DOCTRINE AND OPINIONS

THE NATURE AND SCOPE OF LIMITATIONS AND EXCEPTIONS TO COPYRIGHT AND NEIGHBOURING RIGHTS WITH REGARD TO GENERAL INTEREST MISSIONS FOR THE TRANSMISSION OF KNOWLEDGE: PROSPECTS FOR THEIR ADAPTATION TO THE DIGITAL ENVIRONMENT*

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List of abbreviations

AA	Ars Aequi
AGBG	Gesetz über Allgemeinen die Geschäftsbedingungen
aff'd	affirmed
AfP	Archiv für Presserecht
ALAI	Association Littéraire et Artistique Internationale
AMI	Auteurs, Media- en Informatierecht
ARRvS	Afdeling rechtspraak Raad van State
BC	Berne Convention
BGB	Bürgerliches Gesetzbuch
BGBl	Bundesgesetzblatt
BGH	Bundesgerichtshof
BIE	Bijblad bij de Industriële Eigendom
BUMA	Vereniging Buma (previously: Het Bureau voor Muziekauteursrecht)
BverfGE	Bundesverfassungsgerichtsentscheidungen
CD-ROM	Compact Disk Read Only Memory
cert. denied	certiorari denied
Cir.	United States Circuit Court of Appeals
CPI	Code de la Propriété Intellectuelle
CR	Computer und Recht
EEA	European Economic Association
EC	European Community
ECHR	European Convention on Human Rights
ECR	European Court Reports
EIPR	European Intellectual Property Review
F.	Federal Reporter
F.2d	Federal Reporter, Second Series
F.3d	Federal Reporter, Third Series
F. Supp.	Federal Supplement
FuR	Film und Recht
GEMA	Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigun gstechte
GG	Grundgesetz
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil
Gw	Grondwet
H. Rep.	House of Representatives of the United

	States
HR	Hoge Raad
IER	Intellectuele eigendom & reclamerecht
IIC	International Review of Industrial Property and Copyright Law
JCP	Juris-Classeur, Pratique
NBW	Nieuw Burgerlijk Wetboek
NCCUSL	National Conference of Commissioners on Uniform State Laws
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
NJCM-Bulletin	Nederlands Tijdschrift voor Mensenrechten
NJV	Nederlandse Juristenvereniging
OJ	Official Journal
OLG	Oberlandesgericht
rev'd	reversed
RIDA	Revue Internationale du Droit d'Auteur
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC	Uniform Commercial Code
UCITA	Uniform Computer Information Transaction Act
UFITA	Archiv für Urheber-, Film-, Funk- und Theaterrecht
UNIDROIT	International Institute for the Unification of Private Law
U.S.	United States Supreme Court decisions, official reports
U.S.C.	United States Code
U.S.P.Q.	United States Patent Quarterly
UWG	Gesetz gegen den unlauteren Wettbewerb
VG Wort	Verwertungsgesellschaft Wort
WIPO	World Intellectual Property Organisation
ZUM	Zeitschrift für Urheber- und Medienrecht

1. Introduction

The copyright regime[1] traditionally strikes a delicate balance between the interests of authors and other right holders in the control and exploitation of their works on the one hand, and society's competing interest in the free flow of information and the dissemination of knowledge, on the other hand. But the copyright balance has never been under as much strain as it is today.[2] For example, copyright protection has never been so broad, whether it is in terms of protectable subject matter – including photography, phonograms, films, computer programs, and other digital works , in terms of the scope of exclusive rights – covering new dissemination techniques, such as radio, television, magnetic tape recorders, copy machines, video-recorders, cable and satellite – or in terms of the duration of protection.[3] Moreover, the customary lines between creators and users of copyrighted material and between private and public acts of use are gradually fading away. The use of digital technology is indeed modifying the production, distribution, and consumption patterns of copyrighted works. Not only can users easily reproduce works in countless perfect copies and communicate them to thousands of other users, but they can also manipulate works to create entirely new products. Publishers and other producers are no longer mere intermediaries in the chain of production and distribution of works, but become more active in the creative process. The distribution of works is also simpler in the digital networked environment and, instead of going through complex distribution networks, users progressively seek direct online contact with producers.[4] At the same time, in the digital networked environment producers are in a better position to control the use of their works. Encryption methods and other similar techniques allow right holders to block access to their works altogether or to monitor the actual use that a person makes of a copyrighted work.

What has then become of the traditional balance of interests between right holders and users of protected material in the digital networked environment? While the rules on copyright and neighbouring rights have, as a whole, been unequivocally declared applicable to the digital networked environment[5], the definition of limitations on these rights constitutes however one of the major outstanding issues in relation to the new environment. The debate stems not only from the fact that limitations on copyright and related rights have never been harmonised at the international level, but also from the fact that there is no overriding consensus on how to adapt these limitations to the digital networked environment. Nevertheless, lawmakers and scholars seem to agree that the limitations that are applicable in the analogue world should not be automatically transposed into the digital networked environment. Furthermore, before transposing existing limitations or implementing new ones, a careful examination of their relevance and their impact on the right holders' interests should be carried out. Ideally the rules on copyright and related rights should guarantee sufficient protection for creators to maintain their level of investments in the production of new works distributed on-line, while maintaining the public's right to consume those works, including the possibility to make, in certain well defined circumstances, limited uses of those works without the right holder's consent.

This study, conducted on commission for the Division of Arts and Cultural Enterprise of UNESCO, examines the nature and scope of limitations on copyright and related rights and their possible adaptation to the digital networked environment. The study in divided in two main parts: the first part

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1 Unless stated otherwise, the expression 'copyright regime' refers in the following pages both to the common law system and the *droit d'auteur* system.

2 Dreier 2001, p. 295; and Quaedvlieg 1998, p. 420.

3 In Europe and the United States, the duration of copyright protection has been extended by 20 years, bringing the total duration of copyright protection to the life of the author plus seventy years after his death. See: Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, O.J.E.C. L 290, 24 November 1993, p. 9; Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827, 2828.

4 Hugenholtz 2000b, p. 79.

5 The best evidence of this is the adoption of the WIPO Treaties: WIPO Copyright Treaty, adopted by the Diplomatic Conference, Geneva, December 20, 1996, [hereinafter the 'WCT']; and WIPO Performances and Phonograms Treaty, adopted by the Diplomatic Conference, Geneva, December 20, 1996 [hereinafter the 'WPPT' and collectively referred to as 'WIPO Internet Treaties'].

gives a brief overview of the limitations as they are currently laid down by relevant international conventions and by national legislation, while the second part deals with the changes brought on by the emergence of the digital networked environment and the use of technological protection measures.

Having regard to UNESCO's general interest missions in the field of creativity and copyright, the first part focuses exclusively on limitations that are designed to protect the users' freedom of expression and to foster the dissemination of knowledge, as they have existed until now. In the first section, a number of general remarks are made about the obligations arising under international conventions. The second section concentrates more specifically on limitations allowing the reproduction of works for purposes of quotations and parodies, while the third section examines the limitations adopted for the benefit of educational institutions, as well as libraries and archives, and handicapped persons.

The second part opens with a number of general remarks concerning the adoption of the WIPO Internet Treaties and the impact of the digital networked environment on the definition and exercise of limitations on copyright. Section two follows with a short overview of recent developments in two specific areas, namely libraries and museums, and educational and research institutions. Finally, the provisions on technological protection measures are discussed: first, we identify the international obligations in this respect; then, we turn to the question of the co-existence between technological protection measures and limitations on copyright.

It should be noted in the beginning that the study does not aim to give an exhaustive account of every existing limitation recognised by national legislations to protect the users' freedom of expression and to foster the dissemination of knowledge, nor it pretends to provide a comparative law analysis of all relevant provisions. Reference to national legislation or case law merely serves to illustrate my point. In addition, considering that the achievement of the copyright balance is a matter best left to the national legislator, I will not discuss the limitations' political desirability. Issues relating to the duration of the copyright protection, the idea/expression dichotomy, the criterion of originality, the first sale/exhaustion doctrine fall outside the scope of this article, as do issues relating to private international law. The issue of digital copying for personal use would not be addressed at the present stage.

2. Limitations on copyright

2.1 General remarks

Limitations on copyrights are an integral part of the copyright system, for they are the recognition in positive law of the users' legitimate interests in making certain unauthorised uses of copyrighted material.[6] Such legitimate interests may include the protection of the users' fundamental rights, the promotion of free flow of information and the dissemination of knowledge. However, one must remember that the notion of 'legitimate interest' or 'public interest' is mostly a matter of national policy: what is in the public interest in one country, is not necessarily the same in another. Technically, limitations reflect each legislator's assessment of the need and desirability for society to use a work against the impact of such a measure on the economic interests of the right holders. The outcome of this evaluation will most often determine which limitations are laid down in national legislation and the form that each particular limitation takes. This weighing process often leads to varying results from one country to the next. Indeed, some countries have adopted a very restrictive set of limitations on copyright, like France, Luxembourg, and India, while other countries, like the United Kingdom, Australia and Canada, have included extensive provisions in their legislation allowing acts to take place without the prior authorisation of the rights owner.

As mentioned above, the limitations on copyright and related rights have never been harmonised at the international level. The limitations listed in the Paris Act of the Berne Convention are the result of a serious compromise by national delegations – between those that wished to extend user privileges and

6 Guibault 2002, p. 109.

those that wished to keep them to a strict minimum – reached over a number of diplomatic conferences and revision exercises. Consequently, all but one limitations set out in the text of the Berne Convention are optional: countries of the Union are free to decide whether or not to implement them into their national legislation. As it will be shown in more detail in the sections below, these provisions are meant to set the minimum boundaries within which such regulation may be carried out.[7] One of the most important provisions introduced in the Berne Convention during the Stockholm Revision Conference of 1967 is article 9 (2), which establishes a three-step-test for the imposition of limitations on the reproduction right. According to this test, limitations must be confined to special cases, they must not conflict with normal exploitation of the protected subject-matter nor must they unreasonably prejudice the legitimate interests of the author. No clear interpretation has ever been given of what constitutes a 'normal exploitation of a work' or an 'unreasonable prejudice to the legitimate interests of the author'.[8] Basically, where the normal exploitation of the work is threatened, no reproduction is authorised. If the normal exploitation is not affected, one must still examine whether the reproduction causes an unreasonable prejudice to the interests of the author. Unreasonable prejudice may be avoided by the payment of remuneration under a statutory license.

The Rome Convention of 1961 has brought forth no harmonisation of limitations on related rights. Article 15 of the Rome Convention[9] contains the only provision regarding the possible adoption of limitations on related rights.[10] The limitations listed therein are not as narrowly confined as in the copyright field. This is particularly true with respect to the private use exemption, which, under copyright law, is based solely on Article 9 (2) of the Berne Convention and is therefore subject to the 'three-step test'. These limitations are applicable to all three categories of beneficiaries, i.e. performing artists, phonogram producers and broadcasting organisations, but only insofar as they are implemented in national legislation.[11] Furthermore, according to the second paragraph of Article 15, the list of possible limitations to neighbouring rights permitted under the Rome Convention is not exhaustive. This paragraph allows Contracting States to provide for exemptions other than those enumerated in the first paragraph, if their copyright laws already contain such limitations. As specified in the WIPO *Guide to the Rome Convention*, the four specific limitations in paragraph (1) are those mainly used to limit authors' rights, but there may be other minor ones. Hence, the second paragraph avoids the risk that neighbouring rights owners are treated better than authors, with respect to limitations. However, according to the last sentence of Article 15 (2), none of the uses enumerated in Article 15 must be the equivalent of a statutory license.

The Universal Copyright Convention (UCC) was intended to tie non-Berne countries to other countries both inside and outside the Berne Union, but not to tie Berne countries to each other. The UCC imposes minimum copyright terms, formulates broad standards of protection, but articulates no full system of minimum substantive rights such as Berne institutes.[12] With respect to limitations on copyright, article IV^{bis}(2) of the UCC only provides that a Contracting State may, by its domestic legislation, make exceptions that do not conflict with the spirit and provisions of the Convention, to the rights granted therein. Any State whose legislation so provides, must nevertheless accord a reasonable degree of effective protection to each of the rights to which exception has been made.

By the late 1980s, the spectacular growth of the digital networked environment had sparked the need to review the rules on copyright and related rights. The protection afforded to authors, performers, and

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7 Ricketson, 1987, p. 489; Spoor and Verkade, 1993, p. 206.

8 Hugenholtz and Visser, 1995, p. 4.

9 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, signed in Rome on October 26, 1961.

10 Article 15 of the Rome Convention reads as follows: 'Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:
a) private use;
b) use of short excerpts in connection with the reporting of current events;
c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;
d) use solely for the purposes of teaching or scientific research".

11 WIPO, *Guide to the Rome Convention*, Geneva, WIPO, p. 57.

12 Geller and Nimmer, p. INT-79.

phonogram producers under the Berne Convention and the Rome Convention was deemed no longer sufficient to cope with the characteristics of the new environment. However, instead of calling for a diplomatic conference on the revision of the existing conventions, the World Intellectual Property Organisation (WIPO) convened the countries of the Union to the negotiation of new norms of protection. This led to the adoption in December 1996 of the WIPO Internet Treaties. As was the case in 1994 with the WTO/TRIPS Agreement,[13] delegations were unable to reach a consensus on the inclusion of any limitation on copyright and related rights, other than the so-called 'three-step-test'. Article 10 of the WCT and Article 16 of the WPPT not only confirm the application of this test in the area of copyright - making it applicable to all authors' rights and not only to the reproduction right - but extend it also to the area of neighbouring rights. The model of the Rome Convention has thus been abandoned. The three-step test serves as a general restriction to *all* exemptions presently found, or to be introduced, in the national copyright and neighbouring rights laws. Even if an exemption falls within one of the enumerated categories of permitted exceptions, it is for the national legislatures (and, eventually, the courts) to determine on a case-by-case basis whether the general criteria of the three-step test are met.

Nevertheless, the Contracting Parties to the WCT and the WPPT did agree to the introduction, in both instruments, of the following paragraph in the Preamble: 'Recognizing 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'. According to article 31.1 of the Vienna Convention on the Law of Treaties, the Preamble is an integral part of the treaty and serves as a basis for the treaties' interpretation. However, as Ficsór explains, this paragraph of the Preamble to the WCT only clarifies the fact that such a balance already exists in the Berne Convention and that it should be maintained. Moreover, the reference to particular fields of public interest – namely, 'education, research and access to information' – underlines that the Diplomatic Conference did not intend to introduce any new element into the existing principles of the Berne Convention, since it is exactly with respect to these interests that the Berne Convention provides for certain specific limitations and exceptions.[14] The respective paragraph of the preamble to the WPPT is essentially to the same effect, although it naturally does not refer to the Berne Convention or in fact, to the Rome Convention. On this point, Ficsór notes that it would not have been appropriate to refer to the balance as reflected in the Rome Convention, since certain new elements have been introduced in article 16 of the WPPT concerning the regulation of limitations, which seem to have improved the balance of interests from the point of view of the beneficiaries of related rights.[15]

At the European level, copyright limitations have been truly harmonised so far only with respect to computer programs and databases.[16] Besides implementing the WIPO Treaties, 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[17] was intended to resolve some of the uncertainty about the extent of permissible limitations under European copyright law, with respect to both analogue and digital works. The European Commission was of the opinion that 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.[18] The difficulty of choosing and delimiting the

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13 World Trade Agreement 1994 (establishing the WTO and including GATT 1994), Annex 1C, signed in Marrakech, 15 April 1994.

14 Ficsór 2002, p. 416.

15 Id., p. 589.

16 Council Directive of 14 May 1991 on the legal protection of computer programs (91/250/EEC), O.J.E.C. no. L 122, 17/05/91 p. 42, art. 5 and 6 [hereinafter 'Computer programs directive']; and Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, O.J.E.C. of 27/3/96 no L 77 p. 20, art. 6 [hereinafter 'Database directive'].

17 O.J.C.E. L 167, 22 June 2001, p. 10 - 19 [hereinafter 'Directive on copyright in the information society'].

18 European Commission, Explanatory Memorandum to the Proposal for a European Parliament And Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, 10 December 1997, COM(97) 628 final, p. 35.

scope of the limitations on copyright and related rights that would be acceptable to all Member States proved to be almost insurmountable. Under the pressure of Member States and lobbyists, the list of limitations grew from one version of the directive to the next. Between the time when the Proposal for a directive was first introduced in 1997 and the time of adoption of the final text in 2001, the amount of admissible limitations had passed from seven to twenty-three, only one of which (i.e. the exception for temporary acts of reproduction) is to be obligatorily implemented by the Member States. As a result of a serious compromise, the Directive introduces an exhaustive list of twenty-one optional limitations in addition to the 'three-step-test'. While Member States may not provide for any exemptions other than those enumerated in Article 5, one can entertain serious doubts as to the harmonising effect of an optional list of limitations on copyright and related rights, from which Member States may pick and choose at will.[19] The deadline for implementation of this complex and controversial Directive was set for December 22, 2002. Remarkably, only two Member States, i.e. Greece and Denmark, met the deadline. In June 2003, Austria adopted its implementation act.[20] All other Member States are still wrestling with questions relating to the scope of rights and limitations and to the protection of technological measures.

At the national level, the scope of rights granted to creators can generally be stated either in broad or in narrow terms. When creators enjoy broad exclusive rights, which encompass all possible uses of a work, some limitations on the exercise of their rights may be justified to preserve, in specific circumstances, the public's right to make unauthorised uses of protected material. When the rights are stated in narrow terms, thereby excluding certain acts from the protection regime, exemptions in favour of users may not be needed at all. The choice of a broad or narrow formulation of rights and limitations in a given copyright act ultimately determines how a court will let the balance tip in a particular case between protecting the author's rights and allowing the public to make certain unauthorised uses of copyrighted material. In the countries of continental Europe, and in countries that have adopted a similar system, the economic rights are generally drafted in flexible and open terms, allowing the exclusive rights to encompass a wide range of exploitation acts, while limitations are strictly defined and closed.[21] By contrast, in the Anglo-American copyright law system, economic rights are generally defined narrowly and are limited by the open defences of fair use or fair dealing, which leave courts room to interpret a number of unauthorised uses as non-infringing.[22]

2.2 Protection of freedom of expression

Freedom of expression is usually regarded as one of the cornerstones of any democratic society, for it enhances social progress and ensures individual self-fulfilment.[23] Freedom of expression can be broadly defined as the freedom to communicate. This concept transcends mere speech and embraces the prerogative of every citizen to express herself by any means without prior restraint. In most jurisdictions, freedom of expression extends not only to speech and press, but also to numerous areas where individuals or groups might feel the need to express themselves: in the political arena, in the media, in research, in assemblies, in the arts and culture, or in the course of lawful picketing and other social or political demonstrations. Freedom of expression also entails the freedom to gather and to impart information as an essential prerequisite to the shaping of one's opinion and beliefs. Freedom of expression has been enshrined as a fundamental right in the Universal Declaration of Human Rights[24] and incorporated thereafter in article 19 of the International Covenant on Civil and Political Rights (ICCPR)[25], Article 10 of the European Convention on Human Rights (ECHR)[26] and Article 11 of the

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19 Guibault 2003, p. 558.

20 Urheberrechtsgesetz-Novelle 2003, Bundesgesetzblatt für die Republik Österreich, Part I, 6 June 2003.

21 Strowel 1993, p. 144.

22 Dussolier 2003, p. 64.

23 See : *Roemen & Schmidt v. Luxembourg*, Decision of the European Court on Human Rights, 25 February 2003, Doc. 51772/99; Nieuwenhuis 1997, p. 9.

24 Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), art. 19.

25 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art. 19.

26 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, Council of Europe, ETS No. 5, art. 10(1): '1.Everyone has the right to freedom of expression. This right shall include freedom to

Charter of Fundamental Rights of the European Union.[27] In the United States, free speech is guaranteed under the First Amendment of the Constitution, which states that 'Congress shall make no law (…) abridging the freedom of speech'.

The recognition and exercise of exclusive rights on works impose a burden on the freedom of expression of those who wish to use copyrighted material to convey their own message and on the right to information of those who simply wish to use the information and ideas contained in copyrighted expression.[28] Specific limitations have thus been recognised in copyright law to allow users to make certain uses of copyrighted material in furtherance of their own freedom of expression and right to information. Among the numerous limitations that have been introduced into national legislation for the protection of the users' freedom of expression and for the promotion of the free flow of information are the following:

- The right to quote works or public addresses of critical, polemical, educational, scientific or information character for the purposes of criticism, news reporting;
- The right to reproduce, make available, or broadcast political speeches and other public addresses;
- The right for a daily or weekly newspaper or radio or television broadcast to reproduce news reports, miscellaneous reports or articles concerning current economic, political or religious topics that have appeared in a daily or weekly newspaper or weekly or other periodical or works of the same nature that have been broadcast in a radio or television programme;
- The right to record, show or announce a literary, scientific or artistic work in public in a photographic, film, radio or television report, provided this is necessary in order to give a proper account of the current affairs that are the subject of the report; and
- The right to reproduce works for the purposes of parody.

The following pages contain an overview of the limitations adopted as a safeguard for the user's freedom of expression, in continental Europe and in the United States, with a particular focus on the right to quote, the right to make reproductions for the purposes of news reporting and parody.

2.2.1 Quotations

The fact that, in principle, copyright law protects only the form of expression and not the underlying ideas tends to limit the possible impact of copyright protection on freedom of expression. According to this principle, anyone may publish or reproduce the ideas of another contained in copyrighted material provided the form in which they are expressed is not reproduced. While the idea/expression dichotomy contributes substantially to the freedom of public debate and news reporting, there may be circumstances where it is important to be able to use not merely a person's idea, but also his or her form of expression in order to have effective reporting or criticism of her thoughts.[29] For example, it may be important for a news reporter or a critic to capture the mood, the tone or the nuances of an address, which may not be possible without reproducing part of the speaker's form of expression. Historians, biographers, and scientists also need to be able to portray reality in a truthful manner in their own work, by relying on prior writings. As early as the beginning of the 19th century, authors recognised the importance for the creative process to be able to build on existing works and make certain borrowings from previous authors.[30]

Among the limitations adopted for the safeguard of the user's freedom of expression., the right to quote is undeniably the most important one. It serves as the common denominator of most other limitations, since quotations can be made for 'scientific, critical, informatory or educational

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hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.'

27 O.J.E.C. 18 December 2000, C 364/1.

28 Netanel 1999, p. 9.

29 Spoor and Verkade 1993, p. 5.

30 Renouard 1838, t. 2, p. 17.

purposes'.[31] Quotations can also be made inside historical and other scholarly writings by way of illustration or evidence for a particular view or argument, quotations for judicial, political and entertainment purposes as well as quotations for 'artistic effect'. This last purpose encompasses not only reproductions of artistic works or parts of such works for the purposes of illustrating a text or to provide the basis for discussion, but also the quotation of works in general for 'artistic effect' as in some modern works of fiction or poetry.[32] This right is, in fact, the only mandatory limitation under the Berne Convention. Article 10 (1) of the Convention provides that: 'It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries'. Quotations may be taken from any category of works, including literary works, films, records, radio or television programmes etc., as long as they are made from works that have already been made available to the public. This excludes quotations from unpublished works.[33] No element of measure regarding the length of allowable quotations was included in the text of the Berne Convention: quotations must simply be 'compatible with fair practice' and 'not exceed that justified by the purpose'.[34] In addition to this, national legislation may require that the name of the author and the source of the work be given in the quotation or reproduction.

In France, courts and commentators have accepted the necessity to make short quotations on the basis of the freedom of expression, the freedom to criticize or the dissemination of knowledge.[35] In certain instances, quotations have been deemed essential for the intellectual integrity of the person making reference to other works or opinions.[36] The French Intellectual Property Code (CPI) states that once a work is made available to the public, the author may not prohibit, subject to the indication of the name of the author and of the source, the making of analysis and short quotations justified by the critical, polemical, educational, scientific or information character of the work into which they are incorporated.[37] The requirements of briefness and finality of the quotations have generally been interpreted restrictively. These requirements are assessed – taking account of both the nature of the quoted work, and that of the quoting work. With respect to artistic and plastic works, for example, the courts have refused to apply the quotation exemption arguing that works are either reproduced partially and thereby violate the author's moral rights, or they are reproduced integrally and the reproduction is not a 'short' quotation any more.[38] Quotations of musical works has also been declared inadmissible because none of the purposes enumerated in the act may be inferred from the incorporating of a musical work into another work. Furthermore, quotations of musical or artistic works can hardly comply with the legal obligations to indicate the source and the name of the author in the second work.

By contrast, article 15 (a) of the Dutch Copyright Act 1912 permits the making of quotations only in an 'announcement, criticism, polemic or scientific treatise'. For many authors, the circumstances listed in the Act are the most controversial element of the provision.[39] Such restriction on the scope of the limitation appears strange not only in light of the neutral concept of 'quotation', but also in light of the social reality. In view of the narrow formulation of the right to quote under the Dutch Copyright Act, some defendants in copyright infringement cases have had no choice but to invoke, with limited success, the protection under Article 10 of the ECHR.[40]

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31 Wistrand 1968, p. 159.

32 Ricketson 1987, p. 492.

33 See: Kabel 1999, p. 237 and ff. where the author argues that the requirement according to which quotations can only be made from works that have been made available to the public is meant to protect the author's right to privacy and right of first publication.

34 Stewart and Sandison 1989, p. 136.

35 Lucas and Lucas 1994, p. 269.

36 Bochurberg 1994, p. 29.

37 French CPI, art. L. 122-5, 3° (a).

38 Lucas and Lucas 2001, p. 281.

39 De Zwaan 1995, p. 183; and Spoor and Verkade 1993, p. 208.

40 See: Arrondissementsrechtbank te Amsterdam, 19 January 1994 (*De Volkskrant v. M.A. van Dijk en de Stichting Beeldrecht*), reproduced in *Informatierecht/AMI* 1994, p. 51; Arrondissementsrechtbank te Amsterdam, 12 November

The right to quote constitutes one of the most important limitations on copyright under German law as well.[41] In many areas, and primarily in academia, no one would be able to work adequately without the possibility to make quotations. There is therefore no doubt that the right to quote was introduced in the public interest, in the heart of which is the free intellectual debate. Thus, quotations are not only permissible in science and the arts, but also in other areas of creation, such as for news reporting or for the expression of political opinions. The freedom to quote generally serves to promote cultural development in the widest sense.[42] Paragraph 51 of the German Copyright Act provides, for example, that isolated scientific works may be reproduced in their entirety, in an independent work, for the purpose of explaining the new work's content. The same provision expressly allows the reproduction of small portions of published musical works for incorporation into other works, as justified by the purposes of the quoting works.[43] However, and although the Act is silent on this point, the German courts have upheld by analogy the right to quote artistic and film works, but only to the extent that these quotes are part of a political debate or of an information broadcast.[44]

In the United States, the majority opinion holds that since Congress adopted both the First Amendment and the Copyright Act, the legislator could not have exercised its power over copyright law in a way that runs afoul of the First Amendment. There are however, situations in which strict enforcement of a copyright would inhibit the very 'Progress of Science and useful Arts' that copyright is intended to promote. An obvious example is the researcher or scholar whose own work depends on the ability to refer to and to quote the work of other scholars. Obviously, no author could create a new work if he were first required to repeat the research of every author who had done that before him. The relationship between copyright law and the First Amendment has given rise to numerous court rulings.[45] In *Harper & Row Publishers, Inc. v. Nation Enterprises,*[46] the Supreme Court had to decide whether the unauthorised publication of extracts from an unpublished manuscript of President Ford's memoirs in the magazine 'The Nation' could be excused under the fair use doctrine. 'The Nation' argued that the public's interest in learning about the President's memoirs, guaranteed under the First Amendment, outweighed the right of the author. The Supreme Court did recognise that 'the Framers [of the U.S. Constitution] intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas'. Whereas freedom of thought and expression encompassed both the right to speak freely and the right to refrain from speaking at all, the Court refused to accept that 'this right not to speak would sanction abuse of the copyright owner's monopoly as an instrument to suppress facts'. After examining the facts in the context of the four fair use factors, the Supreme Court ruled that the reproduction of excerpts of the memoirs by 'The Nation' was not a fair use.[47] Today, the Supreme Court's interpretation of the fair use doctrine in *Harper & Row* still serves as a valid precedent. For example, when examining the amount and substantiality of the portion used from the original work, the courts now enquire whether 'such use, focusing on the most expressive elements of the work,

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1998, No. 6 (*Anne Frank Fonds v. Het Parool*), in *Mediaforum* 1999, p. 39 with note from Hugenholtz; Hof Amsterdam, 8 July 1999, No. 44 (*Anne Frank Fonds v. Het Parool*), in *Informatierecht/ AMI* 1999, p. 116, with comment from Hugenholtz.

41 Leinemann 1998, p. 100.

42 Melichar 1999, p. 796; BGH *GRUR* 1994, 803 – *Museumskatalog*.

43 German Copyright Act, § 51(3).

44 BGH *GRUR* 1987, 362 – Filmzitat; OLG Köln *GRUR* 1994, 47/48 (*Filmausschnitt*).

45 *Rosemont Enterprises v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966); *Time, Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130 (S.D.N.Y. 1968); *Sid & Mary Krofft Television v. McDonald's Corp*, 562 F.2d 1157 (9th Cir. 1977); *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977); *Wainwright Securities v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977); *Triangle Publications, Inc. v. Knight-Ridder Newspaper, Inc.* 626 F.2d 1171 (5th Cir. 1980); *Harper & Row v. Nation Enterprises*, 471 US 539 (1985); *Los Angeles Times et al. v. Free Republic*, U.S. District Court Central District of California, 8 November 1999, No. CV 98-7840-MMM.

46 471 U.S. 539 (1985).

47 To a large extent, the Court's finding was founded on the fact that President Ford's Memoirs were unpublished. See: Kabel 1999, p. 237 and ff.

exceeds that necessary to disseminate the facts' and whether the portion copied constitutes the 'heart' of the copyrighted work.[48]

2.2.2 Parodies

Parody has a tradition in literary history that dates back centuries in some countries. Parodies are considered not only to have entertainment value, but also to serve a critical function, pointing out human imperfections and the ironies of our existence. Encouraging the production of parodies is thus one of society's values since they constitute an important artistic vehicle, through which creators and critics exercise their freedom of expression, guaranteed under article 10 ECHR. Almost by definition however, parodies conflict with the rights owners' copyright in their work. Indeed, parody is defined as a 'humorous exaggerated imitation of an author, literary work, style etc'.[49] To be effective therefore, a parody necessarily depends upon the use of a pre-existing work. And as for quotations and news reporting, the question is to what extent one may borrow from a protected work in order to produce a parody without being liable for copyright infringement. The Berne Convention makes no specific reference to parodies. But the making of a reproduction for the purposes of parody would probably fall under article 9 (2) of the Convention, or under the right to quote of article 10 (1) of the Convention. As all nations do not share the same sense of humour, a specific exemption for the making of parodies is not recognised everywhere. This is currently the case in Germany and the Netherlands. However, considering that parody appears among the twenty-one optional limitations allowed under the European Directive on Copyright in the Information Society, its implementation may constitute the perfect occasion for Member States to introduce a parody exemption in national law.

The satirical genre is part of the French tradition and constitutes a form of freedom of expression that is protected under article 11 of the *Déclaration des Droits de l'Homme de 1789* and article 10 ECHR.[50] The European Court of Human Rights has repeatedly stated that article 10 ECHR is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.[51] National courts enjoy a certain margin of appreciation to evaluate what shocks and disturbs, but in principle all forms of humour are acceptable. The humorous genre allows exaggerations, deformations and ironical representations, the good taste of which is left to individual appreciation. This form of expression has received explicit recognition under article L.122-5, 4° of the French Intellectual Property Code, according to which an author may not prohibit the making of parodies, pastiches, or caricatures, subject to the applicable laws. French legal literature traditionally teaches that parodies apply to musical works, pastiches to literary works and caricatures to drawings and artistic works. This classification is somewhat technical and has been the source of much confusion in the case law.[52] In any case, to be considered admissible under French law, a parody must consist of two elements: a moral and a material element. The moral element is essential: the exemption of parody may only be invoked if the humorous intent is established. But the intention to raise laughter must not turn into an intention to harm the personality or the reputation of the artist parodied. As to the material element, the extent of the borrowing is irrelevant. It is important that there is no risk of confusion in the public or an intent of appropriation of the original work by the parodist. Parody implies the making of sufficient and specific borrowings to reveal the relation to the original work, but it must also be different enough to avoid any competition with the original work.[53] Parodies must in principle aim at criticising the original work itself, but those that use a work as a support for a more general critic of society or current events have been tolerated to some extent in the past.[54]

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48 471 U.S. 539 (1985), at p. 564. See: *Religious Technology Center (Church of Scientology) v. Netcom, et al.*, 923 F. Supp. 1231 (N.D. Cal. 1995).

49 Oxford Dictionary of Current English, 2d ed., Oxford, Oxford University Press, 1993, p. 648.

50 Ader 1994, p. 2.

51 *Sunday Times*, European Court of Human Rights, 26 April 1979, Series A no. 30, § 65.

52 Gautier 1999, p. 308.

53 Lucas and Lucas 1994, p. 274.

54 Gautier 1999, p. 309, referring to TGI Paris, 14 May 1992, *Sardou v. Lamy*, reproduced in RIDA Oct. 1992, p. 174.

In the United States, parodies come, like quotations, under the umbrella of the fair use doctrine. In fact, American courts have rendered numerous decisions concerning the use of copyrighted material for the purposes of parody.[55] One of the most important rulings of the recent years on the doctrine of fair use is the Supreme Court's decision in *Campbell v. Acuff-Rose*,[56] which involved a parodied work. This decision clarified several ambiguous issues pertaining to the fair use defence in general, and to parodies in particular. In this case, petitioners, known as the rap group 2 Live Crew, had made a rap version of the song 'Oh, Pretty Woman', originally composed by Roy Orbison and William Dees and whose rights were owned by Acuff-Rose Music, Inc. Writing the unanimous decision of the Supreme Court, Justice Souter accepted the defence of fair use, declaring that, like less ostensibly humorous forms of criticism, parody can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one. To meet the first fair use requirement, a parody must add something new, with a further purpose or different character, altering the first work with a new expression, meaning, or message. This criterion asks, in other words, whether and to what extent the new work is 'transformative'. And although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Turning to the third factor of the fair use defence, the Supreme Court pointed out that it was consistent with earlier case law to hold that, when parody takes aim at a particular original work, it must be able to 'conjure up' at least enough of that original work to make the object of its critical wit recognisable. In the case at hand, Justice Souter estimated that 2 Live Crew's parody of 'Oh, Pretty Woman' was a transformative work and was therefore covered by the exception of fair use.

2.3 Dissemination of knowledge

A number of limitations share the common objective of encouraging dissemination of knowledge and information among the members of society at large. This is the case of the limitations adopted in favour of educational institutions and those adopted in favour of public libraries, museums and archives, and in favour of handicapped persons. These limitations serve as a tool in carrying out a government's information policy and in enhancing democracy within society. They therefore reflect the government's belief that society as a whole derives greater benefit from allowing certain uses to take place, under certain conditions, without the rights owners' authorisation, than from maintaining strict control over protected works. The fact that these objectives justify the use of copyrighted material without the rights owners' authorisation does not however necessarily imply that such use should occur without the payment of a fair compensation to the rights owner. The choice between recognising an exemption and establishing a statutory licence is also part of each legislator's balancing process between the interests of rights owners and those of the users. On the other hand, a number of countries have decided not to adopt specific provisions applicable to educational institutions, libraries, archives or museums, outside of the mandatory right to quote for scientific purposes, the private use exemption and the setting up of a reprography regime.[57]

A number of countries have chosen to regulate the reprographic use of protected material by educational institutions, libraries and other institutions through the implementation of a non-voluntary licence regime. According to such a regime, levies may be imposed following either one of four ways: 1) on the sale of reproduction equipment, such as photocopying machines, and facsimile machines; 2) proportional to the amount of copies made in one year; 3) proportional to the number of students or employees; or 4) a combination of either one of the three preceding systems. Reprography regimes are usually not limited

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55 *Benny v. Loew's Inc.*, 356 U.S. 43 (1958); *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955); *Berlin v. E.C. Publications, Inc.* 219 F. Supp. 911 (S.D.N.Y. 1963) *aff'd*, 329 F.2d 541 (2d Cir. 1964); *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y. 1980) *aff'd* 623 F.2d 252 (2d. Cir. 1980); *Walt Disney Productions v. Air Pirates*, 345 F. Supp. 108 (N.D. Cal 1972) *aff'd in part & rev'd in part*, 581 F.2d 751 (9th Cir. 1978); *Hustler Magazine v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986); *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1991); *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994).

56 *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994), at p. 1181.

57 France and Belgium for example have no such specific exemptions. See: Hugenholtz and Visser 1995, p. 11 and 19.

to schools or libraries, but may also extend to all reproductions made by governmental organisations, enterprises, administration offices, and copy shops where reprographic equipment is available.[58] The sums paid under reprography regimes are administered by a collective society, often on a mandatory basis.[59] In the Nordic countries, reprographic reproduction - outside the field of private use - is subject to the so-called extended collective agreement license.[60] As a rule, the obligation to pay the remuneration imposed on reprographic equipment does not lie with the end-user, but rather on the manufacturers, importers, or intra-community acquirers of such devices. In the majority of cases, manufacturers and importers of reproduction equipment pass the charge on to the consumers by means of the sales price of such equipment. Geller observes that 'where levies are imposed, for example, on the sales price of a copy machine, facsimile machine, or blank recording tapes, there is only an intrusion at that point where these instruments enter commerce, not in private life. Where, by contrast, levies are imposed on machines already purchased by users, some method is needed to police these users, for example, concerning what they do in their offices or homes, or at least to collect monies due'.[61] Similarly, we note that the obligation to pay the proportional remuneration for reprographic activities generally lies with the legal person under whose supervision, direction, or control the reprographic equipment is used, such as copy-shops, educational institutions, libraries, governmental institutions, and businesses.

It is also important to point out that, in some countries, copying under the reprography regime is not authorised if, or to the extent that, licences are available authorising the copying and the person making the copies knew or ought to have been aware of that fact.[62] In other countries, like the United States, there is no reprography regime in force for the making of reproductions of works. Unless such activities qualify as fair use, users, whether libraries, archives, universities or schools, must obtain a licence from the rights holder in order to make photocopies of works. In *American Geophysical Union, et al v. Texaco Inc.* for example, Texaco had developed the practice of making systematic copies of scientific articles made available to scientists, instead of paying licence fees or of acquiring additional subscriptions. The Court of first instance suggested that the availability of means for paying right holders for the use of their works would reduce or even eliminate the need to refer to the fair use defence. In the Court's opinion, the absence of a mechanism to compensate authors would justify a fair use defence, whereas such a defence would hardly be admissible in the presence of such a mechanism:

> 'Despite Texaco's claims to the contrary, it is not unsound to conclude that the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor when the means for paying for such a use is made easier. This notion is not inherently troubling: it is sensible that a particular unauthorized use should be considered 'more fair' when there is no ready market or means to pay for the use, while such an unauthorized use should be considered 'less fair' when there is a ready market or means to pay for the use'.[63]

The Court of Appeals for the Second Circuit confirmed the trial court's decision and found for the plaintiff mainly on the basis of the first and fourth fair use factors. On the purpose and character of defendant's use, the Court ruled in favour of the plaintiff, 'primarily because the dominant purpose of the use was a systematic institutional policy of multiplying the available number of copies of pertinent copyrighted articles by circulating the journals among employed scientists for them to make copies, thereby serving the same purpose for which additional subscriptions are normally sold, or (…), for which photocopying licenses may be obtained'.[64] On the effect upon the potential market or value of the work, the Court considered that the plaintiff had demonstrated a substantial harm to the value of

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58 Spoor and Verkade 1993, p. 242.
59 Belgian Copyright Act, art. 61; German Copyright Act, § 54 (6).
60 Danish Copyright Act, art. 50; Finnish Copyright Act, art. 13; Swedish Copyright Act, art. 26i; Norwegian Copyright Act, art. 36.
61 Geller 1992, at p. 35.
62 UK Copyright, Designs and Patents Act 1988, art. 36(3).
63 *American Geophysical Union, et al v. Texaco Inc.*, 37 F.3d 881 (2sd Cir. 1994).
64 *American Geophysical Union, et al v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1995).

their copyrights through Texaco's copying 'primarily because of lost licensing revenue, and to a minor extent because of lost subscription revenue'. In its concluding remarks, the Court of Appeals added that if Texaco wished to continue its copying activities, it could either use the licensing schemes of the Copyright Clearance Center or purchase additional subscriptions to the periodical.

2.3.1 Libraries and archives

Typical functions of any library are the collection, preservation, archiving, and dissemination of information. The preservation and archiving of copyrighted works often involves the making of reproductions from original works, either because they have been damaged, lost, or stolen.[65] The dissemination of information takes place in a number of ways, either by lending copies of works; by permitting the public consultation of works on the premises of the library or the consultation of electronic material at a distance; by allowing patrons to make their own reproductions of works for personal purposes using freely accessible machines (photocopy, microfiches or printer); or finally by transmitting works at the request of individual patrons in the context of a document delivery service or an interlibrary loan service.[66] Limitations adopted for the benefit of libraries and archives are thus meant to allow them to perform their general tasks and to encourage the dissemination of knowledge and information among members of society at large, in furtherance of the common good. However, the need to adopt specific measures to meet this particular common good objective is evaluated differently from one country to the other.[67] Moreover, since libraries come in different shapes and sizes each pursuing different types of objectives, their public interest dimension has been interpreted differently depending on whether they are publicly or privately funded, commercial or non-profit, accessible to the general public or only to a restricted group. In practice, limitations on copyrights are usually recognised in favour of non-profit, publicly funded, and generally accessible libraries, because they are thought to pursue greater public interest objectives than other types of libraries.

In view of the absence of a specific provision in the Berne Convention concerning libraries, museums and archives, the general limitation of article 9 (2) of the Berne Convention has formed the basis for the adoption of several specific limitations appearing in national legislation, such as reproductions for private use, research and scientific purposes, for preservation purposes in libraries and archives or for inclusion of artistic works in exhibition catalogues.[68] Specific provisions concerning the activities of libraries have existed in one form or another, in many countries around the world, like Australia, Canada, Columbia, and Mexico. Such limitations may cover such acts as the making of reproductions for the purposes of preservation, replacement of lost or damaged copies, or research; the making of reproductions of single articles or short extracts of works for delivery to users; or the making of reproductions for use in reading devices.[69] For example, article 31 of the Japanese Copyright Act states that:

> 'It shall be permissible to reproduce a work included in library materials ("library materials" in this Article means books, documents and other materials held in the collections of libraries, etc.) within the scope of the non-profit-making activities of libraries, etc. ("libraries, etc." in this Article means libraries and other establishments, designated by Cabinet Order, having the purpose, among others, to offer library materials for the use of the public) in the following cases:
> (i) where, at the request of a user and for the purpose of his own investigation or research, he is furnished with a single copy of a part of a work already made public or of all of an individual work included in a periodical already published for a considerable period of time;
> (ii) where the reproduction is necessary for the purpose of preserving library materials;
> (iii) where other libraries, etc., are furnished with a copy of library materials which are rarely available through normal trade channels because the materials are out of print or for other similar reasons.

65 Institute for Information Law 1998, p. 1.
66 Krikke 2000, p. 21.
67 Lucas 1998, p. 220; Visser 1996, p. 52.
68 Ricketson, S. (1989), p. 485 and ff.
69 Columbian Copyright Act, art. 38.

The exercise of limitations adopted for the benefit of libraries and archives is usually subject to strict conditions. For instance, to benefit from the application of article 31 (i) of the Japanese Act, a library patron would be required to come to the library to obtain one copy of a part of the work. A request through the postal service is regarded as a visit, but the Law says nothing about transmission by facsimile and networks.

Under the Australian Copyright Act, a person may make a request to an authorized officer of the library or archives to be supplied with a copy of an article or a part of a published work, provided he presents a declaration to the effect that the copy is required for the purpose of research or study and will not be used for any other purpose and that no copy of the same article or part a work has previously been supplied.[70] The same declaration must be presented by the patron of a library or archives, who requests a copy of an article or part of a work from another library or archives. A library may therefore copy certain amounts of *published* literary, dramatic, musical or artistic works for a patron who needs the material for his or her research or study. Under sect. 50 of the Copyright Act, the inter-library supply of copyright material does not constitute an infringement where the making or supplying of a copy containing more than a reasonable portion of the work is done by an authorised officer of the library. The authorised officer must be 'satisfied that a copy (not being a second-hand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price'. However, the Act contains no similar provision for audiovisual material, such as films, recorded music or talking books. The Australian Copyright Act puts an additional restriction on the ability of libraries to make reproductions of works upon request from their patrons: the reproduction must not relate to more than a 'reasonable portion' of the work. A 'reasonable portion' is defined under s. 10(2) of the Copyright Act as up to 10% of the number of pages in a published edition of a work or the whole or part of a single chapter of a work. The reasonable portion test also plays an important role in the library and archives exceptions and the educational statutory licence regime.

Section 108 of the United States Copyright Act contains excessively detailed exemptions that cover most of the libraries' and archives' main activities. Just like the limitations in favour of educational institutions, however, the limitations adopted for the benefit of libraries and archives were the result of a compromise reached between interested parties just before the enactment of the U.S. Copyright Act of 1976. Under very strict conditions, libraries and archives may make reproductions of certain types of works[71] for the purposes of preservation and security and for the purpose of replacement of a copy that is damaged, deteriorating, lost or stolen. Libraries are also allowed to make, at the individual request of patrons, reproductions of a small portion of a work or of an article taken from a periodical from its own collection or in the framework of an interlibrary loan service. However, these exemptions apply exclusively to libraries and archives 'without any purpose of direct or indirect commercial advantage'. Thus, libraries or archives in a profit-making organisation are precluded from providing employees with copies of copyrighted material, unless such copying qualifies as a fair use, or the organisation has obtained the necessary copyright licences.[72] According to Section 108 of the Act, the reproduction and distribution of works within the framework of an interlibrary loan service is restricted to the isolated and unrelated reproduction or distribution of a single copy of the same material on separate occasions. None of these exemptions must lead to the systematic, related or concerted reproduction and distribution of multiple copies of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one individual or for separate use by the individual members of a group. The Act specifies that systematic reproduction and distribution occur when a library makes copies of such materials available to other libraries or to groups of users under formal or informal arrangements the purpose or effect of which is to substitute

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70 Australian Copyright Act of 1968, art. 49(2A).

71 U.S. Copyright Act of 1976, section 108(h) which reads as follows: 'The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news (…).'

72 U.S. Copyright Office, Circular 21 – Reproduction of copyrighted works by educators and librarians, Washington D.C., 1995, p. 13. See also: *American Geophysical Union, et al v. Texaco Inc.*, 37 F.3d 881 (2sd Cir. 1994).

for a subscription to or purchase of a work. Guidelines were later developed to clarify the extent of the photocopying permissible within the framework of interlibrary arrangements.[73]

In certain European Union countries, whilst no specific exceptions for library use exist (for example Germany, Belgium, France), these institutions may benefit from the general exceptions set out in favour of educational or private use. In Germany, the lawfulness of an interlibrary loan service under the private use exemption was examined in a recent decision of the Supreme Court. The case involved the document delivery service of the Technical Information Library of Hannover (TIB).[74] The TIB is one of the biggest services of this type in Germany. Via the Internet, it offers a worldwide document delivery service, whereby people can consult its on-line catalogue and send an email to order a copy of a work from its collection. The copy is then sent by mail or by fax to the person who made the request. The Supreme Court pointed out that a modern and highly developed industrial nation, like Germany, depends on science and research and therefore needs a fully developed, rapid, and economical information system. On the basis of the legislative history of Article 53 of the Copyright Act, the Court noted that the legislator did not intend to subject the document delivery services of publicly accessible institutions to the prior authorisation of right holders. In the German Court's opinion however, the level of remuneration to be paid to rights owners for such document delivery services could be adjusted to take account of the new reality.[75]

By contrast, other EU Member States (such as the UK, Austria, Ireland, Sweden, Finland, Denmark, Portugal, Greece) set out specific exceptions for the benefit of libraries and archival use of protected subject matter although these differ widely and do not necessarily cover the use of digitised material. With respect to the use of digitised material by libraries, on-line as well as off-line, initiatives are on-going in a number of Member States, notably the UK, where library privileges are most developed, to arrive at more flexible contractual solutions. Article 5 (2) (c) of the European Directive on Copyright in the Information Society allows Member States to adopt a limitation only in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage. This provision allows Member States like the UK, Ireland, Luxembourg, Greece, Portugal, Denmark, Sweden, and Finland to maintain their limitations regarding the reproduction of copyrighted material by libraries and archives, although these legislative provisions may need to be revised to comply with the language of the Directive. However, the Directive puts no obligation on the Member States to implement limitations for the benefit of libraries and archival use, so that the legislation of the Member States will most likely remain unharmonised in this area.

2.3.2 Educational and research institutions

From the point of view of copyright law, the use of copyrighted material in educational institution and in research follows a similar pattern, the primary objective of which is to disseminate existing knowledge. Educational purposes are defined as non-commercial instruction or curriculum-based teaching by educators to students at non-profit educational institutions, and research and scholarly activities, defined as planned non-commercial study or investigation directed toward making a contribution to a field of knowledge and non-commercial presentation of research findings at peer conferences, workshops, or seminars.[76] Perhaps the biggest difference between lower or higher educational and research institutions lies in the fact that the latter are not only users of copyrighted material but also producers of new works. In practice, educators strive to adapt their teaching methods to new learning environments. To catch the students' attention and to improve their learning skills, educators rely heavily on contemporary books, newspapers, magazines, photographs, videos, slides,

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73 H. Rep. No. 1733, 94th Cong., 2d Sess. 72-73 (1976).

74 BGH, 25 February 1999 - I ZR 118/96 (*Kopienversanddienst*), in *GRUR* 1999/08-09, p. 707. See also: Krikke 1999, p. 125.

75 Krikke 2000, p. 91.

76 United States Patents and Trademark Office, The Conference on Fair Use, Final Report to the Commissioner on the Conclusion of the Conference on Fair Use, Washington D.C., Nov. 1998, p. 35.

sound recordings, broadcasting programs and other media.[77] In practice, schools make millions of photocopies of copyrighted material in each country every year. Moreover, the performance of works, the diffusion of radio or television broadcasts and the communication of videos or sound recordings are particularly suitable for teaching in a classroom environment. For the other part, typical research activities include the exchange of cutting-edge discoveries and works-in-progress among scholars; the publication of new and synthetic works for the broad academic community; the dissemination of new and existing knowledge to students through teaching; the establishment of repositories to enable handing knowledge down from generation to generation; and the transmission of knowledge beyond the academy to the public. Research requires the ability to cite and quote the work of others, regardless of format: whereas quotations from text can be manually transcribed, quotations from digital objects may require machine mediation. Scholarly communication involves individuals, academic departments and research units, libraries, archives, university presses, commercial publishers, external research sponsors, academic and industrial software developers and others. Because it carries information that ranges from complex graphical and sound data to plain text and must reach an audience that ranges from Nobel scientists to freshmen in remedial courses, scholarly communication must include the full range of content and take place in all media. It must flow back and forth between all of its participants and be capable of moving rapidly enough to contribute to the evolution of understanding and knowledge. It must not be overwhelmed by a permissions system so burdensome that it makes such movement impossible.

Be that as it may, any unauthorised use of a work in the context of educational or research activities constitutes an infringement of copyright, unless a limitation on copyright applies.[78] While the use of current material undeniably contributes to the intellectual development of students and to the progress of scientific research, it is surprising to note that limitations adopted for the benefit of educational and research institutions vary widely from one country to the next.[79] This is so because the regulation of the 'utilisation of works by way of illustration' for teaching purposes has been left to the discretion of national legislations.[80] Under Article 10 (2) of the *Berne Convention*, such utilisation is lawful if it is made for the purposes of teaching, if it is 'justified by the purpose' and if it is 'compatible with fair practice'. Illustrations can be made by means of publications, broadcasts or sound and audio-visual recordings, provided that they fulfil the listed requirements. Article 10 (2) has been interpreted to apply to teaching at all levels, if dispensed in educational institutions and universities, municipal, state and private schools, but not to teaching dispensed outside these institutions such as general public and adult education facilities[81]. As in the case of quotations, the utilisation of works for teaching purposes is not subject to any determined quantitative restriction. The words 'by way of illustration' do impose some limitation on the size of the borrowing, but would not exclude the use of the whole of a work in appropriate circumstances[82].

In countries like Australia, Chile, Japan, and Mexico, where special measures have been introduced with respect to schools or other educational institutions and with respect to scientific research, the most common limitations to be found in national legislation are the following:

- The right to make compilations of only short works or of short passages of works by one and the same author and, in the case of artistic works, photographs or drawings, only a small number of those works, for purposes of teaching;
- The right to reproduce parts of works in publications for use as illustrations for teaching, or for the purposes of scientific, literary or artistic criticism, and research;

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77 Educational Multimedia Fair Use Guidelines Development Committee, Fair Use Guidelines For Educational Multimedia, Washington D.C., July 17, 1996, § 1.2.

78 Neumann 1994, p. 23.

79 Guibault 2002, p. 69.

80 *Berne Convention*, art. 10(2) which reads as follows: "It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided that such utilization is compatible with fair practice".

81 Stewart and Sandison 1989, p. 138.

82 Ricketson 1987, p. 496.

- The right to annotate and collect in any form by those to whom they are addressed, lectures given either in public or in private by the lecturers of universities, higher institutes of learning and colleges provided that no person may disclose them or reproduce them in either a complete or a partial collection without the prior written consent of the authors;
- The right to communicate to the public parts of works by broadcasting a radio or television programme made to serve as an illustration for teaching purposes or for scientific research purposes;
- The right to perform and display a work in the course of teaching activities;
- The right to reproduce a work already made public in questions of an entrance examination or other examinations of knowledge or skill, or such examination for a license.

Often these uses are allowed provided the work being reproduced has been lawfully communicated to the public and that they occur in conformity with that which may be reasonably accepted in accordance with social custom. As in the case of quotations, the source must be clearly indicated, together with the indication of the author if it appears in the source. Furthermore, the law often provides for the payment of an equitable remuneration to the author or his successors in title, as it is the case in Australia. In addition, a fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the purpose of research or study does not constitute in Australia an infringement of the copyright in the work. A fair dealing with a literary work (other than lecture notes) does not constitute an infringement of the copyright in the work if it is for the purpose of, or associated with, an approved course of study or research by an enrolled external student of an educational institution. In determining whether or not a dealing is fair, a number of factors outlined in s. 40(2) are to be taken into account. These factors include: the purpose and character of the dealing; the nature of the work or adaptation; and the effect of the dealing upon the potential market for, or value of, the work or adaptation. Notwithstanding these factors, a copy is deemed to be fair if it constitutes not more than a 'reasonable portion' of a work. A 'reasonable portion' is defined under s. 10(2) as 10% of the number of pages in a published edition of a work, or the whole or part of a single chapter of the work.

In the United States, educational institutions are allowed to make unauthorised use of copyrighted material according to wide ranging limitations, none of which are subject to the payment of equitable remuneration to the rights owners.[83] The broadest limitation in favour of educational institutions is undeniably that of section 107 of the Act, which lists teaching (including multiple copies for classroom use), scholarship, and research among the activities for which the unauthorised use of copyrighted material might in certain circumstances be excused under the fair use doctrine. The fair use doctrine was codified in the U.S. Copyright Act of 1976 after a decade-long process, during which the most contentious issue was educational photocopying. Some authors have held that the inclusion of classroom copying within the scope of the fair use doctrine only brought confusion to the concept of fair use and that educational use should have been provided for under a separate limitation.[84] The boundaries of the fair use doctrine in the field of education were clarified in an 'Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions', reached between authors and publishers on the one hand, and educators on the other.[85] These Guidelines provide specific examples of what constitutes fair use of published works. They allow, under certain conditions, single copying for a teacher's use and multiple copies for classroom use, but specifically prohibit other uses. In addition to the Classroom Copying Guidelines, the House Report contained the 'Guidelines for Educational Uses of Music', to cover the reproduction of recorded and printed music.[86] In effect, these guidelines are said to have succeeded in providing educators with some certainty as to what was acceptable under the fair use doctrine, while preventing copying where permission could

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83 U.S. Copyright Act of 1976, art. 107 and 110, allowing performances and displays of works in certain face-to-face teaching activities.

84 Klingsporn 1999, p. 108.

85 House Committee Report on the 1976 Copyright Bill (House Committee on the Judiciary, House Report No. 94-1476 to accompany S. 22, 94th Cong., 2d Sess., September 3, 1976, pp. 65-74.

86 Klingsporn 1999, p. 104.

reasonably be requested and where the market for or the value of the work is likely to be affected, as in cumulative copying or reproductions in anthologies.[87]

In Europe, Member States may, under the new Directive on Copyright in the Information Society, provide for limitations relating to the use of copyrighted material for the purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved.[88] Limitations can be adopted with respect to both the right of reproduction and the right of communication to the public. Recital 42 of the Directive specifies that when applying the limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect. The Directive therefore leaves room for the Member States to adopt or maintain limitations relating to the reproduction or communication of copyrighted material for the purpose of illustration for teaching or scientific research.[89] These may include the right to record broadcast works for use in the classroom, the right to make anthologies of works, the right to perform a work in the course of activities of educational establishments and the right to reproduce a work for purposes of instruction or examination.[90] The requirement that appears in the British and Irish Acts according to which a limitation allowing the recording by educational establishments of broadcast or cable programmes and the reprographic copying of works does not apply if or to the extent that there is a licensing scheme is also compatible with Recital 45 of the Directive.[91] Moreover, the possibility for educational institutions to make reproductions of works under a reprography regime only applies to analogue means of reproduction. Under Article 5 (2) (a) of the Directive on Copyright in the Information Society for example, Member States may only allow '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, with the exception of sheet music, provided that the right holders receive fair compensation'.

2.3.3 Handicapped persons

Among the limitations in national legislation which aim at encouraging the dissemination of knowledge and information among the members of society, is the limitation adopted for the benefit of handicapped persons. The multilateral conventions do not specifically address such a limitation. Nevertheless, it appears from the report of the Main Committee I of the Stockholm Conference in 1967, that a limitation for the benefit of handicapped people was envisaged during the negotiations as one possible applications of the limitation set out in Article 9 (2) of the Berne Convention.[92] The copyright laws of several countries around the world, like the acts of the United States, Australia, Japan, and Canada, have contained, in one form or another, a limitation on copyright for the benefit of handicapped people, already for a number of years.[93] The United Kingdom has recently introduced in the Copyright, Designs, and Patents Act 1988, a limitation permitting visually impaired persons or a competent body to make accessible copies for the personal use of visually impaired persons to whom the master copy is not accessible because of their impairment.[94] Interestingly, the British Parliament

87 Patry 1995, p. 356.

88 Directive on Copyright in the Information Society, art. 5(3)a).

89 See for example: Luxembourg Copyright Act of 2001, art. 10(2).

90 See for example: UK Copyright, Design, and Patents Act 1988, art. 32-36; Belgian Copyright Act 1994, art. 21, 2sd par., 22 (4*bis*) and 22(4*ter*); Dutch Copyright Act 1912, art. 16; German Copyright Act, art. 46, 47, 53(3); Irish Copyright Act 2000, art. 53-57.

91 Recital 45 of the Directive on Copyright in the Information Society reads as follows: 'The exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law.

92 Ricketson 1987, p. 485 and ff.

93 See for example: U.S. Copyright Act, § 121; and Copyright Act of Canada, R.S.C. (1985), c. C-42 as last amended by S.C. 1997, c. 24, art. 32; Japanese Copyright Act, Law No. 48 of May 6, 1970, as last amended by Law No. 91 of May 12, 1995, art. 37; and Australian Copyright Act of 1968 as subsequently amended, Commonwealth Consolidated Acts, art. 47a and 135 to 135ZQ and 135ZR to 135ZT;

94 UK Copyright (Visually Impaired Persons) Act 2002, Chap. 33, art. 31A.

also provided that a competent body is not allowed to make accessible copies in a particular form if there is a not unreasonably restrictive licensing scheme in force under which licences may be granted for the making and supply of copies of the copyright work in that form. In continental Europe, many countries have also implemented a provision to this effect.[95] National legislation may provide that the exercise of this limitation is subject to the payment to the author of an equitable remuneration, in addition to any other condition of application. In some countries, the obligation to pay remuneration has been put on the State rather than on the physical or moral persons making the reproductions, which amounts in fact to a subsidy in favour of both handicapped persons and copyright owners.

At the European level, Recital 43 of the Directive on Copyright in the Information Society declares that it is in any case important for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to accessible formats. Consequently, article 5 (3) (b) of the Directive allows Member States to introduce a limitation on the right of reproduction and the right to communicate a work to the public with respect to uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability. This article is broader than the provision that was initially included in the Proposal for a directive, according to which the limitation would have been applicable only with respect to uses for the benefit of visually-impaired or hearing-impaired persons. With respect to this particular limitation and to other limitations of a more limited economic importance, the European Commission declared in the Explanatory Memorandum that the provisions of the Directive only set out minimum conditions of their application, and it is for the Member States to define the detailed conditions of their use, albeit within the limits set out by the Directive.[96] As a result of the adoption of the Directive, France and Germany are considering the introduction of such a limitation in their national law, France in the form of an exemption and Germany, in the form of a statutory licence. This differentiated method of implementing the Directive is in conformity with Recital 36, which states that the Member States may provide for fair compensation for right holders also when applying the optional provisions on exceptions or limitations, which do not require such compensation.

3. Limitations on copyright in the digital networked environment

3.1 General remarks

The adoption of the WIPO Internet Treaties in 1996 gave the international legal community the necessary confirmation that copyright law is to prevail in the digital world. During the preparatory works that lead to the adoption of the Treaties, delegations spent much time discussing what would be the appropriate scope of protection to grant rights owners in the digital environment. A number of exclusive rights have been formally introduced, both under the WCT and the WPPT. Among these are the right of distribution, the right of rental, and the 'right to communicate a work to the public' under the WCT, with its equivalent 'right of making available of a sound performance' under the WPPT[97]. Both rights of 'making available' are meant to encompass all 'on-demand' communications of works or sound performances, which are now subject to authorisation from the rights owner.

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95 Spanish Copyright Code, art. 31(3); Portuguese Copyright Act, art. 80; Luxembourg Copyright Act, art. 10(14); Danish Copyright Act, art. 17; Finnish Copyright Act, art. 17.

96 European Commission, Explanatory Memorandum to the Proposal for a European Parliament And Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, 10 December 1997, COM(97) 628 final, p. 40.

97 Compare the formulation of both Treaties: WCT, art. 8: "Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them"; and WPPT, art. 10 and 14: "Performers [and producers of phonograms] shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms [or their phonograms], by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them".

No specific limitation was adopted with respect to these rights. Among the several questions examined was that of the applicability of the right of reproduction to the new environment, and the possible limitations to it. After lengthy debates, delegations came to the conclusion that the wording of article 9 (1) of the Berne Convention was sufficiently broad to cover digital reproductions. On the basis of this consensus, Contracting Parties to the WPPT agreed to upgrade the protection afforded under the Rome Convention by granting performers and phonogram producers 'the exclusive right of authorising the direct or indirect reproduction of their performances fixed in phonograms [or of their phonograms], in any manner of form.'[98] At the time, no consensus could be reached on the wording of a possible limitation to allow transient or incidental forms of temporary reproductions, which a number of delegations believed should not be covered by the exclusive right of authorising reproduction. At the close of the Diplomatic Conference on the WCT, delegations adopted the following Agreed Statement:

> '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 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'.

It has been suggested that this Agreed Statement could constitute an appropriate basis for the introduction into the Contracting Parties' national laws of any justified exemptions in cases of transient and incidental reproductions, subject to compliance with the 'three-step test.'[99] As mentioned in section 2.1 above, delegations were unable to reach a consensus on the inclusion of any limitation on copyright and related rights, other than the so-called 'three-step-test'. Article 10 (1) of the WCT states that 'Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in 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.' Paragraph 2) adds that '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'. Delegations also issued the following Agreed Statement concerning Article 10:

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

With respect to the WPPT, article 16 (2) extends the 'three-step test' to the new rights provided under the Treaty, in the same way as does Article 10 (1) of the WCT. Article 16 (1) of the WPPT reproduces the main principle of article 15 (2) of the Rome Convention and states that: 'Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works'. This provision avoids once more that performers and producers of phonograms get better treatment than copyright holders. Finally, the Agreed Statement concerning article 10 of the WCT applies *mutatis mutandis* to article 16 of the WPPT.

The application of the "three-step test" to the digital environment raises several questions. What constitutes a normal exploitation of a work in the digital networked environment? If technology makes copyright owners capable of controlling every use made of their work on the information highway and of collecting royalties for every authorised act, does this automatically imply that they should be allowed to

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98 WPPT, art. 7 and 11.

99 Ficsor 2002, p. 521.

do so?[100] Would the imposition of a limitation in this case systematically affect the normal exploitation of the work? If the normal exploitation of the work is not affected, is the prejudice to the legitimate interests of the rights holder always unreasonable? Dreier maintains that the 'normal exploitation' of a work does not include 'any' exploitation possible with regard to protected material whether in print or electronic form. He suggests that a distinction should be made between those exploitation activities already undertaken by the rights owner or which the rights owner is likely to undertake in the near future, and those, which are only theoretically within his reach due to the extended possibilities of exercising the exclusive rights.[101] This approach seems to roughly coincide with the one taken by the Arbitration Panel of the World Trade Organisation in the case opposing the European Union to the United States:

> 'We believe that an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work (i.e., the copyright or rather the whole bundle of exclusive rights conferred by the ownership of the copyright), 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 (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains'.
> In developing a benchmark for defining the normative connotation of normal exploitation, we recall the European Communities' emphasis on the potential impact of an exception rather than on its actual effect on the market at a given point in time, given that, in its view, it is the potential effect that determines the market conditions'.[102]

Despite the adoption of the Agreed Statements, article 10 of the WCT and 16 of the WPPT left Contracting States little to go on for the adoption of new limitations on rights or for the adaptation of existing limitations. Around the world, countries have either completed the process of implementing the WIPO Internet Treaties or are still examining the issue,[103] where the question of the limitations on copyright and neighbouring rights is often given particular attention.[104] In the United States, the WIPO Internet Treaties were implemented into American law through the adoption of the Digital Millennium Copyright Act (DMCA)[105] in 1998, which did not lead to the introduction of new limitations in the U.S Copyright Act. However, it did provide Congress with the opportunity to modify the limitations on ephemeral recordings by broadcasting organisations and on public libraries and archives. Apart from these two modifications, no other limitation was considered necessary, because the fair use doctrine was deemed sufficiently flexible to accommodate the needs of users and rights owners as a consequence of any new technological development. Japan revised the Copyright Law in 1999 to prevent the action for circumventing technological protection measures and removing or altering of rights management information such as electronic watermark devices.[106] In Australia, the Parliament passed the *Copyright Amendment (Digital Agenda) Act 2000*[107] with a view to implementing the WIPO Internet Treaties. The amendment, which came into force in Spring 2001, introduced a new technology-neutral right to communicate literary, dramatic and musical works to the public, which encompasses the making available of such works on-line, and modified a number of limitations on copyright in order to make them applicable to the digital environment. Besides implementing the mandatory limitation of article 5 (1) of the European Directive on Copyright in the Information Society, the Member States of the European Union may adopt in their national law any and all limitations contained in the exhaustive list of twenty-two optional limitations of the Directive. In any case, the

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100 Hugenholtz 1996, at p. 94.
101 Dreier 2001, p. 4.
102 United States – Section 110(5) of the US Copyright Act, World Trade Organization, Panel Decision, WT/DS 160/R, 15 June 2000, §§ 6.183 and 184.
103 See: Government of Canada, *Consultation Paper on Digital Copyright Issues*, Intellectual Property Policy Directorate (Industry Canada) & Copyright Policy Branch (Canadian Heritage), Ottawa, June 22, 2001.
104 Copyright Law Review Committee, *Simplification of the Copyright Act 1968 Part 1 - Report examining the exceptions to the exclusive rights of the copyright owners*, Australian Attorney General's Office, Canberra, September 1998.
105 Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998), art. 404.
106 Law to Partially Amend the Copyright Law, No. 77, 15 June 1999.
107 Copyright Amendment (Digital Agenda) Act 2000, No. 110, 2000 [Hereinafter referred to as 'CADA'].

Member States must ensure that their existing limitations or any new limitation comply with the narrow wording of the Directive and with the 'three-step-test'.[108]

3.2 Adaptation of limitations to the digital environment

The scope of exclusive rights granted to authors and performers has been broadened to include all temporary and permanent reproduction on any medium whatsoever as well as all communications to the public including on-demand services. The question is therefore whether the limitations on copyright and neighbouring rights apply in the digital environment and whether some adaptations are necessary. An exhaustive review of the manner in which existing limitations should be adapted to the digital networked environment would go far beyond the scope of this study. With respect to limitations designed to protect the users' freedom of expression and to foster the dissemination of knowledge, there seems to be little controversy concerning the application to the digital environment of the right to quote, the right to make reproductions for purposes of parody, and the limitations adopted for the benefit of handicapped persons. However, the application to the digital networked environment of two categories of limitations deserves greater attention in the context of this study, i.e. the limitation with respect to public libraries and archives, as well as those pertaining to educational and research institutions. The limitations and exceptions concerning libraries and archives appear to have been among the most hotly discussed provisions of the Directive in the Member States. The same questions arise with respect to educational and research institutions: what kind of reproductions may be permitted? What kinds of practices of communicating or making available materials through information network connections should be permitted?[109]

3.2.1 Libraries and archives

Public and research libraries occupy a central role in the supply of information to the public. Either through catalogues, (electronic) databases, compilations of press articles, and other sources, libraries make current social and cultural information available to the public on a non-profit basis. In this context, one can easily understand the libraries' wish to be able to continue to provide the same services in the digital environment as they are providing in the analogue world. With the digitisation of works, several of the libraries' and archives' main activities have given rise to an intensification of use of works by the public, either off- or on-line, on the premises or at a distance. A number of these activities, when carried out in the digital environment, raise some uncertainty under copyright law, the most problematic of which are electronic document delivery services and the making of digital copies of materials held in their collections and the digitisation of copyright material held in the collections of libraries and archives. Lawmakers generally agree that the extension of the current limitations to the digital domain, thereby also allowing electronic document delivery or the digitisation of works, may not be valid in all cases. In practice, the differences in accessing and marketing material in the digital environment may warrant differing approaches in different situations.[110] As appears below however, the reactions of the legislators vary significantly from one country to the next, even if these issues are still far from being settled everywhere. In view of the uncertainty left by copyright law, copyright owners are increasingly resorting to contractual terms and conditions in order to more clearly delineate the scope of what libraries and archives purchasing or licensing the copyright material may do with what he or she is buying or hiring. In principle, this approach allows copyright owners to better tailor the licence or purchase terms or conditions to what the client is paying for, but it does not take away the fact that some limitations on copyright and neighbouring rights may be necessary to permit libraries and archives to fulfil their mission in the digital environment.

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108 Guibault 2003, p. 560.

109 Liedes 2002, p. 9-10.

110 The Parliament of the Commonwealth of Australia, *Advisory Report on Copyright Amendment (Digital Agenda) Bill 1999*, Commonwealth of Australia, Canberra, November 1999, p. 16.

3.2.1.1 Document delivery services

Document delivery can best be described as the supply of copies of documents on demand to individual customers and users. Document supply is offered by a wide range of service providers: libraries (public, private, or university), scientific institutions and laboratories, commercial document suppliers, host organisations, publishers, database publishers, subscription agents, and the like. In the context of an electronic document delivery service, documents are selected by end users from bibliographic databases, ordered electronically, scanned or copied from existing digital files, transmitted through digital networks and subsequently downloaded.[111] Until now, document delivery services were allowed, with respect to analogue supports, either on the basis of the private use exemption, where library employees would provide their patrons with single paper copies of works for purposes of research and study, or on the basis of a specific library exemption, which usually required compliance with strict conditions. The involvement of public libraries in the sphere of electronic document delivery is increasingly considered as coming in direct competition with the services of publishers or other commercial information providers, thereby affecting the normal exploitation of works and the legitimate interests of right holders. Two types of activities would fall under the category of 'electronic document delivery services', namely supplying patrons with digital reproductions in the context of an 'interlibrary loan' service and granting patrons remote access to their digital collections.

The Australian government's policy in amending the Act in 2000 to give copyright owners rights and protections consistent with the WCT also ensured that limitations in the Act were amended. Thus, as a result of the *Copyright Amendment (Digital Agenda)* (CADA), libraries and archives may, since 4 March 2001, generally digitise and communicate copyrighted material (for example, by email) for the same purposes for which that material could, to date, be copied. The Act extends the existing 'library and archives' limitations to the digital environment, and creates several new library exceptions specific to the digital environment. Without payment or permission, libraries and archives may:

- Copy and transmit 10% of a work or an article in a journal publication in response to a research or study request.
- Copy and electronically transmit (i.e. e-mail) a work to a user in response to a research or study request or to another library, as long as the material is not otherwise available within a reasonable time at an ordinary commercial price.
- Copy and electronically transmit (i.e. via e-mail or an Intranet) material in their collections to officers of the organisation for preservation and internal management purposes.
- Make material acquired in an electronic form available to the public within the institution's premises on a computer terminal that does not allow electronic reproduction (such as copying onto a disk) or communication (such as e-mailing or uploading to the Internet or an Intranet).

The Act also requires that any digital copies made by the institution for the purpose of supplying material to users or other libraries must be destroyed as soon as practicable after the copy is sent. The CADA creates a different test of commercial availability for electronic material under the inter-library supply provisions. In recognition of the difference between electronic and print mediums, the Australian Government has proposed an amendment to the current section 50 of the Copyright Act. New section 50(7B) provides that if a reproduction is made in electronic form, then it will be subject to the commercial availability test, regardless of whether or not it constitutes more than an article contained in a periodical publication or reasonable portion of the work. Thus, any supply of works by libraries in electronic form under section 50 is subject to the commercial availability test, that is, whether the particular part of a work or periodical publication requested is available or not within a reasonable time at an ordinary commercial price.[112]

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111 Hugenholtz and Visser 1995, p. 1.

112 The Parliament of the Commonwealth of Australia, *Advisory Report on Copyright Amendment (Digital Agenda) Bill 1999*, Commonwealth of Australia, Canberra, November 1999, p. 35.

In the United States by contrast, inter-library loan activities are strictly regulated. A working group on inter-library loan and document delivery was convened in 1995 in the context of the Conference on Fair Use (CONFU). CONFU was set up to bring together copyright owner and user interests to discuss fair use issues and, if appropriate and feasible, to develop guidelines for fair use of copyrighted works by librarians and educators. In CONFU's final report, published in 1998, the working group on inter-library loan and document delivery unanimously agreed, after considerable discussion, that it was premature to draft guidelines for digital transmission of digital documents.[113] Not surprisingly, the Digital Millennium Copyright Act (DMCA)[114] brought no modification to article 108 (e) of the U.S. Copyright Act, which allows inter-library loans and document delivery to take place only under the following, rather strict, conditions:

> 'The rights of reproduction and distribution under this section apply to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, if the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, if—
> (1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and
> (2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.'

In Europe, acts that qualify as electronic document delivery fall under the exclusive right of authors to communicate a work to the public and the right of other right holders to make their subject-matter available to the public, pursuant to article 3 of the Directive on Copyright in the Information Society. Under article 5 (2) (c) of the Directive, Member States may provide only for a limitation on the right of reproduction 'in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage', and not on the right to communicate a work to the public. Recital 40 of the Directive expressly specifies that the limitations adopted for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions should not cover uses made in the context of on-line delivery of protected works.[115] As stated in the Explanatory Memorandum, the European Commission believes that any other solution would severely risk conflicting with the normal exploitation of protected material on-line and would unreasonably prejudice the legitimate interests of right holders. According to Ficsor, however, on-line delivery of protected works is still possible, under article 5 (3) (n) of the Directive,[116] provided that the reproductions are made for specific purposes, such as research or private study, and that the works are used exclusively for such purposes. Such guarantees are given under article 5 (3) (n) through the condition that such use is only available through dedicated terminals on the premises of such establishments. As Ficsor points out, availability through dedicated terminals certainly necessitates the application of appropriate technological measures to achieve truly restricted availability.[117]

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113 See: United States Patents and Trademark Office, The Conference on Fair Use, Final Report to the Commissioner on the Conclusion of the Conference on Fair Use, Washington D.C., Nov. 1998, p. 16.

114 Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

115 Directive on Copyright in the Information Society, Recital 40.

116 This article reads as follows: 'Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: (n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections'.

117 Ficsor 2002, p. 527.

3.2.1.2 Digitisation of works

Libraries and archives see in the digital technology the ideal means to preserve or restore their collections. The question therefore arises of whether public libraries, archives and other similar institutions should be allowed to make digital reproductions of works and under what circumstances such reproductions could be allowed. Also, can a library or archives make a copy of a digital work in its collection? A library or archives could consider making such a digital reproduction in the case where the original of a work is currently in an obsolete format, where the technology required in order to consult the original is unavailable or where the institution's copy of a work has been stolen or is deteriorating.[118] Contrary to the making of reproductions of works for the library patrons' personal use, activity which is usually limited to the reproduction of only portions of works, the digitisation of works for preservation or restoration purposes involves the reproduction in digital form of entire works. Recognising the library's and archives' capital role in the preservation of a nation's cultural and historical heritage, the copyright systems of a number of industrialised countries expressly allow the digitisation of certain categories of works, albeit under more or less strict conditions. Most laws are silent however, on the question of whether libraries and archives may convert hardcopies of works into digital copies for purposes of preservation and restoration of their collections. Moreover, even if digitisation is allowed in certain circumstances, the law is not always clear on whether digitisation is permitted only for printed works or also for sound and audiovisual works.

In Australia, the Standing Committee on Legal and Constitutional Affairs, which conducted an inquiry into the Copyright Amendment (Digital Agenda) Bill 1999, proposed to isolate the digital from the print environment by preventing copyright users from making digital reproductions of print material except in very limited circumstances.[119] Under the CADA, the right to digitise print material has been made to fall under the copyright owner's right of reproduction, where the notion of 'reproduction' is defined as follows: 'a work is taken to have been reproduced if it is converted into or from a digital or other electronic machine-readable form and any article embodying the work in such a form is taken to be a reproduction of the work'. The Standing Committee expected that in most cases the conversion of copyright material from hardcopy to digital form would be the subject of commercial negotiations between copyright owners and libraries and archives, and between copyright owners and users. The Committee proposed that, in order to prevent users from digitising print material, only limited exceptions should apply to reproductions from hardcopy to digital form. In this context, the Standing Committed considered that, in the public interest, limited royalty-free copying of copyright materials by libraries and archives is an important exception to the exclusive rights of copyright owners that should be maintained. Consequently, libraries and archives may, under the CADA, make a digital copy of a print work for purposes of replacement of a work that has been damaged, lost, or stolen, which may subsequently be made available online within the premises of the library or archive. A similar limitation applies to the digital reproduction of artistic works for purposes of preservation against loss or deterioration. However, a person accessing such a digital reproduction would not be able to make an electronic or hardcopy of the reproduction or communicate it. In other words, the Australian limitation is restricted to the digitisation of print and artistic works and does not appear to allow the making of digital reproductions of sound recording and films for the purpose of preservation.

In the United States, Section 108(c) of the U.S. Copyright Act was amended by the DMCA[120] to allow the making of replacement copies of works that are damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete, if (1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and (2) any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy. The

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118 See: Instituut voor Informatierecht 1998; and An Act to amend the Copyright Act, Statutes of Canada 1997, c. 24, art. 30.1

119 The Parliament of the Commonwealth of Australia, *Advisory Report on Copyright Amendment (Digital Agenda) Bill 1999*, Commonwealth of Australia, Canberra, November 1999, p. 8.

120 Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998), art. 404.

Act defines 'obsolete format' as one that a machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

> 'The copyright in an original artistic work that is held in the collection of a library or archives is not infringed in the circumstances described in subsection (3B) by the communication, by or on behalf of the officer in charge of the library or archives, of a preservation reproduction of the work by making it available online to be accessed through the use of a computer terminal:
> (a) that is installed within the premises of the library or archives; and
> (b) that cannot be used by a person accessing the work to make an electronic copy or a hardcopy of the reproduction, or to communicate the reproduction.
> (3B) The circumstances in which the copyright in the original artistic work is not infringed because of subsection (3A) are that either:
> (a) the work has been lost, or has deteriorated, since the preservation reproduction of the work was made; or
> (b) the work has become so unstable that it cannot be displayed without risk of significant deterioration.'

At the European level, the Directive on Copyright in the Information Society allows Member States to adopt limitations 'in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage'. As the Explanatory Memorandum to the Directive specifies, the provision does not define those acts of reproduction, which may be exempted by Member States. In line with the 'three-step-test', Member States may not, however, exempt all acts of reproduction, but must identify certain special cases of reproduction, such as the copying of works that are no longer available on the market. The making of digital reproductions of works in a library's collection for purposes of preservation would probably be an acceptable limitation under article 5 (2) (c) of the Directive, since this provision makes no distinction between reproductions made in analogue or digital format.[121] This is in effect the interpretation followed, among others, by the Belgian and Dutch legislators, who plan to introduce in their respective copyright act a limitation allowing libraries and archives to make reproductions – whether analogue or digital – for purposes of preservation or restoration of their collection.[122] Another question arising in this context, and to which there is no clear answer, concerns the extent to which the provisions of the Computer Programs Directive and the Database Directive allow libraries to make reproductions of digital works in their collection for purposes of preservation and archiving.[123] Under the Computer Programs Directive, software users are permitted to make unauthorised reproductions of computer programs for back-up or decompilation purposes only, while users of databases may, under the Database Directive, make reproductions for purpose of illustration for teaching or scientific research. One could argue that the making of a reproduction of a computer program for purposes of preservation and archiving falls under the back-up exemption, but no similar exemption applies to the making of a reproduction of an electronic database.

3.2.2 Educational and research institutions

Similar to librarians and archivists, educators and scientific researchers wish to take the full advantage of digital technology in their teaching or researching activities. The use of digital content in the fields of education and research opens the door to a greater variety of works from everywhere in the world and to a better exchange of ideas and knowledge among students or scientists. The digitisation and communication of works to the public, which play an important role in classroom, research, and distance learning activities, raise significant copyright issues. As in the case of libraries and archives, lawmakers generally agree that the extension of the current limitations to the digital domain, thereby also allowing certain classroom, research, or distance learning activities, may not be desirable in all

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121 Krikke 2000, p. 156.

122 Nederlandse Tweede Kamer, Kamerstuk 2002-2003, 28482, No. 6, 17 March 2003, art. 16n; Sénat de Belgique, Session 2002-2003, Document législatif n° 2-704/8, 25 February 2003, art 22(8).

123 Instituut voor Informatierecht 1998, p. 25-26.

cases. One of the main concerns of copyright owners is that, in the digital environment, limitations on copyright and related rights will undermine the markets of works distributed online. Publishers, particularly those of educational material, believe that 'in a digital environment students will, with the aid of the limitations, be able to access, copy and transmit significant portions of their works without fear of infringement, possibly causing irreparable damage to their market'.[124] A balance must be found between the interests of copyright and related rights owners and those of the educational and research institutions. As appears below however, the assessment by the national legislator of where the balance of interests should be drawn in the educational and scientific sector varies significantly from one country to the next, even if these issues are still far from being settled everywhere. The use of contractual terms and conditions has become an essential tool for the delineation of the scope of what these categories of users may do with what educational and research institutions are buying or hiring. While the contractual approach allows copyright owners to better tailor the terms or conditions to what educational and research institutions are paying for, it does not take away the fact that some limitations may be warranted to permit these institutions to take advantage of the digital technology in a way that does not affect the normal exploitation of copyrighted works or the legitimate interests of the right holders.

3.2.2.1 Classroom activities

Educators have traditionally brought copyrighted books, videos, slides, sound recordings, and other media into the classroom, along with accompanying projection and playback equipment. Multimedia creators integrated these individual instructional resources with their own original works in a meaningful way, providing compact educational tools that allow great flexibility in teaching and learning. Material is stored so that it may be retrieved in a non-linear fashion, depending on the needs or interests of learners. Educators can use multimedia projects to respond spontaneously to students' questions by referring quickly to relevant portions. In addition, students can use multimedia projects to pursue independent study according to their needs or at a pace appropriate to their capabilities. Classroom activities rely on a wide variety of basic and advanced telecommunications technologies to serve the students, including, for example, one-way and two-way open or scrambled broadcast, cable and satellite delivery, fiber-optic and microwave links, CD-ROMS, and the Internet. Furthermore, it is not uncommon to see that analogue works like music, photographs, images, drawings, and maps are digitised and used for educational purposes. From the point of view of the right holders, the limitations adopted for the benefit of classroom or research activities that would pose the greatest problem in a digital environment concern the digitisation of works, including sounds, texts and images, and the performance, display, or broadcast of such digital content in the classroom.

In Australia, the educational licence has been extended to permit reproductions other than in hard copy format, and to include the communication of works. The Standing Committee on Legal and Constitutional Affairs, which conducted an inquiry into the *Copyright Amendment (Digital Agenda) Bill 1999*, considered that educational institutions should be able to make and network digital copies of works that have been published in print form on terms similar to the right given to copy print works. In addition, the educational statutory licence in Part VA of the Copyright Act was modified to allow educational institutions to copy transmissions (such as wireless broadcasts or cable television transmissions) without the permission of underlying copyright owners, subject to the payment of remuneration. This statutory licence has amended to refer to the new broader definition of 'broadcast', and extended to encompass the new right of communication to the public. This should enable educational institutions to communicate broadcasts they have copied, subject to the payment of equitable remuneration. Part VB of the Copyright Act provides educational institutions with a statutory licence to make copies of works subject to the payment of equitable remuneration. The CADA extends this scheme to apply to the reproduction and communication of works in electronic form. The reforms establish two separate schemes. One applies to hard copy material, and the other to works in electronic form. Existing limits on copying will apply generally to the new scheme (as appropriately amended to take into account differences in the digital environment). The new scheme

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[124] Brundenall 1997, p. 4.

is drafted broadly enough to encompass future technological developments. It is a flexible scheme, which relies upon the agreement of the relevant parties. The CADA also amends the existing statutory licences for institutions assisting persons with a disability to the reproduction and communication of copyright material in electronic form. In short, as long as the material is used for 'educational purposes' and equitable remuneration is paid to the relevant collecting society, educational institutions in Australia do not need permission to:

- copy reasonable amounts of electronic material and communicate this to staff and students (e.g. over a closed circuit television system or Intranet); and
- copy and communicate larger amounts of electronic material that can't be obtained within a reasonable time at an ordinary commercial price by the staff or students.

The amount of remuneration that must be paid is determined by negotiation between the institution and the relevant collecting society or copyright owner. If an agreement can't be reached, the Copyright Tribunal has jurisdiction to allocate an amount.

Two working groups on Digital Images and Educational Multimedia were convened in 1995 in the context of the CONFU. As appears from the CONFU's final report, the two working groups were unable to reach consensus on the endorsement of two sets of proposed guidelines for fair uses of copyrighted works in the educational sector.[125] Nevertheless, given that a good proportion of participants supported the goal of achieving workable guidelines, but acknowledging the lack of consensus on the proposed guidelines, it was proposed that a monitored use period be instituted during which institutions could implement the proposed guidelines and use them in practical classroom and institutional situations. The Digital Images Guidelines apply to the creation of digital images and their use for educational purposes. The guidelines cover (1) pre-existing analogue image collections and (2) newly acquired analogue visual images. These guidelines do not apply to images acquired in digital form, or to images in the public domain, or to works for which the user has obtained the relevant and necessary rights for the particular use. According to these guidelines, educators, scholars, and students may digitise lawfully acquired images to support the permitted educational uses under these guidelines if the inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission. Images digitised for spontaneous use do not automatically become part of the institution's image collection. Permission must be sought for any reuse of such digitised images or their addition to the institution's image collection. The Educational Multimedia guidelines apply to the use, without permission, of portions of lawfully acquired copyrighted works in educational multimedia projects created by educators or students as part of a systematic learning activity by non-profit educational institutions. Essentially, students and educators may incorporate portions of lawfully acquired copyrighted works when producing their own educational multimedia projects for their own teaching tools in support of curriculum-based instructional activities at educational institutions. In view of the lack of consensus over these guidelines, it is not surprising to note that no modification was made under the Digital Millennium Copyright Act (DMCA)[126] to article 110 of the U.S. Copyright Act, which deals with the use of copyrighted material as 'part of the systematic instructional activities of a governmental body or a non-profit educational institution'.

In Europe, as we have seen in section 2.3.2 above, article 5 (3) (a) of the Directive on Copyright in the Information Society states that Member States may adopt limitations on the rights of reproduction and of communication to the public for purposes of illustration for teaching or scientific research. Contrary to the limitations allowed under the Directive with respect to libraries and archives, the limitations adopted for the benefit of educational institutions are not only confined to the right of reproduction, but may also apply to the right of communication to the public of a work. Moreover, the Directive makes no distinction between analogue and digital uses of works. Depending on the

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125 United States Patents and Trademark Office, The Conference on Fair Use, Final Report to the Commissioner on the Conclusion of the Conference on Fair Use, Washington D.C., Nov. 1998, p. 11, 15.

126 Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

language of the copyright legislation of each of the Member States, some room could therefore exist for educational institutions and individual teachers or students to make digital reproductions of works and to communicate works in digital form for teaching purpose, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved. Note however that, under article 5 (2) (a) of the Directive, the possibility for educational institutions to make reproductions of works under a reprography regime only applies to analogue means of reproduction. In principle, this provision would mean that a teacher or a student would be authorised to make a print out from an article in an encyclopaedia on CD-ROM and make reprographic reproductions of that print out for the needs of the class, but would not be allowed to make digital reproductions of that article. However, in its implementation Act, Austria allows schools and universities to make, for purposes of teaching, reproductions of works in a form other than paper, provided that the act pursue no direct or indirect economic or commercial advantage.[127]

3.2.2.2 Research activities

More and more, scientific publishers offer an impressive number of on-line publications, research tools per discipline, access to the full text of works (pay-site), and 'contents alert' services allowing those who register to receive the tables of contents of the journals of their choice by e-mail. Electronic publishing not only makes it possible to consult the articles, whether free of charge or otherwise, but also to track down other sources of knowledge through a document search, links, interactive services, electronic commerce, etc. The Internet and electronic mail increasingly offer the research community opportunities that it did not previously have. Access to information has increased as has access to and discussion with those working in similar areas. One other aspect of digital technology, currently in its infancy but which presents enormous possibilities to the research community, is the use of the Internet to reach individuals as research subjects. In particular, there may be significant research benefits to be gleaned where the group being researched is normally difficult to reach and/or the issues being researched are of a particularly sensitive nature. In addition, just as the tools used by scientific research are changing, so too are the tools of scientific communication. Of course, most if not all the limitations described in the previous subsection are susceptible to find application in the context of research activities. For this reason, we will concentrate our attention in this subsection only on the limitations that are specifically implemented to facilitate the use of copyrighted material by researchers and on the implication these have in the digital environment.

In Australia, the Standing Committee on Legal and Constitutional Affairs, which conducted an inquiry into the *Copyright Amendment (Digital Agenda) Bill 1999*, considered that the exceptions for fair dealing (including for research and study) should apply for copyright material that is reproduced from digital to digital form. The Committee expressed this view because the copyright owner has had the opportunity to agree to the digitisation process.[128] However, the Committee concluded that the exceptions should not apply to allow the conversion of material in print form to digital form without the agreement of the copyright owner, except in very limited circumstances. The reasonable portion test for the copying of copyright material in electronic form for the purposes of research or study has been more narrowly defined under the CADA.[129] An article contained in a periodical publication or published work, acquired in digital form by a library or archive, may be made available online within the premises by an officer in charge. Certain conditions would apply, including that a user could not use any equipment supplied by the library or archive to make an electronic copy of the work, nor could they communicate it . A hardcopy of a work available online may be made on the premises as long as it complies with fair dealing principles.

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127 Urheberrechtsgesezt-Novelle 2003, art. 42(6).

128 The Parliament of the Commonwealth of Australia, *Advisory Report on Copyright Amendment (Digital Agenda) Bill 1999*, Commonwealth of Australia, Canberra, November 1999, p. 16.

129 Wiseman 1999, p. 52.

In Europe, article 5 (3) of the Directive on Copyright in the Information Society contains two provisions directly related to the conduct of research activities, according to which Member States may adopt limitations on the rights of reproduction and of communication to the public with respect to the:

> '(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;
> (n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections'.

These two limitations are optional. Member States are thus free to decide whether to implement them or not in national law. Given that only three Member States have implemented the Directive at this time, it is hardly possible to evaluate whether or how they will transpose these provisions into national law. The German legislator recently proposed a rather controversial provision to this effect. Until now Germany has had very restrictive legislation that, for example, made it illegal in most cases for scholars to put copyrighted material on even an internal computer network. The Law implementing the European Directive on Copyright in the Information Society would in effect grant exemption from copyright restrictions, for specified non-profit purposes, to 'privileged institutions', meaning schools, higher-education institutions, and public research organizations. Only 'small parts' of copyrighted material would be distributed this way, and access to such material would be for 'a defined, limited, and small' number of people -- for example, the students in a particular course. Access would be controlled by the use of passwords or a similar mechanism. Moreover, to remain valid, this section of the law would have to be reviewed by Parliament and re-approved at the end of 2006. Academics say the new law would basically give them the same rights over copyrighted material in digital form as they already have over such material printed on paper. Just as they may photocopy pages from a book and distribute them to students registered for a class, they would now be allowed to post such material on a Web page with access limited to those same students.

> '§52a COMMUNICATION TO THE PUBLIC FOR TUITION AND RESEARCH
> (1) It is permitted to communicate to the public
> 1. Published small parts of works, works of small size, as well as individual contributions from newspapers and journals for illustration in tuition at schools, universities, non-commercial institutions of educational and further education, as well as at institutions of vocational training solely for the distinct circle of participants in the tuition; or
> 2. Published parts of works, of works of small size, as well as individual contributions form newspapers and journals, solely for a distinct circle of persons for their own scientific research; to the extent that the communication to the public is necessary for the purpose and justified for the non-commercial ends concerned.
> (2) The communication to the public of a work destined for use in tuition at schools is always only permissible with the consent of the person entitled [to grant permission]. The communication to the public of an audio-visual work is only permissible with the consent of the person entitled [to grant permission] within the first two years from the commencement of customary regular exploitation in movie theatres within the applicable boundaries of this law.
> (3) Permitted are also reproductions regarding par. (1) above the extent that the reproductions are necessary for the making of a communication to the public to the extent that the reproductions are necessary for the purpose concerned;
> (4) In respect of the communication to the public under (1) Nr. 2 above, an adequate remuneration must be paid. This also applies in respect of reproductions under (2). This claim can only be brought by a collective licensing society.'

The new legislation will put Germany, along with the Scandinavian countries and the United States, among the nations with a relatively tolerant approach to the use of copyrighted materials for specified educational purposes. France and Spain are among those with a more restrictive approach.

3.2.2.3 Distance learning activities

Distance education is a particularly important topic for large countries, like Australia, Canada, and the United States, where a decentralised education system would have serious advantages. Distance learning is designed to enable remote students to have access to the same instructional materials and training activities that classroom-based students have, with the caveat that adequate, reasonable, and affordable safeguards are in place to protect against the misuse of copyrighted works in a way that would harm the market for the works. At its core, however, distance education means the delivery of instruction via one or more analogue or digital telecommunications technologies to traditional and non-traditional students or learners who are separated from the instructor by distance and/or time. The characteristic of distance education is not miles, but the use of technology to mediate instruction in a classroom, library or computer lab on a college or university campus or in a student's residence, workplace, or other location physically removed from the originating site on campus. Instruction may be live or asynchronous, may be video or text, or multimedia based, or a combination. It may be interactive, and may be taken for credit as part of a degree or certificate of competency program, for a continuing education unit, to improve employability, or just for a student's personal enrichment. Distance education technologies are employed to offer programs in hundreds of disciplines, from complete undergraduate and degree programs, to non-credit short courses. Distance education employs a wide variety of basic and advanced telecommunications technologies to serve the students, including, for example, one-way and two-way open or scrambled broadcast, cable and satellite delivery, fiber-optic and microwave links, CD-ROMS, and the Internet. Some courses employ combinations of these technologies, but increasingly, higher education institutions are employing the Internet for delivery of courses because it is easy for students to access no matter where they happen to be. The Internet exponentially increases the amount of interaction between student and instructor and among students, a boon for a delivery method often incorrectly perceived as solitary.[130]

In the United States, Section 403 of the DMCA gave the Register of Copyrights the task of submitting to the Congress, within six months of the date of enactment of the Act, recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works. In the course of 1998, the Register of Copyrights conducted public consultations on the issue in the framework of the Conference on Fair Use (CONFU)[131] and published his report in May 1999.[132] In preparing the Report, the Register of Copyright found that digital distance education was a field that was undergoing rapid - even explosive - growth, but one that was still in its infancy. Technological changes had made it possible for educators to reach a much broader student population with a richer variety of course materials than was ever possible before the advent of the Internet. At the same time, the same technological changes created a huge potential market for creators and publishers to license their works for use in distance education. Part of the challenge for the Office in formulating recommendations addressing digital distance education was to remove technologically obsolete legal provisions as an impediment to carrying forward the distance education activities sanctioned by Congress in 1976 into the twenty-first century, without killing a nascent and potentially important market for right holders. The conclusion was that this could best be accomplished by using the policy line drawn by Congress in 1976 as the point of reference for a technological updating of section 110(2) that would take account of the nature and capabilities of digital networks. At the same time, the Copyright Office was mindful of the risks that are inherent in the exploitation of copyrighted works in digital form. It concluded that additional safeguards were necessary to minimize the risk to right holders that legitimate use of works under an expanded and updated distance education exemption could result in copyright piracy.

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130 American Association of Community Colleges, Comments from the AACC before the U.S. Copyright Office in Promotion of Distance Education through Digital Technology, Docket No. 98-12A, p. 2.

131 See: United States Patents and Trademark Office, The Conference on Fair Use, Final Report to the Commissioner on the Conclusion of the Conference on Fair Use, Washington D.C., Nov. 1998, p. 10.

132 See: United States Copyright Office, Report on Copyright and Digital Distance Education, Washington D.C., May 1999.

As a result, Congress adopted, on November 2, 2002, an amendment to article 110 (2) of the U.S. Copyright Act, known as the Technology, Education and Copyright Harmonization, or TEACH Act.[133] The key modifications of the TEACH Act include eliminating the requirement of physical classroom for remote site students, adding new safeguards to counteract new risks for copyright owners, and expanding the categories of works covered beyond the current non-dramatic literary and musical works to limited portions of films. The TEACH Act also redefines the terms and conditions on which accredited, non-profit educational institutions throughout the U.S. may use copyright protected materials in distance education-including on websites and by other digital means--without permission from the copyright owner and without payment of royalties. The law anticipates that students will access each "session" within a prescribed time period and will not necessarily be able to store the materials or review them later in the academic term; faculty will be able to include copyrighted materials, but usually only in portions or under conditions that are analogous to conventional teaching and lecture formats. In other words, this law is not intended to permit scanning and uploading of full or lengthy works, stored on a website, for students to access throughout the semester - even for private study in connection with a formal course.

In Europe, as mentioned above, article 5 (3) of the Directive on Copyright in the Information Society provides that Member States may adopt limitations on the rights of reproduction and of communication to the public with respect to the 'use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved.' It is clear from the following passage of the Explanatory Memorandum to the Proposal for a Directive, that the European Commission did envisage the possibility for such institutions to take part in document delivery activities:

> 'It does not only cover traditional forms of using protected material, such as through print or broadcasted media, but might also serve to exempt certain uses in the context of on-demand delivery of works and other protected matter. Member States will have to take due account of the significant economic impact such an exception may have when being applied to the new electronic environment. This implies that the scope of application may have to be even more limited than with respect to the 'traditional environment' when it comes to certain new uses of works and other subject matter'[134].

Although a number of higher educational institutions in Europe already offer distance education programs and diplomas, such as the 'Open Universities' of the Netherlands and the UK, no modification to the copyright act appears to have been necessary so far to address the specific needs of distance education in these countries.

3.3 Technological protection measures

The digital networked environment has this paradoxical effect that, on the one hand, users can easily reproduce works in countless perfect copies and communicate them to thousands of other users, but that, on the other hand, rights owners are in a better position than in the analogue world to dictate the terms of use of their works. Encryption methods and other similar techniques allow right holders to control the use made of their works more effectively. Some of these techniques can have the effect of blocking access to the work altogether, while other techniques permit rights owners to monitor the actual use that a person makes of a copyrighted work with relative ease. Moreover, the digital environment fosters the conclusion of contracts, thanks to its structure and its interactive nature. Contracts are thus seen, in addition to or in place of copyright law, as a ready solution for the determination of the conditions

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133 21st Century Department of Justice Appropriations Authorization Act (incorporating S. 487, Technology, Education And Copyright Harmonization Act, and S. 320, Technology, Education And Copyright Harmonization Act) Pub. L. 107.273, 2 November 2002, 116 STAT. 1911, Sec. 13301. Educational Use Copyright Exemption.

134 European Commission, Explanatory Memorandum to the Proposal for a European Parliament And Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, 10 December 1997, COM(97) 628 final, p. 40.

of use of protected material in the digital networked environment.[135] The use of technological protection measures in conjunction with contractual agreements to delineate the terms and conditions of use of copyrighted material is not only strongly encouraged, but is also the object of legal protection. To this end, the delegations at the Diplomatic Conference for the adoption of the WIPO Internet Treaties agreed to the introduction of a key provision in both instruments which is aimed at guaranteeing the application of those kinds of technological means that are 'indispensable for the protection, exercise and enforcement of copyright in the digital networked environment.'[136] The question to which the Contracting Parties to the WIPO Internet Treaties are confronted now is how to reconcile the legislative provisions dealing with the protection of technological measures with the exercise of limitations on copyright and neighbouring rights. Before turning to this issue, let us first examine the international obligations with respect to technological protection measures.

3.3.1 International obligations with respect to technological protection measures

A lot has been written over the new provisions of the WIPO Internet Treaties regarding technological protection measures (TPM's).[137] TPM's are designed to prevent, in the digital networked environment, the unauthorised access to or use of works protected by copyright. Their legal protection comes as a third, cumulative, layer of protection for rights owners, in addition to copyright protection itself and to the technical protection of works. The obligation to grant legal protection for the use of TPM's arises from Article 11 of the WCT and article 18 of the WPPT. Article 11 of the WCT states that 'Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law'. According to the majority opinion, article 11 of the WCT requires that protection of TPM's be granted only with respect to technologies used by rights owners in connection with the exercise of a right protected by copyright law. This means that the application of TPM's to public domain material does not fall within the scope of article 11 and that it is not enough that TPM's are 'used in connection with the exercise' of a copyright. In other words, the circumvention of a TPM in order to use a work while benefiting from one of the exceptions to copyright is, in principle, not prohibited by article 11 of the WCT.[138]

One of the questions that the WIPO Internet Treaties left open is what types of acts must be prohibited: the acts of circumvention themselves, the business or trafficking in circumventing technologies or both? Whereas Contracting Parties were free to implement the principle set out in articles 11 of the WCT and 18 of the WPPT according to their national legal traditions, there are significant differences in the manner in which countries have implemented this obligation. Since the accent of this study lies primarily on the intersection between the legal protection of TPM's and the limitations on copyright and related rights, it is not my intention to describe these provisions in detail, preferring to refer the reader to one of the studies mentioned earlier. A very brief overview of the implementation legislation of Australia, Japan, the United States, and Europe should suffice to give a general idea of the situation.

3.3.1.1 United States

In the United States, the DMCA added a new Chapter 12 to title 17 United States Code, which, among other things, prohibits circumvention of access control technologies employed by copyright owners to protect their works. Specifically, section 1201 provides in extensive detail that 'no person shall circumvent a technological measure that effectively controls access to a work protected under this

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135 Guibault 2002, p. 197.

136 Koelman 2003, p. 57 and seq.; Ficsor 2002, p. 544.

137 Koelman 2003 ; Kerr, Maurushat and Tacit, p. 575; Dussolier 2003, p. 62; Labbé 2002, p. 741 and ff.; Nimmer 2002, p. 193; Ficsor 2002, p. 544; De Werra 2001, p. 67 and ff.; Koelman 2000, p. 272.

138 Ficsor 2002, p. 547; and De Werra 2001, p. 98.

title.' Section 1201(a) of the U.S. Copyright Act prohibits the circumvention of a technological measure protecting the access to a work by making two different conducts unlawful: the act of circumvention itself and the business of trafficking in circumventing technology. This provision has been much criticised because it essentially creates a new 'right of access' to the works in favour of rights owners. Under the regime of the DMCA, unless the user can benefit from a specific exemption that would allow him to circumvent the technological access control to get access to a digital work, each access to the work is submitted to the conditions imposed by the copyright owner.[139] In addition, section 1201(b) of the Act prohibits the preparatory activities to the circumvention of a technological measure protecting the use of a work. The decision of Congress not to prohibit the act of circumventing a technological measure protecting a copyright was made because it would otherwise penalise potential non-infringing uses such as fair use. United States courts have enforced the provisions of the DMCA concerning the prohibition on the circumvention of technological protection measures already on numerous occasions with various outcomes.[140]

3.3.1.2 Japan

Japan has amended two statutes to address the circumvention of TPMs for the purpose of complying with the WIPO Treaties. The two statutes are the Japanese Copyright Law and the Japanese Unfair-Competition Law. The amendments to the Copyright Law focus on the circumvention of TPMs protecting works subject to copyright, whereas the amendments to the Unfair-Competition Law focus primarily on the circumvention of access control technologies.[141] With effect from October 1, 1999, article 120 *bis* the Japanese Copyright Act provides as follows:

> 'The following shall be punishable by imprisonment for a term not exceeding one year or a fine not exceeding one million Yen;
> (i) any person who transfers to the public the ownership of, or lends to the public, manufactures, imports or possesses for transfer of ownership or lending to the public, or offers for the use by the public, a device having a principal function for the circumvention of technological protection measures (such a device includes such a set of parts of a device as can be easily assembled) or copies of a program having a principal function for circumvention of technological protection measures, or transmits publicly or makes transmittable such program;
> (ii) any person who, as a business, circumvents technological protection measures in response to a request from the public;'[142]

The anti-circumvention provisions do not apply, for example, to devices that restrict the viewing or listening of a work, such as by encryption, because simple viewing or listening is not an act covered by copyright. Technological measures to prevent the individual use of pirated editions used for game software are not classified as technological measures too, because the act of individually using a pirated edition is not an act that is covered by copyright. Having due regard to the possible chilling effect of regulations banning every circumvention, the Japanese Copyright Law does not penalize the manufacture of the hacking device or end user's circumvention.

Article 2, paragraph 1, subparagraph 11 of the Japanese Unfair-Competition Law provides protection against the act of trafficking in devices and programs solely designed for circumventing an effective technological measure that restricts the recording or viewing of the content to specified parties. This provision is explained to address the problem of unauthorized descrambling of subscription satellite, subscription cable broadcasts, and pay per view services. The Japanese Unfair-Competition Law only

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139 De Werra 2001, p. 104.

140 See for example: United States v. Elcomsoft, (N.D. Cal. 2002). RIAA v. Verizon Internet Services, CA 02-MS-0323 (D.D.C. 2002); Universal City Studios, Inc. v. Reimerdes, No. 00-9185 (2d Cir. 2001); and DVD Copy Control Assoc. v. Andrew Bunner, 2001 Cal. App. LEXIS 1179; 113 Cal. Rptr. 2d 338 (Cal. Ct. App. 2001).

141 Kerr, Maurushat and Tacit 2003a, p. 40.

142 Non-official English translation available on the website of Copyright Research and Information Center: <http://www.cric.or.jp/cric_e/clj/clj.html>. See also: Doi 2000, p. 207; Ficsor 2002, p. 562.

prohibits the trafficking in devices or programs and not the manufacturing of such devices or programs or the act of circumvention itself.[143]

3.3.1.3 Australia

In Australia, article 98 of the *Copyright Amendment (Digital Agenda) Act*[144] amends article 116A to 116D of the Copyright Act. Through this provision, the Australian legislator chose not to proscribe the act of circumvention, but to make it illegal to manufacture or trade in devices that circumvent 'effective technological measures'. The Copyright Act also makes it illegal to provide services for circumventing such measures. The expression 'technological protection measure' is defined in section 10(1) of the Act to mean:

> 'a device or product, or a component incorporated into a process, that is designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work or other subject-matter by either or both of the following means:
> (a) by ensuring that access to the work or other subject matter is available solely by use of an access code or process (including decryption, unscrambling or other transformation of the work or other subject-matter) with the authority of the owner or licensee of the copyright;
> (b) through a copy control mechanism.'

The CADA only prevents the trafficking in circumvention technologies and services. Individuals who use such technologies are not targeted, nor is the act of circumvention itself. However, the trafficking activities that are targeted include making a 'circumvention device available online to an extent that will affect prejudicially the owner of the copyright'.[145] Section 132(5B) of the Copyright Act makes it an offence, *inter alia,* to make, sell, or promote a circumvention device, if the person knows or is reckless as to whether the device will be used to circumvent or facilitate the circumvention of a technological protection measure. The offence carries a maximum penalty of five years imprisonment.

In the *Sony Computer Ent. v. Stevens* case,[146] the Federal Court of Australia considered the provisions of the CADA concerning the prohibition on the circumvention of technological protection measures for the first time. Defendant Stevens was accused of permitting a circumvention of the access locks installed in Sony PlayStations by marketing or distributing computer chips known as 'mod chips'. The applicants plead that Stevens sold devices having a limited commercially significant purpose or use, or no such purpose or use, other than the circumvention, or facilitation of the circumvention of the "effective technological protection measure". It was further alleged that Stevens knew or ought reasonably to have known that the devices sold by him would be used to circumvent, or facilitate the circumvention of, the technological protection measure in violation of section 116A of the Copyright Act. In its decision, the Federal Court discussed the concept of 'technological protection measure' in detail. As the Court observes, the access codes used by Sony for the purpose of locking its PlayStations against the playing of unauthorised copies did not satisfy the conditions set in the Act:

> 'There seems to be nothing in the legislative history to support the view that a technological measure is to receive legal protection from circumvention devices if the only way in which the measure prevents or inhibits the infringement of copyright is by discouraging infringements of copyright which predate the attempt to gain access to the work or to copy it.
> It follows that the protective devices relied on by the applicants cannot be regarded as technological protection measures if the only way in which they inhibit infringement of copyright in PlayStation games is by discouraging people from copying these games as a prelude to playing them on PlayStation consoles. It is necessary for the applicants to demonstrate that the protective devices are designed to

143 Koizumi 2002, p. 101.

144 On 17 August 2000, the Copyright Amendment (Digital Agenda) Bill 2000 passed the Senate and the House of Representatives. The Digital Agenda Bill received Royal Assent on 4 September 2000, and became the Copyright Amendment (Digital Agenda) Act 2000, Act No. 110 of 2000. The Digital Agenda Act came into force on 4 March 2001.

145 Copyright Amendment (Digital Agenda) Act 2000, art. 116A(vi).

146 *Kabushiki Kaisha Sony Computer Entertainment v. Stevens*, [2002] FCA 906 (26 July 2002).

function, by their own processes or mechanisms, to prevent or hinder acts that might otherwise constitute an infringement of copyright'.[147]

While a further petition based on the infringement of the Fair Trading Act was also dismissed, the Court upheld a third claim asserting the infringement of the Trademark Act. In the opinion of the Court, the distribution of unauthorised copies of computer games by the defendant also constituted an unauthorised use of the registered trademarks stored electronically in such games.

3.3.1.4 European Union

In Europe, the legal protection of technological measures is dealt with through the Directive 98/84/EC on the legal protection of conditional access services[148] and by article 6 of the Directive on Copyright in the Information Society. Concentrating exclusively on the provisions of the Directive on Copyright in the Information Society, it is worth pointing out that, contrary to the United States, the European Union chose not to prohibit acts relating to the access to a work, but rather chose to prohibit the actual acts of circumvention of a technological measure protecting a work, as well as the business of importing, selling or otherwise dealing with products or providing services which:

(a) are promoted, advertised or marketed for the purpose of circumvention of, or
(b) have only a limited commercially significant purpose or use other than to circumvent, or
(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures.

In addition, the expression 'technological measures' as defined under article 6 (3) of the Directive means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the right holder of any copyright or any right related to copyright. This formulation differs from article 11 of the WCT, which protects technological protection measures only to the extent that they restrict acts that are not authorised by the authors *or permitted by law*. Must one infer from this that the European legislator did not intend to allow the circumvention of a technological protection measure solely for the purpose of exercising a limitation on copyright?

At this time, most Member States are still in the process of transposing the provisions Directive on Copyright in the Information Society into their national law, process which appears to be particularly challenging for the individual legislators.

3.3.2 Intersection between technological protection measures and limitations on copyright

The intersection between technological protection measures and limitations on copyright and related rights is undeniably the thorniest issue confronting lawmakers in the field today. As much as the protection regimes differ from one another regarding the protection against acts of circumvention of technological measures, so do the solutions put in place to allow legitimate users to be able to exercise limitations on copyright with respect to works protected by such technological protection measures. As we will see below, the measures put in place by the legislatures are far from being fully satisfactory and there is reason to fear that the exercise of legitimate limitations on copyright may be seriously compromised in the digital networked environment through the application of technological protection measures.[149] In fact, the generality of the international obligations regarding the adoption of adequate

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147 Id., § 117 and 118.

148 Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, O.J.C.E. L 320, 28 November 1998, p. 54 – 57, art. 4 which reads as follows: 'Member States shall prohibit on their territory all of the following activities: (a) the manufacture, import, distribution, sale, rental or possession for commercial purposes of illicit devices; (b) the installation, maintenance or replacement for commercial purposes of an illicit device; (c) the use of commercial communications to promote illicit devices'.

149 See among others: Dussolier 2003, p. 73; Gottschalk 2003, p. 151; Labbé 2002, p. 743; Koelman 2001, p. 2;

legal protection and effective legal remedies against the circumvention of effective technological measures has left the Contracting Parties with the difficult task of devising new rules, which do not fit well in the copyright and related rights framework.

3.3.2.1 United States

In the United States, the Digital Millennium Copyright Act[150] contains a number of exceptions to the prohibitions laid down in section 1201 of the Copyright Act. The main exception relates to section 1201(a), the provision dealing with the category of technological measures that control access to works. Section 1201(a)(1)(B)-(E) establishes an ongoing administrative rule-making proceeding to evaluate the impact of the prohibition against the act of circumventing such access-control measures. The Librarian of Congress may, on the recommendation of the Register of Copyrights, exempt certain classes of works from the prohibition against circumvention of technological measures that control access to copyrighted works. The purpose of this proceeding is to determine whether there are particular classes of works as to which users are, or are likely to be, adversely affected in their ability to make non-infringing uses due to the prohibition on circumvention of access controls. In conducting such rulemaking, the Librarian must take account of the following aspects:

(i) the availability for use of copyrighted works;
(ii) the availability for use of works for non-profit archival, preservation, and educational purposes;
(iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;
(iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and
(v) such other factors as the Librarian considers appropriate.

Following a first rulemaking proceeding conducted in 2000, the Librarian of Congress announced that two classes of works were subject to the exemption from the prohibition on circumvention of technological measures that control access to copyrighted works: compilations consisting of lists of websites blocked by filtering software applications; and literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence. A new round of rulemaking started in October 2002, requesting interested parties to make comments before 18 December 2002 on whether there are particular classes of works as to which users are, or are likely to be, adversely affected in their ability to make non-infringing uses due to the prohibition on circumvention. Public hearings have been hold on this issue in the course of the months of April and May 2003.

Section 1201(e) of the U.S. Copyright Act lays down an exception to the operation of the entire section, for law enforcement, intelligence, and other governmental activities. Six additional exceptions to the prohibition on the circumvention of technological measures protecting the access of works included in the DMCA deal with reverse engineering, encryption research, protection of minors, personal privacy, security testing and non-profit library, archive and educational institutions. The prohibition on the act of circumvention of access control measures is subject to an exception that permits non-profit libraries, archives and educational institutions to circumvent solely for the purpose of making a good faith determination as to whether they wish to obtain authorized access to the work. This exception is of a rather limited practical significance since its application is restricted to acts accomplished for the purpose of deciding whether a library will obtain authorised access to a work. Finally, while section 1201(c)(1) specifies that 'nothing in this section shall affect rights, remedies, limitations, or defences to copyright infringement, including fair use, under this title', it does not apply to the circumvention of a technological measure protecting the access to a work since access is not a right protected under the Copyright Act. Indeed, emerging case law from the United States courts

150 Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

shows that fair use constitutes no defence to acts of circumvention of technological measures.[151] Scholars are concerned that Sections 1201 to 1204 of the DMCA will have a chilling effect on analysis, research, and publication, as the result of litigation itself or of the threat of or concern about potential litigation. The anti-circumvention provisions of the Digital Millennium Copyright Act (DMCA) are having 'substantial negative impacts on the conduct of basic research in the U.S.' Among other issues, the computing community as a whole considers that the law prevents scientists and technologists from pursuing legitimate research related to cryptography and other computer security areas.[152]

3.3.2.2 Japan

The amendment brought in 1999 to the Japanese Copyright Law deals only very partially with the question of the intersection between the application of technological protection measures and the exercise of limitations on copyright. Article 30 (1) (ii) carves out from the private copy exception the case:

> 'where such reproduction is made by a person who knows that such reproduction becomes possible by the circumvention of technological protection measures or it ceases to cause obstruction, by such circumvention, to the results of acts deterred by such measures ("circumvention" means to enable to do acts prevented by technological protection measures or to stop causing obstruction to the results of acts deterred by such measures, by removal or alteration of signals used for such measures; the same shall apply in Article 120*bis*, items (i) and (ii)) ("removal" or "alteration" does not include such removal or alteration as is conditional upon technology involved in the conversion of recording or transmission systems)'.[153]

In other words, this provision excludes from the application of Article 30 only those copies that are made in bad faith after circumvention of technological protection measures. The status of the remaining limitations enumerated in the Japanese Act in relation to the circumvention of technological protection measures is highly uncertain, since the amendment of 1999 made no explicit reference to any one of these limitations. Opinions of scholars are divided on this issue: some argue that technological protection measures can be circumvented in order to benefit from a limitation, while others maintain that limitations are only default rules of law, which may be set aside by contract or technology.[154] This matter will eventually have to be resolved by the courts, presumably on the basis of public policy considerations.[155]

The only express exemption mentioned in the Japanese Unfair-Competition Law is provided at article 11, paragraph 1, subparagraph 7 of the Act. This provision makes it lawful to distribute devices used for testing or researching on technological protection measures in order to foster the development of technological improvements. Proposals for the inclusion of an exemption to allow the distribution of devices used for purposes of reverse engineering were abandoned in response to the lobby of the content industry.[156] As Labbé concludes, the new Japanese rules may in theory allow the act of circumvention, particularly when this act is aimed at benefiting from a limitation on copyright, but in practice may prevent its exercise.[157]

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151 See for example: *Universal City Studios, Inc. v. Corley*, F.3d, 2001 WL 1505495 2sd Cir.; *RealNetworks, Inc. v. Streambox, Inc.*, 2000 U.S. Dist. 1889 (W.D. Wash. 2000); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y., Aug. 17, 2000).

152 Samuelson 2001, p. 2028.

153 Non-official English translation available on the website of Copyright Research and Information Center: <http://www.cric.or.jp/cric_e/clj/clj.html>. See also: Doi 2000, p. 207; Ficsor 2002, p. 562.

154 Labbé 2002, p. 751.

155 Koizumi 2002, p. 104.

156 Id., p. 106.

157 Labbé 2002, p. 752.

3.3.2.3 Australia

As mentioned in the previous section, Australian law targets only the circumvention devices and not the act of circumvention itself. Article 116 of the Australian Copyright Act provides for an exception to the prohibition on circumvention for making or importing a circumvention device for use 'for a permitted purpose' relating to works that are 'not readily available in a form that is not protected by a technological protection measure'. Another exception in the Law allows the 'making or importing' of a circumvention device for 'the purpose of enabling a person to supply the device, or to supply a circumvention service, for use only for a permitted purpose'. A person will be able to manufacture or supply a circumvention device or service if the person receives a declaration that it is required for a permitted purpose. A declaration must include certain specified information, including a statement that the copyright material the person wishes to access is not readily available in a form not protected by a technological protection measure. The CADA also introduces new penalties in relation to false declarations. The permitted purposes specified in the CADA are the reproduction of computer programs to make interoperable products, to correct errors and for security testing, activities covered by libraries (including Parliamentary libraries) and archives exceptions, the use of copyright material for the Crown, and activities covered by the statutory licences for educational institutions and institutions assisting persons with a disability under Part VB of the Copyright Act.[158] The Standing Committee declared on this issue:

> 'There is a need to allow copyright users to use circumvention devices in pursuit of legitimate purposes, such as system administration and library collection preservation. Leaving to one side the issue of whether such devices can be used without some form of adaptation — such adaptation being the making of a new circumvention device, there is the objection that in principle, users should not be deprived of innovative Australian circumvention devices for uses other than the infringement of copyright. In view of the need to ensure the continued operation of the exceptions to infringement, the Committee concludes that the permitted purposes exception should remain.[159]

3.3.2.4 European Union

In Europe, the issue of the intersection between TPM's and limitations on copyright and related rights is dealt under article 6 (4) of the Directive on Copyright in the Information Society. It provides that, in the absence of voluntary measures taken by right holders, including agreements between right holders and other parties concerned, Member States must take appropriate measures to ensure that right holders make available the means of benefiting from a certain number of limitations, to the extent necessary to benefit from these limitations and where that beneficiary has legal access to the protected work or subject-matter concerned. The limitations aimed by this provision are:

- Acts of reproduction by means of reprographic equipment;
- Acts of reproduction by publicly accessible libraries, educational establishments or museums, of by archives;
- Ephemeral recordings of works made by broadcasting organisations;
- Reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons;
- Use for the sole purpose of illustration for teaching or scientific research;
- Uses for the benefit of people with a disability;
- Use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;

This provision probably raises more questions than it pretends to answer. Among the several questions left unanswered by the Directive are the following: what type of voluntary measures must be put in place by rights owners? What are the criteria for considering the appropriateness of the

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158 Copyright Amendment (Digital Agenda) Act 2000, art. 116A(2), (3), (4), (4B), (5), and (7).

159 The Parliament of the Commonwealth of Australia, *Advisory Report on Copyright Amendment (Digital Agenda) Bill 1999*, Commonwealth of Australia, Canberra, November 1999, p. 70.

measures taken by the rights owners? How long must Member States wait before taking action and what type of action must instituted? More fundamentally, why have some limitations been included in the list and not others, such as the right to make reproductions for purposes of criticism, research, news reporting, and parody?[160]

The whole effect of this provision may be further undermined by the fourth indent of article 6 (4) which provides that: 'the provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.' The key purpose of this provision is to promote the conclusion of contractual agreements between copyright owners and users. Ficsor argues that 'if the parties are left alone for a while, they will certainly be able to work out appropriate arrangements with due attention to the specific features of the acts covered by the exceptions and limitations listed in the first paragraph'.[161] This is in my opinion a rather optimistic view of how contractual arrangements will take form in the digital networked environment. A more realistic – or perhaps pessimistic – view of contractual arrangements in the digital networked environment might be that most contracts will be in the form of 'take-it-or-leave-it' licences, where users will only have the choice of accepting or refusing the terms of the licence presented to them on the Internet. In other words, the digital networked environment offers no guarantee that the parties will be able to 'individualise' their contract in a manner that takes due account of 'the specific features of the acts covered by the exceptions and limitations' so that everyone is better off.[162]

It is still too early to tell how the different Member States will implement this complex provision. The safest way to follow for the Member States would unquestionably be to keep their implementing legislation close to the wording of the Directive. As a consequence, the intersection between the application of technological protection measures and the exercise of limitations on copyright may remain vague for quite some time before the practicable solution can crystallise in the law. In practice, it is difficult to conceive how these rules may work out for institutions and individuals. For instance, what would be the point for a rights owner to provide the means to circumvent a technological protection measures for the making of a reprographic reproduction on paper or other similar support? Under the regime of article 6, libraries can only hope to obtain the means to circumvent a technological measures for certain acts of reproduction of works for purposes of preservation or restoration, not for communication to the public. While Recital 48 of the Directive on Copyright in the Information Society declares that the legal protection afforded technological protection measures must not create an obstacle to cryptography research, it remains to be seen how legislators and courts will interpret the exception listed in article 6 (4) of the Directive allowing circumvention for the sole purpose of illustration for teaching or scientific research.

4. Conclusion

Limitations on copyright and related rights undeniably form an integral part of the copyright and related rights systems, for they protect the users' freedom of expression and foster the dissemination of knowledge. Among the limitations adopted for the safeguard of the user's freedom of expression, the right to quote is undeniably the most important one. It serves as the common denominator of most other limitations, since quotations can be made for scientific, critical, informatory or educational purposes. Besides the right to quote, the possibility to make parodies is also an essential part of the user's freedom of expression, since parodies are considered not only to have entertainment value, but also to serve a critical function, pointing out human imperfections and the ironies of our existence. A number of limitations share the common objective of encouraging dissemination of knowledge and information among the members of society at large. This is the case of the limitations adopted in

160 Dussolier 2003, p. 73.
161 Ficsor 2002, p. 561.
162 Guibault 2002, p. 203.

favour of educational institutions and those adopted in favour of public libraries, museums and archives, and in favour of handicapped persons. These limitations serve as a tool in carrying out a government's information policy and in enhancing democracy within society. However, there is no harmonisation of the law on this point and the need to adopt specific measures to meet this particular common good objective is assessed differently from one country to the next.

With the advent of the digital networked environment, scholars and lawmakers generally agree that the extension of the current limitations to the digital domain should be encouraged, but that it may not be valid in all cases. In most cases, the balance of interests established through the recognition of limitations on copyright and related rights has not been fundamentally affected as a result of the emergence of the information society. With respect to limitations designed to protect the users' freedom of expression and to foster the dissemination of knowledge, there seems to be little controversy that the right to quote, the right to make reproductions for purposes of parody and the limitation adopted for the benefit of handicapped persons find application in the digital networked environment, as long as the conditions of use set out in the law are met. In the cases of some limitations however, certain adjustments may be needed, for example, to ensure compliance of the limitations with the 'three-step-test', as laid down in articles 10 of the WCT and 16 of the WPPT. This would appear to be the case with regard to the application in the digital networked environment of limitations adopted for the benefit of public libraries and archives on the one hand, and of educational institutions and research on the other hand. Here again, the legislator's position on the manner in which the copyright act should be modified to take account to the digital environment varies widely from one country to another.

Technological protection measures are increasingly used in the digital networked environment to delineate the terms and conditions of use of copyrighted material. Such an extra layer of protection is not only strongly encouraged, but is also the object of specific legal protection under the WIPO Internet Treaties. In view of the generality of the international obligations regarding the adoption of adequate legal protection and effective legal remedies against the circumvention of effective technological measures, the Contracting Parties to the WIPO Treaties have been left with the daunting task of devising new rules, which do not fit well in the copyright and related rights framework. Not only do the 'adequate legal protection and effective legal remedies' differ significantly per country, but legislators are also envisaging various solutions with respect to the intersection between technological protection measures and limitations on copyright and related rights. In fact, efforts in that sense may altogether be vain at this time, since technology is still too primitive to accommodate all the subtleties of the law.[163]

A solution to the legislator's dilemma regarding the intersection between technological protection measures and limitations probably may come during the future conduct of the built-in revision process of copyright and related rights laws. The rulemaking proceeding mandated by the Digital Millennium Copyright Act must take place every three years to determine whether there are particular classes of works as to which users are, or are likely to be, adversely affected in their ability to make non-infringing uses due to the prohibition on circumvention of access controls. Article 12 of the Directive provides for a similar review mechanism according to which not later than 22 December 2004 and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive. In particular, the Commission shall examine the application of Articles 5, 6 and 8 in the light of the development of the digital market. In the case of Article 6, it shall examine in particular whether that Article confers a sufficient level of protection and whether acts which are permitted by law are being adversely affected by the use of effective technological measures.

163 Koelman 2003, p. 15.

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DOCTRINE

COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS AT A TRIPLE CROSSROADS: SHOULD IT REMAIN VOLUNTARY OR MAY IT BE "EXTENDED" OR MADE MANDATORY?

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I. Introduction

It is kind of legal commonplace that the exclusive right of authors to exploit their works or to authorize others to do so is a basic element of copyright. Where recognized, this right is also important for the beneficiaries of related rights. The exclusive nature of a right means that only its owner – and nobody else – is in a position to decide whether he or she will authorize the performance of any of the acts covered by the right; and if he or she decides to do so - under what conditions and against what kind of remuneration.

It goes without saying that an exclusive right may be enjoyed, to the fullest possible extent, if it may be exercised individually by the owner of the right himself. In such a case, the owner maintains his control over the exploitation and dissemination of his work,[1] and he may more or less closely monitor whether his rights are duly respected.

At the time when the international copyright system was being established, the individual exercise of certain rights – first of all the right of public performance of non-dramatic musical works – seemed very difficult. Later, with the ever evolving technologies, the number of areas in which the individual exercise of rights was becoming equally difficult, and in some cases even impossible, started to grow: the establishment of collective management organizations in such cases was the logical solution for the right owners.

In the case of a traditional, fully fledged collective management system, the right owners authorize collective management organizations to monitor the use of their works, to negotiate with prospective users, to grant them licenses under certain conditions and on the basis of a tariff system, to collect the remuneration, and to distribute it among the owners of rights. Many elements of the management of rights in that type of system are standardized – in fact, they may even be "collectivized": the same tariffs, the same licensing conditions and the same distribution rules may apply to all works which belong to a given category; sometimes social and/or "cultural" deductions are also made, etc.

There are certain cases where the right owners do authorize the collective management organization to carry out only some of the functions that have been mentioned. In some countries, for example, the authors of dramatic works have preferred to leave collective

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[1] In this paper, unless the contrary follows from the given context, "copyright" means also related rights, and "work" also means objects of related rights.

negotiations and establishment of framework agreements with the representatives of theatres, to their societies – this is one of the reasons why such a system may be characterized as collective management, even though a partial one. However, as a rule, they conclude directly their contracts with each of the theatres, and entrust the collective management organization with only the monitoring of performances, as well as the collecting and distribution of royalties.

For corporate right owners – producers, publishers, etc. – it also becomes inevitable or at least desirable in certain situations to set up an organization or to join an existing one in order to exercise their rights. Although some of them - e.g. music publishers in some countries – are members of traditional collective management organizations and accept their rules thereof, others prefer different forms of exercising their rights which have as little "collective" elements as possible. This leads to the setting up of an agency-type system, where the only exclusive task, or almost, is the collection and transfer of royalties as quickly and as precisely as possible, at as low cost as possible, and as much in proportion with the value and actual use of the productions involved as possible. The most developed form of such agency-type systems – frequently referred to as rights-clearance systems – is the one where tariffs and licensing conditions are individualized. Thus, the main element of joint management in this case is that one single licensing source is offered, with a significant reduction of transaction costs for both owners of rights and users.

Fully-fledged collective management organizations and agency-type bodies as those described above, do function side by side. Occasionally they also establish alliances or "coalitions", when this is needed for pursuing of common interests or for the joint exercise or enforcement of certain rights.

There is a form of partial collective management which needs special mentioning: the management of mere rights to remuneration (the reason why in this case the management system is not a fully fledged one, is the fact that the rights themselves are not exclusive). It's worth noting that there could be significant differences between various rights to remuneration: from the viewpoint of their roots or their copyright status. In some cases, what is involved is the limitation of an exclusive right to a right to remuneration (e.g. in several countries the exclusive right of reproduction, as regards "private copying" and reprographic reproduction – at least in certain cases – is limited to a mere right to remuneration); in other cases, the right itself is established as a mere right to remuneration (such as the resale right or the "Article 12 rights" of performers and/or producers of phonograms); and in another group of cases, the right to remuneration is a "residual right" (for example, the European Community's Council Directive No. 92/100/EEC of November 19, 1992, on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property has introduced such a right in favour of the authors and performers – the "unwaivable right to equitable remuneration" in respect of the rental of phonograms and audiovisual works (into which their works or, respectively, performances have been incorporated).

With the ever broader application of the digital technology, and particularly with the world-wide use of the Internet, a new situation has emerged: the individual exercise of rights has become possible and practical in a much broader and broadening field - through the application of technological protection measures (TPMs), electronic rights management information (RMI), and their combination in complex digital rights management systems (DRMs). This influences the scope of those exceptions and limitations of exclusive rights that

may be justified and acceptable on the basis of the "three-step test" provided for in Article 9(2) of the Berne Convention, Article 13 of the TRIPS Agreement, Article 10 of the WCT and Article 16 of the WPPT. For example, distribution of copies through interactive transmissions supported by DRM – resulting in what is regarded now as "private copying" – is becoming a basic form of exploitation of works; therefore, in the cases where owners of rights apply DRMs, and in particular TPMs, it would not be in accordance with the requirements of the "three-step test" to reduce the exclusive right of reproduction, in general, to a mere right to remuneration.[2]

Since, as mentioned above, from the viewpoint of right owners, collective management – particularly when it involves fully fledged "collectivization" of the various management elements – goes along with quite extensive restrictions of exclusive rights, it will be fair to raise the question in which cases and under what conditions such restrictions may be justified and acceptable. This paper discusses this question in respect of two forms of non-voluntary collective management – mandatory collective management and extended collective management – on the basis of the international copyright norms and the "*acquis communautaire*"[3] of the European Union.

II. Mandatory Collective Management

Before analysing the Berne Convention, from the viewpoint of when and under what conditions mandatory collective management may be permitted (this analysis is relevant also for the TRIPS Agreement and for the WCT, which incorporate the substantive provisions of the Berne Convention by reference[4]), it is worth to answer to a few preliminary questions: (i) If somebody is in the position of doing something but it is provided that he can only do so in a certain way, does that represent determining/imposing a condition? (ii) If somebody owns something but it is provided that he can only use it in a certain manner, does that represent determining/imposing a condition? (iii) If somebody is granted a right but it is provided that he can only exercise it through a certain system, does that represent determining/imposing a condition?

It is obvious that only definitely affirmative replies should be given to each of these questions.

The Berne Convention contains provisions – Article 11*bis*(2) and Article 13(1) – which provide that it will be a matter for legislation in the countries of the Berne Union to determine the *conditions* under which certain exclusive rights may be exercised. They read as follows (emphasis added):

– Article 11*bis*(2): "It shall be a matter for legislation in the countries of the Union *to determine the conditions under which the rights mentioned in the preceding paragraph*[5]

[2] It is another matter, that, in some *specific* cases, such as copying of certain works, for example, in the framework of distant education program – with appropriate guarantees that only the intended beneficiaries may get access to the works – exceptions and limitations may be justified.

[3] The entire body of European Union laws is known as the acquis communautaire. This includes all the treaties, regulations and directives passed by the European Union institutions as well as judgements laid down by the European Court of Justice.

[4] See Article 9.1 of the TRIPS Agreement and Article 1(4) of the WCT.

[5] Under paragraph (1) of the same Article, "[a]thors of literary and artistic works shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any other

may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."

– Article 13(1): "Each country of the Union may *impose* for itself reservations and *conditions on the exclusive right granted to the author* of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."

In general, these provisions are regarded as a legal basis for the application of non-voluntary licenses, since they define the minimum requirements to be respected when such conditions are applied; namely that they must not, under any circumstances, be prejudicial to authors' rights to obtain an equitable remuneration. This does not mean, however, that non-voluntary licenses may be regarded as the only possible "conditions" mentioned in these provisions of the Berne Convention; other conditions as well – practically, restrictions – of the exercise of the exclusive rights concerned, may also be applied.

Mandatory collective management of rights is such a condition, since it means – in term of the questions we asked above, that (i) although the owners of these rights are in the position of doing something (namely, enjoying the exclusive right of authorizing the acts in question), it is provided that they can only do so in a certain way; (ii) although they own such exclusive rights, it is provided that they can only use them in a certain manner; and (iii) although they are granted such rights, it is provided that they can only exercise their rights through a certain system (namely, collective management).

Since the possibilities of "determining/imposing conditions" are provided for in the Convention in an exhaustive way, it can be deduced, on the basis of the *a contrario* principle, that in general, mandatory collective management of *exclusive rights* may only be prescribed practically in the same cases as non-voluntary licenses (which result in mere rights to remuneration).

In the previous paragraph, the words "exclusive rights" are emphasized. This was necessary for pointing out that what was discussed above should not be interpreted to mean that mandatory collective management may only be prescribed in cases where, in the provisions of the Berne Convention or other international norms on copyright and related rights – the expression "determine/impose conditions" (under which the rights concerned may be exercised) is used. Mandatory collective management is obviously permissible also in cases (i) where a right is not provided for as an exclusive right of authorization but rather a mere right to remuneration (as in the case of the resale right under Article 14*ter* of the Convention, or, in the field of related rights, the so-called "Article 12 rights"[6] of performers

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means of wireless diffusion of signs, sounds or images; (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work."

[6] The expression "Article 12 rights" refers to the rights provided in Article 12 of the Rome Convention which reads as follows: "If a phonogram published for commercial purposes, or a reproduction of such phonogram, is

and producers of phonograms); (ii) where the limitation of an exclusive right to a mere right to remuneration is allowed on the basis of some other wording (as is the case in respect of Article 9(2) concerning the right of reproduction[7]); or (iii) where a "residual right" is concerned, i.e. a right to remuneration (usually of authors and performers) which "survives" the transfer of certain exclusive rights (such a residual right "by definition" cannot be in conflict with the exclusive nature of the right concerned, since it is only applicable after the latter has been duly exercised.)

The best example for a "residual right", is the "unwaivable right to remuneration" under Article 4 of 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 (hereinafter: the Rental Right Directive[8]). And as long as we have mentioned them here, it will be justified to start the review of the *acquis communautaire,* as far as mandatory collective management is concerned, with the provisions on the "unwaivable right to remuneration".

First, paragraph 3 of the Article 4 of the Rental Right Directive provides that "[t]he administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers"; then, paragraph 4 deals with the question of possible prescription of mandatory collective management. Its relevant part reads as follows: "Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed […]".

This provision is significant from the viewpoint of the issue of mandatory collective management not only because it indicates that, in the case of this "residual right" collective management may be imposed (i.e. may be made mandatory), but also because it has an *a contrario* implication. Since the directive has found it necessary to provide that, in this case, collective management *may* be imposed, by this it indicates implicitly that, under the *acquis communautaire* - unless this possibility does not follow directly from the provisions of an international treaty to which the EU Member States are parties – there is a need for such a permission; or in other words: *mandatory collective management is not allowed in any case where the international norms on copyright* (such as the provisions of the Berne Convention, as discussed above) *or, in respect of a specific right not covered by such norms* (such as the right of rental), *the acquis communautaire – do not explicitly permit it.*

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used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration." (Article 16.1(a) of the Convention provides for the possibility of reservations to Article 12, which may go even so far as to no application of the Article.) It is to be noted that Article 15 of the WPPT also provides for similar rights to remuneration for performers *and* producers of phonograms.

[7] Article 9(2) uses the expression "to permit the reproduction of […] works". This may mean – subject to the said test – either free uses or, as it is clarified in the report of Main Committee I of the 1967 Stockholm revision conference (see paragraph 85 of the report), the reduction of the exclusive right to remuneration to a mere right to equitable remuneration. It is on this basis, that, in case of widespread and uncontrollable private copying, in certain countries, a right to remuneration is applied (usually in the form of a levy on recording equipment and material) to which is, of course, the obligation to grant national treatment extends without any reasonable doubt whatsoever.

[8] Paragraph 1 of Article 4 of the Rental Right Directive provides as follows: "Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the rental." And paragraph 2 of the same article adds that "[t]he right to obtain an equitable remuneration for rental cannot be waived by authors or performers."

The Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (hereinafter the Satellite and Cable Directive) goes further: in the case of cable retransmission, not only it permits the imposition of collective management, but it makes such management mandatory. Article 9.1 of the directive provides as follows: "Member States *shall* ensure that the right of copyright owners and holders of related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society [emphasis added]." The directive also regulates the legal technique to be applied so that all such rights of copyright owners and holders of related rights may be concentrated in the repertoire of a collective management organization (or possibly in more than one organization, from which holders of rights may choose one[9]).

This provision of the Satellite and Cable Directive is in accordance with the above-stated principle that in the case of exclusive rights, mandatory collective management may only be prescribed where the relevant international norms allow it, either through permitting for the prescription of conditions for the exercise of rights (the imposing of collective management being obviously a condition) or through limiting it to a right to remuneration in certain cases (in which cases, the exclusive nature of the rights concerned disappears not only in respect of the decisive "upstream" stage – that is, in the relationship between the owners of rights and the collective management organizations – but also in respect of the "downstream" stage between the organizations and the users). This is so since, in respect of authors' "exclusive right of authorizing […] any communication to the public by wire […] of the broadcast of [their] works" granted by paragraph (1)(ii) of Article 11*bis* of the Berne Convention, paragraph (2) of the same Article provides that "[i]t shall be a matter for legislation in the countries of the [Berne] Union to *determine the conditions under which the rights mentioned in* [paragraph (1)] *may be exercised".* As far as related rights are concerned, neither the Rome Convention, nor the *acquis communautaire* provide for *exclusive* rights of authorization for cable retransmission and this situation has not changed since the adoption of the Satellite and Cable Directive; it may be added that the international norms adopted in the meantime – the relevant provisions of the TRIPS Agreement and the WIPO Performances and Phonograms Treaty (WPPT) – have not introduced such rights neither.

Article 10 of the Satellite and Cable Directive provides for one exception to mandatory collective management of cable retransmission rights, namely for the cable retransmission rights of broadcasting organizations.[10] This refers to one of the basic principles concerning

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[9] Article 9.2 and 3 of the Satellite and Cable Directive provide as follows: "2. Where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the rightholder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. A rightholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator an collecting society which is deemed to be mandated to manage his rights as the rightholders who have mandated that collecting society and he shall be able to claim those rights within a period to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter."
"3. A Member State may provide that, when a rightholder authorizes the initial transmission within its territory of a work or other protected subject matter, he shall be deemed to have agreed not to exercise his cable retransmission rights on an individual basis but to exercise them in accordance with the provisions of this Directive."

[10] Article 10 of the Satellite and Cable Directive provides as follows: "Member States shall ensure that Article 9 [prescribing mandatory collective management] does not apply to the rights exercised by a broadcasting

collective management; namely that collective management, even when it might be possible under the international norms and/or the *acquis communautaire,* is only justified where the individual exercise of rights is impossible or, at least, highly impracticable due to the number of right-owners, the number of users or other circumstances of uses. Broadcasting organizations are relatively less numerous (in contrast to authors and owners of related rights other than the rights of broadcasting organizations); hence, they may be able to manage their rights individually.[11]

The Directive 2001/84/EC of the European Parliament and the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (hereinafter: the Resale Right Directive) does not prescribe mandatory collective management for the collection and distribution of royalties for the resale right, but allows Member States to do so. Article 6.2 reads as follows: "Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1." As discussed above, in this case the prescription of mandatory collective management is allowed under the international copyright norms, since it corresponds to the nature of the resale right (*droit de suite*) under Article 14*ter* of the Berne Convention: it is a mere right to remuneration (it is also only a right to remuneration under Article 1 of the Resale Right Directive).

It may be deduced, on the basis of the *a contrario* principle that, where the international copyright norms and/or the *acquis communautaire* provide for an exclusive right which can be exercised individually and the relevant norms do not allow for the prescription of *conditions* for its exercise (nor permit its limitation to a mere right to remuneration), it would be in conflict with those norms to subject the exercise of such a right to the condition that it may *only* be exercised through collective management. For example, no provision on mandatory collective management is allowed under the international copyright norms (and, consequently, under the *acquis communautaire*) in the case of the right of public performance (Article 11 of the Berne Convention), the right of public recitation (Article 11*ter*) or the right of "making available to the public" (Article 8 of the WCT and Articles 10 and 14 of the WPPT[12]).

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organization in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of related rights."

[11] It is another matter, that broadcasting organizations still have found collective management of their cable retransmission rights advantageous. They have established the Association for the International Collective Management of Audiovisual Works (AGICOA) of which one of the most important tasks is exactly the collective management of cable retransmission rights.

[12] Articles 10 and 14 of the WPPT provide explicitly for "rights of making available" of fixed performances and phonograms, while, under Article 8 of the WCT, such a right is provided for as a "sub-right" of the right of communication to the public in the following way: "Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), *11ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, *including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them"* (the text relating to the right of "making available", as a sub-right of the right of communication to the public, is emphasized). It is to be noted that the 1996 Diplomatic Conference which adopted the WCT, has also adopted an agreed statement concerning the above-quoted Article 8 which states as follows: "It is […] understood that nothing in Article 8 precludes a Contracting Party from applying Article 11*bis*(2)" [of the Berne Convention]. Article 11*bis*(2) provides for the possibility of countries of the Berne Union "to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised". The rights mentioned in that "preceding paragraph" – paragraph 11*bis*(1) – are the right of broadcasting and the rights of retransmission and certain "public communications" of broadcast works; that is, sub-rights of the right of communication to the public clearly other than the right of making available to the public Thus, Article 11*bis*(2) obviously is not applicable in respect of the right of "making available". It is another matter that recital (26) of the Information Society Directive contains

This does not mean that owners of rights may not and do not create collective management systems where such management is not mandatory. On the contrary, the oldest and the most efficiently functioning collective management system, both at national level and at international level, through the International Confederation of Societies of Authors and Composers (CISAC), has been established specially for the management of the public performance right. In such cases, extended collective management systems may also be applied (see below). However, in the case of voluntary collective management, any right owner may decide whether to authorize the collective management organization to represent him and to exercise his rights. In the case of extended collective management there is also a possibility for any right owner, as discussed below, to "opt out" from the collective system.

III. Extended Collective Management

One of the most important elements of fully developed collective management systems is the possibility that collective management organizations may grant blanket licenses to users for the use of the entire world repertoire of works or other protected subject matter, as far as the rights managed by them are concerned.

It is to be noted, however, that even where the system of bilateral reciprocal representation agreements is fairly well developed (e.g. as in the case of "performing rights"), the repertoire of works in respect of which a collective management organization has been explicitly given the power to manage exclusive rights is, practically, never the entire world repertoire (since, in certain countries, there are no appropriate partner organizations to conclude reciprocal representation agreements with, or because certain authors do not include their works in a collective system).

There are two basic legal techniques for ensuring the functioning of the blanket licence systems.

The first legal technique is the "guarantee-based system" which involves the following elements: (i) the lawfulness of authorizing the use of works not belonging to the organization's repertoire is recognized by law (either by statutory law or by case law); (ii) the organization must guarantee that individual right owners will not claim anything from users to whom blanket licenses have been granted and, if they still try to do so, that such claims will be settled by the organization, and, that any user will be indemnified for any prejudice and expense caused to him as a result of justified claims by individual owners of rights; and (iii) the organization also should guarantee that it treats owners of rights, who have not delegated their rights to it, in a reasonable way, taking into account the nature of the right involved.

The other legal technique for ensuring the conditions for blanket licenses seems to be more appropriate in the case of exclusive rights, since it *avoids the paradoxical situation of leaving the solution for the problem of those owners of rights who do not wish to participate in the collective system, to this very collective management organization in which they do not wish*

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the following statement: "With regard to the making available in on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof, collective licensing arrangements are to be encouraged in order to facilitate the clearance of the rights concerned." This is another matter since encouraging collective management does not mean making it mandatory.

to participate. This alternative legal technique is the so-called extended collective management system. The essence of such a system is that, if there is an organization which is authorized to manage certain rights by a large number of owners of rights and, if it is sufficiently representative in the given field, the effect of such collective management is extended by the law also to the rights of those owners of rights who have not entrusted the organization to manage their rights; however, with a possibility for the latter to "opt out" from the collective system.

In an extended collective management system, there should be special provisions for the protection of the interests of those owners of rights who are not members of the organization and who do not wish to participate in the collective system. Those owners of rights should have the option of freely choosing between either claiming individual remuneration (as in the case of the application of the guarantee-based system) or "opting out" (that is, declaring that they do not want to be represented by the organization). In the latter case, they should take care of the exercise of their rights. Of course, in the case of "opting out" from the collective system, a reasonable period of time should be given to the organization so that it may exclude the respective works or objects of related rights from its repertoire, however the procedure of "opting out" should be simple and not burdensome (for example, a right owner should be able to "opt out" in a simple declaration concerning all his existing and future works, without being obliged to offer an exhaustive list. Without this, the "opting out" system might be transformed into a *de facto* formality).

An extended collective management system seems to better correspond to the exclusive nature of rights and to the related requirements of the international copyright norms and/or the *acquis communautaire* than a simple "guarantee-based system". This is duly and fully recognized also under the *acquis communautaire.*

This is clearly reflected in the provisions of Articles 2 to 4 of the Satellite and Cable Directive. After that Article 2 provides that "Member States shall provide an exclusive right for the author to authorize the communication to the public by satellite of copyright works […]", and Article 3.1 adds that "Member States shall ensure that the authorization referred to in Article 2 may be acquired only by agreement" (that is, it must not be subject to a non-voluntary license system), Article 3.2 outlines what is an extended collective management system. It reads as follows:

> "A Member State may provide that a collective agreement between a collecting society and a broadcasting organization concerning a given category of works may be extended to rightholders of the same category who are not represented by the collecting society, provided that:
>
> - the communication to the public by satellite simulcasts a terrestrial broadcast by the same broadcaster, and
>
> - the unrepresented rightholder shall, at any time, have the possibility of excluding the extension of the collective agreement to his works and of exercising his rights either individually or collectively."

This provision *authorizes* (the "may" language indicates this) Member States to introduce such an extended collective licensing system, which reflects the position that such an authorization is *needed*, and that, where it is not granted, in the fields expressly covered by the

acquis, no extended collective management may be appropriate (not mentioning, of course, the mandatory collective management).[13]

This is confirmed by Article 3.3 and 4 which indicate that *even the extended collective management may only be justified where it is truly indispensable, and where the right owners usually do not intend to – or could hardly – exercise their exclusive rights on an individual basis.* Article 3.3 identifies a category of works where this is not the case, providing that "[p]aragraph 2 shall not apply to cinematographic works, including works created by a process analogous to cinematography", while Article 3.4 underlines the exceptional nature of extended collective management by introducing a specific notification procedure.[14]

There is one more directive which refers to extended collective management: namely Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter: the Information Society Directive), which, in its recital (18), states as follows: "This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licenses."

It seems obvious, however, that this may hardly be interpreted as an authorization for applying any kinds of arrangements – including extended collective management systems – in respect of any uses and any category of protected subject matter. The principles reflected in Article 3 of the Satellite and Cable Directive certainly must be duly taken into account.

[End of paper]

[13] For example, the right of public performance of authors is not covered by the *acquis communautaire.* In the case of that right, for example, extended collective management may be justified (but, since it is an exclusive right, mandatory collective management obviously is not permitted).

[14] Article 3.4 provides as follows: "Where the law of a Member State provides for the extension of a collective agreement in accordance with the provisions of paragraph 2, that Member States shall inform the Commission which broadcasting organizations are entitled to avail themselves of that law. The Commission shall publish this information in the *Official Journal of the European Communities* (C series)."

DOCTRINE AND OPINIONS

Germany's Copyright Law on the Verge of the Information Age

Thomas Ramsauer*

A) Background

The history of copyright has always been a story of legal responses to technical progress. A new statute came into force in Germany on September 10, 2003 in order to address the effects of digital technologies on copyright and related rights legislation.[1] Apart from bringing German law in line with the requirements of the two 1996 WIPO Treaties,[2] the bill was also designed to implement the European Union Copyright Directive of May 22, 2001.[3] With a nine months delay, Germany was the fifth country in the European Union to do so.

As the Copyright Directive allowed to Member States only 19 months for implementation, the German government decided to first tackle only the mandatory obligations set up by the Directive.[4] Given the massive lobbying by authors' and producers' associations, representatives of consumer interests and other groups, which had already accompanied the legislative efforts on the European scale, an exhaustive reform in due time was almost illusory.[5] The completion of Germany's entry into the information age is therefore left to a so-called "Second Basket" of copyright legislation. Preparations of the envisaged follow-up have already started and are supposed to be completed by the end of 2004.[6]

Notwithstanding its reduced content, the parliamentary enactment of the new law proved difficult. A first draft, presented by the German government in September 2002, raised objections in both chambers of the German Parliament and had to be revised several times

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1 German Law on the Regulation of Copyright in the Information Society (Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft), Federal Law Gazette Part I, No. 46, September 12, 2003, pp. 1774-1788.

2 WIPO Copyright Treaty (WCT), Dec. 20, 1996, 36 I.L.M. 65, WIPO Publ. No. 226 (E); *WIPO Performances and Phonograms Treaty* (WPPT), Dec. 20, 1996, 36 I.L.M. 76, WIPO Publ. No. 227 (E).

3 Directive 2001/29/EC of the European Parliament and of the Council, May 22, 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, O. J. L 167, 22/06/2001, pp. 10-19.

4 Bill introduced by the Federal Government, November 6, 2002 (Bundestag Printed Paper 15/38), p. 14.

5 A thorough documentation of the public debate on national and European level can be found on the website of the Munich based *Institut für Urheber- und Medienrecht*, an association of German copyright lawyers, at http://www.urheberrecht.org/topic/Info-RiLi/.

6 After a kick-off conference hosted by the *Institut für Urheber- und Medienrecht* in Munich in September 2003, Brigitte Zypries, the German Minister of Justice assigned in October several expert working groups to present solutions to various problems left by the current law. As for the topics see infra part C).

during the months to follow.[7] It is worth noting that even after the final draft had eventually passed the Bundestag by a large cross-party majority of some 90% of the votes in April 2003, it was rejected by the Bundesrat, Germany's powerful second chamber.[8] A compromise proposal containing a final amendment was found in the mediation procedure between the two chambers in July 2003.[9] However, the law could not be promulgated before the Federal President's signature in September 2003.

B) Amendments to copyright law

The new law provides for a number of amendments, mainly to the German Copyright Act, but also to some other statutes, like the Copyright Administration Act or the Code of Criminal Procedure. Apart from some minor amendments concerning questions that have been subject to judicial proceedings over the past few years,[10] and mere editorial adaptations,[11] four changes have taken place: The introduction of a new "right of making available to the public" (I.), several amendments to exceptions and limitations to protection of copyright and related rights (II), the creation of a new regime concerning the protection of technological measures (III), and finally, the complete remodelling of the provisions dealing with performers' rights (IV).

I. Introduction of a right of making available to the public

In accordance with Art. 3 of the European Copyright Directive, which in turn implements Article 8 of the WIPO Copyright Treaty as well as Article 10 and 14 of the WIPO Performances and Phonograms Treaty, a new right of making available to the public has been established. The newly-introduced Section 19a of the German Copyright Act grants to authors the exclusive right to authorise or prohibit any making available to the public of their works in such a way that members of the public may access them from a place and a time individually chosen by them. Corresponding amendments have been made to the provisions addressing the rights of performers (Section 78), phonogram producers (section 85),

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7 Cf. in detail Bill introduced by the Federal Government, August 16, 2002 (Bundesrat Printed Paper 684/02); Bill introduced by the Federal Government, November 6, 2002 (Bundestag Printed Paper 15/38); Recommendation and Report of the Legal Affairs Committee, April 9, 2003 (Bundestag Printed Paper 15/837).

8 See Demand of the Bundesrat that the Mediation Committee be convened, May 3, 2003 (Bundestag Printed Paper 15/1066).

9 See Recommendation by the Mediation Committee, July 2, 2003 (Bundestag Printed Paper 15/1353).

10 The Copyright Act, e.g., contains now a novel Section 5 [3], which provides for copyright in technical standards that have been published by private authors and referred to in official norms; this differs from a ruling of Germany's Federal Court of Justice in 1990, which stated that copyright did not subsist in such a case; April 26, 1990, Case No. I ZR 79/88. Moreover, the German Patent and Trademark Office's powers to control the activities of collecting societies have been extended by a new provision in the German Copyright Administration Act (Section 19 [2]) to the effect that an unauthorised collecting society can be prohibited to carry on; this question was recently left open in a ruling of the Bavarian Administrative Court; August 13, 2002, Case No. 22 CS 02.1347.

11 For instance, the compulsory licensing for the production of audio recordings has been "transplanted" out of the chapter dealing with exceptions into another part without any material change. The basic reason for the transplant is that the Copyright Directive does not provide for compulsory licensing in its enumeration of possible limitations. The German legislature therefore chose to maintain the provision under a different heading.

broadcasting organisations (Section 87), and producers of the first fixations of films (Section 94).

The term "making available to the public" aims chiefly at posting protected content or files on the internet. It is worth noting that, even without express mentioning under the former law, the exclusive right of the author to authorise or prohibit these acts was undisputed in Germany. In effect, the amendments in question merely clarify their character as a form of communication to the public. More important is the fact that the new right is now expressly considered in the provisions concerning limitations and exceptions (Sections 44a, 46, 48, 50, 52a, 53 56, 58), thus delineating its scope of application.[12]

II. Amendments to limitations and exceptions

By far the most extensive and heavily disputed amendments were made to the provisions of Sections 44a et seq. of the German Copyright Act concerning exceptions and limitations to the copyright and related rights. Apart from some merely technical adaptations, a number of considerable modifications have taken place. Apart from the mandatory exception of Article 5 [1]concerning temporary acts of reproduction, the Copyright Directive 2001/29/EC provides for an exhaustive enumeration of optional limitations on copyright and related rights in Article 5 [2] and [3]. As the legislature felt that the German copyright had mostly been in line with the European prerequisites, it decided "to make only sparing use" of those provisions.[13]

1. Temporary acts of reproduction

The newly introduced Section 44a transposes almost literally the mandatory exception for the benefit of temporary acts of reproduction provided for by Article 5 [1] of the European Copyright Directive into German law. According to this provision, temporary acts of reproduction, which are transient or incidental and are an integral and essential part of a technological process and whose sole purpose is to enable a transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, are exempted from the reproduction right. In accordance with Recital 33 of the Directive this exception includes, more particularly, acts of browsing or caching.

In view of the obligations set by European law, the introduction of Article 44a has not attracted much attention and is mainly seen as a fair compromise.

2. Reproductions for the benefit of persons with disabilities

Based on Article 5 [3] (b) of the European Copyright Directive, the newly introduced Article 45a is the first provision of the German Copyright Act to be specifically designed for the needs of persons with disabilities. It thus honours Article 3 [3] of the German Constitution ("Grundgesetz", "Basic Law"), which states that no person shall be disfavoured on the basis of disability. Section 45a [1] permits the reproduction of protected subject matter, such as the recording of works of literature for the benefit of blind persons, to the extent required by the

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[12] Under the German doctrine of Copyright Law, the author generally has an exclusive right to allow or forbid *any* possible use of his work. The typical question is therefore rather whether and to what an extent this right is limited in regard to a *specific* use. See in general *Schack*, Urheber- und Urhebervertragsrecht (2nd ed. 2001), p. 175 et seq; in respect of the right of making available to the public, *idem*, p. 195 et seq.

[13] See Bill introduced by the Federal Government, November 6, 2002 (Bundestag Printed Paper 15/38), p. 15.

specific disability. As far as reproduction exceeds a small number of copies, paragraph [2] entitles rightholders to an appropriate compensation which claim is to be exercised by a collecting society.

3. Making available for educational and research purposes

The likewise new Section 52a deals with a specific limitation to the right of making available to the public. Section 52a [1] allows the making available of protected subject matter, which has been published, to certain distinct circles of persons if and to the extent where this is necessary for certain teaching or research purposes. Examples include the use in on-line classes or access-controlled parts of a university's intranet. With this provision, the German legislature has made use of Article 5 [3]*(a)* of the Copyright Directive which entitles Member States to create exemptions for the benefit of educational or scientific uses. Paragraph 4 of Section 52a compensates rightholders with an appropriate remuneration which is to be claimed by a collecting society.

The new exception on the right of making available is subject to various restrictions, due to lobbying by publishing companies and film producers. So has the extent to which protected materials can be made available been delimited to "small parts of a work", "works of small size" and "single contributions from newspapers and periodicals". Moreover, the number of beneficiaries has been confined to those institutions that are expressly mentioned. Finally, Section 52 a [2] exempts expressly school books and – for a limited period of two years after their theatrical release – films.

Yet, the criticisms have not completely vanished. Some would have preferred a more narrowly defined extent. Others find that the current restrictions do not go far enough. Publishers of scientific works, for instance, specifically point at the in arbitrary preferential treatment of school books.[14] Confronted with apparently irreconcilable expectations from different sectors of society, the legislature decided to earmark Section 52a with an expiry date of late 2006 (Section 137k).

4. Reproductions for private and other personal uses (Section 53)

Section 53 of the German Copyright Act sets the conditions for what is permissible under German copyright law, regarding the reproduction for private and other personal uses.

Digital copies

Section 53(1) now contains a formula (reproduction on *any* medium), which makes clear that this provision applies in principle equally to digital and analogue reproductions. The European Copyright Directive allows for such an equal treatment in Article 5(2) (b).

However, as Recital 38 of the *Directive* states, digital private copying is likely to be more widespread and therefore calls for making a distinction between digital and analogue private copying in certain respects. Different opinions existed between the two chambers of Parliament as to how to meet this prerequisite. This has led to a last minute insertion of an additional restriction on private copying.[15] By now, reproductions are prohibited if the source

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[14] Cf. *Schippan*, Urheberrecht goes digital, 5 ZUM 2003, pp. 378-382.

[15] Cf. references at footnote 9.

is "obviously unlawful". The clause is mainly intended to prevent downloads from the so-called "peer-to-peer" platforms.[16] Yet, some commentators have already highlighted a snag: as the wording draws explicitly on the way the source was *produced* („offensichtlich rechtswidrig *hergestellte* Vorlage"), it could be argued that a legally *produced* copy, which is later merely *posted* on an illegal platform, does not match this provision.[17]

Sooner or later, the tribunals will have to provide clarification. In any case, the requirement for an "*obviously* unlawful source" somewhat reduces the consumer's risk of unknowingly committing a breach of law. It is therefore up to the rightholders to raise public awareness against questionable sources.

Copies to be made by another person

Despite considerable pressure by publishers' organisations, the legislature chose to maintain an already-existing provision in Section 53(1), which allows private copies to be made by another person. Today, on-line delivery of digital copies is a heavily contested field of use for this provision. Under the amended Section 53(1) such a service would be permissible, provided no payment is received.[18]

Critics object that, according to the explanatory note of the German parliament, this condition will be met even when institutions, such as public libraries, collect fees, as long as those fees do not exceed their necessary costs. They claim, more specifically, that this does not properly take into account Recital 40 of the European Copyright Directive, which states that any exception or limitation for the benefit of certain non-profit making establishments should not cover uses made in the context of on-line delivery of protected subject matter.[19] The topic is currently revisited in the discussions preparing the "Second Basket".

Further amendments

Further amendments have been made to Section 53(2), which permits, inter alia, the production of source copies for keeping in a private archive [no. 2]. Here, the legislature was thinking of cases in which an institution rather than individuals, e.g. a private foundation, would store its inventory on microfilm in order to either save space or to keep the films in a place safe from catastrophe.[20] In accordance with the conditions set up in Article 5 [3] *(a),(c),(o)* of the Copyright Directive, the intent of the amendments is not to make a more intensive exploitation of the work possible. Therefore, a differentiation between analogue and digital copies can be found in paragraph [2] for the numbers 2, 3, 4, and paragraph [5], which now contains limitations to the assistance of database facilities. This, however, adds considerably to the quite confusing appearance of paragraph (2) et seq. of Section 53.

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16 Cf. *Demand of the Bundesrat that the Mediation Committee be convened,* May 3, 2003 (Bundestag Printed Paper 15/1066), p. 2.

17 Cf. *Lüft*, in *Wandtke/Bullinger*, Ergänzungsband zum Praxiskommentar Urheberrecht (2003), § 53, para. 13.

18 However, according to a ruling of the German Federal Court of Justice of 1999, any delivery of copies sets off a claim to appropriate remuneration for the author which is to be exercised by a collecting society; February 25, 1999; Case-No. I ZR 118/96.

19 Cf. the comments by the *German Publishers Association* (*Börsenverein des Deutschen Buchhandels*) at http://www.urheberrecht.org/topic/Info-RiLi/, and *Schippan*, op. cit., at 384.

20 Cf. *Bill introduced by the Federal Government,* November 6, 2002 (Bundestag Printed Paper 15/38), p. 21.

III. Technological protection measures

In compliance with the obligations of the European Copyright Directive, the legislature created a regime of legal protection (Sections 95a – 95d) and remedies (Sections 108b and 111a), which prohibits the circumvention of mechanisms designed to protect works and other subject matter against unauthorised copies.[21] The new provisions simultaneously implement Articles 11 and 12 of the *WIPO Copyright Treaty,* as well as Articles 18 and 19 of the *WIPO Performances and Phonograms Treaty*.

1. Defences and sanctions (Sections 95a, 95c, 108b and 111a)

Section 95a transposes Article 6(1) to (3) of the Copyright Directive almost literally into German law. Section 95a (1) states that effective technological protection measures may not be circumvented. Section 95a (2) defines technological protection measures as "any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts in respect of works, which are not authorised by the rightholder." Paragraph [3] provides legal protection against devices or services as listed in Article 6 [2] of the Directive that are primarily designed for enabling or facilitating the circumvention of any of those measures. None of these provisions, however, affect the powers of public authorities as far as public security is concerned, paragraph (4).

In compliance with the provisions of Article 6 of the Copyright Directive, these provisions are backed up with criminal law and administrative law („Ordnungswidrigkeit") sanctions which are laid down in Sections 108b and 111a. The statute clarifies, however, that a contravention committed solely for personal use falls outside of the criminal area. Yet, such a copy would still expose the offender to a claim for damages under the civil law regime of Section 97.

In addition, Section 95c provides, in perfect accordance with Article 7 of the Copyright Directive, legal protection to the so-called "rights management information". This includes any type of data associated with a copy or communication to the public that identifies the protected subject matter, the rightholder or the terms and conditions of access, as laid down in Article 7(2) of the European Directive. Section 95c does not figure among the offences defined in Article 108 et seq., which means that infringements against the ban on removing copyright information can only be pursued under private law.

2. Consumer protection (Sections 95b and 95d)

According to Section 95b (1) no. 2, a rightholder who applies technical protection measures has to provide the beneficiaries under a number of certain exceptions with the necessary means, so that the beneficiary may use the work as provided in the relevant provision. This clause implements Article 6(4), subparagraph 1 of the Copyright Directive. The Copyright Act does not contain any specifications as to how the rightholder who uses technical protection measures must comply with the obligation under Section 95(1). Notably, the rightholder is not obliged to communicate the password to a beneficiary, provided it is ensured in another form that the beneficiary benefits from the exception.

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[21] In line with Recital 50 of the Copyright Directive, computer programmes do not fall under this regime. The protection of computer programmes is left to the *European Council Directive 91/250/EEC*, May 14, 1991 on the legal protection of computer programs, O. J. L 122 , 17/05/91 p. 42. The Bundesrat could not get through with his opposite proposal; cf. *Demand of the Bundesrat that the Mediation Committee be convened,* May 3, 2003 (Bundestag Printed Paper 15/1066), p. 2.

A rightholder who does not comply with this obligation can be sued under Section 95(2) and risks punishment under Section 111a (1) no. 2. Moreover, an infringement can be pursued by collective action according to the new Article 2a of the relevant German law concerning collective actions for injunctions („*Unterlassungsklagen-Gesetz*"). However, Section 95(2) of the Copyright Act also assumes that a means which has been designated in a collective agreement between rightholders' associations and beneficiaries meets the obligation under Paragraph (1). This assumption is designed for the promotion of mutually-agreed technological standards between the concerned interest groups.

Additionally, Section 95d (1) requires that works and other items that are protected by technological protection measures, must be clearly labelled, stating the characteristics of the technological measures.[22] Moreover, Section 95d [2] provides that such subject matter must be labelled with the name or business name of the person who applied the measures, as well as an address for service to enable claims to be asserted in accordance with Section 95b (2).

In sum, Section 95b in connection with 95d is one of the most heavily contested provisions among the latest amendments. Rightholders, on the one hand complain that their right to use technological protection measures is being obliterated by those obligations.[23] On the other hand, the beneficiaries of those exceptions that have not been considered in the catalogue of Section 95b (1) claim for equal treatment.[24] This applies in particular to the exception for the benefit of reproductions for private uses (Section 53(1)); under the current law, this right cannot be enforced against technological protection measures. Small wonder, therefore, that the question of legal enforcement of exceptions has been set quite high on the agenda of the meetings preceding the upcoming "Second Basket".[25]

IV. Amendments to Performers' Rights

Sections 73 et seq. of the Copyright Act, which govern performers' rights, have been completely remodelled. These amendments are due to the implementation of the obligations set up in Articles 5 et seq. of the WIPO Performances and Phonograms Treaty. Apart from a broadened scope of applicability, which from now on also covers the performance of so-called expressions of folklore (Section 73), the amendments concern mainly performers' moral and economic rights. The structure of the authors' rights as laid down in Sections 11 et seq. has been visibly used as a model. In contrast to the provisions discussed above, the amendments concerning performers' rights have not received much public attention.

1. Moral Rights (Sections 74-76)

In accordance with Article 5 of the WIPO Performances and Phonograms Treaty, performers' moral rights have been strengthened. Under the former law, they were only considered in a

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[22] According to section 137j of the *Copyright Act*, this provision does not apply to subject matter published before December 1, 2003.

[23] Cf. various comments of rightholder's associations at http://www.urheberrecht.org/topic/Info-RiLi/, and *Schippan*, op. cit., at 386.

[24] Cf. the website of the leading private initiative committed to the maintenance of the existing exception for the benefit of private uses *"Rettet die Privatkopie"* at http://privatkopie.net.

[25] So far, Sections 95b (2) and 95d (2) have not entered into force. The *Transposition Law* (Article 6) has stated a delay for a period of 12 months which will be due on September 10, 2004. By then, the talks at the German Ministry of Justice are supposed have come to an end.

fragmented way. In its amended form, the newly introduced moral rights are provided for before the economic rights, thus underlining the greater commitment of the German legislature.[26]

Section 74(1) provides for a right to be identified as the performer of a performance and for the right to choose the name under which this is to happen. If a group of performers is concerned, this right will belong to the group as such, to the extent that the mention of individual members would be too burdensome and this would not unreasonably prejudice the legitimate interests of the relevant rightholders. The right of integrity, already known under the former law, is now covered by Section 75.

Section 76 sets up a term of protection until at least the end of a period of 50 years after the performance and up to the performers lifetime. In addition, performers‘ moral rights are maintained at least until the expiry of the economic rights (Section 82), as stated by Article 5 [2] of the WIPO Performances and Phonograms Treaty.

2. Economic Rights (Sections 77-80)

Whereas under the former law, performers were granted merely so-called “rights of consent” („Einwilligungsrechte“), the novel Sections 77-80 provide for veritable “rights of exploitation” („Verwertungsrechte“). In practice, this will not lead to a remarkable change. The legislature has thus made clear that performers can assign those rights to *third parties* without any restrictions (Section 79).[27]

Section 77 contains the rights of fixation, reproduction and distribution, as set out in Articles 10 to 12 of the WIPO Performances and Phonograms Treaty. The rights of communication to the public in an immaterial form are treated in Section 78. In addition to broadcasting and others act already considered by the former law, this provision also covers the making available to the public of a performance as defined in the novel Section 19a.

Finally, Section 80, in its new form, contains a general rule for the case that the contributions of several joint performers cannot be separately exploited; under the former law, only choral, orchestral and stage performances were expressly considered. According to Section 80(1), similarly to the case of joint authorship (Section 8), the right of exploitation shall belong jointly to all performers involved. However, a joint performer may not unreasonably refuse his consent. Moreover, if a group has an elected representative, the consent of all performers in that group shall be replaced by the consent of that person (Paragraph (2).

C) Conclusions

As the forgoing outline has made it clear, not all problems, created by the information age, have been solved by the latest amendments of the German copyright law. Besides, the previously mentioned differences of opinion with regard to current exceptions and the new

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[26] Cf. *Büscher* in *Wandtke/Bullinger*, Ergänzungsband zum Praxiskommentar Urheberrecht (2003), vor §§ 73, para. 4.

[27] Cf. *Büscher* in *Wandtke/Bullinger*, Ergänzungsband zum Praxiskommentar Urheberrecht (2003), vor §§ 73, para. 8.

provisions in favour of technological protection measures,[28] the German Government has identified a whole range of "digital" issues that it plans to deal with in the "Second Basket".

One of the main topics will be the future of Germany's elaborate system of collective remuneration, established in 1965 and last revised in 1985. Special attention will be paid to the question whether and to what extent so-called "Digital Rights Management" (DRM) systems will allow levies on recording mediums and appliances to be replaced by a mechanism of individual licenses. Other points of interests are, for instance, the tracing of copyright infringements in the internet, on-the-spot-consultations in libraries, and the assignability of rights to unforeseen uses.[29]

When tackling these questions, the German legislature will have to carefully balance the competing interests between rightholders and society, unless Aldous Huxley's gloomy aphorism is to come true: "Technological progress has merely provided us with more efficient means for going backwards."

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[28] Cf. supra parts B) II. 4 and B) III. 2.

[29] Cf. the German Ministry of Justice's press-release, September 16, 2003 at http://www.bmj.bund.de/ger/service/pressemitteilungen/10000790/.

UNESCO ACTIVITIES

NEW STANDARD-SETTING INSTRUMENTS ADOPTED BY THE GENERAL CONFERENCE OF UNESCO

Five standard-setting instruments, including the International Convention on the Preservation of Intangible Cultural Heritage, were adopted by the 32nd session of UNESCO's General Conference which took place at UNESCO Headquarters from September 29 to October 17, 2003.

The General Conference, UNESCO's supreme governing body, brings together, every two years, representatives of all the Organization's Member States, which – since the return of the United States of America and the accession to membership of Timor-Leste – number 190.

At the beginning of the general policy debate, the Director-General of UNESCO, Mr Koichiro Matsuura stressed that the process of globalization underway increases the pertinence of UNESCO's standard-setting role.

On the subject of heritage, the General Conference adopted by an overwhelming majority the International Convention on the Preservation of Intangible Cultural Heritage[*]. A complement to the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, which concerns monuments and natural sites, the new Convention addresses oral traditions and expressions, including languages as vehicles of cultural heritage; the performing arts; social practices, rituals and festive events; knowledge and practices concerning nature and the universe; and traditional craftsmanship.

The preservation of this particularly vulnerable heritage is provided for by the Convention through the drawing up of national inventories of cultural property to be safeguarded, the establishment of an Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, composed of experts from future States Parties to the Convention, and the creation of two lists: a Representative List of the Intangible Heritage of Humanity and a List of Intangible Cultural Heritage in Need of Urgent Safeguarding. The text stresses that safeguarding intangible cultural heritage is a complex process involving many parties, starting with the communities and groups that bring it to life.

The General Conference adopted a Declaration Concerning the Intentional Destruction of Cultural Heritage[*]. According to this text, which recalls "the tragic destruction of the Buddhas of Bamiyan" and expresses "serious concern about the growing number of acts of intentional destruction of cultural heritage", States should "take all appropriate measures to prevent, avoid, stop and suppress acts of intentional destruction of cultural heritage, wherever such heritage is located." Although it is not legally binding, the Declaration should inspire the actions of States.

On the subject of bioethics, the General Conference adopted an International Declaration on Human Genetic Data*, which lays down the ethical principles that should govern their collection, processing, storage and use. The purpose of the Declaration is to ensure the respect of human dignity and the protection of human rights and fundamental freedoms, in keeping with the requirements of equality, justice and solidarity, while giving due consideration to freedom of thought and expression, including freedom of research. It undertakes to define the principles that should guide States in formulating their legislation and their policies on these issues.

Two standard-setting instruments were adopted in the field of communication and information. The Recommendation on the Promotion and Use of Multilingualism and Universal Access to Cyberspace*, concerns four important aspects: development and promotion of multilingual content and systems; access to networks and service; development of public domain content; and reaffirming and promoting the fair balance between the interests of right owners and the public interest. These measures aim to provide more equitable access to information and favour the development of multicultural knowledge societies.

The Charter on the Preservation of the Digital Heritage is a declaration of principle designed to assist Member States in preparing national policies to preserve, and provide access to, digital heritage. The digital heritage consists of unique resources of human knowledge and expression, be they cultural, educational, scientific or administrative, as well as technical, legal, medical and other kinds of information created digitally or converted into digital form from existing analogue resources. This fast growing heritage is particularly at risk because of the rapid obsolescence of the hardware and software with which it is generated and preserved. The Charter recognizes that this material constitutes a common heritage and that its preservation requires urgent measures.

The General Conference also laid the ground for new standard-setting projects requesting that new instruments be prepared on the subjects of cultural diversity and the fight against doping in sport and bioethics. Draft texts could be presented to the 33rd session, in 2005.

The General Conference thus requested that UNESCO prepare an international standard-setting instrument on cultural diversity. Already in 2001, it adopted the UNESCO Declaration on Cultural Diversity which recognized cultural diversity as a "common heritage of humanity" and considered its safeguarding to be a concrete and ethical imperative, inseparable from respect of human dignity. At the end of a long debate on the subject, delegates agreed that "cultural diversity, as regards the protection of the diversity of cultural contents and artistic expressions shall be the subject of an international convention." Consultations should be undertaken on the subject with the World Trade Organization (WTO), the United Nations Conference on Trade and Development (UNCTAD) and the World Intellectual Property Organization (WIPO). The resolution invites the Director-General to submit a first draft convention on the protection of the diversity of cultural content and artistic expression to the next session of the General Conference.

The General Conference also examined the desirability of elaborating a universal instrument on bioethics that would be more comprehensive than the Universal Declaration on the Human Genome and Human Rights adopted by UNESCO in 1997 and the one just

adopted on human genetic data in 2003. Member States approved the project for such an instrument despite their awareness of the ethical dilemmas involved, as bioethics cover a wide range of areas and problems, such as those connected to embryology, which are set in the various cultural, philosophical and religious bedrocks of human communities. A draft instrument should be submitted in 2005.

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* texts available on the website of the General Conference: www.unesco.org/confgen and of the UNESCO Intangible Heritage website.

Source : Press Release No.2003-83.

SELECTED WORKS

Patent, Trademark, and Copyright Laws (2003 Edition). Edited by Jeffrey M. Samuels. Washington, D.C., BNA Books, A Division of The Bureau of National Affairs, Inc. (BNA), March 2003, 812 pp. All key legislative developments through February 10, 2003 that affect U.S. intellectual property law are covered in the new 2003 Edition. In addition, this Edition covers important updates such as amendments to the Trademark (Lanham) Act implementing the provisions of the Madrid Protocol, an international treaty that facilitates obtaining trademark protection abroad; significant amendments to the Copyright Act relating to distance learning and Web broadcasting; amendments to the Patent Act relating to reexamination and the prior art effect of published applications; and provisions of the Patent and Trademark Office Authorization Act of 2002. First published in 1985, *Patent, Trademark, and Copyright Laws* features a finding list by topic; a finding list by U.S.C. Section; relevant constitutional provisions; the popular names of selected statutes; U.S. Code, Title 35, Patents; U.S. Code, Title 15, Chapter 22, Trademarks; U.S. Code, Title 15, Chapter 63, Technology Innovation; U.S. Code, Title 17, Copyrights; other relevant statutes; and a comprehensive index. Softcover/ISBN 1-57018-378-3/Order #1378-PRY3/$115.00 plus tax, shipping, and handling. May be purchased from BNA Books, P.O. Box 7814, Edison, NJ 08818-7814. Telephone orders: 1-800-960-1220. Fax orders: 1-732-346-1624. E-mail address: books@bna.com. World Wide Web: www.bnabooks.com.