclusion of moral rights protection. Cf. Gervais 1998, 72; Dietz 1993, 312.

BC.[1095] The inclusion of article 20 BC in the TRIPs Agreement could therefore be understood to force the contracting parties of TRIPs to ensure that the Agreement is interpreted in a way that increases the protection of authors or at least in no way contravenes the Berne Convention.[1096] In this line of reasoning, it is arguable that the interests underlying article 6*bis* BC must be observed irrespective of the explicit exclusion of the provision itself in article 9(1) TRIPs.[1097] A reference to the 'legitimate interests of the author' in article 13 TRIPs, therefore, could easily have led to the understanding that the authors' non-economic interests, as solidified in article 6*bis* BC, must be taken into account.

The formulation, 'legitimate interests of the right holder', bars interpreters from following the described line of reasoning. The traditional, continental European concept of *droit moral* is inseparably linked with the author. A work is regarded as a materialisation of its creator's personality. Successors of the author clearly have to enforce the moral rights *in nomine auctoris*. They receive these rights to respect the work and the person of the author.[1098] The author himself cannot assign or licence moral rights; only waiver is possible.[1099] Therefore, the neutral mention of the right holder in article 13 TRIPs cannot be understood as a reference to the author insofar as moral rights are concerned. If this had really been intended by the drafters of the TRIPs Agreement, they would have referred directly to the author and his successors in title, like in article 11 TRIPs. Furthermore, they would not have excluded article 6*bis* BC.

The term 'right holder' underlines the repudiation of the concept of moral rights. It corroborates the imperviousness of the TRIPs Agreement to any form of moral rights protection. The moral rights of the Berne Convention are not only placed beyond its scope, but also prevented from indirectly influencing its framework. Article 13 TRIPs is rendered incapable of serving as a means of lending weight to non-economic interests.[1100]

In sum, the circle of interests that must be taken into account in the context of the third criterion can be circumscribed as follows: the economic interest of the authors in the exploitation of the exclusive rights recognised in international copyright law always plays a decisive role. In the field of non-economic interests, however, a distinction must be made between article 9(2) BC and article 10 WCT on the one

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[1095] See subsection 3.2.2.

[1096] Cf. Gervais 1998, 72, and subsection 3.2.2 above.

[1097] Cf. Gervais 1998, 72, who is of the opinion that the task not to contravene the Berne Convention has to be extended to article 6*bis*. From his point of view, the inclusion of article 20 includes article 6*bis*. This assumption, however, does not rest on a firm basis. Doubt must be cast upon the result that the clear exclusion of article 6*bis*, as laid down in the second sentence of article 9(1) TRIPs, is compromised by the first sentence of this paragraph. It appears more convincing to assume that the inclusion of article 20 BC is also limited insofar as the moral rights of article 6*bis* are concerned.

[1098] Cf. Dietz 1995, 217.

[1099] Provisions on waiver of moral rights differ substantially throughout civil law countries. See the survey conducted by Dietz 1995, 219-225. Cf. also Schardt 1993, 320-321.

[1100] Cf. Ricketson 1999, 81.

hand, and article 13 TRIPs on the other. Non-economic interests are prevented from influencing the framework of the latter provision. Article 9(2) BC and article 10 WCT, by contrast, afford authors moral rights protection. The author's interest in the acknowledgement of authorship and a work's integrity, as set out in article 6*bis* BC, can be taken into account in the framework of these provisions.

4.6.4 THE PROPORTIONALITY TEST

The proportionality test to be carried out in the framework of the third criterion comprises two elements. Firstly, the circle of relevant interests of the authors is confined to interests that can be qualified as legitimate. Secondly, a prejudice to these interests is forbidden if it reaches an unreasonable level. These two elements entered the picture successively. The potential harm to the authors' legitimate interests was not factored into the equation until a committee of governmental experts, in 1965, discussed the initial, preliminary draft which had been presented by the study group undertaking the preparatory work for the 1967 Stockholm Conference.[1101] In the course of the committee's deliberations, one delegation stated that the formula tabled by the study group 'might prove dangerous to the authors' legitimate interests'.[1102] In consequence, the committee gave its approval to a draft that permitted a work's reproduction 'in certain particular cases where the reproduction is not contrary to the legitimate interests of the author and does not conflict with a normal exploitation of the work'.[1103] On the eve of the 1967 Stockholm Conference, the third criterion of the three-step test, therefore, was still incomplete. The second element, the prohibition of an unreasonable prejudice, was missing. It owes its existence to the intervention of the UK delegation. The UK proposal referred to 'certain special cases where the reproduction does not unreasonably prejudice the legitimate interests of the author and does not conflict with a normal exploitation'.[1104] The three-step test was based on this amendment. Ultimately, merely the order of the two conditions delimiting the basic rule that limitations must be certain special cases was reversed.[1105]

It can easily be seen that the two elements of the third criterion (the legitimacy of interests and the reasonableness of prejudices) point in the same direction: a balance between the author's and the public's concerns must be found. A prejudice to interests of the author is permitted. An unreasonable prejudice to legitimate interests, however, is prohibited. Nonetheless, it makes sense to reflect the necessity of finding a balanced proportion by setting forth two distinct elements. To explain why, the following picture can be drawn: copyright law is centred round the

[1101] See Doc. S/1, Records 1967, 112. Cf. subsection 3.1.2.
[1102] See Doc. S/1, Records 1967, 112.
[1103] See Doc. S/1, Records 1967, 113. Cf. subsection 3.1.2.
[1104] See Doc. S/13, Records 1967, 630.
[1105] Cf. subsection 3.1.2.

delicate balance between grants and reservations. On one side of this balance, the economic and non-economic interests of authors of already existing works can be found. On the other side, the interests of users – a group encompassing authors wishing to build upon the work of their predecessors[1106] – are located. If a proper balance between the concerns of authors and users is to be struck, both sides must necessarily take a step towards the centre. The two elements of the third criterion mirror these two steps. The authors cannot assert each and every concern. Instead, only legitimate interests are relevant. As a countermove, the users recognise that copyright limitations in their favour must keep within reasonable limits. An unreasonable prejudice is unacceptable.

The third criterion paves the way for the establishment of a proper copyright balance by reflecting both steps to be taken. The corresponding proportionality test is consequently an internal two-step test. Its first step concerns the question which interests of the author are legitimate under the given circumstances. The second question is whether these relevant interests are unreasonably prejudiced. Subsequently, both elements will be examined in detail. In the following subsection 4.6.4.1, the identification of legitimate interests will be discussed. How to avoid an unreasonable prejudice will be explained in subsection 4.6.4.2.

4.6.4.1 IDENTIFYING LEGITIMATE INTERESTS

An interest of the author can be qualified as legitimate if it is 'conformable to law or rule; sanctioned or authorized by law or right' – thus, if it is 'lawful; proper'.[1107] In the case of conformity to a recognised standard type, the term may furthermore simply mean 'normal' or 'regular'.[1108] Attempts to interpret the term 'legitimate' have particularly been made by WTO Panels. Two Panel reports touched upon the three-step test so far. The first concerned the patent protection of pharmaceutical products in Canada and dealt with the three-step test of the patent section of the TRIPs Agreement, laid down in article 30.[1109] The second report concerned section 110(5) of the US Copyright Act. It dealt directly with the three-step test in international copyright law, as set out in article 13 TRIPs.[1110]

The WTO Copyright Panel reporting on section 110(5) of the US Copyright Act approached the question of legitimate interests from a legal positivist perspective. 'In our view', the Panel stated, 'one – albeit incomplete and thus conservative – way of looking at legitimate interests is the economic value of the exclusive rights conferred by copyright on their holders'.[1111] It appears safe to assume that this

[1106] Cf. section 2.3.
[1107] See the Oxford English Dictionary.
[1108] See the Oxford English Dictionary.
[1109] The report on Canada's protection regime for pharmaceutical products was adopted on 7 April 2000. See WTO Panel – Patent 2000, §§ 7.60ff. for a discussion of the third criterion of article 30 TRIPs.
[1110] See for a detailed discussion of these two Panel reports Ficsor 2002b, 111-251.
[1111] See WTO Panel – Copyright 2000, § 6.227.

statement indicates that the Panel was of the opinion that the term 'legitimate' primarily means conformity with and authorisation by the law.[1112] In consequence, the expression 'legitimate interests' is de facto equated with 'legal interests'.[1113] Notwithstanding its own focus on the economic value of exclusive rights, however, the Copyright Panel observed that the term 'legitimate' also has 'the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights'.[1114] This point was conceded with an eye to the earlier Panel report on patent protection of pharmaceutical products in Canada.[1115]

As already mentioned, the three-step test of the patent section of TRIPs, laid down in article 30 thereof, was interpreted in this report. The third criterion of article 30 TRIPs forbids an unreasonable prejudice to 'the legitimate interests of the patent owner, taking account of the legitimate interests of third parties'. The Patent Panel reporting on Canada's protection regime for pharmaceutical products rebutted an argument, advanced by the European Communities,[1116] that legitimate interests should be viewed through the prism of legal positivism and, thus, actually identified with legal interests. Besides other reasons, this conclusion was drawn on the grounds that 'a definition equating "legitimate interests" with legal interests makes no sense at all when applied to the final phrase of Article 30 referring to the "legitimate interests" of third parties'.[1117] Hence, to a certain extent, the approach pursued by the Patent Panel evolves from the particular situation in the field of patent protection. Nonetheless, it is noteworthy that this Panel unequivocally rejected a legal positivist approach. It elaborated that

> 'to make sense of the term "legitimate interests" in this context, that term must be defined in the way it is often used in legal discourse – as a normative claim calling for the protection of interests that are "justifiable" in the sense that they are supported by relevant public policies or other social norms'.[1118]

To illustrate its line of reasoning, the Patent Panel brought an exception into focus under which use of the patented product for scientific experimentation, during the term of the patent and without consent, is not an infringement. It explained:

> 'It is often argued that this exception is based on the notion that a key public policy purpose underlying patent laws is to facilitate the dissemination and advancement of technical knowledge and that allowing the patent owner to prevent experimental use during the term of the patent would frustrate part of

[1112] Cf. the definition given in the Oxford English Dictionary.
[1113] Cf. the explanations given by Ficsor 2002b, 141.
[1114] See WTO Panel – Copyright 2000, § 6.224.
[1115] See WTO Panel – Copyright 2000, § 6.227, footnote 202.
[1116] Cf. WTO Panel – Patent 2000, § 7.62.
[1117] See WTO Panel – Patent 2000, § 7.68.
[1118] See WTO Panel – Patent 2000, § 7.69.

> the purpose of the requirement that the nature of the invention be disclosed to the public. To the contrary, the argument concludes, under the policy of the patent laws, both society and the scientist have a "legitimate interest" in using the patent disclosure to support the advance of science and technology.'[1119]

The survey of WTO Panel reports shows that there are two different approaches to the problem of legitimacy. The Copyright Panel touched upon both. Its own legal positivist perspective focuses on 'the economic value of the exclusive rights conferred by copyright on their holders'.[1120] However, the Panel did not say that legitimate interests are limited to this economic value.[1121] By contrast, it referred to the report on patent protection of pharmaceutical products in Canada and, thus, to the second approach. The Patent Panel understood the expression 'legitimate interests' as a 'normative claim calling for the protection of interests that are "justifiable" in the sense that they are supported by relevant public policies or other social norms'.[1122] This approach can be called the normative perspective. The line of argument of the Patent Panel runs as follows: if one is ready to conceive of patent protection as a means to induce inventors to disclose their invention to the public in order to facilitate the dissemination and advancement of technical knowledge, it appears illegitimate to prevent experimental use during the term of the patent.[1123] As the Copyright Panel itself concedes that this normative perspective catches the claim for legitimacy more completely than its own legal positivist view, there seems to be no reason why preference should be given to the narrower legal positivist perspective equating 'legitimate interests' with 'legal interests'.

Nevertheless, Ficsor espouses the legal positivist perspective. He does not disapprove the normative view stating that the interests at stake must be justifiable in the light of relevant public policies or other social norms. He is merely of the opinion that the further prohibition of an unreasonable prejudice is capable of underlining this normative position as well. For this reason, he fears that the test procedure could become tautological and asserts that

> 'the "justification" test – in harmony with the […] non-legal normative sense of "legitimacy" – concerning the limits of defensible interests of authors, would be just repeated within this third, interest-related condition of the three-step test'.[1124]

[1119] See WTO Panel – Patent 2000, § 7.69.

[1120] See WTO Panel – Copyright 2000, § 6.227.

[1121] See WTO Panel – Copyright 2000, § 6.227.

[1122] See WTO Panel – Patent 2000, § 7.69.

[1123] See the example given by the WTO Panel – Patent 2000, § 7.69.

[1124] See Ficsor 2002b, 147. To support his argument, he refers to the evolution of the third criterion in the course of the preparatory work undertaken for the 1967 Stockholm Conference. Cf. Ficsor 2002b, 141-147. See the explanations given at the beginning of subsection 4.6.4.

This fear is unfounded. Admittedly, the two elements of the proportionality test are closely connected with each other. They both point towards the necessity to strike a proper balance in copyright law. As already elaborated above, however, the two elements – the legitimacy of interests on the side of authors, and the reasonableness of prejudices on the side of users – represent the two steps towards the core of copyright's balance that must be taken to establish proportionality. Instead of being tautological, a complete proportionality test is only possible if the justifiability of the interests of both authors and users is examined. The legal positivist approach takes it for granted that the author's interests are justifiable. By equating the term 'legitimate interests' with 'legal interests', however, it causes the whole edifice erected by the third criterion to collapse. If the legitimate interests of the author are nothing but his legal interests, the reference to interests as such becomes questionable. If this meaning really was intended, it could easily have been given expression by simply forbidding an unreasonable prejudice to the author's rights instead of mysteriously referring to 'legitimate interests'. The legal positivist approach, thus, must be rejected. It is right to understand the expression 'legitimate interests' instead, like the WTO Patent Panel, as a 'normative claim calling for the protection of interests that are "justifiable" in the sense that they are supported by relevant public policies or other social norms'.[1125]

In the field of copyright, several public policy considerations can be considered in this connection. As elaborated in chapter 2, the principal objective of copyright protection is the promotion of cultural diversity. Under this heading, weight can be lent to several further arguments:[1126] the protection of works, the creation of which tends to be rooted in an idealistic motivation, like personal satisfaction, the desire for respect or esteem, or the urge for artistic expression, can primarily be supported by the natural law argument and the furtherance of freedom of expression. If the aim to succeed commercially is central to the creation of a work, its protection can foremost be explained by the utilitarian incentive rationale and corresponding industry policy. The crucial question that must be asked in the context of the third criterion, then, is whether the economic and non-economic interests which an author has in respect of a certain way of using his work are justifiable in the light of these rationales of copyright protection. If this question can be answered in the affirmative, the author's interest is legitimate. If not, it is illegitimate and therefore irrelevant to the proportionality test.

To point the right way for the outlined inquiry into the justifiability of an author's interests, a principle can be invoked that is commonly associated with the proportionality test. It is usually demanded that the measure in question is suitable for the realisation of the envisaged objective.[1127] An author's interest can

[1125] See WTO Panel – Patent 2000, § 7.69.

[1126] See for an overview subsections 2.1.2 and 2.1.3.

[1127] Guidance in respect of this 'principle of suitability' is especially provided by German law where the suitability test is explicitly recognised as a part of the concept of proportionality. Cf. Jowell/Lester 1988, 52; Emmerich-Fritsche 2000, 151. As the latter author shows, the principle of suitability is

accordingly only be deemed justifiable if its assertion is suitable for promoting the attainment of one of the aforementioned objectives.[1128] It would be illegitimate to insist on an interest that is not conducive to the realisation of one of the rationales underlying copyright protection anyhow. Placing an ineffective, useless constraint on the public domain is disproportionate. This situation arises particularly when the authors are hindered from exploiting their works by market imperfections.

In the analogue world, it is for instance useless to erode personal and internal use privileges in order to afford authors the opportunity of exerting control over the use of their works. Market failure inhibits them from doing so.[1129] The abolition of this type of copyright limitations in the analogue environment, thus, does not contribute to the realisation of one of the objectives underlying copyright protection. A corresponding interest of the author is unjustifiable and illegitimate. What remains is the interest he may have in some sort of reward. Private copying has become a mass phenomenon.[1130] A gratification for the myriad copies made by private users will spur the productivity of an author who aims to succeed commercially. An author who is not induced to create intellectual works by the prospect of monetary profits is shown that his work is appreciated. The extra income, moreover, enhances an author's independence of patrons, thereby encouraging free speech. Hence, the independence of intellectual creations and their production can be enhanced if some sort of monetary reward for private use is given to the authors. In consequence, cultural diversity is promoted. An author's interest in being remunerated for private copying of his work is thus justifiable and legitimate.

An author's economic interest in controlling the use of a work, however, again becomes unjustifiable and illegitimate insofar as objectionable uses are concerned. As explained above, it is unlikely that creators of intellectual works will in general develop or license others to develop markets for critical reviews or lampoons of their works.[1131] To subject these markets to the authors' control, thus, is unsuitable for promoting the realisation of one of the objectives underlying copyright

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also an element of the proportionality test in EC law. In this context, its outlines are drawn along the lines of the German conception by the European Court of Justice. Cf. Emmerich-Fritsche 2000, 207-211. Considerations of this kind, furthermore, are not alien to the European Court of Human Rights. Cf. the Sunday Times case, ECHR Judgement of April 26, 1979, Series A No. 30, §§ 59-68. Cf. Emmerich-Fritsche 2000, 190; Jowell/Lester 1988, 58-59; Hugenholtz 2002, 246-247 and 262.

1128 The German Federal Constitutional Court, the Bundesverfassungsgericht, refrains from qualifying a means as unsuitable if the pursued objective cannot be fully attained. To answer the question of suitability in the affirmative, it is deemed sufficient that, with the help of the chosen means, the desired objective can be promoted. Cf. BVerfGE 30, 292 (316); 33, 171 (187); 39, 210 (230); 40, 196 (222). The reason for this reserve is the danger evolving from the replacement of the legislator's discretion with the judgement of the courts. Cf. Emmerich-Fritsche 2000, 151. This restriction of the rigidity of the suitability test appears appropriate in the context of the three-step test as well. Cf. Jackson 2000, 154; Helfer 1998, 404.

1129 Cf. subsection 2.2.2.

1130 Cf. subsection 4.5.3.2. See Ficsor 1981, 60-61.

1131 Cf. subsection 4.5.4.1. Cf. the US Supreme Court decision Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), II C.

protection. Authors would refrain from exploiting their works in this area anyway. In this case, the economic interests of authors are therefore unjustifiable. The moral interests, however, occupy centre stage. In particular, uses criticising or ridiculing a work may encroach upon non-economic interests, such as the interest in a work's integrity. This concern of the author is accordingly of particular relevance and must not be unreasonably prejudiced.[1132]

A ramification of the suitability principle is the consideration that the author's interests must give way if a limitation is *evidently* better suited to achieving the goals of copyright. If a work is used for the purpose of quotation, for instance, the economic interests of the quoted author come second. Very strong freedom of expression values underlie the right to quote. Like the grant of exclusive rights itself, it substantially contributes to intellectual debate.[1133] Moreover, considerations of intergenerational equity urge the exemption of quotations.[1134] Later authors ought to be free to use the work of their predecessors if they depend on that use to express themselves.[1135] Admittedly, quoted authors could derive some extra income from licensing the making of quotations. In the field of commercial productions, authors could thus be vested with a further incentive to create. Authors following the maxim '*l'art pour l'art*' would obtain a further individual source of income enhancing their independence of patrons.[1136] However, these benefits are minimal and negligible in comparison to the detriment to other authors wishing to make quotations. It would have a corrosive effect on intellectual debate. The potential harm flowing from the exemption of quotations to the economic interests of a quoted author is thus evidently outweighed by the competing user interests at stake. On balance, the author's economic interests must be considered illegitimate and irrelevant. The moral interests of the quoted author, by contrast, must strictly be observed. The original work must already have been made lawfully available to the public and be reproduced accurately. The author's name is to be clearly indicated. Otherwise, legitimate moral interests are unreasonably prejudiced.[1137]

A further example is the incidental inclusion of a work in a report on current events. The author could establish a market for this kind of incidental use and derive some profit. This extra income would give commercially oriented authors an additional incentive to create and authors following idealistic motives more

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[1132] The author's right of integrity set out in article 6*bis* BC can be asserted against reproductions for parody. Cf. Ricketson 1987, 468, elaborating that 'any "rewriting" in the case of literary or dramatic work, for instance, for purposes of a parody' touches upon article 6*bis*.

[1133] Cf. Ricketson 1987, 489.

[1134] See section 2.3.

[1135] Cf. the Germania 3-decision of the German Federal Constitutional Court, BVerfG, Zeitschrift für Urheber- und Medienrecht 2000, 869. See subsection 2.2.1.

[1136] Cf. subsection 2.1.3.

[1137] Cf. articles 10(1) and 10(3) BC. The inevitable encroachment upon the right of integrity arising from the fact that only passages of the original work are quoted instead of the entire work, however, is irrelevant. Cf. Quaedvlieg 1992, 22-23.

independence from patronage.[1138] The freedom of the press, however, is a facet of freedom of expression that is of paramount importance.[1139] Press privileges, like the permission to include works seen or heard incidentally in the course of a current event,[1140] are therefore furnished with a strong underpinning. On balance, the potential benefit to the author whose work is included incidentally is thus far from being capable of outweighing the threatening detriment to the important competing interests at stake. It would evidently be disproportionate to uphold the economic interests of an author whose work is seen or heard incidentally in the course of a current event. Under the given circumstances, the economic interest of this author in exploiting a work's incidental inclusion is therefore illegitimate and, in consequence, irrelevant.

A clarification seems appropriate in this context. Positing that in some cases the author's economic interest must give way, should not be misunderstood as a general attack on minor sources of income. Instead, it is to be repeated that in the framework of the third criterion, each and every possibility of deriving economic profit from a work carries weight and may accordingly not so readily be put aside.[1141] The making of quotations and a work's incidental inclusion in a report on current events are exceptional cases. Under the given extraordinary circumstances, an evident imbalance between the benefit of authors and the detriment to users comes to the fore which clearly tips the scale in favour of the users. Section 110(5)(B) of the US Copyright Act, on which the aforementioned WTO Copyright Panel reported, is suitable for substantiating that minor sources of royalty revenue are not in danger of being neglected when it comes to identifying an author's legitimate interests. Under the so-called 'business exemption' set out in section 110(5)(B), commercial establishments such as bars, shops, and restaurants which do not exceed a certain size or which meet certain equipment requirements, may play radio and TV music without paying any royalty fees to collecting societies.

This exemption encroaches upon a typical ramification of a work's broadcast that is explicitly pointed out in article 11*bis*(1)(iii) BC. Authors clearly have the prospect of some royalty revenue accruing from this typical use of their work. The extra income spurs the productivity of authors seeking to succeed commercially and affords others more independence from patrons.[1142] Unlike the exemption of the making of quotations or the incidental inclusion of a work in a press report, however, the importance of section 110(5)(B) is far from towering above the one of other limitations. It neither substantially contributes to intellectual debate and the information of the public nor promotes intergenerational equity. It simply helps bars, shops and restaurants to engender the inevitable background music often

[1138] Cf. subsection 2.1.3.
[1139] Cf. subsection 2.2.1.
[1140] See article 10*bis*(2) BC.
[1141] Cf. subsection 4.6.2.
[1142] Cf. subsection 2.1.3.

perceived as indispensable. This justification is incapable of outweighing the author's loss of income. Consequently, there is no reason to assume that it would be illegitimate for authors to insist on their economic interest in deriving profit from the playing of radio and TV music in commercial establishments such as bars, shops and restaurants.

Finally, the following example of a deadlock can be given: if passages of a work or entire small works are included in a schoolbook, important social interests are at stake. A work's use for teaching contributes substantially to the dissemination of knowledge. Moreover, considerations of intergenerational equity support the use of copyrighted material for teaching.[1143] On the side of the authors, however, vital interests are to be found as well. The included work will often stem from an author pursuing idealistic motives. If he is adequately rewarded, this will testify to the specific appreciation of his work. The pecuniary return will enhance his financial independence from patronage.[1144] It must moreover be borne in mind that the pecuniary reward is given to authors who made noteworthy cultural contributions – substantial enough to be considered for the inclusion in a schoolbook. Feelings of rightness and justice, thus, militate against leaving the author empty-handed. A poem, for instance, may be reproduced more often in a schoolbook than in the original publication. In the case of a commercial production, the pecuniary reward, in addition, has a stimulating effect. It serves as an incentive to create.[1145]

On balance, it can be said that the involved user interests are of particular importance but not as central to the promotion of society's cultural life as the possibility of quoting.[1146] Furthermore, the author's interests must be considered. They are not as marginal as in the case of a work's incidental inclusion in a report on current events. That the user interest in including a work in a schoolbook outweighs the author's competing economic interest *evidently*, thus, cannot be concluded. On the contrary, the author's interest in receiving a pecuniary reward for a work's reproduction in a schoolbook appears legitimate. It must consequently not be unreasonably prejudiced. To find an appropriate solution, it is therefore advisable to have recourse to the payment of equitable remuneration.[1147] The three-step test offers this possibility as a means to reduce the prejudice caused by a limitation to a reasonable level.[1148] It is a feature of the second part of the proportionality test that will be discussed in the next subsection.

[1143] Cf. subsection 2.2.2 and section 2.3.

[1144] Cf. subsections 2.1.2 and 2.1.3.

[1145] Cf. subsections 2.1.2 and 2.1.3.

[1146] Firstly, the making of quotations directly serves freedom of expression values instead of generally serving the dissemination of information. Cf. subsections 2.2.1 and 2.2.2. Moreover, considerations of intergenerational equity are stronger in the case of the making of quotations. Cf. section 2.3.

[1147] Cf. the decision 'Kirchen- und Schulgebrauch' of the German Federal Constitutional Court, BVerfGE 31, 229 (244-245).

[1148] Cf. subsections 3.1.2, 3.3.1, 4.3.2 and 4.3.3.

4.6.4.2 AVOIDING AN UNREASONABLE PREJUDICE

After delineating the authors' legitimate interests, the question of an unreasonable prejudice must be examined. The ordinary meaning of the term 'prejudice' connotes 'injury, damage, hurt, loss'.[1149] A prejudice can be regarded as 'unreasonable' if it is 'inequitable, unfair; unjustifiable',[1150] for instance, because of excessiveness in amount or degree. It may not go 'beyond what is reasonable or equitable', not be 'extravagant or excessive'.[1151] Hence, the prejudice to the authors' legitimate interest must be 'of such an amount, size, number, etc., as is judged to be appropriate or suitable to the circumstances or purpose'.[1152] It has to be proportionate.[1153]

This second element of the proportionality test carries on where the first criterion of the three-step test, the basic rule that limitations must be certain special cases, left off. That there is a mutual relationship between the first and the third criterion has already been emphasised above.[1154] To pass the first step of the three-step test, a limitation must be special in a qualitative sense. The outline of this qualitative requirement has been drawn as follows above: a careful weighing process must precede the adoption of a limitation at the national level. A cultural, social or economic concern must be invoked that serves as a rational justificatory basis for the limitation. In the light of the conflict of interests, the limitation's adoption must be plausible.[1155] The competing interest that consequently underlies each limitation reaching the final proportionality test, must now be brought into focus again. Its mere existence is already ensured by the basic rule that limitations must be certain special cases. In the framework of the proportionality test, the way in which it was reconciled with the author's legitimate interests must be scrutinised thoroughly. The content of the weighing process at the national level must be critically reviewed.

In principle, it can be posited in this context that, insofar as the objective underlying a limitation justifies the entailed prejudice to the author's legitimate interests, it can be approved. This can clearly be inferred from the French text of the Berne Convention.[1156] The translation of the expression 'unreasonable' into French posed some difficulties. At the 1967 Stockholm Conference, the terms *inéquitable, injustifié, appréciable* and *sensible* were under discussion. Finally, preference was given to the expression *'ne cause pas un préjudice injustifié'*.[1157] This formulation emphasises that a limitation must be brought into a state of justification to meet the

[1149] Cf. the Oxford English Dictionary.
[1150] Cf. the Oxford English Dictionary.
[1151] Cf. the Oxford English Dictionary.
[1152] Cf. the Oxford English Dictionary.
[1153] Cf. the Oxford English Dictionary.
[1154] See subsection 4.4.2.5.
[1155] See subsection 4.4.2.3.
[1156] See as to the particular importance of the French text subsection 4.1.2.6.
[1157] Cf. the discussion in Main Committee I, Records 1967, 883-885.

third criterion. Although the limitation might serve socially valuable ends, the prejudice to the legitimate interests of the author must not be a disproportionate. The detriment to the authors must be reasonably related to the benefit of the users. In other words: the room to manoeuvre created by national legislation for the user interest at stake must keep within reasonable limits.

To point the right way for examining a limitation in the light of these findings, the suitability principle that has already been embraced above to identify legitimate interests of the author can be re-invoked. At the beginning of the inquiry into an unreasonable prejudice, it must accordingly be ensured that a limitation is suitable for promoting the attainment of the objective pursued by its imposition on exclusive rights. The harm to the authors' legitimate interests which inevitably flows from any limitation cannot be justified if the relevant objective cannot be promoted with the help of the limitation under examination. To burden the authors with a useless limitation represents a clear instance of an unreasonable prejudice. Placing a constraint on authors' rights which does not correspond to the underpinning justifying its existence, undoubtedly causes an unreasonable prejudice.[1158]

Besides the suitability test, a second principle commonly associated with the proportionality test can be used to identify an unreasonable prejudice: the necessity test. A limitation must be the least harmful of more than one available means to obtain a particular objective. Consequently, it can be posited that those measures for achieving the objectives underlying a limitation must be pursued which cause the minimum injury to the legitimate interests of the author.[1159] It is to be noted in this context that the necessity test does not hinder the legislator from applying the best suited instrument. The different alternatives which are at the disposal of the legislator must have a comparable potential for realising the objective at stake. Less restrictive possibilities come into play only if they are capable of reaching the pursued objective as effectively as the current limitation.[1160] An unreasonable prejudice only arises if the least harmful means is not chosen even though there are equal alternatives.[1161]

[1158] See the explanations given in the previous subsection. Cf. Emmerich-Fritsche 2000, 151 and 207-211; Jowell/Lester 1988, 52.

[1159] See the description of this principle by Jowell/Lester 1988, 53, Birnhack 2003, 29. In the US, this requirement is known as the principle of the 'less restrictive alternative'. Cf. Jowell/Lester, ibid., 53. It also forms a part of the proportionality test that is applied by the European Court of Justice. See the decisions Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case 11/70 (1970) ECR 1125, §§ 8-12, and Bela-Mühle v. Grows-Farm, Case 114/76 (1977) ECR 1211, § 7. Cf. Jowell/Lester, ibid., 56-58; Emmerich-Fritsche 2000, 211-212. The German Federal Constitutional Court (Bundesverfassungsgericht) draws the outlines of the necessity test by enunciating that an instrument can be considered necessary to achieve a certain goal if the legislator 'nicht ein anderes, gleich wirksames, aber das Grundrecht weniger fühlbar einschränkendes Mittel hätte wählen können'. See BVerfGE 25, 1 (17); 30, 292 (316); 33, 171 (187).

[1160] Cf. Emmerich-Fritsche 2000, 151-152.

[1161] See the explanations given in the previous subsection. Cf. Jowell/Lester 1988, 53 and 56-58; Emmerich-Fritsche 2000, 211-212 and 151-152.

That considerations of this nature can guide the process of devising a limitation has already been demonstrated above in the context of personal use privileges in the digital environment. In this respect, the establishment of a library-administered personal use system has been recommended instead of upholding general personal use privileges.[1162] The considerations governing this decision are in line with the principle that the least harmful means must be chosen. It is to be expected that a refined digital library system enabling a work's personal use would be capable of promoting the dissemination of information and intergenerational equity as effectively as the general exemption of personal use in the digital environment. As the latter alternative has a much deeper impact on the marketing of works in the digital world, a library-administered system must be preferred.[1163] To extend general personal use privileges to the digital environment would militate against the principle that the least harmful means must be chosen. Consequently, it would unreasonably prejudice the author's legitimate economic interests.

A prominent feature in evaluating the intensity of the prejudice caused by a limitation is the payment of equitable remuneration. The three-step test allows compulsory licensing in the framework of the third criterion.[1164] Before considering the practical consequences of this feature, it is to be noted that the payment of equitable remuneration must be separated from the principle that the least harmful means is to be chosen. Otherwise, a limitation could only be imposed on author's rights if it is accompanied by the payment of monetary reward. Obviously, the adoption of a limitation A without providing for equitable remuneration always does more harm than the adoption of exactly the same limitation A accompanied by the obligation to pay equitable remuneration. The introduction of a limitation without providing for equitable remuneration can hardly ever be qualified as a less restrictive alternative when compared with the introduction of the same limitation linked with the obligation to pay equitable remuneration.

The three-step test, however, has always been understood to offer the possibility of setting limits to exclusive rights without remunerating the authors. At the 1967 Stockholm Conference, the following statement was made in the general report:

> 'If [the photocopying] implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted *without payment*, particularly for individual or scientific use.'[1165]

[1162] Cf. subsections 4.5.5.1 and 4.5.5.2.

[1163] The library-administered system has the advantage that users can be individualised and personal uses can be restricted. Cf. subsection 4.5.5.2.

[1164] Cf. subsections 3.1.2, 3.1.3.1, 3.3.1, 4.3.2 and 4.3.3.

[1165] See Report on the Work of Main Committee I, Records 1967, 1145-1146 (emphasis added).

In the framework of the prohibition of an unreasonable prejudice to the author's legitimate interests, two different outcomes are therefore possible. National legislation may be obliged to provide for the payment of equitable remuneration. However, certain uses can be permitted without payment. The principle that the least harmful means is to be chosen must therefore not be misused to divest national legislation of the latter possibility. The groundwork laid for the application of the three-step test at the Stockholm Conference precludes this result.

As to the payment of equitable remuneration in the context of the three-step test, two questions are pending. Firstly, it must be clarified what equitable remuneration means precisely. Secondly, it must be determined in which cases the payment of equitable remuneration is necessary and in which it is not. With regard to the first question, it must be pointed out that the field of equitable remuneration, at the international level, is more or less virgin territory. Commenting on article 13(1) BC, Ricketson takes the view that the expression 'equitable remuneration' must essentially mean that

> 'the author is to receive, for the compulsory use of his work, an equivalent remuneration to that which he would have received if he were free to authorise the use in the absence of a compulsory licensing provision'.[1166]

He admits, however, that 'no guidance as to the meaning of the expression "equitable remuneration" is to be found in the Convention'.[1167] Ricketson's somewhat idealistic position makes sense and appears desirable. However, it hardly portrays reality adequately – least of all within the realm of the three-step test. As can be seen from the passage quoted above, the payment of equitable remuneration was mentioned in the general report of the Stockholm Conference in connection with the internal use of copyrighted material in industrial undertakings. This example can be traced back to German legislation that entered into force on the eve of the 1967 Stockholm Conference.[1168] The 1965 Copyright Act of the FRG obliged enterprises, making copies for internal use, to remunerate the authors adequately. The precursor of this solution was a prior agreement reached in the FRG ensuring that a lump sum for photomechanical reproductions made in industrial undertakings is paid.[1169] The model underlying the example given in the general report of the Stockholm Conference, thus, bears scant resemblance to Ricketson's shining ideal.

Even worse, the fact must be faced that the 'equivalent remuneration to that which [an author] would have received if he were free to authorise the use in the absence of a compulsory licensing provision'[1170] can hardly ever be ascertained in the field of personal and internal use of copyrighted material – at least in the

[1166] See Ricketson 1987, 520.
[1167] See Ricketson 1987, 520. Cf. Ficsor 2002a, 275, who draws very similar conclusions.
[1168] See subsection 3.1.3.1.
[1169] See subsection 3.1.3.1. Cf. van Lingen 1969, 1067-1069; Ulmer 1965, 30; Hubmann 1966, 158.
[1170] See Ricketson 1987, 520.

analogue environment. Market failure prevents authors from developing corresponding markets. The ordinary retail price of the copied work may serve as an indicator of what the author might have received.[1171] However, in the past, national legislation did not vest authors with a monetary reward for personal or internal copying that could be suspected of coming close to this (presumably high) sum. The income accruing from levy systems that had already been established at the time of the Stockholm Conference in the FRG and were maintained after the three-step test had been adopted,[1172] for instance, can hardly be qualified even as a pale reflection of the profit an author freely authorising the use of his work could derive.[1173] Against this backdrop, the view that equitable remuneration amounts to the price a free author would have agreed upon can hardly be endorsed in the context of the three-step test. The reference to equitable remuneration in the general report of the Stockholm Conference rather points towards the payment of a lump sum.

This result foreshadows the response to the second question. No clear boundary line can be drawn between those cases in which equitable remuneration must be paid and others where this is unnecessary. Instead, it is to be concluded that the concept of equitable remuneration underlying the three-step test is a fluid transition from a state where no remuneration has to be paid to cases necessitating the payment of the price a free author would have received. It must be borne in mind that the payment of equitable remuneration serves as a means for avoiding that the prejudice inevitably resulting from a copyright limitation reaches an unreasonable level.[1174] In general, it can therefore be enunciated that equitable remuneration must be paid *insofar* as the limitation in question does not keep within reasonable limits. If the threshold of a reasonable prejudice is merely overstepped slightly, a relatively low sum is sufficient. If not, a higher monetary reward is required that appears fair and just under the given circumstances. The following examples can be given:

In respect of objectionable uses like parody, it has been concluded in the previous subsection that an author's economic interest is illegitimate. What remains are the legitimate moral interests at stake. This concern must be taken seriously. Parody depends on the use of portions of the original work in a modified, or even disfigured way. Hence, it necessarily encroaches upon the moral integrity right.[1175] Nonetheless, it cannot so readily be considered as a case in which an unreasonable prejudice is caused. Strong freedom of expression values underlie the use of a copyrighted work for the purpose of parody.[1176] At the core of this way of using a

[1171] However, cf. Schricker 2002, 739-743, criticising the rule that 10% of sales is to be regarded as an equitable remuneration.
[1172] See subsection 3.1.3.1.
[1173] Cf. the TIB-decision of the German Federal Court of Justice, Juristenzeitung 1999, 1005, that has been discussed in subsection 4.5.5.2. Cf. Kirchhof 1988, 51 and 54; Schack 1999, 1008.
[1174] Cf. in particular subsections 3.1.2, 3.3.1, 4.3.2 and 4.3.3.
[1175] See articles 9(1), 12 and 6*bis*(1) BC. Cf. in respect of the latter provision Ricketson 1987, 468.
[1176] See subsection 2.2.1.

work lies a commentary having a critical bearing on the substance or style of the original. Objectionable uses of this kind play a decisive role in intellectual debate. They promote cultural diversity.[1177] Considerations of intergenerational equity further strengthen this line of argument. To express himself artistically, the parodist depends on the imitation of the characteristic features of the original in such a way as to make them appear ridiculous.[1178] The appreciation of freedom of expression and the aim to ensure a controversial intellectual debate necessitate that users, parodying and thereby criticising a work, can work free from influence of the author. By and large, the harm to author's moral interests is thus outweighed and no unreasonable prejudice arises. The following guidelines given in the US Supreme Court's decision Campbell v. Acuff, however, must be observed:

> 'If […] the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh', Justice Souter who delivered the opinion of the Court explained, 'the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish)…'[1179]

Examining the legitimacy of an author's interests, the inclusion of passages of a work in a schoolbook has been discussed in the previous subsection as well. It was concluded that the author's interest in exploiting this kind of use is legitimate, and that it appears advisable to provide for the payment of equitable remuneration. Further guidelines can be given in the present context. In general, the exemption of a work's use for teaching is a reaction to the social and cultural concern for appropriate education. Particularly in developing countries, the importance of breathing space serving educational ends, also for increasing the general acceptance of copyright protection, can hardly be underestimated.[1180] Furthermore, an aspect of intergenerational equity can be made visible in this context. Someone learning of already existing works in educational institutions may be induced to discover and develop his own creative potential.[1181] As limitations for educational purposes, like the schoolbook privilege, thus serve social and cultural concerns of paramount importance and have a share in the promotion of intergenerational equity, the remuneration need not amount to the profit an author freely authorising the inclusion of a work could derive. By contrast, the payment of a moderate sum appears sufficient. Moreover, the author's remaining moral interests must be taken into account.

[1177] Cf. subsections 2.1.3 and 2.2.1.
[1178] Cf. section 2.3. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), II C.
[1179] See Campbell v. Acuff, ibid., II A.
[1180] See subsection 2.1.2 and the introductory remarks made in section 2.2.
[1181] Cf. subsection 2.3.

Finally, the library system for strictly personal use which has been envisaged above can be revisited.[1182] From the perspective of intergenerational equity, it has been posited in this context that it is advisable to replace general personal use privileges in the digital environment with a refined library framework specifically aiming at permitting those uses that are not unlikely to contribute sooner or later to the creation of a new work. Libraries would then be permitted to make copyrighted material available online. A similar solution might be espoused with regard to other indispensable benefits evolving from strictly personal use privileges. Besides the promotion of intergenerational equity, they serve the dissemination of information and the enhancement of democracy.[1183] A library-administered system for personal use, thus, rests on a firm justificatory underpinning.

In its TIB-Hannover-decision, which has already been discussed above,[1184] the German Federal Court of Justice, on the other hand, unequivocally pointed towards the threat posed by digital library services. It emphasised that the library practice of dispatching copies which was challenged in the decision has a tendency to come close to a publisher's activity.[1185] Against this backdrop, it was stressed above that the circle of beneficiaries profiting from the envisioned digital library service must be narrowly drawn and that, in addition, certain restrictions on the use, for instance as to the number of downloads, may be apposite. To avoid an unreasonable prejudice, it is to be added here that equitable remuneration must be paid.[1186] The sum need not come up to the price an author freely authorising the use would agree upon. On account of the particular importance of the objectives underlying the envisioned library system, it may be lesser. Nonetheless, a fairly high remuneration seems appropriate to avoid an unreasonable prejudice.

4.6.5 THE IMPACT ON INTERNATIONALLY RECOGNISED LIMITATIONS

A final comment on the relationship between the three-step test and special provisions of the Berne Convention permitting limitations is to be made here. Article 13 TRIPs, when applied to limitations already complying with special provisions of the Berne Convention, and article 10(2) WCT fulfil the function of additional safeguards.[1187] However, it has already been emphasised that the three-step test is prevented from realising its full regulatory potential in this connection. At the 1996 WIPO Diplomatic Conference, it was understood that article 10(2) WCT 'neither reduces nor extends the scope of applicability of the limitations and

[1182] Cf. subsection 4.5.5.2.
[1183] Cf. subsections 2.2.2 and 2.2.4.
[1184] See subsection 4.5.5.2.
[1185] See BGH Juristenzeitung 1999, 1004; Krikke 2000, 163. Cf. subsection 4.5.5.2.
[1186] This conclusion was also drawn by the Court. See subsection 4.5.5.2.
[1187] Cf. subsection 4.2.2.

exceptions permitted by the Berne Convention.'[1188] It has been shown that this statement renders the additional safeguard function powerless in the context of criteria 1 and 2.[1189] As to the prohibition of an unreasonable prejudice to the author's legitimate interests, the same conclusion need not be drawn. Certain provisions of the Berne Convention offer the possibility of consulting the three-step test in order to clarify their meaning. The wording of these provisions opens a loophole for lending weight to the third criterion of the three-step test. They may be concretised with an eye to the proportionality test described above. Three groups of provisions of the Berne Convention can be distinguished.

The first one is formed by limitations referring to compatibility with 'fair practice'. Article 10(1) BC, for instance, permits the making of quotations from a work which has already been lawfully made available to the public, provided that the use is 'compatible with fair practice, and their extent does not exceed that justified by the purpose…' Similarly, article 10(2) BC allows 'the utilisation, to the extent justified by the purpose, of literary or artistic works by way of illustrations in publications, broadcasts or sound or visual recordings for teaching, provided such utilisation is compatible with fair practice'. To determine whether or not a national limitation based on these provisions really is compatible with fair practice and justified by the underlying purpose, it is advisable to employ the described proportionality test. When the interests of the author that can be deemed legitimate under the given circumstances are not unreasonably prejudiced, the limitation in question complies with fair practice and is justified by the underlying purpose. Quotations and the inclusion of passages of a work in a schoolbook have been discussed by way of example in the previous subsection 4.6.4.

The second group is formed by provisions of the Berne Convention that permit the use of a work 'to the extent justified by the informatory purpose'. This formula can for instance be found in article 2*bis*(2) BC that allows national legislation to determine the conditions under which publicly delivered lectures, addresses and similar works may be reproduced by the press, broadcast or communicated to the public 'when such use is justified by the informatory purpose'. By the same token, article 10*bis*(2) BC permits the inclusion of copyrighted material in a report on current events 'to the extent justified by the informatory purpose'. The two steps of the proportionality test described above provide guidance for deciding whether or not the informatory purpose underlying a corresponding limitation justifies the detriment to the author. If no unreasonable prejudice comes to the fore, the question can be answered in the affirmative.

The third group is formed by the implied limitations accepted by the members of the Berne Union. For instance, the task of delineating the so-called 'minor

[1188] See WIPO Doc. CRNR/DC/96, agreed statement concerning article 10 WCT. Cf. subsections 3.3.2, 4.2.2 and 4.4.3.

[1189] Cf. subsections 4.4.3. and 4.5.4.

reservations doctrine'[1190] more precisely has been explicitly assigned to the three-step test. In the preparatory work for the 1996 WIPO Diplomatic Conference, it was stated:

> 'It bears mention that [the proposed three-step test] is not intended to prevent Contracting Parties from applying limitations and exceptions traditionally considered acceptable under the Berne Convention. It is, however, clear that not all limitations currently included in the various national legislations would correspond to the conditions now being proposed. In the digital environment, formally "minor reservations" may in reality undermine important aspects of protection. Even minor reservations must be considered using sense and reason."[1191]

The proportionality test can serve in this context as a means to scrutinise traditional 'minor reservations' thoroughly. Insofar as digital technology deepens the impact of these limitations on the author's legitimate interests, the proportionality may bring to light that it is indispensable to provide for the payment of equitable remuneration to avoid an emerging unreasonable prejudice. A further implied exemption concerns the translation right recognised in article 8 BC. At the 1967 Stockholm Conference,

> 'it was generally agreed that Articles 2*bis*(2), 9(2), 10(1) and (2), and 10*bis*(1) and 2, virtually imply the possibility of using the work not only in the original form but also in translation, subject to the same conditions, in particular that the use is *in conformity with fair practice*…'[1192]

The reference to 'fair practice' once again offers the possibility of having recourse to the proportionality test inhering in the three-step test to trace the conceptual contours of this implied limitation more precisely.

4.6.6 THE SYSTEM OF THE THREE CRITERIA REVISITED

A final overview of the regulatory framework embodied in the three-step test can be given when shedding light of the principle of proportionality not only on the prohibition of an unreasonable prejudice to the author's legitimate interests but also on the two preceding criteria. When viewed through the prism of proportionality, they appear as instruments for sorting out cases of evident disproportionality. In retrospect, it can therefore be confirmed that they pave the way for the final balancing of interests in the context of the third criterion:

[1190] See subsection 3.1.1.

[1191] See the basic proposal for substantive provisions of the later WCT, WIPO Doc. CRNR/DC/4, § 12.08.

[1192] See the Report on the Work of Main Committee I, Records 1967, 1165 (emphasis added). Cf. the explanations given by Desbois/Francon/Kerever 1976, 207-209; Ricketson 1987, 537-542.

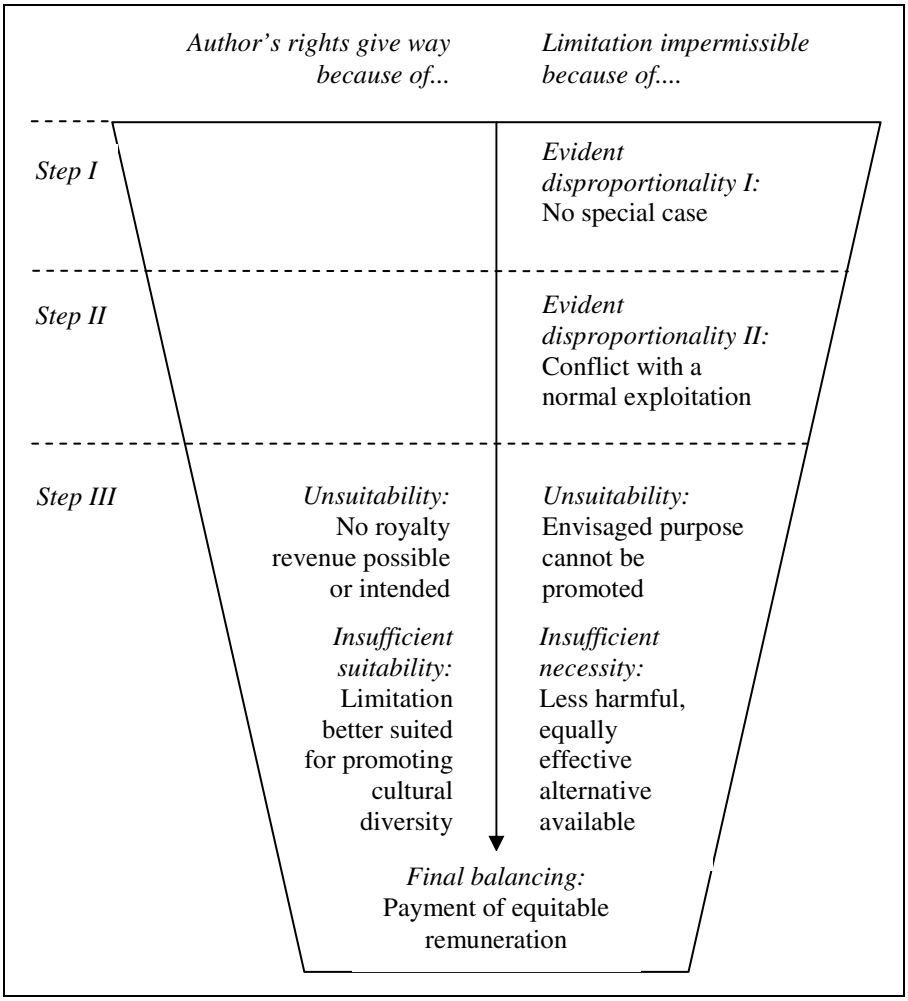

Figure 1. Overview of the Regulatory Framework

Chapter 5

The Three-Step Test in the European Copyright Directive

In EC law, the three-step test has become widespread. In Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, substantial parts of the three-step test were already reflected in article 6(3). Seeking to bring the provisions on decompilation of computer programs into line with the Berne Convention, article 6(3) ensures that the given rules

> 'may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the right holder's legitimate interests or conflicts with a normal exploitation of the computer program'.

A corresponding formulation has been embodied in article 6(3) of the European Parliament and Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases.[1193] In Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter: Copyright Directive or CD), the European Parliament and the Council continued to intersperse European legislation with the three-step test. Article 5(5) CD draws heavily from the formulation used in international law. Limitations

> 'shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder'.

Article 11(1) CD, moreover, incorporates a nearly identical[1194] formulation into Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. The latter Directive did not yet contain the three-step test. Therefore, EC legislation in the field of copyright law embraces the three-step test as a regulatory instrument. Its utilisation in the Copyright Directive is of particular interest. In this context, the task is assigned to the three-step test to control the optional adoption of 21 permissible exemptions by EU member states, for which the Directive provides in article 5.[1195]

[1193] Cf. Walter, in: Walter 2001, 1063-1064, § 95.

[1194] Instead of 'a normal exploitation of the work or other subject-matter', the amendment to Directive 92/100/EEC speaks of 'a normal exploitation of the subject-matter'.

[1195] Cf. Walter, in: Walter 2001, 1063.

In the following sections, the clarification of the functioning of the three-step test and the interpretation of its abstract criteria in the previous chapter 4 form the basis for assessing and explaining the application of the three-step test in the Copyright Directive. To lay groundwork for this analysis, the contextual background to article 5(5) CD will be explained in section 5.1. Afterwards, in section 5.2, the function assigned to the three-step test in this context will be analysed. The impact on the limitations permitted by the Directive will be examined in section 5.3. Finally, the question of who is addressed by article 5(5) CD – the national legislators or the courts – will be begged in section 5.4.

5.1 The Contextual Background

The following examination of the contextual background to article 5(5) CD seeks to yield a better understanding of the objectives underlying the inclusion of the three-step test in the Copyright Directive and the role it plays therein. To achieve these goals, the drafting history of article 5(5) CD will first be recapitulated in subsection 5.1.1. Subsequently, the framework set out for limitations in article 5 CD will be described in subsection 5.1.2. The final subsection 5.1.3 devotes attention to the objectives underlying the Directive. They are to be borne in mind when applying the three-step test.

5.1.1 THE DRAFTING HISTORY OF ARTICLE 5(5) CD

The incorporation of the three-step test into the Copyright Directive can be traced back to the Green Paper 'Copyright and Related Rights in the Information Society' of July 19, 1995.[1196] On the basis of preparatory work undertaken since the mid-90s, the European Commission presented this document to pave the way for further debates on problem areas.[1197] In the context of the right of reproduction, the Commission critically noted that the three-step test of article 9(2) BC 'considerably limits the effectiveness of the reproduction right'.[1198] It maintained that the test led to 'very different arrangements in respect of reprography and private copying'.[1199] Against this background, the need for harmonisation was underlined.

Based on the consultations resulting from the Green Paper, the Commission tabled a follow-up document on November 20, 1996.[1200] Irrespective of the critical comments on article 9(2) BC made in the preceding Green Paper, the three-step test is embraced in this context as a guiding principle. The Commission emphasises that 'a number of parties suggest the general "economic prejudice" clause in Article 9§2

[1196] Doc. COM(95) 382 final.
[1197] Cf. v. Lewinski, in: Walter 2001, 1019-1021.
[1198] See EU Commission 1995, Doc. COM(95) 382 final, 50.
[1199] See EU Commission 1995, Doc. COM(95) 382 final, 51.
[1200] Doc. COM(96) 586 final.

of the Berne Convention as a point of reference'.[1201] This statement heralds a right holder-centric view seeking to employ the test, understood as an 'economic prejudice' test, in favour of the right holders.[1202]

The further development in the EU was overshadowed by the adoption of the two WIPO 'Internet' Treaties underscoring the particular importance of the three-step test.[1203] Due account had to be taken of this development in the EU which itself became one of the contracting parties.[1204] In its proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related in the information society of December 10, 1997,[1205] the European Commission sought to meet this requirement without losing sight of the aforementioned prior consultations and initiatives. The proposal itself is declared to be 'closely linked to, if not based upon, international developments'.[1206] In this framework, however, the potential threat to the functioning of the internal market posed by limitations is emphasised:

> 'Without adequate harmonization of these exceptions, as well as of the conditions of their application, Member States might continue to apply a large number of rather different limitations and exceptions to these rights and, consequently, apply these rights in different forms.'[1207]

In this context, the three-step test is perceived as a guiding principle but not as an effective means for avoiding the fragmentation of the internal market. As regards articles 10 WCT and 16 WPPT, it is stated that,

> 'unless interpreted in the light of the *acquis communautaire*, these new international obligations might lead to divergent interpretations between Member States and the risk of obstacles to trade within the Community, notably in on-demand services containing protected material.'[1208]

Hence, it was deemed necessary to shift the three-step test of international copyright law into line with the *acquis communautaire*, primarily formed by the Computer Programs Directive and the Database Directive,[1209] to pave the way for a smoothly functioning internal market. The regulatory framework resulting from this conception was given the following shape: in paragraphs 1, 2 and 3 of article 5 of

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[1201] See EU Commission 1996, Doc. COM(96) 586 final, 11-12.
[1202] Cf. Heide 1999, 107.
[1203] Cf. subsection 3.3.2.
[1204] Cf. v. Lewinski, in: Walter 2001, 1027.
[1205] Doc. COM(97) 628 final – 97/0359 (COD).
[1206] See the Explanatory Memorandum, Doc. COM(97) 628 final – 97/0359 (COD), 3.
[1207] See the Explanatory Memorandum, Doc. COM(97) 628 final – 97/0359 (COD), 35.
[1208] See the Explanatory Memorandum, Doc. COM(97) 628 final – 97/0359 (COD), 35-36.
[1209] See Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs and the European Parliament and Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases.

the proposed Directive, an exhaustive list of permitted limitations was set out. The first of these limitations, concerning temporary acts of reproduction, is mandatory. The following limitations, however, are optional. Article 5(4), finally, clarifies that the permitted limitations

> 'shall only be applied to certain specific cases and shall not be interpreted in such a way as to allow their application to be used in a manner which unreasonably prejudices the rightholders' legitimate interests or conflicts with the normal exploitation of their works or other subject matter'.

The initial proposal for the later Copyright Directive, thus, referred to 'certain specific cases' instead of using the expression 'certain special cases' that would have corresponded to international copyright law. The order of the two following conditions, moreover, is reversed – a further departure from the international framework. Instead of prohibiting a conflict with *a* normal exploitation of the work, a conflict with *the* normal exploitation is forbidden. The reference point for the application of the two conditions delimiting the basic rule that limitations must be certain special/specific cases, in addition, is a limitation's interpretation. This latter feature is in line with article 6(3) of the Computer Programs Directive and article 6(3) of the Database Directive.[1210] It corresponds to the *acquis communautaire*. Whether it would really have contributed to a more effective application of the three-step test, as intended pursuant to the explanatory memorandum,[1211] appears questionable.[1212]

Besides the inappropriate treatment of the three-step test, the conception of the proposal as such is also questionable. Obviously, the fundamental problem which arose in respect of limitations was the wide variety of limitations to be found in the EU member states.[1213] Against this backdrop, the task of effective harmonisation can hardly ever be accomplished.[1214] It is foreseeable that each member state will seek to safeguard its domestic system of limitations.[1215] The drafters of the three-step test had to face a similar situation. To escape from the dilemma, recourse was had to an abstract formula, now constituting the three-step test.[1216]

[1210] The text of these provisions has already been quoted. See the introduction above.

[1211] See the Explanatory Memorandum, Doc. COM(97) 628 final – 97/0359 (COD), 35-36.

[1212] Cf. Heide 1999, 107-109.

[1213] The European Commission ascertained more than 130 limitations. Cf. Hoeren 2000, 517; Bayreuther 2001, 829. The final article 5 CD still mirrors the wide array of limitations by providing for 21 different limitations. However, even a list of this size seems to be incapable of covering all instances in which a limitation might be appropriate. Cf. Flechsig 2002, 13; Schippan 2001, 125.

[1214] Not surprisingly, the solution which has been found and laid down in article 5 of the Copyright Directive is harshly criticised. Cf. Hart 1998, 169-170; Hugenholtz 2000c, 501; Visser 2001, 9; Schippan 2001, 128; Bayreuther 2001, 829. Reinbothe 2002, 46, by contrast, takes the view that article 5 of the Directive is capable of bringing about a remarkable degree of harmonisation.

[1215] Cf. Bayreuther 2001, 829. Against this backdrop, Hoeren 2000, 516, referred to limitations as 'sakrosankte Orte nationaler Heiligtümer'.

[1216] See Doc. S/1, Records 1967, 113. Cf. subsection 3.1.2 and Ricketson 1987, 479.

The experiences in the field of the three-step test suggest that the best way of solving the problem of harmonising limitations on the European level would have been to employ a flexible, abstract formula.[1217] To limit the great latitude which an open formula may possibly allow national legislation, the latter could have been complemented by a small number of mandatory exemptions. Furthermore, as the three-step test, by virtue of the provisions set out in international copyright law, exerts control over all of these limitation anyway, a formula could have been devised which leans on the three-step test without merely repeating its wording. Instead of the expression 'certain special cases', socially valuable ends which EU member states may pursue could have been enumerated explicitly.[1218] The prohibition of a conflict with a normal exploitation of the work could have been aligned with the goal of ensuring the functioning of the internal market. Finally, the proportionality test embodied in the last criterion of the three-step test could have been adapted to the principle of proportionality, as applied in EC law.[1219]

Apparently, it was felt in the course of the further development that a flexible formula might indeed be an appropriate solution. When the Commission's proposal for the later Copyright Directive was submitted to the European Parliament, the notion of an open-ended norm modelled on the US fair use doctrine influenced the deliberations.[1220] However, these proposals were incapable of making their way to the later Copyright Directive. The Commission's amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the information society of May 21, 1999[1221] followed in the footsteps of the original proposal. The three-step test is maintained in article 5(4) with exactly the same language already used in the previous draft.

It was not until the negotiations in the Council Working Group began that the initial concept underwent substantial changes. The moment the member states influenced the drafting process, however, it proved to be inappropriate that the European Commission had developed an exhaustive list of permissible exemptions.[1222] The member states insisted on the maintenance of the majority of limitations existing in their national laws. They de facto reduced the concept of an

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1217 Cf. Hugenholtz 2000c, 501; Dreier 2002a, 28.

1218 Cf. subsection 4.4.2.3. An approach which points in this direction can be found in recital 34 of the Copyright Directive where educational and scientific purposes, the benefit of public institutions such as libraries and archives, news reporting, quotations, privileges for people with disabilities, public security and administrative and judicial purposes are mentioned as laudable objectives.

1219 Cf. Emmerich-Fritsche 2000, 198-224.

1220 See Draft Opinion for the Committee on Legal Affairs and Citizen's Rights on the proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society of the Committee on Economic and Monetary Affairs and Industrial Policy (Draftsman: Brian Cassidy), dated 3 June 1998, 4-5, and of the Committee on the Environment, Public Health and Consumer Protection (Draftsman: Phillip Whitehead), dated 3 July 1998, 8-9.

1221 Doc. COM(1999) 250 final – 97/0359 (COD).

1222 Cf. Hugenholtz 2000c, 500.

exhaustive list of permissible limitations to absurdity. This shortcoming clearly comes to the fore when the light of the harmonisation objective is shed on the final outcome.[1223] The European Parliament and Council Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society of 22 May 2001 gives approval to no fewer than 21 permissible limitations, 20 of which are optional. That existing differences really will be levelled out on this basis is nothing but a vague hope.[1224]

However, the negotiations of the Council Working Group had a beneficial effect on the incorporation of the three-step test. In the course of the deliberations of March 13 and 14, 2000, the UK proposed to bring article 5(4) into line with the international three-step test, as laid down in the WCT and TRIPs.[1225] The delegates of numerous other member states favoured this proposal. Accordingly, the initial plan to follow the *acquis communautaire* was abandoned. The three-step test of the final Copyright Directive – set out in article 5(5) – in consequence, does not deviate from the wording used in international provisions. It refers to 'certain special cases' instead of 'certain specific cases' as well as to a 'conflict with *a* normal exploitation' instead of a 'conflict with *the* normal exploitation'. Moreover, the drafters of article 5(5) CD refrained from choosing the interpretation of a limitation as point of departure for the test's application.

5.1.2 THE FRAMEWORK SET OUT FOR LIMITATIONS

Article 5 CD contains an exhaustive list of exceptions and limitations which, pursuant to recital 32, not only 'takes due account of the different legal traditions in Member States' but also, purportedly, aims to 'ensure a functioning internal market'. That the extensive enumeration is not necessarily conducive to realising the latter objective can already be gathered from the further requirement that the member states are obliged to 'arrive at a coherent application of these exceptions and limitations'.[1226]

The system of the enumeration is oriented by the exclusive rights recognised in the Directive. Article 5(1) concerns the reproduction right provided for in article 2. It allows temporary acts of reproduction, which are of a transient or incidental nature and form an integral and essential part of a technological process. Only two purposes may be enabled by the reproduction: a transmission in a network between third parties by an intermediary, or a lawful use. Moreover, the reproduction must be deprived of any independent economic significance.[1227] This provision is of

[1223] Cf. Hugenholtz 2000c, 500-501.

[1224] Cf. Desurmont 2001, 13-15: 'Au total, on ne peut exclure que la Directive du 22 mai 2001 ait un effet déstabilisateur sur le niveau de protection reconnu aux créateurs dans les États membres de la Communauté.'

[1225] Cf. sections 3.2 and 3.3.

[1226] See recital 32 of the Copyright Directive.

[1227] For a detailed discussion of this provision, see Hugenholtz 2000b, 482-493 and 2001, 5-7.

particular importance because it is the only mandatory limitation. In the field of temporary reproductions, such as browsing and caching, harmonisation, thus, really does take place.[1228]

Besides this mandatory exemption, article 5(2) CD contains five optional limitations which also concern the right of reproduction. The first of these provisions brings the technical circumstances of the privileged reproduction into focus: a copy of a work may be made on paper or any similar medium using any kind of photographic technique or other processes having similar effects. Electronic means of reproduction are barred.[1229] Correspondingly, article 5(2)(a) is often characterised as 'reprography exemption'.[1230] Article 5(2)(b) privileges non-commercial private use.[1231] From the third case enumerated in article 5(2), publicly accessible libraries, educational establishments or museums, as well as archives can profit. In this connection, the Directive does not delineate the particulars of the envisioned privileged use. Article 5(2)(c) simply refers to 'specific acts of reproduction […], which are not for direct or indirect economic or commercial advantage'.[1232] That on-line delivery should not be covered by the exemption, however, is clarified in recital 40. Furthermore, article 5(2)(d) contains a limitation concerning ephemeral recordings of works which is aligned with article 11*bis*(3) BC.[1233] Ultimately, reproductions of broadcasts made by social institutions, such as hospitals and prisons, are exempted from the right of reproduction by virtue of article 5(2)(e). An important feature of some of these limitations, namely of the reprography exemption, the private use privilege, and the limitation for social institutions, is that the right holders shall receive 'fair compensation'.

Article 5(3) CD imposes various limitations not only on the right of reproduction, as set out in article 2, but also on the right of communication to the public, recognised in article 3.[1234] The free utilisation of a work is allowed in article 5(3)(a) 'for the sole purpose of illustration for teaching or scientific research'. People with a disability are the beneficiaries of article 5(3)(b). It allows, to the extent required by the specific disability, uses which are directly related to the disability and of a non-commercial nature.[1235] The press privileges set out in article 10*bis* BC reappear in article 5(3)(c). The subsequent article 5(3)(d) is also rooted in

[1228] Cf. Dreier 2002a, 33. That article 5(1), in particular, aims at privileging browsing and caching can be inferred from recital 33 of the Copyright Directive.
[1229] Cf. Visser 2001, 9.
[1230] Cf. Reinbothe 2001, 738; Bayreuther 2001, 831; Hart 2002, 59.
[1231] Cf. Hoeren 2000, 519.
[1232] See article 5(2)(c) of the Copyright Directive. Visser 2001, 11, emphasises the broad potential field of application. Originally, it was planned to restrict this limitation to the purposes of archiving and preserving copyrighted material. Cf. Reinbothe 2001, 739.
[1233] Cf. Bayreuther 2001, 834; Reinbothe 2001, 739; Visser 2001, 11.
[1234] Cf. the overview given by Reinbothe 2001, 739-740; Visser 2001, 11-15; Bayreuther 2001, 835-837; Flechsig 2002, 10-13.
[1235] Cf. the examples discussed by Hart 2002, 61.

the Berne Convention. It exempts the making of quotations. By contrast to the broader article 10(1) BC, however, quotations are only allowed 'for purposes such as criticism or review'. In article 5(3)(e), allowance is made for public security concerns and the utilisation of works in connection with administrative, parliamentary or judicial proceedings. Article 5(3)(f), in line with article 2*bis*(1) and (2) BC, devotes attention to the free use of 'political speeches as well as extracts of public lectures or similar works'. Among the following eight exemptions, a privilege for religious celebrations or official celebrations organised by a public authority can be found,[1236] as well as the exemption of uses for the purpose of 'caricature, parody or pastiche'.[1237] Finally, article 5(3)(o) also permits 'use in certain other cases of minor importance where exceptions or limitations already exist under national law'. This rule can only be applied if the currently exempted use is analogue and, moreover, does not affect the free circulation of goods and services within the EU. Nonetheless, it further imperils the objective to harmonise effectively the copyright laws of the member states.[1238] Inevitably, it gives rise to the question of why an enumeration of a limited number of mandatory limitations, complemented by an abstract formula leaning on the three-step test, was not preferred to a list of this length, comprising moreover the outlined open provision of a general nature.

In article 5(4) CD, the sphere of influence of the limitations on the right of reproduction, set out in paragraphs 2 and 3 of article 5, is extended. The distribution right granted in article 4 is also subject to these exemptions:

> 'Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4.'

The right of distribution, however, shall only be exposed to the limitations on the reproduction right 'to the extent justified by the purpose of the authorised act of reproduction'.[1239] In this connection, Reinbothe noted that the distribution must be the intended and permitted consequence of the exempted reproduction.[1240] The last paragraph of article 5 embodies the three-step test:

> 'The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.'

[1236] See article 5(3)(g). The provision rests on the 'minor reservations doctrine'. Cf. subsection 3.1.1.

[1237] This limitation is laid down in article 5(3)(k) and leans on French copyright law. Cf. Visser 2001, 14; Bayreuther 2001, 836-837.

[1238] Cf. Hoeren 2000, 519; Bayreuther 2001, 837.

[1239] See article 5(4) of the Copyright Directive.

[1240] Cf. Reinbothe 2001, 740.

5.1.3 THE OBJECTIVES UNDERLYING THE DIRECTIVE

Many provisions of the Copyright Directive draw heavily on the WIPO 'Internet' Treaties.[1241] In particular, this is true for the right of communication to the public set out in article 3,[1242] and the protection of technological measures and rights-management information in articles 6 and 7.[1243] Moreover, recital 44 of the Directive underscores the importance of international obligations with regard to limitations: 'When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations.' The incorporation of the three-step test in article 5(5) CD, therefore, is also a tribute paid to the WIPO 'Internet' Treaties.[1244]

One of the objectives pursued with the adoption of the Copyright Directive, thus, is to pave the way for the ratification of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty by the European Community itself and its member states.[1245] Compliance with new international obligations, however, does not occupy centre stage in the Copyright Directive. Only recital 15 refers to the WIPO 'Internet' Treaties and clarifies that 'this Directive also serves to implement a number of new international obligations'. The adaptation of EC copyright law to the standard reached on the international level is intertwined with the principal objective of the Directive to harmonise the laws of the member states on copyright and related rights.[1246]

The various facets of the intended harmonisation are described in depth in recitals 1 to 14 of the Copyright Directive.[1247] First of all, it is stressed that copyright and related rights play a decisive role with regard to the promotion of the development of the information society in Europe.[1248] It is feared that legislative differences and uncertainties evolving from varying responses of the member states to the challenges of digital technology could thwart the establishment of a flourishing internal market for intellectual products.[1249] A harmonised legal

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[1241] Cf. Desurmont 2001, 5; Hoeren 2000, 516-517; Reinbothe 2001, 734; Schippan 2001, 118.

[1242] In accordance with article 8 WCT, the right of communication to the public granted under article 3 CD includes the making available to the public of a work in such a way that members of the public may access the work from a place and at a time individually chosen by them. Cf. Flechsig 2002, 5; Heide 2001, 472; Bayreuther 2001, 828.

[1243] Compare these provisions with article 11 and 12 WCT as well as articles 18 and 19 WPPT. Cf. Koelman 2001, 16; Heide 2001, 474; Reinbothe 2001, 734.

[1244] Cf. Reinbothe 2001, 740; Bayreuther 2001, 839. The three-step test also plays a decisive role in these treaties. See article 10 WCT and article 16 WPPT. Cf. section 3.3 above.

[1245] Cf. Flechsig 1998, 140; v. Lewinski 1998a, 115; Reinbothe 2001, 734; Schippan 2001, 117; Desurmont 2001, 5. The urgency and advantages of the ratification of these treaties is emphasised by Hugenholtz 2000c, 499.

[1246] See recital 1. Cf. Hugenholtz 2000c, 499-500; Reinbothe 2001, 734; Flechsig 2002, 3.

[1247] See for an overview Hugenholtz 2001, 4 and Flechsig 2002, 3.

[1248] See recital 2 of the Copyright Directive.

[1249] See recital 6 of the Copyright Directive.

framework, by contrast, is believed to foster substantial investment in creativity and innovation, thereby leading to growth and increased competitiveness of European industry.[1250] The Directive, therefore, is not brought into line with the maxims of the civil law tradition of copyright, focusing on the author and a work of art as materialisation of his personality. First and foremost, it rests on utilitarian objectives.[1251] The harmonisation of the laws of the member states on copyright and related rights is pursued to establish an effective internal market.[1252]

In respect of the conceptual contours of the Directive, it is clearly stated that 'any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation'.[1253] In this context, authors and performers are addressed directly. Following once again a utilitarian line of argument, the necessity of appropriate reward is emphasised, spurring them to continue their creative and artistic work. The Directive seeks to secure satisfactory returns on investment in creative works.[1254] In this connection, it is pointed out that 'the investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable'.[1255] The person of the individual author or performer, as creator of a work of art or its interpreter is forced to the sidelines. Instead, the Directive seems to be concerned primarily with the well-being of the information industry.[1256] Not surprisingly, the field of moral rights protection is bypassed by succinctly suggesting that moral rights should be exercised according to the legislation of the member states and the provisions set out in international copyright law.[1257] It is stated that 'moral rights remain outside the scope of this Directive'.[1258]

In sum, two objectives consequently come to the fore. Firstly, the Copyright Directive is intended to serve as a means for harmonising copyright law in the EU. Secondly, copyright law shall be brought into line with international obligations, particularly those set forth in the WIPO 'Internet' Treaties. The latter objective is central to the application of article 5(5) CD. As regards the aim to harmonise copyright law, the three-step test has only a limited potential. It is incapable of altering the fact that 20 of the 21 permissible limitations were declared optional. However, it may encourage a coherent application of the enumerated limitations, as envisaged in recital 32.

[1250] See recital 4 of the Copyright Directive.
[1251] Cf. in respect of copyright's traditions section 2.1 above.
[1252] See recital 1 of the Copyright Directive. Cf. Dietz 1998, 440-441.
[1253] See recital 9 of the Copyright Directive. Cf. Schippan 2001, 117; Desurmont 2001, 7.
[1254] See recital 10 of the Copyright Directive.
[1255] See recital 10 of the Copyright Directive.
[1256] Cf. Hugenholtz 2000c, 501, who points out that 'the Directive fails to protect authors or performers against publishers and producers imposing standard-form "all rights" (buy-out) contracts'.
[1257] See recital 18 of the Copyright Directive.
[1258] See recital 18 of the Copyright Directive. See the critique by Dietz 1998, 440.

5.2 The Function of Article 5(5) CD

It has already been indicated in the preceding subsections, that article 5(5) CD draws heavily on the three-step test of international copyright law. This can easily be gathered from a comparison of article 5(5) CD with article 10(2) WCT:

Table 1. Article 10(2) WCT and Article 5(5) CD

Article 10(2) WCT:	*Article 5(5) CD:*
'Contracting Parties	'The exceptions and
shall, when applying the	limitations provided for in
Berne Convention,	*paragraphs 1, 2, 3 and 4*
confine any limitations of or exceptions	shall only be applied in
to rights provided for therein to	
certain special cases	certain special cases
that do not conflict with	which do not conflict with
a normal exploitation	a normal exploitation
of the work	of the work
	or other subject-matter
and do not	and do not
unreasonably prejudice	unreasonably prejudice
the legitimate interests	the legitimate interests
of the author.'	of the rightholder.'

Article 10(2) WCT controls the application of the Berne Convention. The limitations allowed under the Convention are its field of application. When national legislation adopts a limitation, it must first ensure compliance with the relevant provision of the Berne Convention permitting the limitation. Additionally, article 10(2) WCT comes into play. The three criteria of the three-step test must also be observed. The following sequence illustrates this *modus operandi*:

(a) imposition of a national limitation on an internationally recognised exclusive right;
(b) compliance with relevant special provisions of the Berne Convention;
(c) additional application of article 10(2) WCT.[1259]

Similarly, article 5(5) CD controls the application of the permissible limitations listed in paragraphs 1, 2, 3 and 4 of article 5 CD. The limitations allowed under the Copyright Directive, thus, are its field of application. When national legislation adopts a limitation, it must first ensure compliance with the relevant case on the list of article 5 CD. Additionally, article 5(5) CD comes into play. The three criteria of the three-step test must also be observed. A sequence identical with the one arising in the context of article 10(2) WCT comes to the fore:

[1259] See subsection 4.2.2.

(a) imposition of a national limitation on an exclusive right recognised in the Copyright Directive;
(b) compliance with a case listed in paragraph 1, 2, 3 or 4 of article 5 CD;
(c) additional application of article 5(5) CD.

The close relationship between article 10(2) WCT and article 5(5) CD, therefore, can clearly be brought to light. As the Copyright Directive seeks to pave the way for the ratification of the WIPO 'Internet' Treaties,[1260] this result is not surprising. Article 5(5) CD was obviously based on article 10(2) WCT. In consequence, it also fulfils an additional safeguard function.[1261] In line with recital 44, it can furthermore be stated that article 5(5) CD is a direct reference to the three-step test in international copyright law. It makes the existing international obligations visible in the framework of the Copyright Directive. The interpretation of article 5(5) CD must accordingly follow the interpretation of the three-step test at the international level to prevent EU member states from falling short of international obligations and endangering the ratification of the WIPO 'Internet' Treaties.

The fact that article 5(5) CD functions as an additional control mechanism in the outlined way allows for its ambit of operation to be defined precisely. In line with the rules at the international level,[1262] it is to be noted here that the question of whether or not article 5(5) is applicable to a certain national limitation must be answered on the basis of the framework set out in the Copyright Directive. The legislative technique which is used at the national level – a restrictively delineated exclusive right may be granted instead of conferring a broad exclusive right first and imposing certain limitations afterwards – is not decisive. Otherwise, the obligation to ensure compliance with article 5(5) CD could easily be bypassed. Thus, if a member state, for instance, defines in its domestic law the right of reproduction so as to exclude from protection temporary acts of reproduction covered by article 5(1) CD, the three-step test of article 5(5) CD applies to this exclusion even though it is not labelled 'limitation' at the national level. This follows from the framework set out in the Directive.[1263] Pursuant to article 2 CD, the reproduction right encompasses temporary acts. They are to be exempted, however, by virtue of article 5(1) CD. This mandatory exemption is subjected to the three-step test of article 5(5) CD. A member state cannot circumvent the three-step test by not granting the right of temporary reproductions from the outset. If it does so, and excludes this facet of the reproduction right from protection, the three-step test must be applied to a national exclusion from protection instead of a national limitation.

[1260] Cf. subsections 5.1.1 and 5.1.3.
[1261] Cf. subsection 4.2.2.
[1262] See subsection 4.1.3.
[1263] See Triaille 2002, 11, discussing the legislative technique used in the Copyright Directive.

5.3 The Impact on the List of Permissible Limitations

The insertion of the three-step test into the Copyright Directive is judged very differently. Whereas some commentators are of the opinion that its incorporation was unnecessary because sufficient weight had already been given to the three-step test while drafting the catalogue of permissible limitations laid down in article 5,[1264] the view is also taken that the three-step test might prove to substantially limit the room to manoeuvre which the member states enjoy when amending their national laws.[1265] Whether the three criteria are observed can, in any case, be controlled by the European Commission and the European Court of Justice.[1266] Insofar as the three-step test really has the potential for placing constraints on national legislation, this potential can thus easily be realised on the European level.

Hence, there is all the more reason for turning to each individual criterion of the three-step test in order to clarify its precise meaning and sphere of influence in the context of the Copyright Directive. In the following subsections, the impact of each step of the three-step test on the permissible limitations enumerated in article 5 CD will accordingly be examined. Subsection 5.3.1 concerns the prerequisite that the listed limitations shall only be applied in certain special cases. Subsection 5.3.2 conducts an inquiry into a potential conflict with a normal exploitation. Subsection 5.3.3 clarifies whether the legitimate interests of the right holders are in danger of being unreasonably prejudiced.

5.3.1 CERTAIN SPECIAL CASES

It is stated in article 5(5) CD that 'the exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases'. The crucial question arising in this context is therefore whether the enumerated limitations can be qualified as special cases in the sense of the international three-step test. To ensure their exercise in accordance with international obligations, as intended pursuant to recital 44, this hurdle must be surmounted by the cases listed in article 5 CD. A corresponding examination will be undertaken in the following subsection 5.3.1.1. The formulation 'shall only be applied in certain special cases' chosen in article 5(5) CD, furthermore, begs the question whether the EU member states are obliged to further concretise the cases enumerated in article 5 CD. The potential need for further specification will accordingly be discussed in subsection 5.3.1.2.

[1264] Cf. Bayreuther 2001, 839.
[1265] Cf. Reinbothe 2001, 740.
[1266] Cf. Reinbothe 2001, 740.

5.3.1.1 SPECIALITY

At the international level, the conceptual contours of the requirement that a copyright limitation must be a 'special case' can be drawn as follows: the legislative decision to set limits to the author's exclusive rights must be a reaction to an understandable need for the reconciliation of the user interests at stake with the author's legitimate interests. A limitation that rests on a rational justificatory basis making its adoption plausible constitutes therefore a special case. If an exemption corresponds to an internationally recognised limitation permitted by the Berne Convention, it can be assumed automatically that this requirement is met.[1267]

This standard of control must be met by the limitations declared permissible in paragraphs 1, 2, 3 and 4 of article 5 CD. Otherwise, they would be incompatible with international obligations and thwart the ratification of the WIPO 'Internet' Treaties. When the cases listed in article 5 are scrutinised in the light of the outlined standard of control, the following conclusions can be drawn:

Article 5(1) CD exempts temporary acts of reproduction, such as caching, for the purpose of enabling network transmissions and lawful uses. This limitation reconciles the legitimate interest of the author in controlling reproductions of this kind with the interest of the general public in the efficient functioning of the internet. As pointed out in subsection 4.4.2.3, it can be qualified as a special case.

Article 5(2)(a) CD allows reproductions on paper or any similar medium effected by the use of any kind of photographic technique or by some other process having similar effects. This 'reprography exemption' refers to the technical process employed to make a copy instead of giving evidence of the objective pursued with the reproduction. Its judgement in the light of the outlined standard of control, thus, is impossible. Whether or not a rational justificatory basis exists is difficult to ascertain. Nevertheless, it need not be called into doubt that it is a special case. The market imperfections of the pre-digital world form the background to the exemption. It refers solely to analogue reproduction techniques. At the 1967 Stockholm Conference, it was unequivocally stated that copies made with the help of photographic techniques pass the first step of the three-step test – even if they serve commercial purposes:

> 'If [photocopying for various purposes] consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid.'[1268]

[1267] See subsections 4.4.2.4 and 4.4.3.

[1268] See report on the work of Main Committee I, Records 1967, 1145-1146.

Pursuant to this practical example, the problem of reprography is to be solved in the context of the second and particularly the third criterion of the three-step test. Hence, photographic reproductions were apparently regarded as a special case in the sense of the test's first criterion. Otherwise, the following criteria could never be met. Article 5(2)(a) CD reflects this decision. It can thus be qualified as a special case on account of the drafting history of article 9(2) BC.[1269]

Article 5(2)(b) CD exempts analogue or digital copies made by a natural person for private non-profit use. That strictly personal use of this kind is a special case in the sense of the three-step test – also in the digital environment – has already been emphasised in subsection 4.4.4.1 above.

Article 5(2)(c) CD privileges publicly accessible libraries, educational establishments and museums as well as archives. These institutions may make unauthorised copies on the condition that any profit motive is absent. This limitation reconciles the legitimate interest of the author in the exploitation of these reproductions with the competing public interest in the archiving, preservation and dissemination of information. For this reason, it is a special case.[1270]

Article 5(2)(d) CD exempts ephemeral recordings of works made by broadcasting organisations. It is in line with article 11*bis*(3) BC. For this reason, article 5(2)(d) CD automatically constitutes a special case.[1271]

Article 5(2)(e) serves social institutions pursuing non-commercial purposes, such as hospitals or prisons. They may make reproductions of broadcasts. It has already been stated in subsection 4.4.4.1 that limitations of this type are special cases.

Article 5(3)(a) CD allows the unauthorised use of copyrighted material for the sole purpose of illustration for teaching or scientific research to the extent justified by the non-commercial purpose to be achieved.[1272] It has already been substantiated in subsection 4.4.2.3 that a limitation of this kind is a special case.[1273] As regards the teaching aspect of the provision, this can also be inferred from article 10(2) BC. Although article 10(2) BC, in contrast to article 5(3)(a) CD, does not affect the right of making available granted in article 8 WCT, it nevertheless clearly indicates that the use for the purpose of illustrating teaching is a case where the imposition of a copyright limitation was deemed appropriate at the international level.[1274]

Article 5(3)(b) CD permits the non-profit use of a work for the benefit of people with a disability to the extent required by the specific disability. It has already been stated in subsection 4.4.2.3 that a limitation of this kind is a special case.[1275]

[1269] Cf. subsections 3.1.2, 3.1.3.1, 3.1.3.2.

[1270] Cf. subsections 2.2.2, 4.4.2.3 and 4.4.4.1.

[1271] See subsection 4.4.3.

[1272] See for a detailed description Xalabarder 2003, 134-149.

[1273] Cf. in addition the detailed analysis conducted by Geiger 2002b, 31-32 and 36-38.

[1274] Cf. subsection 4.4.3. Cf. Reinbothe/von Lewinski 2002, 125.

[1275] However, see Ricketson 2003, 77, doubting that article 5(3)(b) CD complies with the three-step test.

Article 5(3)(c) CD sets forth press privileges that are closely related to article 10*bis*(1) and 10*bis*(2) BC. It therefore automatically constitutes a special case in the sense of the three-step test.[1276]

Article 5(3)(d) CD exempts the making of quotations for purposes such as criticism or review. The provision draws heavily on article 10(1) BC. Thus, it can automatically be qualified as a special case.[1277]

Article 5(3)(e) CD allows the unauthorised use of a work for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings. It accordingly has three different aspects, all of which are special cases. Firstly, it is a plausible legislative decision to reconcile the author's interest in controlling the use of a work with the public's vital interest in public security. Secondly, the state enjoys the freedom of lending weight to its own interest in the effective functioning of its legislative, executive and judiciary bodies.[1278] However, it is to be emphasised that it is not sufficient when the exemption of a work's use for administrative, parliamentary or judicial purposes is merely considered politically useful. A copyright limitation does not become a special case just because it is conducive to reducing the costs of administration, etc. By contrast, it is only a special case if an administrative, parliamentary or judicial body really depends on the use of copyrighted material so that it would be rendered incapable of accomplishing its tasks if the required use is denied.[1279] Article 5(3)(e) CD is in line with this requirement. It refrains from generally permitting the use of copyrighted material. Merely the use ensuring the *proper* performance of administrative, parliamentary or judicial proceedings is privileged. This definition can be construed so as to necessitate that the state body involved really must depend on a work's use in the outlined sense. As to the third aspect, the reporting of such proceedings, the freedom of the press, as facet of freedom of expression,[1280] must be considered. It undoubtedly forms a rational justificatory basis.

Article 5(3)(f) CD exempts the use of political speeches as well as extracts of public lectures or similar works insofar as justified by the informatory purpose. This provision corresponds to articles 2*bis*(1) and 2*bis*(2) BC. Hence, it is automatically a special case.[1281]

Article 5(3)(g) CD permits the unauthorised use of a work during religious celebrations or official celebrations organised by a public authority. A line can be drawn between this limitation and the so-called 'minor reservations doctrine'

[1276] Cf. subsections 2.2.1 and 4.4.3. See in respect of the right of making available that is not affected by the provisions of the Berne Convention the previous comment made on article 5(3)(a) CD.

[1277] Cf. subsections 2.2.1 and 4.4.3. See in respect of the right of making available that is not affected by article 10(1) BC the previous comment made on article 5(3)(a) CD.

[1278] See subsection 4.4.2.3.

[1279] Cf. subsection 4.4.4.1.

[1280] Cf. subsection 2.2.1.

[1281] Cf. subsections 4.1.3 and 4.4.3. See in respect of the right of making available that is not affected by article 2*bis* BC the previous comment made on article 5(3)(a) CD.

constituting an implied limitation recognised by the members of the Berne Union.[1282] The 1996 WIPO Diplomatic Conference, at which the WIPO 'Internet' Treaties were adopted, touched upon the 'minor reservations doctrine'.[1283] Australia in particular, favoured its maintenance.[1284] The clarification that article 10(2) WCT 'neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention' in the agreed statement concerning article 10 WCT indicates that the contracting parties decided to uphold the doctrine. It can consequently be regarded as one pillar on which article 5(3)(g) CD rests.[1285] Whether the link to this implied limitation suffices, however, is doubtful because the conceptual contours of article 5(3)(g) CD have not been drawn restrictively. A work's reproduction, communication to the public and making available is exempted in general. The fundamental principle underlying the 'minor reservations doctrine', by contrast, is the *de minimis* principle.[1286] The right of reproduction, furthermore, does not fall within its sphere of influence. Traditionally, only public performing rights are subjected to the 'minor reservations doctrine'.[1287] As regards the first alternative, use during religious celebrations, it is nevertheless irrelevant that the boundary lines of the 'minor reservations doctrine' are overstepped. Here, it is also arguable that national legislation reconciles the author's interest in controlling the use of a work with the interest in freedom of worship and unhindered religious practice. As to the second alternative, use during official celebrations, however, a similar justificatory basis is difficult to find. The broad exemption set out in article 5(3)(g) CD follows the dictate of political usefulness rather than evolving from the necessity to solve an understandable conflict of interests. In this case, the *de minimis* principle and the restriction to public performing rights, namely articles 11(1), 11*bis*(1), 11*ter*(1), 14(1) and 14*bis*(1) BC,[1288] must consequently be interpolated to bring article 5(3)(g) CD into line with international obligations. A work's reproduction and making available in the course of official celebrations is therefore not a special case. Its communication to the public constitutes a special case only insofar as solely the listed Berne rights are affected[1289] and the use made is of a *de minimis* nature.

Article 5(3)(h) CD allows the unauthorised use of works, such as works of architecture or sculpture, made to be located permanently in public places.

[1282] See for a more detailed description subsection 3.1.1.

[1283] See WIPO Doc. CRNR/DC/4, §§ 6.01, 12.06 and 12.07.

[1284] Cf. WIPO Doc. CRNR/DC/102, §§ 93 and 510.

[1285] Cf. subsection 4.4.3.

[1286] Cf. subsection 3.1.1.

[1287] Cf. subsection 3.1.1. The analysis conducted by Ficsor 2002a, 291-294, suggests that articles 11(1), 11*bis*(1), 11*ter*(1), 14(1) and 14*bis*(1) BC are covered nowadays.

[1288] See the analysis conducted by Ficsor 2002a, 291-294.

[1289] These exclusive rights are encompassed by the general right of communication to the public granted in article 8 WCT. It appears safe to assume that article 3 CD also covers these rights.

Traditionally, this widespread[1290] limitation is defended on the grounds that works of this kind shape the appearance of public streets, squares, parks and so forth, thereby inevitably becoming some sort of common property.[1291] Whether a user interest in all kinds of unauthorised uses, encompassing use for commercial purposes,[1292] can be inferred from this explanation, appears questionable – but still, the fact remains that these works inevitably form the background to people's life. A certain interest in unhindered use of objects closely related to day-to-day life and personal experiences, thus, cannot be denied. In respect of the media, an aspect of freedom of expression is also to be taken into account. In the course of a report or film, that does not concern current events,[1293] copyrighted works in public places may become visible. Article 5(3)(h) CD ensures in this situation that media activities are not restricted. The preparatory work undertaken for the 1967 Stockholm Conference, moreover, gives evidence that the use of works in public places was considered in the context of the later three-step test.[1294] On the whole, article 5(3)(h) CD can therefore be regarded as a special case.

Article 5(3)(i) CD permits the incidental inclusion of a work in other material.[1295] The principle on which this exemption rests seems to be the *de minimis* principle. It is arguable whether copyright must be hindered from becoming an obstacle to activities not specifically aiming to make use of a work but rather affecting a work 'by accident'. However, it can hardly be assumed on this basis that there is an understandable need calling on the legislator to reconcile the outlined user interest with the author's interests. The *de minimis* principle as such is, in any case, insufficient to lend a limitation the air of speciality – at least of speciality in the sense of the three-step test. The better solution would be not to extend the coverage of exclusive copyrights to *de minimis* uses such as a work's incidental inclusion in other material. This exclusion from protection would not fall under the three-step test.[1296] Article 5(3)(i) CD is therefore not a special case. To fulfil international obligations, EU member states must refrain from moulding a national limitation on article 5(3)(i) CD.

Article 5(3)(j) CD exempts the use of a work for the purpose of advertising the public exhibition or sale of artistic works insofar as necessary to promote the event. The limitation accordingly reacts to specific needs that are closely related to the work. A museum, for instance, depends on the use of its exhibits if it wants to

[1290] Cf. the overview given in subsection 3.1.3.
[1291] Cf. von Gierke 2002, 105.
[1292] Cf. von Gierke 2002, 113 and Cohen Jehoram 2002, 1693, both discussing use for the production of postcards and guidebooks.
[1293] Cf. article 5(3)(c) CD.
[1294] See Doc. S/1, Records 1967, 112 (footnote 1).
[1295] This limitation can traditionally be found in the German and UK copyright acts. Cf. subsections 3.1.3.1 and 3.1.3.4.
[1296] See subsection 4.1.3. Cf. as to the way in which common law countries deal with this kind of *de minimis* use subsections 3.1.3.4 and 3.1.3.5.

attract attention by publicising current exhibitions. Similarly, the owner of an artistic work depends on the work's use if he wishes to publicise the object he wants to sell.[1297] The limitation thus affords national legislation the opportunity to react adequately to an understandable conflict of interests. It is a special case.

Article 5(3)(k) CD allows the unauthorised use of a work for the purpose of caricature, parody or pastiche.[1298] This kind of use can be regarded as a specific (polemic) way of making a quotation of a work.[1299] In this line of reasoning, it can directly be supported by article 10(1) BC and would thus have to be qualified as a special case automatically.[1300] Moreover, it can be asserted that uses of this nature play a decisive role for cultural diversity. The parodist depends on the use of the original work to express himself artistically. Freedom of expression and considerations of intergenerational equity alike urge the national legislator to reconcile the author's interest in controlling objectionable use of this kind with another author's interest in using a work for caricature, parody or pastiche. Article 5(3)(k) CD is therefore a special case.[1301]

Article 5(3)(l) CD concerns the use of a work in connection with the demonstration or repair of equipment. This case has been discussed in detail in subsection 4.4.2.3 above: it is a special case only insofar as incidental use of a work is exempted that can hardly be avoided in the normal course of events when running a business selling and repairing relevant equipment. The permanent playing or showing of copyrighted material in such businesses, however, is not a special case.

Article 5(3)(m) CD permits the use of an artistic work in the form of a building or a drawing or plan of a building for the purpose of reconstructing the building. It reconciles the architect's interest in profiting from every construction of his artistic building with the owner's competing interest in making unauthorised use of the work to reconstruct the building. Article 5(3)(m) CD, therefore, reacts to an understandable conflict of interests and can be qualified as a special case.

Article 5(3)(n) CD allows libraries, educational establishments, museums and archives on their premises the unauthorised public communication or making available of a work in their holdings to individual persons for research or private study. The limitation serves the dissemination of information. The user interest at stake is the interest in getting unrestrained access to works of the intellect. The limitation is also related to considerations of intergenerational equity.[1302] The national legislator is thus free to solve the existing conflict of interests. Article 5(3)(n) CD is a special case.

[1297] Cf. subsection 4.4.2.3.

[1298] This limitation is traditionally imposed on copyright in France. Cf. subsection 3.1.3.3.

[1299] Cf. Quaedvlieg 1992, 23-24 (footnote 50), whose comment on quotations and parody points in this direction.

[1300] Cf. subsection 4.4.3. See in respect of the right of making available that is not affected by article 10(1) BC the previous comment made on article 5(3)(a) CD.

[1301] Cf. subsections 2.2.1, 2.3, 4.4.2.3.

[1302] Cf. subsections 2.2.2, 2.3, 4.4.2.3 and 4.4.4.1.

Article 5(3)(o) CD allows EU member states the maintenance of already existing limitations of minor importance on certain further conditions. The provision 'grandfathers' a wide variety of traditional limitations. It is thus impossible to make a general comment on whether or not article 5(3)(o) CD is a special case. All depends on the national limitation. Each national limitation falling under article 5(3)(o) CD has to be scrutinised thoroughly in the light of the rules governing the identification of special cases.[1303]

5.3.1.2 NO NEED FOR FURTHER SPECIFICATION

The analysis conducted in the previous subsection shows that the first criterion of the three-step test impacts only modestly on the list of permissible limitations set out in article 5 CD. Against this backdrop, it is of particular interest to reread the text of article 5(5) CD attentively: 'The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall *only be applied in* certain special cases…' (emphasis added). Does this mean that the EU member states, when adopting a limitation from the list, must form a special case of the listed type of limitation?[1304]

Sufficient room for further specification is created by the Copyright Directive. The cases listed are circumscribed in broad terms. The reprography exemption of article 5(2)(a) CD, for instance, simply refers to the technical process enabling the reproduction. National legislation, thus, is free to determine the purposes for which a corresponding national limitation may be invoked. The private use exemption of article 5(2)(b) CD merely requires that the beneficiary is a natural person and that any profit motive is absent. National legislation could additionally determine how many copies are permissible, and whether a work in its entirety or only extracts therefrom may be reproduced. Further conditions could similarly be imposed on the use for illustrating teaching or scientific research pursuant to article 5(3)(a) CD, the use for administrative, parliamentary or judicial proceedings pursuant to article 5(3)(e) CD, the use during religious celebrations pursuant to article 5(3)(g) CD and so forth. As to the use during official celebrations pursuant to article 5(3)(g) CD and the use for demonstrating or repairing equipment pursuant to article 5(3)(l) CD, more precision is necessitated by the international three-step test itself. The Copyright Directive, therefore, enumerates obviously types of limitations rather than precisely defined exceptions.[1305]

Nonetheless, the passage 'shall only be applied in certain special cases' does not generally require the enumerated cases to be further concretised. Admittedly, there is a move afoot in international copyright law seeking to align the requirement of

[1303] These rules have been set out in section 4.4.2.

[1304] An affirmative answer is given by Walter, in: Walter 2001, 1064. Dreier 2002a, 35, and Bornkamm 2002, 43, by contrast, answer in the negative.

[1305] Cf. the comments made by Poll and Reinbothe in the course of the discussion summarised by Zecher 2002, 53. See Walter, in: Walter 2001, 1064; Senftleben 2003, 12.

certainty with the continental European dogma of restrictively delineated exceptions.[1306] However, as shown above, this point of view must be rejected for various reasons.[1307] International obligations do not give rise to the assumption that a more precise delineation of the enumerated cases is generally required. Article 5(3)(l) CD and the second alternative of article 5(3)(g) CD which must further be specified to pass the first step of the three-step test are exceptions to this rule.

In the context of the Copyright Directive, it would even appear schizophrenic to contend that the expression 'shall only be applied in certain special cases' calls for devising special cases of the listed limitations. If the Directive's drafters really were of the opinion that the enumerated cases are not 'certain special cases', what was there preventing them from laying down a more precise definition themselves? Setting out an extensive list of permissible limitations first, and afterwards preventing national legislation from adopting the listed cases, appears a bewildering manoeuvre. This is all the more true because the overarching objective of the Copyright Directive, pursuant to its numerous recitals, is the harmonisation of copyright law in the EU.[1308] The further specification of the enumerated limitations in each member state would encourage the fragmentation of copyright law rather than its harmonisation. The best way of arriving at a coherent application of permissible limitations, as envisaged in recital 32, is to implement the listed types of limitations in national law in exactly the same broad terms as used in the Directive itself. Their further, more precise delineation in the light of the three-step test, then, can confidently be left to the courts – including the European Court of Justice, which is capable of taking care of their coherent application.[1309]

The assumption that the expression 'shall only be applied in certain special cases' means that special cases of the listed limitations must be formed, therefore, inevitably points to certain inconsistencies. It can be inferred from the final shape of article 5 CD itself, that this result was not intended. When the first proposal for the later Copyright Directive was tabled by the EU Commission, it was stated in the explanatory memorandum in respect of the precursor of the later article 5(2)(c) CD, privileging libraries, educational establishments, museums and archives, that the provision 'does not define those acts of reproduction which may be exempted by Member States'. It was clarified that, 'in line with the "three step test", Member States may not, however, exempt all acts of reproduction, but will have to identify certain special cases of reproduction, such as the copying of works which are no longer available on the market'.[1310] As to article 5(2)(c) CD, the view was

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[1306] See subsection 4.4.1. Cf. Reinbothe/von Lewinski 2002, 124; Ficsor 2002a, 516.

[1307] Cf. subsections 4.4.1 and 4.4.4.2.

[1308] Cf. subsection 5.1.3.

[1309] Cf. Buydens 2001, 442, who takes the view that the wording of article 5(5) CD indicates that judges must consider the three-step test in each single case anyway.

[1310] See the Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society of 10 December 1997, COM(97) 628 final – 97/0359 (COD), Explanatory Memorandum, 39.

accordingly adopted that certain special cases of the enumerated case must be formed at the national level indeed. This additional requirement, however, was directly given expression in the text of the proposed Directive itself. Draft article 5(2)(c) of the Commission's proposal explicitly allows solely 'specific acts of reproduction'.[1311] To this day, article 5(2)(c) CD is the only case listed in article 5 CD where this language is used. If the drafters of the Copyright Directive would have been of the opinion that the necessity to form special cases of the enumerated limitations already results from article 5(5) CD, this clarification in article 5(2)(c) CD would have been superfluous. Its existence, thus, indicates that the formulation 'shall only be applied in certain special cases' chosen in article 5(5) CD was not understood to call on national legislators to further concretise the enumerated types of limitations.

This conclusion can further be supported by developments in the field of article 10(2) WCT – the international provision on which article 5(5) CD was based.[1312] The outlined problem arose in the context of article 10(2) WCT as well. Pursuant to this provision, the contracting parties of the WCT, 'when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases…' Article 10(2) WCT is not accompanied by a list of 21 permissible limitations like article 5(5) CD. However, the limitations allowed under the Berne Convention function as such a list in this connection.[1313] The question is accordingly the same: are the contracting parties obliged to further concretise the limitations permitted by the Berne Convention in order to confine them to certain special cases?

Interestingly, this issue was expressly addressed in the context of the WIPO Copyright Treaty. The agreed statement concerning article 10(2) WCT clarifies that 'article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention'.[1314] The contracting parties of the WIPO Copyright Treaty, thus, were apparently alert to the potential harm flowing from the formulation chosen in article 10(2) WCT. The agreed statement, consequently, seeks to leave interpreters in no doubt about its impact on the scope of Berne limitations – none. As elaborated above, national limitations complying with provisions of the Berne Convention fulfil the first criterion of article 10(2) WCT automatically.[1315]

However, to present a complete discussion of the problem, the specific merit of the incorporation of all three criteria of the three-step test into article 5(5) CD shall not be concealed. Only the reference to the whole three-step test fully reflects the existing international obligations. As the analysis conducted in the previous

[1311] See the text of the proposal, ibid., 57.
[1312] Cf. section 5.2.
[1313] Cf. the parallel between article 10(2) WCT and article 5(5) CD drawn in section 5.2.
[1314] See WIPO Doc. CRNR/DC/96, agreed statement concerning article 10 WCT.
[1315] See subsection 4.4.3.

subsection has shown, a modest adjustment of the enumerated cases evolves from a scrutiny in the light of the first criterion. One case of minor importance, article 5(3)(i) CD, must even be abolished. In the context of article 10(2) WCT, it has moreover been argued above that the expression 'certain special cases' can at least function as a reminder for national legislation. It calls upon national policy makers to use the provisions of the Berne Convention moderately with sense and reason.[1316] By the same token, it can be posited here that, when adopting the cases listed in the Copyright Directive, national legislation must proceed moderately. Instead of thoughtlessly exhausting the room to manoeuvre offered in article 5 CD, a careful analysis of the social and cultural needs must precede the adoption of a limitation. National legislators are expected to weigh carefully the need for copyright protection against the justifications for limitations. The expression 'certain special cases', therefore, can potentially help to diminish the potential harm flowing from the extensive enumeration of permissible limitations in the Copyright Directive. If the claim for moderateness is taken seriously, no member state should succumb to the temptation of adopting all listed exemptions.

In the context of the Copyright Directive, using the offered room to manoeuvre with sense and reason, moreover, necessitates considering the European harmonisation project. Whereas in connection with article 13 TRIPs and article 10(2) WCT only provisions of international copyright law must be reconciled with the objectives of national legislation, the complex framework surrounding article 5(5) CD comes up with further challenges. Recital 32 of the Copyright Directive stresses that the member states should arrive at a 'coherent application' of the limitations allowed under the Directive. It has already been pointed out that this task, ultimately, is not unlikely to be accomplished first and foremost by the courts. National legislation, however, also can contribute to its realisation by taking developments in other member states into consideration and seeking to bring its own decisions into line with them.

In sum, the following conclusions can accordingly be drawn: the requirement that the limitations listed in article 5 CD, pursuant to paragraph 5 thereof, 'shall only be applied in certain special cases' does not mean that national legislation must form special cases of the enumerated limitations.[1317] Instead, it simply completes the reference to the international three-step test. It gives full evidence of the existing international obligations which, pursuant to recital 44, shall be observed. In the light of the harmonisation objective underlying the Directive, the passage can furthermore, like the corresponding formulation chosen in article 10(2) WCT, be understood as a claim for moderateness. When bringing domestic copyright law into line with the Copyright Directive, national legislators must use sense and reason. Limitations should only be adopted or maintained if necessary for an appropriate national copyright balance.

[1316] Cf. subsection 4.4.3.
[1317] Cf. Dreier 2002a, 35; Bornkamm 2002, 43.

5.3.2 CONFLICT WITH A NORMAL EXPLOITATION

Article 5(5) CD also comprises the second criterion of the international three-step test: 'The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter…' The reference to 'other subject matter' besides the 'work' concerns the rights related to copyright which are protected by the Directive, such as the rights of performers, phonogram and film producers, and broadcasting organisations.[1318] In international copyright law, a conflict with a normal exploitation arises if the authors are deprived of an actual or potential market of considerable economic or practical importance. Among the circle of these actual or potential markets rank solely those possibilities of marketing a work which typically constitute a major source of income and, consequently, belong to the economic core of copyright. For determining these major sources of income, the overall commercialisation of works of the relevant category must be considered instead of focusing on the international system of exclusive rights. On the basis of these findings, the following comments can be made:

Article 5(1) CD exempts solely temporary acts of reproduction having no independent economic significance. These acts, thus, do not constitute a potential major source of income. The provision consequently does not conflict with a work's normal exploitation.

Article 5(2)(a) CD concerns reproductions effectuated by the use of photographic or similar techniques. In this area, it is fruitless to speculate about a potential conflict with a normal exploitation. Due to market failure in the analogue world, right holders are rendered incapable of establishing functioning markets that could be profitable enough to belong to the economic core of copyright.

Article 5(2)(b) CD allows unauthorised analogue or digital reproductions for strictly personal use. It is advisable to assign the task of administering digital private use of this kind to libraries and other organisations capable of individualising users.[1319] It is irrelevant in this context that, with an eye to article 5(2)(c) CD, recital 40 emphasises that uses made by libraries and similar institutions should not cover on-line delivery of protected works or other subject matter. The institutions involved in the envisioned digital private use infrastructure serve as intermediaries. They deliver protected material on behalf of private users. These beneficiaries are entitled to make digital reproductions under article 5(2)(b) CD. Insofar as the digital library service is confined to private users, it can thus be defended on the basis of article 5(2)(b) CD – irrespective of recital 40. Libraries and similar institutions involved in a digital private use infrastructure must enter into

[1318] See articles 1(1), 2 and 3(2) of the Copyright Directive. Cf. also the scope of the WCT and WPPT on which the Directive leans.

[1319] Cf. subsection 4.5.5.

contractual agreements with the right holders anyhow. To be authorised to run the envisioned private use network,[1320] they have to obtain a licence for making works available on-line – at least insofar as article 5(3)(n) CD does not allow such use. The framework set out in the Copyright Directive, thus, is not favourable for the establishment of an appropriate digital private use infrastructure. This is a serious flaw of the Directive.

Article 5(2)(c) CD, when read together with recital 40, does not conflict with a normal exploitation. Reproductions made by libraries, educational establishments, museums or archives for internal use, such as the preservation and archiving of copyrighted material, can hardly be regarded as a potential major source of royalty revenue. Insofar as copies are passed on to third persons, the circle of beneficiaries must be drawn sufficiently narrow so that the limitation does not encroach upon the economic core of the overall commercialisation of affected works.

Article 5(2)(d) CD exempts ephemeral recordings. The provision keeps within the limits of article 11*bis*(3) BC. A potential major source of royalty revenue, belonging to the economic core of copyright, need not be expected in this area.

Article 5(2)(e) CD allows social non-profit institutions, such as hospitals or prisons, the reproduction of broadcasts. One can hardly assume that this limitation encroaches upon the economic core of copyright by depriving right holders of broadcast works of a major source of income. Insofar as the reproduction serves time shifting purposes, this has already been discussed in more detail in subsection 4.5.5.1. Article 5(2)(e) CD does therefore not conflict with a normal exploitation.

Article 5(3)(a) CD permits the use for the purpose of illustrating teaching or scientific research to the extent that it is justified by the underlying non-commercial purpose. The limitation leans on article 10(2) BC. The guidelines given in subsection 4.5.4.2 above, where the case of limitations based on article 10(2) BC was discussed in detail, must be observed in this respect. Furthermore, it is to be taken into account that only non-commercial purposes are exempted by article 5(3)(a) CD. It cannot therefore readily be inferred that the right holders are deprived of a major source of royalty revenue. It accordingly appears safe to assume that article 5(3)(a) CD does not conflict with a normal exploitation. This is particularly true if the circle of beneficiaries is drawn narrowly at the national level so that the economic core of a work's overall commercialisation, for instance of an academic work, remains untouched.[1321]

Article 5(3)(b) CD privileges people with a disability. It does not affect a potential major source of income. Hence, there is no conflict with a normal exploitation.

Article 5(3)(c) CD exempts the use of articles on current topics and, insofar as justified by the informatory purpose, a work's use in connection with the reporting of current events. The provision rests on article 10*bis* BC. A potential major source

[1320] Cf. subsection 4.5.5.2.
[1321] Cf. Xalabarder 2003, 165-167.

of royalty revenue need not be expected – neither when an article on current topics is used nor when a work is incidentally included in a report on current events. The use of articles on current topics can furthermore be reserved. There is accordingly no conflict with a normal exploitation.

Article 5(3)(d) CD allows quotations. A typical major source of royalty revenue can hardly be expected in this area. Even in the case of academic works, where it is not unlikely that a work will be quoted in other treatises, it cannot generally be assumed that a major source of income – comparable to the sale of copies – will accrue from quotations. In the case of certain works of paramount importance, a potential major source of income might be expected. Surveying the wide variety of academic works, however, this appears as an atypical case. Hence, it is not possible to derive the general rule that quotations typically constitute a potential source of income which belongs to the economic core of an academic work's overall commercialisation. Article 5(3)(d) CD thus does not conflict with a normal exploitation. Considerations of intergenerational equity strongly support this finding.[1322]

Article 5(3)(e) CD permits the use for the purpose of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings. As to the first aspect – public security – it suffices to say that a typical major source of income cannot be expected. There is consequently no conflict with a normal exploitation. In respect of the second aspect, the proper performance of administrative, parliamentary or judicial proceedings, it must be considered that this alternative solely concerns situations in which an administrative, parliamentary or judicial body really depends on the use of copyrighted material so that it would be rendered incapable of accomplishing its tasks if the required use is denied. Any further exemption of the use of copyrighted material in this context evolves from considerations of political usefulness and is not a special case.[1323] Owing to this restricted ambit of operation, a potential major source of royalty revenue is not at stake. Hence, there is no conflict with a normal exploitation. On the same grounds, it can be inferred that the third aspect, the reporting of proceedings of parliamentary, administrative or judicial bodies, is in line with the second criterion.

Article 5(3)(f) CD exempts the use of political speeches as well as extracts of public lectures or similar works insofar as justified by the underlying informatory purpose. The limitation is in line with articles 2*bis*(1) and 2*bis*(2) BC. A typical potential major source of royalty revenue cannot be expected here. Not every political speech[1324] or lecture held in public attracts attention. In the majority of

[1322] Cf. subsections 2.3 and 4.5.4.1.

[1323] Cf. subsection 5.3.1.1.

[1324] By virtue of article 2*bis*(1) BC, political speeches may be excluded from protection wholly or in part. This permissible exclusion is not subjected to the three-step test in international copyright law. See subsection 4.1.3. Article 5(5) CD, however, may be applied to this case because the internationally permitted exclusion reappears in the Copyright Directive in the shape of a limitation.

cases, a public speech will not be reproduced, communicated to the public and made available on-line. Article 5(3)(f) CD does therefore not conflict with a normal exploitation.

Article 5(3)(g) CD permits the use during religious or official celebrations. As to the first aspect, use in the course of religious celebrations, it has already been shown above that this exemption conflicts with a normal exploitation of works specifically created to be used during such celebrations.[1325] This facet of article 5(3)(g) CD, thus, is incompatible with the three-step test. In connection with the second aspect – official celebrations – it must be borne in mind that this alternative is a special case only insofar as it does not go beyond the conceptual contours of the 'minor reservations doctrine'. Its sphere of influence must accordingly be restricted to public performing rights.[1326] Furthermore, it appears safe to assume that the works publicly performed during official celebrations, by and large, will be of a general nature instead of being created specifically for use in the course of such celebrations. The conflict with a normal exploitation arising in the field of religious celebrations, thus, does not come to the fore in this context as well. The second alternative of article 5(3)(g) CD, the use during official celebrations, is therefore not in conflict with a normal exploitation.

Article 5(3)(h) CD allows the unauthorised use of works, such as works of architecture or sculpture, made to be located permanently in public places. This limitation poses substantial difficulties. To approach the problem, it is advisable to clarify at the outset that the passage 'made to be located permanently in public places', and the fact that especially the example of 'works of architecture or sculpture' is given, clearly indicates that the reference to 'public places' must not be misconstrued so as to encompass 'premises open to the public'.[1327] Works situated in museums and similar institutions, thus, do not fall under article 5(3)(h) CD. Otherwise, the limitation would inevitably conflict with a normal exploitation. It has always been understood to also exempt use for commercial purposes, such as the production of postcards and guidebooks.[1328] The sale of reproductions of an exhibited artistic work, however, constitutes a potential major source of royalty revenue for painters, sculptors, etc. besides the sale of the original itself. If the postcard industry were to enjoy the freedom of entering museums, making all kinds of reproductions of the exhibited artistic works, and selling postcards and digital copies afterwards, the authors would be deprived of a major source of income.

The crucial question, then, is whether the same conclusion must be drawn when a work is really 'made to be located permanently in public places', as demanded by

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For the application of article 5(5) CD, the framework set out in the Directive itself is decisive. See section 5.2.

1325 See subsection 4.5.4.3.

1326 See subsection 5.3.1.1.

1327 The latter extension, for instance, can be found in section 62 of the UK CDPA 1988. Cf. Garnett/James/Davies 1999, 553 and subsection 3.1.3.4.

1328 Cf. von Gierke 2002,113; Cohen Jehoram 2002, 1693; Garnett/James/Davies 1999, 553.

article 5(3)(h) CD. In this case, it can be argued that the architect or sculptor dedicates his work – erected in a public street, square, park, etc. – to the public.[1329] However, this dedication need not be misunderstood to imply that he also waives exploitation possibilities capable of yielding major profits. Therefore, a fine line has to be walked here. If a photograph is taken showing family members in front of a famous monument to be presented to relatives in a photo album, this is a strictly personal use that does not deserve a defence based on article 5(3)(h) CD anyway.[1330] The paintings of amateur painters inspired by the beauty of a public square are irrelevant in the present context either. A typical major source of royalty revenue will not accrue from this kind of use anyway.[1331]

If a public place serves as a background to a film, the unauthorised use of the works situated in that place is of a commercial nature. However, this is no typical source of income. It cannot be stated that works made to be located in public places, *generally*, will sooner or later be used for the making of a film. A typical major source of royalty revenue, thus, cannot be expected. This commercial use is therefore irrelevant.

If, however, a work situated in a public place is systematically reproduced on postcards, in guidebooks or made available on-line for commercial ends, the conclusion can hardly be ignored that a conflict with a normal exploitation arises. It may be argued that such use is not typical. Admittedly, a work will not automatically be printed on postcards just because it is located in a public place. There are myriad works out there in public streets, squares and parks, a postcard of which will never be produced. On the other hand, it is not atypical that a work located in a public place attracts attention and is exploited in this way. The sale of postcards and similar uses systematically exploiting the work, therefore, may indeed be regarded as a relevant potential major source of income – just like the sale of postcards of works exhibited in a museum. Insofar as article 5(3)(h) CD exempts the systematic reproduction, and communication or making available to the public of works permanently located in public places for commercial purposes it conflicts accordingly with a normal exploitation.

Article 5(3)(i) CD is not a special case.[1332] It does not reach the second criterion.

Article 5(3)(j) CD exempts the use for the purpose of advertising the public exhibition or sale of artistic works. It does not affect a potential major source of royalty revenue. Hence, no conflict with a normal exploitation arises.

Article 5(3)(k) CD allows the unauthorised use of a work for the purpose of caricature, parody or pastiche. It has already been explained in subsection 4.5.4.1 that limitations of this kind do not conflict with a normal exploitation.

[1329] Cf. von Gierke 2002, 105. See also the decision 'Verhüllter Reichstag' of the German Federal Court of Justice, Juristenzeitung 2002, 1005-1007.

[1330] See articles 5(2)(a) and (b) CD.

[1331] Cf. section 2.3.

[1332] See subsection 5.3.1.1.

Article 5(3)(l) CD permits the use of a work in connection with the demonstration or repair of equipment. It is a special case only insofar as incidental use of a work is exempted that can scarcely be avoided in the normal course of events when running a business selling and repairing relevant equipment. This does not constitute a potential major source of royalty revenue. Article 5(3)(l), thus, does not conflict with a normal exploitation.

Article 5(3)(m) CD permits the use for the purpose of reconstructing a building. This is no typical potential source of income. It can hardly be assumed that copyrighted buildings, in general, will be destroyed and reconstructed afterwards. Article 5(3)(m) CD, therefore, does not conflict with a normal exploitation.

Article 5(3)(n) CD allows libraries, educational establishments, museums and archives on their premises the unauthorised public communication or making available of a work in their holdings to individual persons for research or private study. On account of this restricted field of application, it is unlikely that article 5(3)(n) encroaches upon a potential typical major source of income. It does not conflict with a normal exploitation.[1333]

Article 5(3)(o) CD allows the member states to maintain already-existing limitations of minor importance on certain further conditions. It is thus impossible to make a general comment on whether or not article 5(3)(o) CD conflicts with a normal exploitation.

5.3.3 UNREASONABLE PREJUDICE TO LEGITIMATE INTERESTS

In line with the international three-step test, article 5(5) CD forbids an unreasonable prejudice to 'the legitimate interests of the right holder'. The reference to the right holder instead of the author is consistent with the Directive's scope. It does not only deal with copyright, but also with rights related to copyright, such as the rights of performers, phonogram and film producers, and broadcasting organisations.[1334] As the Directive does not protect moral rights, the term 'interests' comprises only a right holder's economic interests. Recital 19 posits unequivocally that 'moral rights remain outside the scope of this Directive'. Accordingly, the conceptual contours of the term 'interests' must be drawn like in article 13 TRIPs.[1335] Merely the economic interest of the right holders in the exploitation of the exclusive rights granted under the Copyright Directive – the right of reproduction (article 2), the right of communication to the public, including the right of making a work available (article 3), and the distribution right (article 4) – is included. This interest encompasses every conceivable possibility of deriving economic value.[1336]

[1333] Cf. subsection 4.5.5.2.

[1334] See articles 1(1), 2 and 3(2) of the Copyright Directive. Cf. also the scope of the WCT and WPPT on which the Directive leans.

[1335] See subsection 4.6.3.2.

[1336] Cf. subsection 4.5.1.2.

The proportionality test which the prohibition of an unreasonable prejudice to the legitimate interests of the right holders entails[1337] is compatible with EC law. In the decision Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary, the European Court of Justice stated that,

> 'in determining the scope of any derogation from an individual right […], the principle of proportionality, *one of the general principles of law underlying the Community legal order*, must be observed'.[1338]

The Court maintained that the principle of proportionality 'requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view'.[1339] The latter statement, with its reference to the appropriateness and necessity of the measure taken, shows that the different notions, which have been invoked above in the context of the international three-step test, are consistent with the application of the principle of proportionality in EC law.[1340] As the comparative analysis conducted by Emmerich-Fritsche shows, the principle of proportionality is known in all EU member states.[1341] Therefore, the proportionality test constitutes a feature of the international three-step test which can also be reconciled with the different legal traditions of the member states.[1342]

In connection with the final balancing process, a specific problem comes to the fore which concerns the payment of equitable remuneration. In the context of the international three-step test, national legislation is offered the possibility to provide for the payment of equitable remuneration to avoid an unreasonable prejudice.[1343] As to the amount of remuneration to be paid, it has been elaborated above that the concept of equitable remuneration underlying the three-step test is a fluid transition from a state where remuneration is unnecessary to cases requiring the payment of the sum an author freely bargaining for the use in question would have received.[1344] As the payment of equitable remuneration serves as a means for avoiding that an unreasonable prejudice is caused, it can be enunciated in general that equitable remuneration must be paid *insofar* as the limitation in question does not keep within reasonable limits.[1345]

The Copyright Directive does not refer to the payment of equitable remuneration. Instead, the formulation 'fair compensation' is used. The reprography exemption of

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[1337] Cf. subsection 4.6.4.

[1338] See Judgement of the European Court of Justice of 15 May 1986, Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary, Case 222/84 (1986) ECR 1651, § 38 (emphasis added).

[1339] See Johnston v. Chief Constable, ibid., § 38.

[1340] Cf. the analysis by Emmerich-Fritsche 2000, 207-224. See subsections 4.6.4 and 4.6.4.2.

[1341] See Emmerich-Fritsche 2000, 140-193.

[1342] The drafters of the Copyright Directive sought not to encroach upon the different legal traditions in the member states. Cf. recital 32 of the Directive.

[1343] Cf. subsections 3.1.2, 3.1.3.1, 3.3.1, 4.3.2, 4.3.3 and 4.6.4.2.

[1344] See subsection 4.6.4.2.

[1345] See subsection 4.6.4.2.

article 5(2)(a) CD, the limitation for strictly private use of article 5(2)(b) CD, and the privilege for social institutions, such as hospitals and prisons, of article 5(2)(e) CD place the obligation on the member states to secure the payment of fair compensation. In this regard, it is stated in recital 35:

> 'In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question.'

Apparently, the expression 'fair compensation' thus refers to a concept that is quite similar to the system of the three-step test. It is not clear, however, whether or not 'fair compensation' will ever amount to a remuneration equivalent to that which the right holder would have received if he were free to authorise the use in the absence of a compulsory licence provision. Use of the term 'compensation' instead of 'remuneration' in connection with the adjective 'fair' instead of 'equitable' suggests that this cannot so readily be assumed. It is a compromise formula rather than an equivalent.[1346] The pecuniary reward accruing from the international obligation to pay equitable remuneration, by contrast, may reach this level.[1347] The obligation to provide for the payment of equitable remuneration is therefore stronger than the claim for fair compensation.[1348]

As the Copyright Directive only provides for the payment of fair compensation in the three aforementioned cases, the relationship between this concept and the international system embodied in the three-step test must be examined. Recital 36 indicates in this respect that the member states 'may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation'. The payment of pecuniary reward is therefore obviously not restricted to those cases which explicitly contain the obligation to provide for fair compensation. Instead, it is a concept which may generally be applied to the limitations listed in article 5. Recital 44 must also be borne in mind in this context: 'When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations'. On the one hand, the Copyright Directive thus clarifies that the payment of pecuniary reward is not confined to those cases in which it is prescribed. On the other hand, it recalls international obligations arising from the three-step test. Against this backdrop, the obligation to fairly compensate the right holders laid down in articles 5(2)(a), (b) and (e) CD can be understood to have a

[1346] Cf. Reinbothe 2001, 738. See for a detailed discussion Hugenholtz/Guibault/van Geffen 2003.
[1347] See Ricketson 1987, 520; Ficsor 2002a, 275. Cf. subsection 4.6.4.2.
[1348] Cf. Reinbothe 2002, 49.

privileging effect. In these cases, the drafters of the Copyright Directive sought to ensure that the right holders would receive monetary reward anyway – irrespective of whether or not such an obligation results from the three-step test. To underline that an internal, 'European' obligation is imposed on the member states, the term 'fair compensation' was used instead of the expression 'equitable remuneration' that could have been mixed up with the international obligation. The divergent formulation also gives evidence that the international obligation remains untouched and must be fulfilled separately – notwithstanding the necessity to provide for fair compensation.[1349]

The payment of equitable remuneration pursuant to the three-step test should therefore be independent of the rules governing the payment of fair compensation under the Copyright Directive. If a corresponding inquiry, in a case where the Directive itself does not provide for monetary reward, brings to light that the payment of equitable remuneration is necessary to fulfil international obligations, the right holders must be remunerated. If it shows that fair compensation is insufficient in a case where the Directive expressly provides for such compensation, a higher amount of monetary reward must be paid on account of the international obligation to pay equitable remuneration. If, by contrast, the inquiry supports the view that the payment of pecuniary reward is unnecessary in a case in which the Directive provides for fair compensation, this latter 'European' obligation has a privileging effect. Right holders receive fair compensation even though a corresponding international obligation does not exist.

It is to be reiterated in this context that the three-step test has always been understood to allow national legislation great latitude.[1350] The decision on whether and how much equitable remuneration ought to be paid is far from being a mathematical exercise. On the basis of the international rules, the following guidelines can nonetheless be given:

Article 5(1) CD concerns temporary acts of reproduction having no independent economic significance. It is therefore justified to refrain from providing for the payment of monetary reward.

Article 5(2)(a) CD sets out the 'reprography exemption', thereby prescribing the payment of fair compensation. In some cases, however, this will turn out to be insufficient. If, for instance, industrial undertakings take advantage of article 5(2)(a) CD, the right holders should receive the sum they would have agreed upon, if they had been free to bargain for the exempted use. The claim for a pecuniary reward reaching this level can be based on the international obligation to provide for the payment of equitable remuneration.

Article 5(2)(b) CD privileges strictly personal use. As elaborated above, it would unreasonably prejudice the legitimate interests of the right holders if digital uses of this kind would not be administered by libraries and similar institutions. The

[1349] Cf. Bornkamm 2002, 47-48.
[1350] Cf. Kerever 1975, 331; Collova 1979, 125-127; Heide 1999, 105. Cf. subsection 3.1.2.

establishment of a library-administered digital private use system is the least harmful means.[1351] As to adequate pecuniary reward, the payment of fair compensation, as set out in the Directive itself, appears sufficient.[1352]

In the case of article 5(2)(e) CD, the prescribed payment of fair compensation is sufficient to fulfil international obligations.

Article 5(3)(a) CD exempts the use for illustrating teaching or scientific research. As discussed above, the payment of equitable remuneration is appropriate in this case to fulfil international obligations.[1353] In this context, the three-step test of article 5(5) CD thus requires the payment of monetary reward.

Article 5(3)(e) CD, among other things, allows administrations the unauthorised use of copyrighted material insofar as the accomplishment of their tasks depends on such use.[1354] The limitation ensures the effective functioning of administrative bodies. However, it also helps to reduce the cost of proper administration. Arguably, it has overtones of a tax on right holders. The payment of equitable remuneration is consequently appropriate to ensure compliance with international obligations. It evolves from article 5(5) CD.

In the remaining cases, there is no obvious need for the payment of equitable remuneration.[1355]

5.3.4 OVERVIEW OF INTERNATIONAL OBLIGATIONS

Conducting a survey of the obligations imposed on national legislation by the reference to the international three-step test made in article 5(5) CD, the following conclusions can be drawn: the 'reprography exemption' of article 5(2)(a) CD is merely accompanied by the obligation to provide for fair compensation. With regard to copies made by industrial undertakings, this pecuniary reward is insufficient. Pursuant to article 5(5) CD, it should amount in this case to the sum a right holder freely bargaining for the use in question would have received. Hence, equitable remuneration must be paid.[1356] Article 5(2)(b) CD, privileging strictly personal use, must be replaced in the digital environment with a library-administered private use system to fulfil the three-step test. Otherwise, it would unreasonably prejudice the legitimate interests of the right holders. The payment of fair compensation, as prescribed in the Directive, appears appropriate.[1357]

[1351] See subsections 4.6.4.2. and 4.5.5.

[1352] Cf. subsection 4.6.4.2. See as to the relationship between levy schemes and the protection of DRM systems Hugenholtz/Guibault/van Geffen 2003, 32-47, and Peukert 2003.

[1353] Cf. Xalabarder 2003, 167. See subsections 4.6.4.1 and 4.6.4.2.

[1354] Cf. subsection 5.3.1.1.

[1355] Ricketson 2003, 77, considers it advisable to provide for equitable remuneration in connection with article 5(3)(b) CD. Article 5(3)(i) CD is not a special case. The first alternative of article 5(3)(g) and article 5(3)(h) CD conflicts with a normal exploitation. See sections 5.3.1.1 and 5.3.2.

[1356] See subsection 5.3.3. Cf. subsection 4.6.4.2 and Ricketson 1987, 520; Ficsor 2002a, 275.

[1357] See subsection 4.6.4.2.

Article 5(3)(a) CD, exempting the use for illustrating teaching or scientific research, is incompatible with the three-step test insofar as no provision is made for the payment of equitable remuneration.[1358] In article 5(3)(e) CD, the exemption of the use for administrative, parliamentary or judicial proceedings must be restricted to those institutions which really depend on the use of copyrighted material to accomplish their tasks. Otherwise, this aspect of article 5(3)(e) CD cannot be considered a special case.[1359] Furthermore, the use for administrative purposes must be cushioned by the payment of equitable remuneration.[1360] The first alternative of article 5(3)(g) CD, the use of works during religious celebrations, conflicts with a normal exploitation.[1361] It is therefore incompatible with the three-step test. The second alternative of article 5(3)(g) CD, the use of works during official celebrations, must be confined to the scope of the 'minor reservations doctrine'. Otherwise, it cannot be deemed a special case.[1362] National legislation must furthermore refrain from adopting article 5(3)(h) CD, allowing the unauthorised use of works made to be located permanently in public places. Insofar as article 5(3)(h) CD exempts the systematic reproduction and communication or making available to the public of works situated in public places for commercial ends, it conflicts with a normal exploitation.[1363] Article 5(3)(i) CD concerning the incidental inclusion of a work in other material is not a special case.[1364] Its adoption, consequently, runs counter to international obligations. Article 5(3)(l) CD, permitting the use in connection with the demonstration or repair of equipment, is a special case only insofar as incidental use is made that can hardly be avoided in the normal course of events when running a business selling or repairing relevant equipment.[1365] When maintaining so-called 'cases of minor importance', as permitted by article 5(3)(o) CD, national legislation must moreover proceed carefully. Affected limitations must be scrutinised thoroughly in the light of the three-step test.

5.4 The Addressees of Article 5(5) CD

Finally, the question is to be raised, to whom should the task of bringing national copyright law into line with all the described modifications be assigned? Is it solely the task of national legislation? May it confidently be left to the courts? This question has interesting ramifications that shall not be concealed. Insofar as it touches upon the division of labour between courts and legislators, it also refers to

[1358] Cf. subsections 4.6.4 and 5.3.3.
[1359] See subsection 5.3.1.1.
[1360] See subsection 5.3.3.
[1361] See subsection 5.3.2.
[1362] See subsection 5.3.1.1.
[1363] See subsection 5.3.2.
[1364] See subsection 5.3.1.1.
[1365] See subsections 4.4.2.3 and 5.3.1.1.

the basic problem of whether copyright limitations should either be enshrined in restrictively delineated provisions or be circumscribed in elastic terms in the framework of an open-ended provision. The first alternative mirrors the continental European model, the second alternative reflects the Anglo-American approach.[1366] If the first alternative is chosen, the legislative decision about how to draw the conceptual contours of the restricted number of precisely delineated limitations forms the centre of gravity. If preference is given to the second alternative instead, the courts play a decisive role. They must bring to light the different facets of the given open-ended norm. As clarified in the context of the requirement that limitations have to be 'certain special cases', the three-step test leaves sufficient room for both alternatives.[1367] Hence, it is not prescribed in international copyright law which of the two outlined models is to be followed at the national level.

Furthermore, the question of how to fulfil international obligations has overtones of the general problem of the effect of international treaties in domestic law. It is beyond the scope of the present inquiry to dive into the theoretical profundities this question entails. Different answers are to be expected on the basis of the different national mechanisms regulating the effect of international treaties in domestic law.[1368] The observation of articles 9(2) BC, 13 TRIPs and 10 WCT depends on these specific mechanisms. In the framework of the Copyright Directive, however, this underlying complex problem[1369] has been solved by transforming the existing international obligations into EC law. Article 5(5) CD, accompanied by recital 44, repeats the international obligation to comply with the three-step test, thereby making it part of the obligation to implement the Copyright Directive correctly in national law.

In general, it might be doubted, however, whether the three-step test has the potential for impacting on national court decisions. It could be argued that it is too vague because of the openness of its wording. National legislation, it could then be argued, must concretise the three-step test first. Against this assumption, it is to be asserted that the test is an indispensable element of the international system. It sets limits to limitations on internationally recognised rights. If allowance is made only for the more precisely delineated limitations to be found in the Berne Convention but not for the three-step test, merely the walls of the building erected in international copyright law are considered but not the roof. A national court that is alert to international obligations will accordingly always seek to take into account the entire framework established in international copyright law instead of focusing merely on those elements, the outlines of which appear sufficiently specified. In fact, it cannot be said that courts were loath in the past to take the abstract criteria of

[1366] Cf. section 2.1.

[1367] Cf. subsections 4.4.1 and 4.4.4.2.

[1368] Cf. the overview given by numerous authors in: Jacobs/Roberts 1987. See as to the TRIPs Agreement Duggal 2001, 86-110; Drexl 1994, 777-788.

[1369] Cf. as to treaty-making by the EC Pescatore, in: Jacobs/Roberts 1987, 171-192.

the three-step test into account. Examples in Germany, the Netherlands and Austria show that the opposite is true.[1370]

Against this background, it becomes obvious that the question of the addressees of the three-step test cannot be answered by drawing an entirely black or white picture. It does not portray reality adequately when it is assumed that the national legislator, by setting out precisely delineated limitations, is capable of barring courts from having recourse to the three-step test. National legislation cannot monopolise the application of the three-step test. As the test is now enshrined in article 5(5) CD, this is even more true in EC law. National courts have always and will always orient their decision by the abstract criteria of the three-step test when it comes to entering unknown territory. In particular, in times of upheavals within the copyright matrix, when new solutions have to be developed, the three-step test will be used as a signpost.[1371] The crucial question, then, is the extent to which national legislation should pave the way for the application of the three-step test by the courts. With regard to the implementation of the Copyright Directive in the member states, this question has taken concrete shape. Should the three-step test itself be incorporated into national copyright law?[1372]

The latter question can clearly be answered in the negative. The passage of article 5(5) CD stating that limitations 'shall only be applied in certain special cases' is a mere reference to international obligations.[1373] The three-step test must be borne in mind but not be incorporated. As there is no indication that national courts are reluctant to lend weight to the test, it is not necessary to impose the obligation on national legislation to include the three-step test in national law. However, it may be wise to introduce the three-step test in national copyright law – particularly in the context of the Copyright Directive. The realisation of the Directive's principal objective to harmonise copyright law is imperilled by the extensive list of optional limitations set out in article 5 CD. It would have been more effective to set forth an open-ended formula based on the three-step test instead of enumerating no fewer than 21 limitations. The courts, including the European Court of Justice, could then have accomplished the gradual harmonisation of copyright limitations.[1374]

[1370] Cf. German Bundesgerichtshof (Federal Court of Justice), decisions I ZR 118/96 of February 25, 1999, in: Juristenzeitung 1999, 1000-1007, and I ZR 255/00 of July 11, 2002, in: Gewerblicher Rechtsschutz und Urheberrecht 2002, 963-967. Cf. Dutch Hoge Raad (Supreme Court), decision no. 13933 of June 22, 1990, 'Zienderogen Kunst', in: Nederlandse Jurisprudentie 1991, no. 268, and decision no. 14695 of June 26, 1992, in: Nederlandse Jurisprudentie 1993, no. 205. See also the decision of the Gerechtshof Amsterdam of January 30, 2003, in: Tijdschrift voor Auteurs-, Media- en Informatierecht 2003, 94-97. Cf. Austrian Oberster Gerichtshof (Supreme Court), decision 4 Ob 143/94 of January 31, 1995, in: Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil 1995, 729-731. Cf. the overview given by Bornkamm 2002, 35-38.

[1371] Cf. section 2.3.

[1372] Cf. Cohen Jehoram 2002, 1694.

[1373] Cf. subsection 5.3.1.2.

[1374] Cf. Dreier 2002a, 28 (footnote3).

However, this more effective solution of the harmonisation problem is not completely beyond reach. A last chance is offered by the circumscription of the 21 permissible limitations in the Directive. As the enumerated cases are not delineated precisely but rather reflect certain types of limitations, the outlines of which are not drawn restrictively,[1375] some breathing space is left. National legislation can use this room to manoeuvre by laying down literal copies of the enumerated cases in national law which are combined with the three-step test. The framework set out in article 5 CD, in other words, is to be copied as precisely as possible.[1376] By doing so, a further fragmentation of copyright law in the EU can be prevented. If all member states would literally reproduce the cases they wish to include in national law and subject these cases to the three-step test, a uniform framework would indeed be established. If the European Court of Justice, then, is called upon to decide on one of the limitations allowed under the Copyright Directive, its holding would equally affect the laws of those member states providing for the limitation in question.[1377] If, by contrast, each member state embarks on the further specification of the listed types of limitations, this will inevitably result in a further fragmentation of copyright law. Decisions of the European Court of Justice could not have the same harmonising effect. As they may concern only one specific variant chosen in one individual member state, it will become much more difficult for the Court to contribute to the intended harmonisation of copyright law.

It is therefore preferable to adopt the three-step test at the national level, and to combine it with literal copies of the types of limitations listed in article 5 CD. The outcome of this procedure would be a half-way house – somewhere between the much more open US fair use doctrine and the traditional continental European system of more restrictively delineated limitations. The question posed at the beginning of this subsection, then, could finally clearly be answered as follows: courts and legislators alike are the addressees of the three-step test.[1378] Otherwise, the project to harmonise copyright law in the EU will further be compromised.

[1375] Cf. subsection 5.3.1.2.

[1376] For a more detailed description of this proposal, see Senftleben 2003, 11-13.

[1377] Cf. Bornkamm 2002, 44, elaborating that the three-step test, within the framework set out in article 5 CD, 'offers the chance for dynamic harmonisation'.

[1378] Cf. Buydens 2001, 442, who believes that this conclusion follows directly from the wording of article 5(5) CD anyway.

Chapter 6

Summary

The three-step test sets limits to limitations on authors' rights. The latter sequence – grant of exclusive rights, imposition of limits on these rights, application of the three-step test – has been inspected more closely in chapter 2.

Inquiring into the rationales underlying copyright protection first, it could be shown on the basis of historical findings that it is inappropriate to conceive of the two legal traditions of copyright law – the common law approach and the civil law approach – as two incompatible, separate systems in this context. Instead, the groundwork laid for copyright protection in the two traditions turns out to rest on a shared set of basic ideas derived from natural law and utilitarian notions alike.[1379] The natural law argument has subsequently been traced back to Locke's elaboration of a natural right to property in his Second Treatise on Government. It focuses attention on the individual merit of the author and the act of creation. Further ramifications of natural law theory, like the assumption that a bond unites the author to the object of his creation which is perceived as a materialisation of his personality, become understandable against this backdrop. Utilitarian arguments, by contrast, permit society's overall welfare to be factored into the equation. In this line of reasoning, the promise of monetary rewards is offered to authors as an incentive to encourage their intellectual productivity. Ultimately, this encouragement shall enhance the benefits for society. Economic, industrial and cultural considerations as well as freedom of expression values can be summoned up to support copyright protection in this framework. To establish a central basis for natural law and utilitarian arguments alike, it may be posited that copyright law is primarily to be understood as a means to provide an optimal framework for cultural diversity.[1380]

As to the limits set to authors' rights – the second element of the aforementioned sequence – a survey of justifications for copyright limitations has been conducted after sifting through the rationales of copyright protection. Instead of seeking to determine a universe of potential justifications, stretching from the specific needs of disabled people to the regulation of industry practice, the discussion was confined to certain elements impacting deeply on the balance between grants and reservations of copyright law. Attention has been devoted to the fundamental guarantee of freedom of expression and information that may be invoked in favour of press privileges as well as the exemption of quotations and a work's use for the

[1379] See subsection 2.1.1.
[1380] See subsections 2.1.2 and 2.1.3.

purposes of criticism and parody.[1381] In respect of the objective to disseminate information, it has been stressed that personal use privileges, functionally, constitute a powerful decentralised instrument for spreading information. This substantial contribution to the dissemination of information may be capable of justifying their maintenance in the emerging information society. The right to privacy has also been discussed in this context.[1382] Finally, it was pointed out that limitations may also be imposed on authors' rights on the grounds that they fulfil a democracy-enhancing function.[1383]

In order to point a clear route through the thicket of the wide variety of surveyed arguments, Locke's elaboration of a natural right to property was finally revisited. The three-step test would be hard to apply if no guidelines could be given as to where the line between grants and reservations of copyright, ultimately, should be drawn. It has therefore been emphasised that Locke's labourer acquires a property right only if he leaves 'enough and as good' in common for others. In the field of copyright, the principle of so-called 'intergenerational equity' can be derived from this proviso. It has accordingly been posited with regard to copyright limitations that an author acquires an intellectual property right in his creation only on the condition that he permits (potential) later authors to study and build upon his works – just like he himself may have done to discover and develop his creative talent. The specific balance with regard to those individuals who take part in the process of creation, thus, was brought into focus. Considerations of this kind support the exemption of transformative uses but also privileges for private study, educational purposes and library activities. The maxim of intergenerational equity does not only demand the exemption of uses which are directly related to the creation of a new work but also undergirds limitations serving uses which are of a consumptive nature at the moment they occur. This concept was used as a signpost for the later interpretation of the three-step test.[1384]

In chapter 3, the different stages of development of the three-step test in international copyright law have been examined in detail. At the 1967 Stockholm Conference for the revision of the Berne Convention, the three-step test was introduced to pave the way for the formal recognition of the general right of reproduction *jure conventionis*. A provision had to be devised which accomplishes two opposite tasks. On the one hand, the envisioned general right of reproduction had to be sheltered from the potential corrosive effect of the numerous limitations to be found in domestic legislation.[1385] On the other hand, the margin of freedom which the countries of the Berne Union considered indispensable to satisfy social

[1381] See subsection 2.2.1.
[1382] See subsections 2.2.2 and 2.2.3.
[1383] See subsection 2.2.4.
[1384] See section 2.3.
[1385] The survey of national limitations known at the time of the Stockholm Conference, which has been conducted in this context, brought to light that there was a wide variety of limits set to the right of reproduction in domestic legislation indeed. See subsection 3.1.3.

and cultural needs had to be left untouched. Against this background, it is not surprising that the three-step test was adopted, the final wording of which can be traced back to a proposal tabled by the UK delegation. Due to the openness of its abstract criteria, the test is capable of encompassing a wide range of limitations. At the Conference, it constituted an appropriate basis for the reconciliation of the contrary opinions expressed by the participants. The first three-step test in international copyright law was thus enshrined in article 9(2) BC. Its ambit of operation was confined to limitations imposed on the general right of reproduction which could now be recognised internationally in article 9(1) BC.[1386]

After its introduction at the 1967 Stockholm Conference, the three-step test reappeared in the TRIPs Agreement in 1994. It was thus embedded in a trade context. In the course of the negotiations, the abstract formula was apparently perceived as a kind of materialisation of the standard of protection reached in the Berne Convention. Accordingly, it was not only incorporated into TRIPs by referring to article 9(2) BC but also laid down separately in article 13 TRIPs as an instrument regulating generally 'limitations or exceptions to exclusive rights'. This latter insertion brings about a substantial broadening of the test's scope. It is no longer confined to the general right of reproduction. By contrast, the task was assigned to the three-step test to hinder limitations from encroaching upon whatever exclusive right was recognised internationally. As regards the rights newly granted under TRIPs, this means that the three-step test is the only standard of control to be met by national legislation. As to the rights conferred on authors in the Berne Convention, article 13 TRIPs turns out to be a Berne-plus element when taking into account article 2(2) TRIPs and article 20 BC which is incorporated into TRIPs by reference: domestic legislation wishing to impose a limitation on a right granted in the Berne Convention must not only ensure compliance with the specific norms of the Convention itself but also, in addition, observe the three-step test of article 13 TRIPs.[1387]

The comprehensive applicability of the three-step test to all kinds of limitations was consolidated when it came to embodying the abstract formula also in article 10 WCT at the 1996 WIPO Diplomatic Conference. Pursuant to article 10(1) WCT, the test is to be applied to the limitations on the rights newly granted under the WIPO Copyright Treaty. Article 10(2) WCT makes plain that limitations on Berne rights must additionally be subjected to the three-step test. The confirmation of this latter aspect, already following from article 13 TRIPs, gave rise to the fear among the participants of the Conference that the freedom traditionally enjoyed by national legislation may be unduly curtailed. It was therefore understood that article 10(2) WCT neither reduces nor extends the scope of those provisions permitting limitations under the Berne Convention. Besides this tribute paid to the concern about sufficient room to manoeuvre for national legislation, the agreed statement

[1386] See subsection 3.1.2.
[1387] See section 3.2.

concerning article 10 WCT expressly embraces the three-step test as a guiding principle for the adjustment of traditional limitations to the digital environment and a basis for the development of new limitations to come.[1388]

In chapter 4, the functioning and structure of the three-step test was analysed before embarking on the interpretation of each criterion. If restrictions are imposed on the reproduction right of article 9(1) BC, the three-step test of article 9(2) BC functions as a direct control mechanism. Similarly, article 13 TRIPs directly controls exemptions from the rental rights of article 11 and 14(4) TRIPs, and the three-step test of article 10(1) WCT directly governs limitations on the right of distribution of article 6 WCT, the rental right of article 7 WCT, and the right of communication to the public of article 8 WCT. Exertion of direct control means that the three-step test itself constitutes the standard of review that a national legislator wishing to adopt a limitation must meet. This situation differs from the application of the three-step test as an additional safeguard. If limits are set to exclusive rights granted in the Berne Convention, the three-step test always additionally comes into play. Here, national legislation, first of all, must observe the specific rules for limitations set out in the Convention itself. Furthermore, however, the three-step tests of article 13 TRIPs and 10(2) WCT must be fulfilled. In this context, the three-step test, thus, does not exert direct control but must additionally be observed after ensuring compliance with a specific norm of the Berne Convention. The additional control exerted by the test influences particularly those provisions of the Berne Convention which, like article 10(1) and (2) BC, refer to fair practice, and the implied limitations accepted in the framework of the Berne Convention.[1389]

As to the structure of the three-step test, it could be shown that the system of its three criteria can be considered a means for approximating gradually the core of copyright's balance: the first step is the furthest from the core and correspondingly of a general nature. It sets forth the basic rule that limitations are only permitted in certain special cases. Copyright limitations which are incapable of fulfilling this criterion are inevitably doomed to fail. The second step delineates the basic rule of criterion 1 more precisely: a conflict with a normal exploitation is not permissible. This criterion is located halfway to the core. At this stage, no additional instruments for the reconciliation of the interests of authors and users, like the payment of equitable remuneration, are necessary. Limitations which fail to meet this condition cannot be countenanced at all. The third step, however, is the closest to the core. The wording of this condition contains elements that can be applied for the exact calibration of copyright's balance. The prejudice has to be 'unreasonable', the interests of the author 'legitimate'. In this situation, where the divergent interests of copyright law finally meet, the possibility to provide for equitable remuneration is indispensable. As the mere decision between permission and prohibition of limitations would be too imprecise, it serves as a means to establish a balanced

[1388] See section 3.3.
[1389] See section 4.2 and subsection 4.6.5.

proportion between the interests at stake. The realisation of the objective to strike a proper copyright balance, thus, finally depends on the last criterion. This last step, if any, is therefore to be regarded as the kingpin of the three-step test.[1390]

Turning to the interpretative analysis after clarifying the function and system of the three-step test, the first step, 'certain special cases', was brought into focus. It has been pointed out here that its first element, the claim for 'certainty', must not be overestimated. In particular, it is not necessary that limitations are precisely and narrowly determined in the sense of the civil law approach to copyright. The espousal of a clear definition that might be inferred from the term 'certain' has its limits. It simply means that limitations must be delineated so as to become distinguishable from each other. They must be discernible as 'some special cases'. The task to draw the necessary dividing line between different limitations need not be fulfilled by national legislation but may also be left to the courts. In common law systems, established case law can accordingly be factored into the equation in the context of open-ended provisions.[1391]

As to the second element, the necessity of 'speciality', it could be shown that an approach leaning heavily on quantitative findings is manifestly unsuited to determining special cases. A corresponding concept of the WTO Panel reporting on section 110(5) of the US Copyright Act had to be rejected. From the ensuing inquiry into the qualitative connotation of the term 'special', it could be inferred that some clear reason of public policy must underlie the adoption of a copyright limitation.[1392] The national legislator must enter into a careful weighing process. The legitimate interests of the author, to which the third criterion of the three-step test refers, must be weighed carefully against the competing interests at stake. The legislative decision to set limits to the author's exclusive rights on account of these competing user interests must be a reaction to an understandable need for the reconciliation of the user interests at stake with the author's legitimate interests. Hence, a limitation that rests on a rational justificatory basis making its adoption plausible constitutes a special case in the sense of the three-step test.[1393]

Provisions of the Berne Convention which explicitly permit the adoption of a limitation at the national level always constitute a rational justificatory basis in the outlined sense. A national limitation which complies with the Berne Convention, therefore, automatically forms a special case.[1394] However, the use of copyrighted material in industrial undertakings is, for instance, not a special case – at least not insofar as such use can be controlled in the digital environment.[1395] As regards the

[1390] See section 4.3.
[1391] See subsection 4.4.1.
[1392] Cf. Ricketson 1987, 482.
[1393] See subsection 4.4.2.
[1394] See subsection 4.4.3.
[1395] See subsection 4.4.4.1.

US fair use doctrine, it could be concluded that it is not unreasonable to assume that the doctrine forms a 'certain special case' in the sense of the three-step test.[1396]

In the field of the second step, 'no conflict with a normal exploitation', concepts to be found in literature proved to be inappropriate. The historical approach of Bornkamm and Ricketson's empirical approach alike had to be rejected.[1397] The development of a new normative concept, subsequently, was based on the guideline given at the 1967 Stockholm Conference that all actual and potential forms of exploitation which have considerable economic or practical importance must be reserved to the authors. With an eye to the digital environment, it was clarified at the outset that this formula must not be misunderstood to encompass each and every conceivable way of deriving economic profit from a work. Otherwise, the three-step test would virtually be reduced to a 'one-step test': copyright limitations would almost always come into conflict with a normal exploitation.[1398]

Taking this insight as a starting point, it could be gathered from a comparative analysis with the fourth factor of the US fair use doctrine that only major sources of royalty revenue should be qualified as an exploitation form of considerable importance in the context of the second criterion. The prohibition of a conflict with a normal exploitation, thus, merely shelters the economic core of copyright from erosion.[1399] The international system of exclusive rights, on which the WTO Panel reporting on section 110(5) of the US Copyright focused, turned out to be unsuitable for determining this core area. Instead, the overall commercialisation of works of the different categories affected by a limitation must be considered.[1400] A limitation therefore conflicts with a normal exploitation if it divests authors of an actual or potential, typical major source of royalty revenue that carries weight within the overall commercialisation of works of the relevant category.[1401]

Pursuant to this standard of review, a conflict with a normal exploitation arises in particular if a limitation erodes the very market for a certain category of works.[1402] Privileges for strictly personal use form a further problem area. It can hardly be overlooked that the broad private use privileges known from the pre-digital past have the potential for depriving authors of potential major sources of royalty revenue in the digital environment. To avoid a conflict with a normal exploitation, it is thus advisable not to uphold broad private use privileges. On the other hand, the fact must be faced that particularly limitations serving strictly personal use may be of crucial importance for the appropriate distribution of information resources in the information society, the enhancement of democracy and the promotion of intergenerational equity. Instead of thoughtlessly abolishing personal use privileges

[1396] See subsection 4.4.4.2.
[1397] See subsections 4.5.1 and 4.5.2.
[1398] See subsections 4.5.3.1 and 4.5.3.2.
[1399] See subsection 4.5.3.3.
[1400] See subsections 4.5.3.4.
[1401] See subsection 4.5.3.5.
[1402] See subsections 4.5.4.2 and 4.5.4.3 for examples.

altogether, they should accordingly be carefully restructured. Those areas are to be carved out and enshrined in new limitations which are indispensable for attaining the aforementioned ends. The inquiry into possible ways of accomplishing this task which has been undertaken in this context suggests that particularly digital library services may play a decisive role.[1403]

The third step, 'no unreasonable prejudice to legitimate interests of the author', lies at the core of copyright's delicate balance and serves as final adjustment tool. The different abstract terms establishing this criterion can be understood as elements of one final proportionality test. The author's interests to be taken into account in the course of the final balancing exercise, first of all, are his economic interests. Every conceivable economic concern may enter the picture in this framework. Economic interests which do not belong to the economic core of copyright and, therefore, were not considered in the context of the previous second step are thus to be factored into the equation now. Article 9(2) BC and 10 WCT, furthermore, offer the possibility of making allowance for an author's moral interests. Article 13 TRIPs, on the contrary, is impervious to the protection of non-economic interests. It neutrally refers to the 'right holder' instead of the 'author'. This language seems to indicate, however, that the economic concerns of a broader group, including licensees like publishers, record companies and film distributors, are relevant in this context.[1404] The proportionality test itself is an internal two-step test. On both sides – the side of authors and the side of users – a step towards the centre of copyright's balance is to be taken. Interests of the author are accordingly only relevant insofar as they can be qualified as 'legitimate'. Prejudices to the circle of legitimate interests, however, are forbidden if they reach an 'unreasonable' level.

As to the first of these two internal steps, it could be clarified that the expression 'legitimate interests' can be perceived as a 'normative claim calling for the protection of interests that are "justifiable" in the sense that they are supported by relevant public policies or other social norms'.[1405] Hence, an author's interests must be scrutinised in the light of the rationales of copyright protection. They may turn out to be unjustified, for instance, when market failure bars authors from exploiting their works in a certain area. Subjecting this area to the author's control would neither entail an additional incentive to create, nor would it enhance the author's independence from patrons, thereby encouraging free speech. The same is true as regards a work's use for the purposes of criticism and parody. Authors are likely to refrain from developing markets for these uses. The beneficial effects of a potential extra income accruing from uses of this kind, thus, would not be realised anyway. The interests of authors must also give way if a limitation is evidently better suited for achieving a certain objective underlying copyright protection. Cultural diversity and intellectual debate, for instance, can evidently be promoted more effectively by

[1403] See subsections 4.5.5.1 and 4.5.5.2.
[1404] See subsections 4.6.2 and 4.6.3.
[1405] See WTO Panel – Patent 2000, § 7.69. Cf. subsection 4.6.4.1.

exempting the making of quotations instead of subjecting such use to the author's control to open an additional source of royalty revenue.[1406]

Turning to the side of users, the issue of 'unreasonable prejudices' had to be raised. The justificatory groundwork laid for a limitation is of particular importance in this respect. If a limitation, for instance, is unsuited to promoting the attainment of the objective which is pursued by its imposition on exclusive rights, this is a clear instance of an unreasonable prejudice. A useless constraint would be placed on the rights of authors under these circumstances. A limitation, in addition, must be the least harmful of more than one available means to achieve a particular goal. It was pointed out here that less restrictive alternatives only come into play insofar as they have the potential for furthering the pursued objective as effectively as the current limitation.[1407]

The feature of the three-step test which occupies centre stage in the context of the third criterion, however, is the possibility to provide for the payment of equitable remuneration. To prevent the harm flowing from a limitation from reaching an unreasonable level, national legislation can ensure that authors receive adequate monetary reward. It could be shown that the concept of equitable remuneration underlying the three-step test is a fluid transition from a state where no remuneration has to be paid to cases necessitating the payment of the price a free author bargaining for the use in question would have agreed upon. In general, equitable remuneration must be paid insofar as the relevant limitation does not keep within reasonable limits. Hence, the extent to which the limitation oversteps the borderline must be estimated. The justification on which the limitation rests must once again be brought into focus in this connection.[1408]

Ultimately, it could be shown by shedding the light of the principle of proportionality on the overall regulatory framework established by the three-step test that the whole test procedure, virtually, can be perceived as a refined proportionality test. The necessity that limitations must be 'certain special cases', and the prohibition of a 'conflict with a normal exploitation', could be identified as instruments for sorting out cases of evident disproportionality. They establish a gateway to copyright's delicate balance which, finally, is to be adjusted with the help of the last criterion, forbidding an 'unreasonable prejudice to the legitimate interests of the author'.[1409]

In chapter 5, the results of the interpretative analysis were used to clarify the role which the three-step test plays in the European Copyright Directive 2001/29/EC of 22 May 2001 (CD). The Directive's principal objective is to harmonise copyright law in the European Union. However, it also paves the way for the ratification of

[1406] See subsection 4.6.4.1.
[1407] See subsection 4.6.4.2.
[1408] See subsection 4.6.4.2.
[1409] See section 4.3 and subsection 4.6.6.

the WIPO 'Internet' Treaties.[1410] Therefore, international obligations are taken into account. In this framework, the three-step test forms a window opened in article 5(5) CD to make the existing international obligations in the field of limitations visible. On its merits, it functions just like article 10(2) WCT as an additional safeguard. The limitations allowed under paragraphs 1 to 4 of article 5 CD are its field of application. When a member state wants to adopt one of these limitations, it must additionally ensure compliance with three-step test of article 5(5) CD.[1411]

With regard to the requirement laid down in article 5(5) CD that the limitations listed in article 5 CD 'shall only be applied in certain special cases', it could be shown that national legislation is not obliged to form special cases of the enumerated cases. To fulfil the first criterion of article 5(5) CD, national legislation thus need not draw the conceptual contours of a limitation based on one of the cases listed in article 5 CD more narrowly than is done in the Directive itself. Instead, this passage of article 5(5) CD simply completes the reference to the international three-step test.[1412]

Attention has also been devoted to the fact that the Copyright Directive explicitly provides for the payment of fair compensation in three cases, namely in respect of unauthorised photographic reproductions falling under article 5(2)(a), reproductions by a natural person for private use privileged by article 5(2)(b), and reproductions of broadcasts by social institutions permitted by article 5(2)(e). As to the relationship between this guarantee of fair compensation and the obligation to provide for the payment of equitable remuneration potentially resulting from the three-step test, it could be clarified that the international obligation remains untouched and must be fulfilled separately. Arguably, it is an even stronger claim for an adequate pecuniary reward because it may amount to the sum an author freely bargaining for the use in question would have agreed upon. The guarantee of fair compensation does not exempt EU member states from the necessity to determine carefully in each single case whether or not equitable remuneration is to be paid. In the case of articles 5(2)(a), (b) and (e), it has a privileging effect if an international obligation to provide for the payment of equitable remuneration does not result from the three-step test.[1413]

Besides these functional clarifications, each permissible limitation enumerated in article 5 has been scrutinised in the light of the three-step test. This inquiry yielded the following results: it is insufficient that the exemption of photographic reproductions in article 5(2)(a) CD is merely accompanied by the obligation to provide for the payment of fair compensation. With regard to copies made in industrial undertakings, it follows from article 5(5) CD that the pecuniary reward should amount to the sum a right holder freely bargaining for the use in question

[1410] See subsection 5.1.3.
[1411] See section 5.2.
[1412] See subsection 5.3.1.2.
[1413] See subsection 5.3.3.

would have received. Hence, equitable remuneration must be paid. Article 5(2)(b) CD, privileging strictly personal use, must furthermore be replaced in the digital environment with a library-administered private use system to fulfil the three-step test. Otherwise, it would unreasonably prejudice the legitimate interests of the right holders. The payment of fair compensation, as prescribed in the Directive in this case, appears appropriate.[1414]

Article 5(3)(a) CD, exempting the use for illustrating teaching or scientific research, is incompatible with the three-step test insofar as no provision is made for the payment of equitable remuneration. In article 5(3)(e) CD, the exemption of the use for administrative, parliamentary or judicial proceedings must be restricted to those institutions which really depend on the use of copyrighted material to accomplish their tasks. Otherwise, this aspect of article 5(3)(e) CD cannot be considered a special case. Furthermore, the use for administrative purposes must be cushioned by the payment of equitable remuneration. The first alternative of article 5(3)(g) CD, the use of works during religious celebrations, conflicts with a normal exploitation. It is therefore incompatible with the three-step test. The second alternative of article 5(3)(g) CD, the use of works during official celebrations, must be confined to the scope of the so-called 'minor reservations doctrine'.[1415] Otherwise, it cannot be deemed a special case. National legislation must furthermore refrain from adopting article 5(3)(h) CD, allowing the unauthorised use of works made to be located permanently in public places. Insofar as article 5(3)(h) CD exempts the systematic reproduction and communication or making available to the public of works situated in public places for commercial ends, it conflicts with a normal exploitation. Article 5(3)(i) CD, concerning the incidental inclusion of a work in other material, is not a special case. Its adoption, consequently, runs counter to international obligations. Article 5(3)(l) CD, permitting the use in connection with the demonstration or repair of equipment, is a special case only insofar as incidental use is made that can hardly be avoided in the normal course of events when running a business selling or repairing relevant equipment. When maintaining so-called 'cases of minor importance', as permitted by article 5(3)(o) CD, national legislation must moreover proceed carefully. Affected limitations must be scrutinised thoroughly in the light of the three-step test.[1416]

Finally, it has been recommended that the three-step test of article 5(5) CD be introduced into national copyright law. To realise the Directive's overarching objective to harmonise copyright law, it would have been more effective anyway to set forth an open-ended formula instead of enumerating no fewer than 21 limitations. The courts, including the European Court of Justice, could then have accomplished the gradual harmonisation of copyright limitations in the EU. On the basis of the framework set out in article 5 CD, this solution is not completely

[1414] See subsection 5.3.3.
[1415] See subsection 3.1.1.
[1416] See subsections 5.3.1.1, 5.3.2 and 5.3.3.

beyond reach. The cases enumerated in article 5 CD are not delineated precisely but rather reflect certain types of limitations, the outlines of which have not been drawn restrictively. National legislation can use this room to manoeuvre by laying down literal copies of the enumerated cases in national law which are combined with the three-step test. The framework set out in article 5 CD, in other words, is to be copied as precisely as possible. If the European Court of Justice, then, is called upon to decide on one of the limitations allowed under the Copyright Directive, its holding would equally affect the laws of all those member states providing for the limitation in question. The outcome of this procedure would be a half-way house – somewhere between the much more open US fair use doctrine and the traditional continental European system of more restrictively delineated limitations.[1417]

[1417] See section 5.4.

Chapter 7

Conclusion

On its merits, the three-step test is a relic of the pre-digital world, resting on the market imperfections which, in particular, threatened the right of reproduction.[1418] It reflects the circumstances surrounding the operation of copyright law in the analogue world. Its very existence, as an instrument for setting limits to limitations on exclusive rights, implies the existence of copyright limitations. Its way of functioning inhibits user privileges from encroaching upon the authors' exclusive rights. The task of the three-step test is to safeguard a copyright balance of traditional shape: strong copyright protection is conferred on authors, while users may benefit from privileges which make inroads into the field of author's rights insofar as necessary for lending sufficient weight to the user interests at stake.[1419] One might be induced to regret the maintenance of the status quo of the analogue world in view of the potential of the digital environment for spreading the world's knowledge, wisdom and wealth of aesthetic expression. It is to be borne in mind, however, that this decision affords the opportunity of taking full advantage of the wealth of experience which has been aggregated in the pre-digital past of copyright law.

Whether or not copyright law, furnished with the three-step test as a tool for adjusting its balance of grants and reservations, will finally prove to be capable of reacting adequately to the demands of the information society, is a question to be answered in the years to come. On the basis of the preceding close inspection of the three-step test, several guidelines can be given for the further development of the copyright system. The following section 7.1 concerns the copyright paradigm as such and refers primarily to the concept of intergenerational equity that has been embraced as a guiding principle in the course of the interpretation of the three-step test.[1420] Concrete proposals for the further improvement of the framework set out in international copyright law will be tabled in the final section 7.2. In this context, the role will be discussed which the incorporation of the three-step test into EC copyright law might play for future developments at the international level.

[1418] Cf. subsections 3.1.2. This can particularly be seen in the field of the prohibition of a conflict with a normal exploitation. Cf. subsection 4.5.3.2.

[1419] Cf. Dreier 2001, 70-72.

[1420] Cf. as to its theoretical foundation section 2.3.

7.1 Aligning Copyright Law with the Users among Authors

Over the last decades, much attention has been devoted to the economic analysis of copyright law. Imbued with the aim to shape the system of copyright protection so as to afford the most efficient allocation of intellectual resources, copyright scholars became engrossed in the world of economic thought and strove to bring to fruition the economic models they embraced.[1421] The golden fleece they were searching for seems to have been the very formula yielding the one graph that clearly indicates how to properly calibrate the delicate balance between grants and reservations of copyright law – author's rights on the hand and exempted uses on the other. To this day, this goal could not be achieved. The complexity of the influences impacting on copyright's balance successfully resisted any attempts to lump them all together in a refined economic model.[1422] The purism of neo-classicist economic property theory, for instance, was convincingly rebutted on the grounds that an economic model losing sight of hardly quantifiable but socially valuable 'externalities' of copyright limitations can scarcely be deemed appropriate for informing the adjustment of copyright's delicate balance.[1423]

Nonetheless, the specific merit of the economic analysis of copyright law shall not be contested here. Undoubtedly, it yielded a better understanding of the basic problem that a proper balance between grants and reservations of copyright law is to be struck.[1424] This notion inheres in the common law approach to copyright. It

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[1421] The Chicago school of thought, with its emphasis on efficiency, as well as Public Choice theory, focusing on affected interest groups, have been invoked alike. The overview given by van den Bergh 1998, 17-20, also touches upon normative economic analyses of law. Groundwork for the debate was particularly laid by Landes/Posner 1989, 325.

[1422] Cf. the extensive economic analysis conducted by Fisher 1988, 1698-1744, who, interestingly, offers a so-called 'utopian analysis', ibid., 1744-1794, as well. Introducing his utopian model, Fisher, ibid., 1744, explains: 'This Part considers how the fair use doctrine might be rebuilt if one's ambition were not merely to reduce inefficiency in the use of resources, but to advance a substantive conception of a just and attractive intellectual culture.' This statement points in the right direction. An economic approach may indeed be useful. However, it is to be regarded as an insufficient transitional stage paving the way for a more comprehensive and appropriate dealing with questions concerning copyright as law about creativity.

[1423] Cf. subsection 2.2.4. See Cohen 2000, 1819: 'Where complexity is central, however, and models overly reductionist, economic modeling may do more harm than good. It may cause harm, in particular, if it causes us to focus on an emphasize those aspects of the process that are least important – to overlook what is most vital in favor of what is easier to describe or model. The particular brand of economic analysis practiced within the legal academy compounds this error. Conventional law and economics has overwhelmingly focused on generating static pictures of the demand and distribution curves for isolated goods at a particular point in time. As applied to information goods, this approach is especially perverse. Like a medieval mapmaker skirting the boundaries of terra incognita, it concentrates on the familiar and visible – transactions! licensing revenues! – and evinces little curiosity about the rest and its relation to the dynamic, irreducible whole.'

[1424] Cf. Landes/Posner 1989, 333-336, van den Bergh 1998, 20-22.

occupies centre stage in the US.[1425] The economic analysis of copyright law, however, also succeeded in making continental European scholars and policy makers alike sensitive to this fundamental task. That the instruments of economic thought, in the end, are not unlikely to be incapable of solving the problem of copyright's delicate balance appropriately, may appear unfortunate to enthusiasts seeking to view all aspects of human activities through the prism of economic theory, thereby inexorably reducing human movements to economic actions. For all others, the time is ripe to put an end to the foray into the economic world of thought. It is advisable to begin digging the grave of the economic analysis of copyright in order to pave the way for passing this – in spite of the outlined merits – insufficient transitional stage. Genuine human creativity does not obey market dictates.[1426] It is therefore erroneous to seek to align laws intruding into the sphere of creative activity with the ostensible 'rationalism' of economic models.

Instead, the author and his specific needs must be brought into focus. This statement need not be misunderstood as a last-ditch effort to keep the out-dated prayer wheel of continental European author-centric copyright theory running.[1427] As the necessity to reconcile the interests of authors with those of users has clearly been brought to the fore in recent years – not least by the economic analysis of copyright law –[1428] this project would be doomed to failure anyhow. The reference to the specific needs of authors, thus, does not foremost address an author's interest in deriving profit from the works he has already created, but the same author's concern about unhindered use of existing intellectual productions as a stimulus if not prerequisite for his own future creativity. It seeks to tear down the artificial wall strictly dividing authors from users that is often erected in copyright law. In fact, the same individuals are to be found on both sides of the wall.[1429] The distinction between 'consumptive' and 'transformative' uses that is frequently made in the field of US copyright law,[1430] gives evidence of how inconsistent the dividing line drawn between authors and users is in reality. If a second author builds upon a predecessor's work to express himself artistically, he makes a 'transformative' use. The latter category circumscribing a certain way of using intellectual works, thus, bears witness to the fact that there are indeed users among authors.

To infer a comprehensive concept capable of assisting in the proper adjustment of copyright's balance from this basic insight, it must necessarily be placed in a broader context. It is indispensable to focus not only on instances in which an already existing work is used directly for creating a new one, but also on the beneficial effect which sufficient breathing space for the unauthorised use of

[1425] Cf. subsection 2.1.2.
[1426] Cf. subsection 2.1.3.
[1427] Cf. subsection 2.1.2.
[1428] Cf. Holzhauer 2000, 79-80.
[1429] See section 2.3. Cf. Landes/Posner 1989, 332-333.
[1430] Cf. Ginsburg 1997, 1-20, dealing specifically with this distinction.

copyrighted material, in general, has on future creativity. An efficient, decentralised, many-faceted and thus rich information infrastructure allows people to explore the cultural landscape of society free from interference by right holders. It grants access to diverse sources of perceptions and knowledge of the world, thereby substantially promoting the development of independent thinking and ideas.[1431] It constitutes a propelling force for freedom of expression and future creativity by facilitating the discovery of the creative talent lying dormant in certain beneficiaries, as well as the further evolution of creative potential already unveiled. Besides situations where copyrighted material is directly used to create a new work, the delineated indirect beneficial effect on future creativity which copyright limitations have must accordingly be factored into the equation.[1432]

This means that the sphere of so-called 'transformative' use is to be transcended. The mere finding that creative users of today are the authors of tomorrow is a platitude. At the core of 'transformative' use lies particularly the objective to embed already existing copyrighted material in a new work. If quotations are made in the course of writing an academic article, or a work is criticised in the guise of parody, the creation of a new work is already under way and its completion is foreseeable. The crucial ramification of the insight that there are authors using existing works as a basis for a new work, then, is the further statement that *also the consumptive users* of today are not unlikely to become authors tomorrow. Among pupils learning of intellectual creations in a schoolbook are future authors, potentially induced or further encouraged to develop their talent while studying the works presented in that book. Among teenagers addicted to rock, pop, rap or techno, making copies of recordings for personal use, are the creators of future musical trends. Among the users of libraries archiving and preserving information are future scientists writing articles. Among the members of the general public, adequately informed about current events by the press, are writers, painters and composers potentially prompted to creative activity by the presented information.

Hence, the conceptual contours of so-called 'transformative' use must substantially be widened. Not only the recourse to existing copyrighted material directly serving the creation of a new work is to be considered, but also beneficial long-term effects. The development and final realisation of creative talent is a gradual evolutionary process. Along the path ultimately leading to the creation of new literary and artistic works, copyright law may place obstacles by affording right holders pervasive control over the use of copyrighted material. However, it has also the potential for promoting and stimulating future creativity. Unhindered access to diverse sources of information and already existing intellectual creations is of paramount importance in this respect.[1433] The logical operation to be undertaken, thus, is to conceive of copyright limitations serving the delineated ends

[1431] Cf. subsections 2.2.1 and 2.2.2.
[1432] Cf. section 2.3.
[1433] Cf. subsection 2.2.2.

as an anticipated tribute paid to future creativity. Although not directly assisting in the creation of a new work, like the exemption of the making of quotations, a limitation may nevertheless have a share in the final realisation of creative talent. This notion concerns limitations for the purpose of teaching and private use as well as library and press privileges.[1434] It blurs the erroneous distinction between 'consumptive' and 'transformative' use. The only difference between these two imaginary poles lies in the time that passes until the creation of a work is enabled or at least facilitated by a copyright limitation, and in the likeliness that the creation really will take place. Like two sides of a coin, however, both categories – the exemption of 'consumptive' and 'transformative' use alike – substantially encourage and promote human creativity.

Interestingly, it is in particular Locke's elaboration of a natural right to property – the philosophical undercurrent of the continental European approach to copyright – that can be invoked to lay the theoretical groundwork for the exemption of uses either directly or indirectly contributing in the outlined way to the creation of new works. Locke's labourer acquires a natural right to property only 'where there is enough and as good left in common for others'.[1435] The notion of intergenerational equity among authors that can be inferred from this proviso has been described in detail above.[1436] At the core of considerations of this kind lies the basic assumption that authors ought to refrain from sawing off the very branch on which their own creativity rests. In the case of the making of quotations, this is obvious. It is hard to imagine that an academic author, rendered incapable of presenting adequately an intellectual debate in the absence of the right to quote, would support the abolition of this user privilege. Similarly, a parodist is unlikely to militate against the unauthorised use of parts of his own work for the purpose of creating a lampoon thereof. However, the same can be said of limitations indirectly promoting the creation of new works. An author who, on his way to the realisation of his talent, profited from the privilege to use existing works for the purpose of private study can hardly be expected to espouse the erosion of the privilege. A famous writer admitting that the foundations for his literary work were laid at school and university is unlikely to call the legitimacy of teaching and library privileges into doubt. The principle of intergenerational equity, demanding solidarity among authors is thus a powerful justification for a wide variety of 'user' privileges.

It could be demonstrated in the context of the three-step test that it can be put to good use when seeking to provide guidance for the adjustment of the delicate balance between grants and reservations of copyright law. A limitation which reacts to a conflict of interests between (potential) creators of works – authors who want to exploit the fruit of their labour, and others seeking to access intellectual works to discover and develop their talents or, at a later stage, to build their own creations

[1434] Cf. section 2.3.
[1435] See Locke 1698, Second Treatise on Government, chapter 5 § 27.
[1436] See section 2.3.

upon the work of predecessors – can be regarded as a special case in the sense of the three-step test.[1437] From the perspective of intergenerational equity, a conflict with a normal exploitation should not be assumed if a use is made that serves intergenerational equity. It is not normal that authors stifle breathing space for the unauthorised use of works that helped themselves to arrive at the creation of a work. To use an aforementioned image: an author ought to refrain from sawing off his own branch.[1438] Eventually, a prejudice to an author's legitimate interests, caused by a form of using a work that is supported by considerations of intergenerational equity, can hardly be qualified as unreasonable. In this case, the detriment to the author is likely to be outweighed by the benefit for another – already active or potential future – author.[1439]

The alignment of copyright law with the needs of authors, thereby particularly focusing on those instances where already active or potential future authors depend on the unhindered use of copyrighted material, would have a beneficial effect on the international copyright system. It builds a further bridge between copyright's legal traditions. In this regard, it is to be borne in mind that Locke's elaboration of a natural right to property forms the theoretical underpinning of the proposed concept of intergenerational equity.[1440] The very foundation of the civil law approach to copyright, thus, underlies the presented considerations. The author-centric view traditionally endorsed in continental Europe can accordingly be opened to the conviction that an appropriate balance between grants and reservations of copyright law must be struck. Placing the person of the author in the centre of the copyright system, rightly understood, does not at all mean espousing the constant gradual expansion of copyright protection, but finding a balance between the interest of authors in exploiting their work and the interest of the same authors in sufficient breathing space for unauthorised uses. The necessity of a proper copyright balance between author's rights and user privileges need consequently no longer be perceived as a notion alien to continental European copyright theory.[1441]

The balance between grants and reservations has tended to occupy centre stage in the common law copyright tradition.[1442] However, this fact does not shield Anglo-American thought patterns from a critical review in the light of the concept of intergenerational equity. The fundamental utilitarian notion that copyright law shall serve the enhancement of the benefits for society is unproblematic insofar as advocates of this thesis are not loath to agree that this benefit, primarily, lies in the

[1437] Cf. subsection 4.4.2.3.
[1438] Cf. subsection 4.5.4.1.
[1439] Cf. subsections 4.5.5 and 4.6.4.2.
[1440] Cf. section 2.3.
[1441] Notwithstanding civil law copyright rhetoric, national policy makers always had to face the practical need to strike a balance between grants and reservations anyway. Cf. subsections 3.1.3.1, 3.1.3.2 and 3.1.3.3. The time is therefore overripe for a goodbye to the theoretical lopsided espousal of exploitation interests which neglects the user interests authors have.
[1442] Cf. subsection 2.1.2.

promotion of cultural diversity.[1443] The unshakeable reliance on marketplace principles and the motivating power of economic incentives as appropriate means for promoting society's overall welfare, however, cannot escape more thorough scrutiny. The production of intellectual works – and particularly of genuine literary and artistic expression – does not necessarily depend on the promise of monetary reward.[1444] The firm belief that such a promise has the potential for encouraging intellectual productivity is mere delusion.

As a guideline for industry policy, it may be upheld. However, it is to be noted that the welfare of copyright industries is only one aspect entering the picture when seeking to promote a wide variety of cultural activities.[1445] Policy makers forcing the person of the author onto the sidelines on account of this single aspect emphasised by powerful interest groups are ill-advised.[1446] Ultimately, the task to create new works is to be accomplished by authors. A copyright regime nourishing copyright industries but ignoring the specific needs of authors is inevitably doomed to fail in long term. Copyright industries may be capable of entertaining the public for a certain period of time by flooding the market with products that react perfectly to consumer tastes. Fresh ideas, new trends and the incessant renewal of original expression which solely guarantee a robust cultural framework, however, still are the domain of independent individuals who are motivated to create a work of the intellect by their artistic or scientific nature and not by the prospect of monetary reward.[1447] The well-being of the copyright industry itself is hanging by the thread of new impulses from these individuals when consumers finally get bored by the fireworks of safe but shallow intellectual productions and ask for something fresh and new.

The enhancement of the benefits for society, thus, must not be confused or equated with the well-being of copyright industries.[1448] The adequate vehicle for realising the objective to promote the overall welfare of society, consequently, is not necessarily the promise of bigger profits. It is wrong to allege that the prospect of higher monetary reward will automatically spur authors into increased intellectual productivity, thereby enhancing the number of creations and the benefits for society.[1449] On the contrary, it is right to assume that a copyright framework which reacts appropriately to the specific needs of authors – as exploiters and users

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[1443] Cf. subsection 2.1.3.
[1444] Cf. subsection 2.1.3.
[1445] Cf. subsection 2.1.3.
[1446] Cf. Samuelson 1999, 587, pointing out that particularly at the international level it is to be taken into account that the interests of copyright industries and the interests of authors, in fact, diverge in some significant respects.
[1447] Cf. subsection 2.1.3.
[1448] Sifting through the recitals of the European Copyright Directive 2001/29/EC, one is inevitably left to wonder whether this fault, interestingly, was not recently made in the EU instead of the US. Cf. subsection 5.1.3.
[1449] Cf. subsection 2.1.3.

of intellectual works alike – has the potential for contributing substantially to the enrichment of society's cultural life and really improves the overall welfare of society.[1450] A copyright system that is perfectly aligned with the specific needs of authors gives a much bigger incentive to create, and is much more efficient, than the traditional spiral progressively extending copyright protection.[1451] The time has come to face the fact that this spiral entails the danger of overprotection[1452] that would inexorably stifle the breathing space necessary for the discovery, development and realisation of creative talent. In the field of computer programs and databases, one is left to wonder whether this dangerous stage has not already been reached. Hence, the reliance placed in Anglo-American copyright systems on the motivating power of economic incentives is to be replaced with the reliance on the beneficial effect of a copyright system that is carefully adapted to the needs of authors as creators and users of intellectual works. If continental European copyright systems, as a countermove, give more weight to the necessity of striking a proper balance between author's rights and user privileges, the way for the unification of copyright's legal traditions could be paved on the basis of the proposed concept of intergenerational equity.

For another reason, it is even the more advisable to tread the path of the strict alignment of copyright law with the specific needs of authors. In the emerging information society, copyrighted material enshrining a wide diversity of information constitutes the raw material of economic activity and the origin of wealth. It is to be expected that the social fabric of the society to come will depend on whether certain segments of the population are capable or incapable of accessing diverse sources of information.[1453] The information society, thus, comes up with further challenges. Copyright law is confronted with tasks taking on hardly foreseeable proportions. The mistake of lumping the protection of genuine literary and artistic expression together with the protection of computer programs and even databases can be regarded as a harbinger of the heavy burdens to be carried in the future. The repercussions of this fault on pillars of the copyright system, like the notion of a work and the idea/expression dichotomy, herald the jeopardising of the current copyright paradigm. It is questionable whether the traditional instruments of copyright law will finally prove to have the potential for coping with the challenges lying ahead. In 1997, Litman already concluded that,

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[1450] Cf. Goldstein 2001, 293.

[1451] Admittedly, this spiral particularly inheres in the mechanism of periodic conferences revising international copyright law. These conferences aim to progressively improve copyright protection. However, it is to be feared that they lose sight of the necessity to furthermore offer sufficient breathing space for unauthorised use of copyrighted material. The preamble of the WIPO Copyright Treaty appears as a sheet anchor in this regard. Cf. subsection 3.3.2.

[1452] Cf. Hugenholtz 2002, 239-240. See Geiger/Senftleben 2003, 734-735, summarising observations made by the participants of the MPI Conference "A New Framework for Intellectual Property Rights" held in November 2002.

[1453] Cf. subsection 2.2.2.

> 'if we build the information law of the Internet, and its progeny, around the copyright paradigm, we may be able to stretch and scrunch and bend copyright law out of any recognizable shape to permit it to manage all of the interests it has hitherto viewed as unimportant. If we can't, I think it's clear that the information space it encourages will be one that few of us will like very much.'[1454]

In this situation, it is of crucial importance not to lose sight of the basic concern to establish a framework favourable to creativity and intellectual productivity. As it is ultimately the author who creates a work of the intellect, his specific interest in exploiting and using copyrighted material towers above all conceivable competing concerns and should govern the metamorphosis of copyright law in the information society. The dualism between the authors' interest in deriving economic profit from a work on the one hand, and the same authors' concern about sufficient breathing space for unauthorised use on the other, clearly reveals the central task to be fulfilled in the future: an appropriate level of protection has to be found that leaves ample room to manoeuvre for the dissemination of information and freedom of expression.[1455] If the application of the three-step test is oriented by the specific needs of authors and brought into line with the principle of intergenerational equity, it may substantially contribute to the realisation of this objective.

The future tasks of academic work in the field of copyright law, thus, clearly come to the fore. Instead of continuing to muse and debate on the appropriateness or inappropriateness of economic models, the psychology of creative processes should be high on the agenda of interdisciplinary research. Copyright scholars have to get to know what exactly induces people to engage in the creation of an intellectual work, and how the framework that is best suited for encouraging and supporting intellectual productivity can be established.[1456] They must refrain from reiterating the out-dated mantra that the progressive improvement of copyright protection, in one way or another, will always promote the creation of new works.[1457] Instead, all excessive ramifications of the traditional espousal of stronger protection are to be pruned back and new growth of overprotection is to be nipped in the bud. The prerequisites for the discovery and development of creative talent are to be explored meticulously. Future decisions on whether or not the scope of exclusive rights or copyright limitations should be reduced or enhanced are to be based on profound empirical data demonstrating that the change corresponds to the actual needs of authors. The analytical instruments of social sciences must be

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[1454] See Litman 1997, 619.

[1455] Cf. subsections 2.2.1 and 2.2.2.

[1456] See Cohen 2000, V: 'Before we can construct a reliable system of entitlements and public policy exceptions to promote the twin goals of progress and access, we must learn to understand and describe creative processes more accurately. We need to understand how people get ideas, and how ideas migrate and transform within society. And we must learn how to design open spaces – zones of unpredictability within and around the predictable contours of rights and rules.'

[1457] Cf. Samuelson 1999, 591.

employed to inform the decisions of policy makers. To further substantiate the results of psychological and empirical studies, attention should moreover be paid to the teachings of those scientific disciplines that analyse the final outcome of creative productivity. Why should copyright scholars be reluctant to consult literary studies and the teachings of musicology and art history if they really are interested in what they are talking about?

7.2 Restructuring International Copyright Law

When evaluating the influence of the three-step test on the establishment of a proper copyright balance in the digital environment, the danger of underestimating its regulatory potential is as big as the temptation to exaggerate its importance. Virtually, the three-step test is a fig leaf for the helplessness and dividedness of policy makers on the international level. Every time an explicit agreement on permissible limitations was out of reach, the abstract formula of three criteria was invoked. Due to its openness, it gains the capacity of serving as a compromise solution for the reconciliation of opposite opinions.[1458] Therefore, it would be an exaggeration to posit that the three-step test sets forth a balance of specific shape. Its three criteria can hardly be expected to draw the conceptual contours of permissible limitations exactly. Rather, it can be deemed a materialisation of the notion of an appropriate copyright balance which lends sufficient weight to the interests of authors and users alike. The three-step test merely outlines conceivable solutions by providing an abstract catalogue of criteria.

However, there is also a specific merit which is grounded in the conceptual openness of the three criteria. The high degree of flexibility enables the protection of copyright's balance even in times of upheavals within the copyright system. Accordingly, it was wise to embrace the three-step test to circumscribe the ambit of operation of permissible limitations in the digital environment at the 1996 WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions. By virtue of this decision, national legislation can orient its action by the abstract, and thus technology-independent criteria of the three-step test instead of blindly groping for solutions.[1459] Casting doubt upon the appropriateness of the three-step test would deprive national legislators of a helpful signpost for solving the problems raised by the digital environment. Thus, the three-step test prevents national policy makers from going astray by losing sight of essential questions which must necessarily be asked when seeking to shape future copyright limitations responsibly. Hence, the underestimation of the three-step test's regulatory potential has its own dangers.

[1458] Cf. subsection 3.1.2.
[1459] See the agreed statement concerning article 10 WCT, WIPO Doc. CRNR/DC/96.

This is even more true when considering the influence the three-step test may have on the further improvement of the international copyright system. At the beginning of its 'career'[1460] in international copyright law, it served foremost as a vehicle paving the way for the formal recognition of the right of reproduction *jure conventionis*.[1461] Since its introduction at the 1967 Stockholm Conference, however, the abstract formula has made its way to the top of instruments regulating copyright's delicate balance.[1462] Nowadays, all relevant international treaties contain the three-step test. Each and every limitation imposed on whatever exclusive right falls within its ambit of operation. Not only the task of controlling traditional limitations has expressly been assigned to the three-step test but also the provision of guidance in the digital environment.[1463]

Hence, the three-step test has become a powerful counter-principle to the edifice of permissible limitations erected in the Berne Convention. The importance of this finding can be assessed by drawing a line between the international system and copyright's legal traditions. The framework established in the Berne Convention reflects the continental European approach to exemptions from author's rights. Permissible limitations are separately enumerated and more or less restrictively delineated, for instance, in articles 2*bis*(2), 10(1) and (2), 10*bis*(1) and (2), 11*bis*(3) and 14*bis*(2)(b) BC.[1464] Within this framework, the three-step test of article 9(2) BC seems to be completely out of place. It rests on three abstract factors, circumscribed in elastic and flexible terms. The conclusion is therefore inescapable that it is an element stemming from the Anglo-American sphere rather than from the continental European tradition. Not surprisingly, it was especially the UK delegation which supported the adoption of a provision constituted solely by abstract criteria at the 1967 Stockholm Conference.[1465] It is noteworthy that particularly this provision became a universal principle in the context of the TRIPs Agreement and the WIPO 'Internet' Treaties.[1466]

The deep impact which this elevation of the three-step test might have on the much more detailed system of limitations set out in the Berne Convention was noticed by the participants of the 1996 WIPO Diplomatic Conference. They were alert to the fact that the three-step test has the potential for overruling the Berne system of permissible limitations altogether. Reluctantly, they nevertheless agreed on the subjection of Berne limitations to the three-step test of article 10(2) WCT.[1467] In the agreed statement concerning article 10 WCT, however, they hastened to stress that 'Article 10(2) neither reduces nor extends the scope of applicability of

[1460] See Bornkamm 2002, 29.
[1461] Cf. subsection 3.1.2.
[1462] Cf. the description of the several stages of development of the three-step test in chapter 3.
[1463] Cf. subsection 3.3.2.
[1464] Cf. the more detailed overview given in subsection 4.2.2.
[1465] Cf. subsection 3.1.2.
[1466] Cf. sections 3.2 and 3.3.
[1467] Cf. subsection 3.3.2.

the limitations and exceptions permitted by the Berne Convention'.[1468] This statement appears as a curiosity. After expressly extending the scope of the three-step test to the limitations for which the Berne Convention provides, the contracting parties of the WIPO Copyright Treaty finally straitjacketed the test of article 10(2) WCT by adopting the agreed statement. A closer inspection, however, reveals that the statement does indeed make sense. It prevents article 10(2) WCT from bringing inconsistencies within international copyright law to the fore.

It cannot so readily be assumed that the drafters of the WIPO Copyright Treaty were fully aware of the statement's harmonising effect. The records of the 1996 Diplomatic Conference merely give evidence of the delegates' fear that national legislation might be inhibited by the three-step test from upholding those limitations in their domestic laws which they deemed compatible with the Berne Convention.[1469] Be that as it may, the agreed statement nonetheless fulfils an important function: it inhibits the three-step test from eroding those limitations permitted by the Berne Convention that do not fulfil its criteria. Article 11*bis*(2) BC, for instance, would inevitably fall prey to article 10(2) WCT in the absence of the agreed statement.[1470] The so-called 'minor reservations doctrine' would have to be restricted.[1471] These corrections of the international system of permissible limitations may be perceived as desirable. However, it is to be noted that if article 10(2) WCT is employed as a means for their realisation, the self-contradictory nature of the actual international framework could no longer be masked.

By virtue of article 1(4) WCT, articles 1 to 21 BC are incorporated into the WIPO Copyright Treaty by reference. Article 11*bis*(2) BC which clearly fails the three-step test, thus, is encompassed. Against this background, it would appear inconsistent if article 10(2) WCT were to erode article 11*bis*(2) BC. Why should the drafters of the WIPO Copyright Treaty include a certain provision by reference first, and seek to abolish it afterwards? This inconsistent result is avoided by the agreed statement concerning article 10 WCT. The same situation arises in the context of the TRIPs Agreement. Here, article 11*bis*(2) BC is incorporated pursuant to article 9(2) TRIPs. It is consequently not advisable to construe article 13 TRIPs so as to require the abolition of article 11*bis*(2) BC. Otherwise, the inconsistencies prescribed in actual international copyright law would come to the fore which the contracting parties of the WIPO Copyright Treaty circumvented by adopting the aforementioned agreed statement. There is thus reason to recommend that the agreed statement concerning article 10 WCT should also be taken into account when applying article 13 TRIPs.[1472] This inclusion of the agreed statement is also in line with the drafting history of article 13. In the context of the TRIPs Agreement,

[1468] See WIPO Doc. CRNR/DC/96, agreed statement concerning article 10 WCT.
[1469] Cf. subsection 3.3.2.
[1470] Cf. subsection 4.5.4.4.
[1471] Cf. subsection 4.5.4.3.
[1472] Cf. Ficsor 2002a, 60-61 and subsection 4.1.2.2.

the three-step test was understood as a materialisation of the standard of protection reached in the Berne Convention but not as a control instrument eroding Berne limitations.[1473]

When applying the three-step test, the outlined consideration for the contradictions inhering in international copyright law inevitably leads to unsatisfactory results. Although a certain national limitation is found to be incompatible with the three-step test, it cannot be abolished when it keeps within the limits set forth in provisions of the Berne Convention, such as article 11*bis*(2) BC. The three-step test, in consequence, is hindered from realising its full regulatory potential. The agreed statement concerning article 10 WCT shields the scope of applicability of Berne limitations from the additional control the three-step test exerts.[1474] At the core of this peculiar constraint placed on the three-step test lies the fact that a renewed revision of the Berne Convention was out of reach after the twin revisions in Stockholm 1967 and Paris 1971. Instead, the TRIPs Agreement and the WIPO Copyright Treaty were superimposed on the Convention.[1475] The agreed statement concerning article 10 WCT, on its merits, hides the inconsistencies in the field of copyright limitations evolving from the conglomerate of international treaties. This provisional solution interferes with the operation of the three-step test. The latter must carry the burden of the complicated mixture of relevant international provisions and bridge the fissures it entails. Not surprisingly, there is a move afoot in international copyright law seeking to degrade the three-step test to a mere tool of interpretation.[1476]

As the inconsistencies of international copyright law become particularly visible in the context of the three-step test, its closer inspection is a useful starting point for tabling proposals of how to redress the shortcomings of the actual international framework set out for copyright limitations. Two divergent principles, mirroring copyright's two legal traditions, are important in this respect. On the one hand, the detailed provisions laid down in the Berne Convention enter the picture. This complex sub-system enshrined in the Convention points towards the civil law approach to copyright.[1477] On the other hand, the three-step test is to be factored into the equation. Theoretically, it is devised so as to control the numerous more detailed limitations permitted by the Berne Convention.[1478] In practice, however, it is often inhibited from exerting control over the application of Berne limitations by the agreed statement concerning article 10 WCT. The three-step test forms an open-ended, horizontal provision that points towards the common law approach to copyright.[1479] The two divergent principles – the system of specific limitations set

[1473] Cf. subsection 3.2.1.
[1474] Cf. subsection 4.2.2.
[1475] Cf. the overview of the development of international copyright law given in chapter 3.
[1476] Cf. Reinbothe 2000, 264; Ficsor 2002a, 519. Cf. subsection 4.2.2.
[1477] Cf. subsection 2.1.2. See the overview given in subsection 4.2.2.
[1478] Cf. subsection 4.2.2.
[1479] Cf. subsection 2.1.2.

out in the Berne Convention on the one side and the flexible three-step test on the other – can be reconciled by merging the catalogue of Berne limitations in the three-step test. This procedure further concretises the three-step test while not imperilling its open-ended nature. The resulting provision could take the following shape:

> 'Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works in special cases, such as the use of a work for the purposes of
>
> (a) making quotations;[1480]
>
> (b) parody, caricature or pastiche;
>
> (c) strictly personal use in privacy;
>
> (d) illustration for teaching;[1481]
>
> (e) disseminating, preserving and archiving information, as long as carried out by non-profit libraries and similar institutions;
>
> (f) reporting current events;[1482] and
>
> (g) enabling the press to inform the public about political speeches, speeches delivered in the course of legal proceedings, as well as lectures, addresses and other works of the same nature which are delivered in public;[1483]
>
> provided that the limitation or exception does not conflict with a normal exploitation of the work and does neither unreasonably prejudice the legitimate interests of the author, including his moral interests,[1484] nor the legitimate interests of other right holders.'[1485]

In this way, the inconsistent framework established in international copyright law could be replaced with one general provision governing all national exemptions from exclusive rights. The expressly listed cases mirror the particular importance of limitations serving freedom of expression and the dissemination of information.

[1480] See article 10(1) BC.
[1481] See article 10(2) BC.
[1482] See article 10*bis*(2) BC.
[1483] See article 2*bis*(1) and (2) BC.
[1484] Cf. subsection 4.6.3.
[1485] Cf. subsection 4.6.2.

The clarification that they are examples of permissible special cases clearly indicates that a rational justificatory basis must underlie limitations.[1486] The enumeration is not closed ('special cases, *such as*'). At the national level, legislators are free to base more precise limitations on the concretised three-step test (civil law approach) or to bring open-ended norms into line therewith (common law approach, principle of fair use).

The merit of the proposed provision lies not only in the facilitation and clarification of international copyright law, but also in the realisation of more equality between authors and users. In international copyright law, a trend towards flexibly-devised author's rights, as traditionally granted in civil law copyright systems,[1487] can be observed. The general right of reproduction was laid down in broad terms in article 9(1) BC at the 1967 Stockholm Conference. The complementing general right of communication to the public was conferred on authors in article 8 WCT at the 1996 WIPO Diplomatic Conference. Broad exclusive rights, therefore, nowadays occupy centre stage at the international level. As a countermove, it is advisable to adopt a flexible provision regulating limitations on these rights. Otherwise, the task to strike a proper copyright balance could be made unnecessarily difficult or even become impossible. This is particularly true in times of upheavals within the copyright system. They require fast reactions to technical and contractual challenges so that precisely delineated provisions are in danger of becoming out-dated soon.

In particular, the international framework may be rendered incapable of keeping pace with the speed of future developments. To succeed in setting forth rules that, for instance, have the potential for standing the test of a 20-year period – the traditional interval of revisions of the Berne Convention –[1488] it is indispensable to have recourse to flexible norms instead of seeking to give precise guidelines on the basis of the status quo. This conclusion must not be misunderstood as an attack on the civil law dogma of restrictively-delineated exceptions to author's rights. As pointed out above, national legislation enjoys the freedom of developing more precise provisions. International policy makers, however, should confine themselves to outlining the conceptual contours of permissible limitations in order to create sufficient room to manoeuvre for establishing and safeguarding copyright's delicate balance between grants and reservations. The fact that the path of precisely-defined limitations has been left in the context of the TRIPs Agreement and the WIPO Copyright Treaty in favour of the abstract three-step test is accordingly a promising first step in the right direction. The next step must be the application of an amalgam of Berne limitations and the three-step test which concretises the three-step test without encroaching upon its flexible nature.

[1486] Cf. subsection 4.4.2.3.
[1487] Cf. the introduction given in section 2.1.
[1488] Cf. section 3.1.

The outcome of this further improvement of international copyright law – flexibility on the side of authors and users alike – is in line with the conclusions drawn in the previous section: copyright law must be aligned with the specific needs of authors. This task requires that weight be given not only to an author's interest in the exploitation of his work but also to the interest of already active or potential future authors in the unhindered use of copyrighted material. Limitations supporting this consideration of intergenerational equity are to be qualified as rights of authors just like the exclusive rights conferred by copyright law. In certain circumstances, and particularly in those cases which are explicitly listed in the concretised three-step test proposed above,[1489] authors and users, thus, meet on equal footing. It would therefore be wrong to set out flexibly-devised author's rights while straitjacketing limitations. The establishment of such a framework ignores the fact that authors are users of copyrighted material as well. This mistake may lead to overprotection stifling the breathing space necessary for the incessant renewal of individual expression, thereby impoverishing the cultural life of society, neglecting the principal objective underlying copyright law to promote cultural diversity and thus ultimately reducing the whole copyright system to absurdity.[1490]

Unfortunately, the chance of anticipating the proposed solution of the problems raised by current international copyright law was missed by the drafters of the Copyright Directive 2001/29/EC. They were ready to embrace the three-step test as a regulatory instrument in the field of exemptions from the rights granted under the Directive. However, they apparently lacked the courage to rely on a flexible norm resting on the three-step test, and instead turned to the enumeration of no fewer than 21 limitations. As at the international level, the application of permissible limitations was finally subjected to the three-step test. Hence, the structure of the international framework – with all its inconsistencies – was copied.[1491]

This is all the more regrettable as the final result, laid down in article 5 CD, is not so far from the concretised three-step test espoused here. If the drafters of the Copyright Directive had confined themselves to the enumeration of a few indispensable limitations and combined these cases with the three-step test, a promising regulatory framework would have been established that could have served as a model for future international developments. The task to pave the way for the further improvement of international copyright law is now left to the EU member states. On the basis of article 5 CD, they may introduce a provision in their national laws which at least resembles the open-ended norm recommended above. To realise this objective, they merely have to reproduce literally the wording of the cases explicitly listed in article 5(1), (2) and (3) CD they wish to adopt, and to combine these precise copies with the abstract criteria of the three-step test in the

[1489] Cf. also the explications given in section 2.3.
[1490] Cf. the previous section and subsection 2.1.3.
[1491] Cf. section 5.2 and subsection 5.3.1.2.

same way as indicated above.[1492] It appears safe to assume that this form of implementation best serves the principal objective underlying the Copyright Directive: the harmonisation of copyright law throughout the EC.[1493]

Naturally, the mere fact that the international three-step test has made its way to the Copyright Directive has its own merits. It is foreseeable that a robust body of case law will emerge, including decisions of the European Court of Justice. Right holders in EU member states are unlikely to hesitate to challenge limitations in national law on the grounds that they are incompatible with the international obligations the three-step test represents. The experience to be gained in the years to come in EC copyright law may be brought to fruition at the international level afterwards. Thus, time will tell whether the European approach to the three-step test, ultimately, is capable of contributing to the improvement of international copyright law in the described sense, or merely proves to be a dead end – just like the current framework established in international copyright law, the unsatisfactory structure of which was carefully copied in article 5 CD.

[1492] See for a concrete example of the resulting norm Senftleben 2003, 12.
[1493] Cf. section 5.4.

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COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST

An Analysis of the Three-Step Test in International and EC Copyright Law

Martin Senftleben

The three-step test by which limitations on exclusive copyrights are confined to 'certain special cases' which do not conflict with a 'normal exploitation of the work' and do not 'unreasonably prejudice the legitimate interests of the author' is among the most enduring of standards affecting limitations on intellectual property rights. Its field of application is the delicate balance between exclusive rights and sufficient breathing space for the free flow of ideas and information. However, the emerging information society has thrown numerous unforeseen obstacles in the once-clear path of its implementation. Can the traditional balance between grants and reservations of copyright law be recalibrated along the lines of the three-step test in order to meet current and future needs? Controversies over this crucial question in Europe, the U.S., Australia, and elsewhere, as well as in two significant WTO panels in 2000 have brought the three-step test into focus, the essential principle governing copyright limitations in the information society.

Investigating the development, structure, and function of the three-step test in international copyright law with thoroughness and precision, *Copyright, Limitations and the Three-Step Test* offers a close and insightful analysis of its continuing utility for the twenty-first century. The book includes:

- viable restatements of the rationales of copyright protection for the emerging IP environment;
- new insights into the relationship between copyright protection and copyright limitations;
- in-depth explanation of the structure and functioning of the three-step test;
- detailed interpretations of each criterion of the test;
- discussion of the two WTO panel reports dealing with the test;
- a proposal for the further improvement of the copyright system and the international rules governing copyright law;
- detailed information about international conference material concerning the test; and
- discussion of potential future trends in copyright law.

The author provides many examples that demonstrate the test's impact on different types of limitations, such as private use privileges and the U.S. fair use doctrine. He explains the test's role in the European Copyright Directive. The detailed examination and explanation of the three-step test will be of extraordinary value to policymakers, judges, and lawyers in the field of intellectual property law seeking to react adequately to the challenges of the digital environment.

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