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Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations

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THIS ARTICLE SUGGESTS A PATH TO DEVELOP A PRINCIPLED CONCEPTUALIZATION for copyright of limitations and exceptions at the international level. The paper argues that, normatively, copyright has always sought to reflect a balance between protection and access. It demonstrates that this balance was present to the minds of the negotiators of the 1886 *Berne Convention for the Protection of Literary and Artistic Works* and may have been somewhat overlooked in revisions of the Convention. It was ultimately replaced by a three-step test designed to restrict the ability of individual legislators to create limitations and exceptions. The article also considers the conflicts between copyright and rights such as the right to privacy, human rights principles of free expression and cultural diversity, the right to information, the right to education, and the nascent right to development, all of which imply striking a balance in intellectual property protection. The article begins with a historical look at the public interest foundations of the *Berne Convention* and its revisions until 1971. The article then proceeds to a conceptualization of limitations and exceptions in order to show the policy linkages of each type of exception and proposes a set of principles for limitations and exceptions. The article also examines the meaning and impact of the three-step test because it would be pointless, not theoretically, but from a policy perspective, to ignore the application of the test in suggesting international principles for limitations and exceptions.

DANS CET ARTICLE, ON PROPOSE UN MOYEN D'ÉLABORER UNE CONCEPTUALISATION, fondée sur des principes, des limites et exceptions en matière de droit d'auteur au niveau international. Dans le texte, on soutient que, de manière normative, le droit d'auteur a toujours cherché à refléter un équilibre entre protection et accès. Dans cet article, on démontre que cet équilibre était présent dans l'esprit des négociateurs de la *Convention de Berne pour la protection des œuvres littéraires et artistiques* en 1886, mais qu'il aurait été quelque peu laissé de côté lors des révisions de la Convention. Cette préoccupation d'équilibre aurait finalement été remplacée par un critère en trois volets destiné à restreindre la capacité des législateurs individuels de créer des limites et des exceptions. Dans cet article, on examine également les conflits entre le droit d'auteur et d'autres droits tels que le droit à la vie privée, les principes des droits de la personne que sont la libre expression et la diversité culturelle, le droit à l'information, l'égalité des chances en éducation, et le droit naissant au développement, tous ces droits impliquant qu'il faille réaliser un équilibre en matière de protection de la propriété intellectuelle. Le texte débute par un aperçu historique des fondements de l'intérêt public de la Convention de Berne et de ses révisions jusqu'en 1971. L'article se poursuit en proposant une conceptualisation des limitations et exceptions afin de démontrer les liens politiques de chaque des exceptions et propose un ensemble de principes applicables aux limites et aux exceptions. Cet article examine en outre la signification et l'incidence de ce critère en trois étapes dans la mesure où il serait sans intérêt, non pas sur un plan théorique, mais selon une perspective de politique, de faire fi de l'application du critère en proposant des principes internationaux pour régir les limites et les exceptions.

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Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations

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Le livre, comme livre, appartient à l'auteur, mais comme pensée, il appartient—le mot n'est pas trop vaste—au genre humain. Toutes les intelligences y ont droit. Si l'un des deux droits, le droit de l'écrivain et le droit de l'esprit humain, devait être sacrifié, ce serait, certes, le droit de l'écrivain, car l'intérêt public est notre préoccupation unique, et tous, je le déclare, doivent passer avant nous [...] Constatons la propriété littéraire, mais, en même temps, fondons le domaine public.¹

—Victor Hugo, *Discours d'ouverture du Congrès littéraire international de 1878*

1. INTRODUCTION

THE TIME HAS COME TO MAKE COPYRIGHT WHOLE, to recognize, contrary to Manichean debates that have emerged in the past few years, that the public interest requires the protection of authors *and* users of their works, and to recognize that both authors and users require a functioning copyright system.

The purpose of this Article is to contribute to the development of a principled conceptualization for copyright of limitations and exceptions² at the international level. The paper argues that normatively, copyright has always sought to reflect a balance³ between protection and what is now known as

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1. There is no good translation of this quote (that I could find). The three main thoughts are as follows:
 - a) A book belongs to its author but the ideas belong to humankind.
 - b) If either the right of the writer or the right of the human spirit must be forfeited ("sacrificed"), it is assuredly the right of the writer that must be, because public interest is the sole preoccupation and must come before everything else.
 - c) One must recognize literary property, but at the same time establish ("found") the public domain.

Victor Hugo, *Discours d'ouverture du Congrès littéraire international de 1878*

<<http://www.inlibroveritas.net/lire/oeuvre1923.html>> at pp. 5–6.

2. In this Article, "limitation" refers to conditions on the exercise of copyright, including transforming an exclusive right into a right to remuneration (e.g. a compulsory license). An "exception" is a full non-application of the exclusive right in a specific situation.
3. I am fully aware that this term is imprecise. I will ask the reader to bear with me as I will attempt to define it later on in the paper.

“access” in myriad forms, but that this balance, which was very present to the minds of the negotiators of the 1886 *Berne Convention for the Protection of Literary and Artistic Works*,⁴ may have been somewhat overlooked in revisions of the Convention. It was ultimately replaced by a “test,” the three-step test, designed to restrict the ability of individual legislators to create the limitations and exceptions used to maintain this balance.

The degree of complexity of the exercise reflects the fact that copyright is increasingly sparring with rights outside of its own sphere, such as the right to privacy, human rights principles of free expression and cultural diversity and cultural development, the right to information, the right to education, and the nascent right to development, each of which implies striking a balance in intellectual property protection.

Part 2 of this Article begins with a historical look at the public interest foundations of the *Berne Convention* and its successive revisions until 1971. This effort to “go back to basics” will demonstrate that (a) the protection of authors was instituted internationally in the public interest; (b) there is no contradiction between the protection of authors and the public interest; and (c) the public interest requires a well-functioning system that includes appropriate limitations and exceptions. The analysis will also show that limitations and exceptions are largely *unregulated policy space* at the international level. This has led to a lack of uniformity and harmony among national and regional implementations of limitations and exceptions allowed under the main international treaties, especially the *Berne Convention*.

Part 2 then proceeds to a conceptualization of limitations and exceptions in order to better understand the policy linkages of each type of exception. Part 2 concludes with a proposed set of principles for limitations and exceptions.

Part 3 examines the meaning and impact of the three-step test in establishing international principles for limitations and exceptions. Originally conceived as a political compromise to limit exceptions to the right of reproduction in the *Berne Convention*, the three-step test has become the single sieve through which all, or almost all, exceptions to exclusive copyright rights must pass to be compatible with the TRIPS Agreement.⁵ It would be pointless, not theoretically, but from a policy perspective, to ignore the application of the test in suggesting international principles for limitations and exceptions.

The analysis contained in Part 3 goes beyond a simple overview of the three-step test as interpreted by WTO dispute-settlement panels. It examines also the normative locus of the test and its possible application *directly* in national legislation. The Article concludes with a brief look at ways in which the principles identified in Part 2 could be implemented internationally in light of the constraints imposed by the three-step test.

4. *Berne Convention for the Protection of Literary and Artistic Works* (9 September 1886), 1161 *United Nations Treaty Series* 3, <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html>, as last revised at Paris on 24 July 1971 and last amended 28 September 1979 [*Berne Convention*].

5. *World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights* (15 April 1994), <http://www.wto.org/english/docs_e/legal_e/27-trips.pdf>, (1994) 33:1 *International Legal Materials* 1197, 1869 *United Nations Treaty Series* 299 (Marrakesh Agreement Establishing the World Trade Organization, Annex 1C) [TRIPS Agreement].

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2. THE ROLE OF LIMITATIONS AND EXCEPTIONS IN INTERNATIONAL COPYRIGHT LAW

2.1. *Current Limitations and Exceptions in the Berne Convention and the TRIPS Agreement*

2.1.1. The 1886 Text of the *Berne Convention*

THE SEED OF THE *BERNE CONVENTION* WAS sown by the *Association littéraire internationale*, the predecessor of the present-day *Association littéraire et artistique internationale* (ALAI).⁶ Its first president was the famous French author and human rights campaigner Victor Hugo, perhaps the best known advocate for the Romantic Movement so closely associated with the natural rights foundation of authors' rights. Romantics saw creative works as extensions of their authors. But they also believed in the power of individuals to influence and shape events. Victor Hugo wrote (in the same speech excerpted above) that "literature was the government of humankind by the human spirit."⁷

The traditional insistence on the filiation between authors' rights and Romanticism offers an incomplete picture, however, one that remains incomplete to this day. Yet, Hugo's words were abundantly clear; the sole preoccupation in protecting the author was and is the public interest. It is from this perspective that he refers expressly to the exclusion of ideas from copyright, a notion that is well established in both major (Western) legal systems. Two examples should suffice. First, section 102(b) of the *US Copyright Act*⁸ excludes ideas, procedures, processes, systems, methods of operation, concepts, principles, and discoveries from the scope of protection. Second, every French treatise on copyright (literary and artistic property, that is) mentions at least once that "*les idées sont de libre parcours*" (ideas should circulate freely).⁹

Hugo also wrote that if a conflict should arise between the rights of the author and those of "the human spirit," the latter should prevail. This means that copyright protection should cease to apply once the goal of maximizing welfare by ensuring that new works are created without stifling the potential for new ones (i.e. that copyright protection should go no further than is required to "promote the progress of science and useful arts"¹⁰). This would seem to mesh rather well also with economic analyses of copyright that look for a (measurable) optimal protection point at which creation and dissemination of new works is not

6. *Association Littéraire et Artistique Internationale*, <<http://www.alai.org>>

7. "La littérature, c'est le gouvernement du genre humain par l'esprit humain." Hugo "Discours," *supra* note 1 at p. 3.

8. *US Copyright Law*, (1976) 17 *United States Code* 512, 90:2 *United States Statutes at Large* 2541, <<http://www.copyright.gov/title17/92chap1.pdf>>, at s. 102(b) [*US Copyright Act*].

9. For example, in André Lucas and Henri-Jacques Lucas, *Traité de la propriété littéraire et artistique*, 3d ed. (Litec, 2006) the authors explain: "C'est un principe fondamental du droit de la propriété intellectuelle que les idées sont en elles-mêmes de libre parcours. La règle a été présentée comme une concession à l'intérêt de la société" (no. 28 at p. 31).

10. *Constitution of the United States of America* (1787), <http://avalon.law.yale.edu/18th_century/usconst.aspml> at art. 1, s. 8. See also Jane Ginsburg, "A Tale of Two Copyrights: Literary property in Revolutionary France and America," (1990) 64 *Tulane Law Review* 991–1032, at p. 992.

negated by deadweight and other welfare losses.¹¹

The translation of this foundational role of the public interest thus was to protect authors for the personal contribution that they make to humankind and the development of human “intelligence,” while putting limits on such protection when so required in the public interest, that is, when the public interest (once again, the sole consideration) no longer dictates protecting a writer’s rights.

The 1886 text of the Convention arguably met this objective. Its normative content was minimalist. Its basic premise was to ensure that authors who were nationals of countries that would accede to the new treaty and thus form the “Berne Union” would be protected in all countries of the Union without discrimination, according to the well-known principle of national treatment. Otherwise, the original text of the Convention only contained a right of translation.¹²

2.1.2. The Berne Convention Between 1886 and 1971

The evolution of the *Berne Convention*, which has been revised seven times (the last in 1971), has proceeded along a single axis, namely towards the recognition of new rights. The most fundamental right, the right of reproduction, was mostly taken for granted, as it were, because it was fully incorporated only at the Stockholm Revision of 1967,¹³ although it had existed in national laws for decades before that, starting with the *Statute of Anne of 1710*.¹⁴ It would be untrue, however, to say that the original text did not at least implicitly recognize a right of reproduction. First, the text referred to “infringing copies,” which were “liable to seizure on importation.”¹⁵ It also contained a right of reproduction for newspapers or periodicals but the right only applied if specifically asserted by the author.¹⁶ More importantly, the 1886 text contained a partial definition of “unlawful reproductions to which this Convention applies,” which interestingly, included

11. Landes and Posner provide a classic statement:

Copyright protection [...] trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place. Striking the correct balance between access and incentives is the central problem in copyright law. For copyright law to promote economic efficiency, its principal legal doctrines must, at least approximately, maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection.

William M. Landes and Richard A. Posner, “An Economic Analysis of Copyright Law,” (1989) 18:2 *Journal of Legal Studies* 325–363 at p. 326.

12. *Berne Convention for the Protection of Literary and Artistic Works* (9 September 1886) [*Berne Convention 1886*] in *Berne Convention Centenary* (WIPO, 1986), arts. 5 and 6, at p. 228. The term of protection was ten years. Arguably, a right of reproduction was implied because the original text contained exceptions (see section 2.1.2). Additionally, there is an indirect reference to the public performance of protected works (there is an exclusive right in the public performance of translations) in Article 9.
13. *Berne Convention for the Protection of Literary and Artistic Works* (14 July 1967), 828 United Nations Treaty Series 11850 (revised in Stockholm on 14 July 1967), <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html> [*Stockholm Revision*] at pp. 232–234. It is also at the 1967 Stockholm Revision Conference that the three-step test, to which I return below, made it into the *Berne Convention*.
14. *Copyright Act*, (1709) 8 Anne c. 19, <<http://www.copyrighthistory.com/anne.html>> [*Statute of Anne*].
15. *Berne Convention 1886*, *supra* note 12, art. 12(1), at p. 228.
16. *Berne Convention 1886*, *supra* note 12, art. 7 at p. 228.

unauthorized indirect appropriations of a literary or artistic work of various kinds, such as adaptations, musical arrangements, etc., when they are only the reproduction of a particular work, in the same form, or in another form, *without essential alterations, additions, or abridgements, so as not to present the character of a new original work.*¹⁷

There is much that could be said about this provision. In fact, one of the ways in which I will suggest that copyright law must be substantially revisited is the scope of the right of adaptation (or the right to make “derivative works”). This idea will be partly discussed in the analysis of the impact of the three-step test, below.

Put another way, apart from a limited right of reproduction and a right of public representation for “dramatic and dramatico-musical works,”¹⁸ the most important provision of the original *Berne Convention* was the inclusion of national treatment. There were also references to exceptions, including for the reproduction of “articles of political discussion, [...] news of the day or miscellaneous facts,” which could not be prohibited,¹⁹ and for “use in publications for teaching or scientific purposes, or for chrestomathies.”²⁰ Interestingly, the few exceptions, including the only *mandatory* one (news of the day, facts and “articles of political discussion”)²¹ contained in the *Berne Convention* clearly reflected public interest considerations. In what seems a precursor to debates about the manufacture of tools to circumvent Technical Protection Measures (TPMs),²² a Protocol to the 1886 text provided that the manufacture and sale of “instruments for the mechanical reproduction of musical works in which copyright subsists shall not be considered as constituting an infringement of musical copyright.”²³

The pattern of evolution of the Convention was then fairly linear. For forms of exploitation invented after 1886, new rights were added at successive Revision Conferences, as well as a few exceptions. Without providing a complete list, here are some of the principal milestones.

17. *Berne Convention 1886*, *supra* note 12, art. 10(1) at p. 228 (emphasis added).

18. *Berne Convention 1886*, *supra* note 12, art. 9(2).

19. *Berne Convention 1886*, *supra* note 12, art. 7(2).

20. *Berne Convention 1886*, *supra* note 12, art. 8. This provision allowed only national legislation to maintain exceptions.

21. The other exceptions are permissive.

22. Technological tools used to restrict the use of and/or access to a work.

23. *Berne Convention 1886*, *supra* note 12, *Final Protocol of September 9, 1886*, art. 3.

Table 1. *Evolution of Rights, Limitations and Exceptions in the Berne Convention*²⁴

REVISION OR PROTOCOL (YEAR)	NEW RIGHTS (ARTICLE)	NEW LIMITATIONS OR EXCEPTIONS (ARTICLE)
Paris (1896)	<ul style="list-style-type: none"> • Extension of reproduction right to serial novels (must be asserted, IV) • Right of adaptation applied specifically to transformation of a novel into a theatrical play and vice versa 	
Berlin (1908)	<ul style="list-style-type: none"> • Term of protection of life + 50 years (7) • Broader translation right (8) • Removal of need to assert reproduction right in serial novels and short stories • New right of adaption for mechanical reproduction and public performance using such reproductions (13) • Extension of right to obtain seizure to such adaptations (13(4)) • New right of reproduction and public performance by cinematography (14) 	<ul style="list-style-type: none"> • Possible conditions and restrictions on mechanical reproduction right (13)
Rome (1928)	<ul style="list-style-type: none"> • Moral right (6bis, 9(2), 11bis(2)) • New exclusive right of communication by broadcasting (11bis(1)) 	<ul style="list-style-type: none"> • Possible exclusion from protection of political speeches and speeches in legal proceedings (2bis(1)) • Possible limit on right of reproduction of lectures, addresses and sermons (2bis(2)) • Possible limit on the right of communication by broadcasting, including compulsory licenses (11bis(2))
Brussels (1948)	<ul style="list-style-type: none"> • Broader right of translation (8) • Broader moral right (in quotations, 10(3)) • Extension of public performance right to communications to the public of the performance (11(1)) • Extension of communication right to broadcasting or communication by any other means of wireless diffusion of signs, sounds and images; any communication to the public by wire (cable) or rebroadcasting; and public communication by loudspeaker (11bis(1)) • New right of public recitation (11ter) • Broader right of adaptation, arrangement and other alteration (elimination of reference to new original work as being excluded, 12) • Broader right in cinematographic adaptations (now includes distribution as well as public performance, 14) • New <i>droit de suite</i> (resale right, 14bis(1)) 	<ul style="list-style-type: none"> • Mandatory right of quotation (10(1)) • Possible exception to use excerpts in educational and scientific publications (10(2)); replaces previous possibility of maintaining existing exceptions • Possible exception for the recording, reproduction and public communication of short extracts for the purpose of reporting current events (10bis) • Possible conditions (incl. compulsory license) on broader communication right (11bis(2)) • Possible exception for ephemeral recoding and official archiving (11bis(3)) • Possible limit on resale right (14bis (2))

24. Not included in this table are (a) extensions of the protection to new types of works (photography, works of applied art, cinematography, etc.); (b) definitional changes (what is “published” etc.); (c) dispute-settlement (including a limited right to retaliate for failure to protect); and (d) administrative provisions.

REVISION OR PROTOCOL (YEAR)	NEW RIGHTS (ARTICLE)	NEW LIMITATIONS OR EXCEPTIONS (ARTICLE)
Stockholm (1967)	<ul style="list-style-type: none"> • New/ broader right of reproduction (all categories of works, 9(1)) • News reporting reproduction exception may be excluded by rightsholder (10bis(1)) • Broader right of public performance and communication (reservations no longer mentioned, 11) • New right of public communication of a recitation; right extended to translations (11ter) • Right of performance for cinematographic works extended to communication by wire (14bis) 	<ul style="list-style-type: none"> • Three-step test (9(2)) • Possible limits on protection of official texts (2(4)) • Right of quotation extended to all works but must be compatible with fair practice and the extent of use must be justified by purpose (10(1)) • Modification of educational exception, limited to "by way of illustration" and compatibility with "fair practice" but applied also to broadcasts and recordings (not just publications, 10(2)) • Newspaper / periodicals reproduction exception now applies to broadcasting and communication and to publications on "economic, political or religious topics" (10bis(1)) • Exception for reporting current events by photography, cinematography, broadcasting or communication to the public limited to "the extent justified by the informative purpose" (10bis(2))
Paris (1971)		<ul style="list-style-type: none"> • New Appendix (providing developing countries with the possibility of issuing compulsory reproduction and translation licenses, subject to a complex administrative machinery)

This table shows that new rights were created to recognize that some works, especially theatrical, musical and cinematographic, derive most of their commercial value from their public performance (live) or communication (distance). When exceptions or limitations were provided together with new rights, the exceptions and limitations were often unspecified possibilities offered to national legislators. In some cases (for example, articles 11bis(2) and 13), those limitations have generally taken the form of a compulsory licensing system. In a few cases (for example, the *droit de suite*), the right was introduced into the *Berne Convention* "in principle" but essentially made optional.²⁵

While the evolution of the domain of rights is thus fairly clear, the same cannot be said of the domain of exceptions, which remain generally unregulated space. Most exceptions (excluding the quotation right) are only permissive; that is, Berne member States may enact them.

The pinnacle of this development was the adoption of the three-step test, which began its normative career as a political compromise designed to allow, within limited confines, exceptions to be made by Berne member States to the right of reproduction, but has since become the cornerstone of exceptions to all copyright rights, as well as a number of industrial property rights in the TRIPS Agreement.²⁶ To this rather vague test (as we will see below), one must include the addition at the Stockholm Conference of references to fair practice and the need to justify the extent of a use under an exception to the purpose of the use, which thus arguably adds an evidentiary burden on users.

25. The same technique was used in the TRIPS Agreement, *supra* note 5, which provides, e.g., a right for broadcasting organizations (as a related or neighboring right) at art. 14 but then makes it optional.

26. TRIPS Agreement, *supra* note 5 at arts.13 (all copyright rights), 26(2) (industrial designs), and 30 (patents).

Interestingly, the only mandatory exception is the quotation right, and the only exceptions that have been part of the *Berne Convention* from its inception and through the many revisions are related to news reporting and political discussion. In that sense, and without entering here in the debate as to whether free expression is already fully factored into copyright norms²⁷, or whether constitutional protection of free expression²⁸ might force copyright holders to yield beyond exceptions provided for in national laws and international texts,²⁹ there is a sense in the *Berne Convention* that certain public interest considerations related to information and the press trump exclusive copyright rights.

2.1.3. Limitations and Exceptions are Unregulated Space

What remains after the brief historical overview of the evolution of the *Berne Convention* is the notion that, while rights are generally well defined in the *Berne Convention*, exceptions other than those related to “public information” are unregulated internationally. Additionally, most of those unregulated exceptions are now possibly subject to the further sieve of the three-step test. This raises a number of issues, two of which deserve to be mentioned here. First, normatively, the incremental elevation of the level of protection to encompass new forms of commercial exploitation of (mostly individual) human creativity with unclear or unspecified exceptions makes it harder to define proper boundaries for those rights in a globalized world. The impact of this policy vacuum has been felt very palpably on the internet, where social norms at play are interfacing with exceptions which tend to be unclear at the national level and unspecific internationally. The need for enforcement grows with each degree of separation from those social norms and the resulting lack of internalization.³⁰ In fact, enforcement and the perception that the law is unduly harsh or misdirected in its application will lead to more “infringement.” This in itself is nothing new,³¹ but this fairly obvious observation has taken on new meaning on the internet.

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27. See Michael D Birnhack, “Global Copyright, Local Speech,” (2006) 24:2 *Cardozo Arts & Entertainment Law Journal* 491–547, <http://works.bepress.com/michael_birnhack/1/>; Neil W Netanel, *Copyright's Paradox* (Oxford University Press, 2008) 109–152.
28. See L Ray Patterson, “Free Speech, Copyright and Fair Use,” (1987) 40:1 *Vanderbilt Law Review* 1–66.
29. See Daniel J Gervais, “The Role of International Treaties in the Interpretation of Canadian Intellectual Property Statutes,” in Oonagh E Fitzgerald, ed., *The Globalized Rule of Law: Relationships Between International and Domestic Law* (Irwin Law, 2006) 549–572.
30. See Daniel J Gervais, “The Price of Social Norms: Towards A Liability Regime for File-Sharing,” (2004) 12:1 *Journal of Intellectual Property Law* 39–73, <<http://ssrn.com/abstract=525083>>. As Confucius stated long ago in the *Analects*: “The Master said, ‘If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame. If they be led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good.’” Confucius, *The Analects of Confucius*, trans. James Legge, <<http://etext.library.adelaide.edu.au/c/confucius/c748a/complete.html>>, book II, no. 3 at p. 88.
31. In a speech delivered in the House of Commons (UK) 5 February 1841, <<http://yarchive.net/macaulay/copyright.html>>, Thomas Babington Macaulay declared:

Those who invade copyright are regarded as knaves who take the bread out of the mouths of deserving men. Everybody is well pleased to see them restrained by the law, and compelled to refund their ill-gotten gains. No tradesman of good repute will have anything to do with such disgraceful transactions. Pass this law: and that feeling is at end. Men very different from the present race of piratical booksellers will soon infringe this intolerable monopoly. Great masses of capital will be constantly employed in the violation of the law. Every art will be employed to evade legal pursuit; and the whole nation will be in the plot. [...] Remember too that, when once it ceases to be considered as wrong and discreditable to invade literary property, no person can say where the invasion will stop.

In the 1996 *WIPO Copyright Treaty (WCT)*,³² there are two references to the need for balance, including one in the preamble, which refers back to the *Berne Convention*: “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* [...]”³³ The WCT also incorporates the three-step test as a limit to permitted limitations and exceptions,³⁴ but an Agreed Statement to that Article provides that it “neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the *Berne Convention*.”³⁵ This statement would support the view that the three-step test does not constitute an additional limit on limitations and exceptions. As we will see below, it may, however, serve as a guide to their interpretation.

A second question stems from the lack of clarity itself. For the first time in copyright’s 300-year- history,³⁶ individual end-users, who until recently have rarely had encounters with copyright law (no one need sign a license when buying a copy of a book at a bookstore or a CD at a record store), suddenly have to learn rules about what they can or cannot do legally with pictures, music, videos, images, etc. Many users feel that restrictions on use of copyrighted material on the internet are at odds with established practices of non-commercial “sharing” and reusing of content, often done to create something new—a phenomenon sometimes referred to as the “remix culture”—a form of which is user-generated content (UGC).³⁷ Educators, who draw considerable benefits from the great global library that is the internet, are pointing to the lack of clarity or technological adaptability of exceptions. For example in the Canadian *Copyright Act*, uses covered by educational exceptions are generally limited to the physicality of the use (which must be “on the premises” of the educational establishment).³⁸ Authors and other rightsholders also stand to lose because users may refuse to engage, lest they partake in the emergence of a definitional process that could result in a broadening of the scope of uses that require an authorization (i.e. beyond applicable exceptions and limitations).

The lack of clarity follows in significant part from the fact that limitations and exceptions remain mostly unregulated space at the international level. An empirical study of limitations and exceptions in place in the various national legal systems would provide an interesting mosaic of exceptions, if only because some

32. *WIPO Copyright Treaty* (20 December 1996), <http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html>, (1997) 36 *International Legal Materials* 65 (entry into force on 6 March 2002) [WCT].

33. *WCT*, *supra* note 32, preamble, last paragraph.

34. *WCT*, *supra* note 32, art. 10(2).

35. *WCT*, *supra* note 32, Agreed Statement concerning art. 10, 2d paragraph, in Agreed Statements Concerning the *WIPO Copyright Treaty*, adopted by the Diplomatic Conference on 20 December 1996, <<http://www.wipo.int/treaties/en/ip/wct/statements.html>>.

36. Counted from the *Statute of Anne*, *supra* note 14.

37. I would take issue—but it is not the focus of this paper—with that expression. If original content is generated, then it is generated by an author, not a “user.” All authors are, in one form or another, users of previous “content.” Don’t we all stand “on the shoulder of giants”? Whether reuse resulting in the creation of a new copyright work amounts to the creation of a derivative work—and then whether it is covered by an exception (such as fair use in the United States)—are distinct issues.

38. *Copyright Act*, (1985) *Revised Statutes of Canada* ch. C-42, <<http://laws.justice.gc.ca/en/C-42>> ss. 29.4, 29.5, 29.6 and 30.3 [*Copyright Act*].

are expressed in ways that are very specific,³⁹ while others are there essentially to provide criteria and guidance to courts called upon to decide whether a particular use is infringing.⁴⁰ If a common denominator could be found, this exercise might provide a basis to argue that a “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding [the] interpretation [of the *Berne Convention*]” has emerged according to article 31(3)(b) of the *Vienna Convention*.⁴¹

Copyright, whether viewed as an economic lever, a utilitarian construct,⁴² or a natural rights-based doctrine, intrinsically requires balance to achieve its stated objective. From an economic perspective, the protection needs to be sufficient to generate new works and ensure optimal (not necessarily maximal) commercial dissemination (where applicable) without endangering the creation of new works or generating unreasonable welfare costs. A utilitarian analysis leads one to a similar conclusion: protection is required to achieve the objective of generating robust copyright industries and well-functioning markets for informational and ideational objects, including public information and entertainment without stifling the emergence of new works or access. Victor Hugo argued that copyright and the public interest must go hand-in-hand, and that protection must go only as far as the public interest (which includes the protection of authors) will dictate.

39. For example, s. 29.5 of the *Copyright Act*, *supra* note 38:

It is not an infringement of copyright for an educational institution or a person acting under its authority to do the following acts if they are done on the premises of an educational institution for educational or training purposes and not for profit, before an audience consisting primarily of students of the educational institution, instructors acting under the authority of the educational institution or any person who is directly responsible for setting a curriculum for the educational institution:

(a) the live performance in public, primarily by students of the educational institution, of a work.

Another example might be Article 6 of EC, *European Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs*, [1991] *Official Journal of the European Union* L 122, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31991L0250:EN:HTML>> [*Computer Programs Directive*], which provides a very specific right to decompile (reverse engineer) software.

40. A good example of course is s. 107 of the *US Copyright Act*, *supra* note 8, which provides four criteria, codified in 1976 from case law, to decide whether a particular use which is otherwise infringing is “fair use.” The criteria are:

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

41. *Vienna Convention on the Law of Treaties* (23 May 1969), <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>, 1155 *United Nations Treaty Series* 331, (1969) 8 *International Legal Materials* 679 (entry into force 27 January 1980) [*Vienna Convention*].

42. Which I see as having a broader, if less measurable, purview than economic theory.

Copyright also is intended to support a system, a macrocosm, in which authors and publishers compete for the attention and favor of the public. [...] The argument for copyright here, to be sure, is an argument of utility—but not mere economic utility. Utility is found in the fostering of a pluralism of opinion, experience, vision, and utterance within the world of authors. [...] [O]ur freedom depends not only on freedom for a few, but also on variety, regardless of the ultimate commingling of truth and error. Copyright fosters that variety.

David Ladd, “The Harm of the Concept of Harm in Copyright,” (1982-1983) 30 *Journal of the Copyright Society of the USA* 421–432, at pp. 427–428. Mr. Ladd was the Register of Copyrights of the United States from 1980 until 1985.

2.1.4. Human Rights Analysis

A human rights analysis would lead one to the same conclusion of a need for balance. As René Cassin noted, "human beings can claim rights by the fact of their creation."⁴³ Article 27 of the *Universal Declaration on Human Rights* (UDHR),⁴⁴ which saw the light of day 238 years after the *Statute of Anne*, protects both the authors' right to the protection of their moral and material interests resulting from scientific, literary or artistic production and users' rights freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. The objective of protection embraces, at least indirectly, the moral desert theory (protection of interests resulting from scientific, literary or artistic production), while the objective of access is expressed teleologically as a tool to allow everyone to enjoy the arts and to share in scientific advancement and its benefits.

A human rights approach brings values to the copyright system. For example, the emphasis on a somewhat amorphous right to promote culture and cultural diversity complements the economic analysis and theory as a policy-making machine. As Professor Julie Cohen suggests, copyright needs a substantive balance, which

concerns the ways in which copyright's goal of creating economic fixity must accommodate its mission to foster cultural play. Economic analysis can help us to understand some of the considerations relevant to the balance between economic fixity and cultural mobility, but both valuation and incommensurability problems prevent a comprehensive summing of the relevant costs and benefits. Modeling the benefits of artistic and intellectual flux is hard to do.⁴⁵

Copyright's "mission to foster cultural play" may then be read against the backdrop of articles 27(1) of the UDHR and 15 of the *International Covenant on Economic, Social and Cultural Rights*,⁴⁶ which enshrine the right to participate in cultural life. "Cultural Life must be regarded as a benefit to which every member of the community is entitled. Culture must not be viewed as an esoteric activity of a superior social elite."⁴⁷

From copyright's viewpoint, culture is a two-way street: it provides the essential substratum upon which all creators draw to create, and their creations in turn feed and expand the culture. The phenomenon has taken on an additional layer of complexity with the globalization of Web culture, but a lot of cultural resonance remains local. "Individual creators begin with situatedness and work through culture to arrive at the unexpected."⁴⁸

43. Quoted in M Vivant, "Authors' Rights, Human Rights?", (1997) 174 *Revue internationale du droit d'auteur* (RIDA) 60 at p. 86.

44. *Universal Declaration of Human Rights* (10 December 1948), UN, *General Assembly Resolution 217A* (III), <<http://www.un.org/Overview/rights.html>>, (1948) *United Nations Doc. A/810* art. 27 at p. 71.

45. Julie Cohen, "Creativity and Culture in Copyright Theory," (2007) 40:3 *University of California Davis Law Review* 1151–1205, <<http://ssrn.com/abstract=929527>> at p. 1196.

46. *International Covenant on Economic, Social, and Cultural Rights*, (16 December 1966) UN, *General Assembly Resolution 2200A* (XXI), <http://www.unhcr.ch/html/menu3/b/a_cescr.htm>, 993 *United Nations Treaty Series* 4 (entry into force 3 January 1976) art. 15.

47. Yoram Dinstein, "Cultural Rights," (1979) 9 *Israel Yearbook on Human Rights* 58–81, at p. 76.

48. Cohen, "Creativity and Culture" *supra* note 45 at p. 1183.

Copyright and culture both need new works to be created, though for different reasons (the former to justify its existence, the latter to grow), and to be created those new works need existing works. Conceptually, this can be framed as a “freedom to create,” which, to a certain extent at least, is the freedom to copy. Whether copying constitutes copyright infringement is a question of degree. Professor François Dessemontet has suggested a list of factors to be taken into account: (a) whether the work copied from fades away in the new work; (b) whether the first work is recognizable and the degree to which it is; and (c) the proportionality of “newness” (presumably assessed quantitatively but also, and perhaps mostly, qualitatively) to the amount that is borrowed.⁴⁹

Human rights arguably restore a degree of authorial dignity to copyright. “[H]uman beings have fundamental interests, which should not be sacrificed for public benefit, and [...] society’s well-being does not override those interests. Protecting those interests is deemed vital for maintaining individual autonomy, independence, and security.”⁵⁰ Human rights, in providing a teleological framework for exceptions, can also guide courts⁵¹ in interpreting whether a particular use should be covered by an unclear exception, and assist policy makers in designing new exceptions. One might think this impossible, owing to the presence of the three-step test “straitjacket.” However, the third step of the test, as discussed below, has been interpreted as allowing public interest considerations (i.e. what constitutes an allowable “justification” for the exception), and human rights principles might thus inform the determination of the proper scope of exceptions. The UDHR, in particular, allows exceptions that demonstrably augment access, where such access (enjoyment) is not commercially reasonable or possible, and the right to reuse and thereby participate in the cultural life of the community. This seems to justify both *consumptive use* exceptions where commercial access is undesirable or impracticable, such as those in the Appendix to the *Berne Convention* for access in developing countries, and exceptions for *transformative uses* (such as, but not limited to, parody), the principal element of the United States fair use doctrine.⁵²

If, then, copyright *intrinsically* must be balanced, how should this balance be achieved? Before answering this question, one must recognize that copyright is facing a number of *extrinsic* pressures that should ideally result in new equilibria being progressively established. Copyright’s sparring with free expression is not recent.⁵³ Nor is the well-established need to limit copyright when the public’s “right to information” is involved, as the *Berne Convention* recognizes in a

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49. François Dessemontet, “Copyright and Human Rights,” in Jan Kabel, ed., *Intellectual Property and Information Law: Essays in Honour of Herman Cohen Jehoram* (Kluwer, 1998) 113–120, <<http://www.unil.ch/webdav/site/cedidac/shared/Articles/Copyright%20&%20Human%20Rights.pdf>>.
50. Orit Fischman Afori, “Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law,” (2003–2004) 14:2 *Fordham Intellectual Property, Media & Entertainment Law Journal* 497–565, <<http://ssrn.com/abstract=1089376>> at p. 503.
51. As was done, e.g., by French courts. See Edelman, Note, (1989) 116:4 *Journal du Droit International* 1005; Pierre Sirinelli, Note, (1989) 142 *Revue Internationale du Droit d’Auteur* 301–324.
52. Except, arguably, between *Sony Corp. of America v Universal City Studios, Inc.* (USA SC, 1984), <<http://supreme.justia.com/us/464/417/case.html>>, 464 *United States Reports* 417, and *Metro-Goldwyn-Mayer Studios Inc. v Grokster, Ltd.* (USA SC, 2005), <<http://supreme.justia.com/us/545/04-480/case.html>>, 125 *Supreme Court Reporter* 2764. *Sony* was interpreted (wrongly in my view) as deciding that private uses were fair uses. I read *Sony* as teaching that some forms of time-shifting copying may be fair use. In *Grokster*, the US Supreme Court went back to traditional fair use jurisprudence and focused on transformative—not purely consumptive—uses.
53. Birnhack, “Global Copyright,” *supra* note 27; Netanel, *Copyright’s Paradox*, *supra* note 27.

number of ways.⁵⁴ But copyright must now face other rights. It is not or no longer viewed as a closed system with built-in exceptions such as fair use or fair dealing sufficient to ensure the right balance (at least not completely). To mention but two examples, copyright enforcement vis-à-vis end-users (for example, to obtain a subscriber's identity from an Internet Service Provider) requires a normative battle with the right to privacy;⁵⁵ and TPMs limiting use and enjoyment of consumer goods may involve violation of consumer protection legislation (for example, if the restriction is insufficiently explained at the time of sale).

A principled approach to the determination of limitations and exceptions must factor in the need for balance against the backdrop of the principles and values that inform the intrinsic public interest balance of copyright, its utilitarian/economic function, and the recognition of the extrinsic factors that affect the realm of copyright.

2.2. Copyright in the Private Sphere

At the international level, but also in many national laws, limitations and exceptions appear as an incrementally developed patchwork of historical accretions, a patchwork woven reactively or in response to poorly defined special interests or practical constraints (such as ephemeral recording). Some exceptions may indeed have a solid normative footing, but not a uniform one. Private use (which will be discussed separately in this section) provides a good example of this for many reasons: its multifaceted normative core (human right⁵⁶ and/or constitutional rights,⁵⁷ consumer protection, and as an inherent limit to the reach of copyright),⁵⁸ its history in both Anglo-Saxon copyright and authors' rights traditions, and its applicability to the internet.

54. Birnhack, "Global Copyright," *supra* note 27; Netanel, *Copyright's Paradox*, *supra* note 27 and accompanying text.

55. See Pamela Samuelson, "Privacy as Intellectual Property?," (2000) 52:5 *Stanford Law Review* 1125-1173, <<http://people.ischool.berkeley.edu/~pam/papers.html>> at p. 1128:

While utilitarian considerations weigh heavily in the minds of many Americans who have written on information privacy issues, noneconomic considerations provide an equally or more compelling rationale for legal protection for personal data in cyberspace, according to other commentators. [For t]hose who conceive of personal data protection as a fundamental civil liberty interest, essential to individual autonomy, dignity, and freedom in a democratic civil society, information privacy legislation is often viewed as necessary to ensure protection of this interest.

56. EC, *Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950), <<http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>>, ETS No. 155, art. 8; *International Covenant on Civil and Political Rights* (16 December 1966), UN, *General Assembly Resolution 2200A (XXI)*, <http://www.unhcr.ch/html/menu3/b/a_ccpr.htm>, 999 *United Nations Treaty Series* 187 (entry into force 23 March 1976) arts. 17 and 19.

57. For example in the United States, see Julie E Cohen, "A Right to Read Anonymously: A Closer Look at Copyright Management in Cyberspace," (1996) 28:4 *Connecticut Law Review* 981-1039, <<http://ssrn.com/abstract=17990>>; Julie E. Cohen, "DRM & Privacy," (2003) 18:2 *Berkeley Technology Law Journal* 575-617, <<http://ssrn.com/abstract=372741>>. In "DRM & Privacy," Professor Cohen states at pp. 576-577:

Properly understood, an individual's interest in intellectual privacy has both spatial and informational aspects. At its core, this interest concerns the extent of "breathing space," both metaphorical and physical, available for intellectual activity. DRM technologies may threaten breathing space by collecting information about intellectual consumption (and therefore exploration) or by imposing direct constraints on these activities.

Furthermore, she argues that there may be harm in allowing individuals to waive or sell usage data (via a DRM system) if it amounts to waiving their intellectual privacy, "DRM & Privacy," at p. 609.

58. See Alain Strowel, "Droit d'auteur et accès à l'information: de quelques malentendus et vrais problèmes à travers l'histoire et les développements récents," (1999) 12:1 *Les Cahiers de propriété intellectuelle* 185-208, at p. 198, where Professor Strowel considers the defence of the private sphere as one of the three main justifications for exceptions to copyright, the other two being circulation of information, and cultural and scientific development.

To make matters more complex still, the issue has taken on a different hue on the internet. Historically, copyright was a tool designed to support contractual relations between professionals (authors, publishers, producers, broadcasters, etc.) or to fight professional pirates. It has now become a tool that rightsholders use against end-users, including consumers.⁵⁹ This use has a dual purpose: ensuring that end-users pay a fee for the material they use (access through authorized sources), and preventing the transfer of the material by those “end”-users to other users (in other words, preventing them from becoming intermediaries).

On the other side of this legal and technological tug-of-war, individual users want to harness the enormous capabilities of the internet to access, use, and disseminate information and content. The demand is large and ever increasing.⁶⁰ Internet technology has responded to this huge pull by providing the initial adequate technological means. It has also responded to legal and technological barriers by providing new tools: close Napster and peer-to-peer (P2P)⁶¹ emerges. Try to shut P2P down, as was done in the recent wave of subpoenas and law suits against individual file traders and, quite predictably, anonymous file trading systems emerge, thus defeating subpoenas served on the ISP to find out the identity of subscribers.⁶²

The fact that copyright's power to exclude has not, historically, extended its reach to individual end-users was never formulated with a high degree of precision in copyright statutes and even less so in international treaties. It is, however, a fundamental concept of many national copyright systems, including

59. See *BMG Canada Inc. v John Doe*, 2004 FC 488, <<http://reports.fja.gc.ca/en/2004/2004fc488/2004fc488.html>>, 2004:3 *Federal Court Reports* 241 (upheld on different grounds by 2005 FCA 193).

60. Richard Stallman wrote a perceptive piece in 1996:

The Internet is relevant because it facilitates copying and sharing of writings by ordinary readers. The easier it is to copy and share, the more useful it becomes, and the more copyright as it stands now becomes a bad deal.

This analysis also explains why it makes sense for the Grateful Dead to insist on copyright for CD manufacturing but not for individual copying. CD production works like the printing press; it is not feasible today for ordinary people, even computer owners, to copy a CD into another CD. Thus copyright for publishing CDs of music remains painless for music listeners, just as all copyright was painless in the age of the printing press. To restrict copying the same music onto a digital audio tape does hurt the listeners, however, and they are entitled to reject this restriction.

We can also see why the abstractness of intellectual property is not the crucial factor. Other forms of abstract property represent shares of something. Copying any kind of share is intrinsically a zero-sum activity; the person who copies benefits only by taking wealth away from everyone else. Copying a dollar bill in a color copier is effectively equivalent to shaving a small fraction off of every other dollar and adding these fractions together to make one dollar. Naturally, we consider this wrong. By contrast, copying useful, enlightening or entertaining information for a friend makes the world happier and better off; it benefits the friend and inherently hurts no one. It is a constructive activity that strengthens social bonds.

Richard Stallman, “Reevaluating Copyright: The Public Must Prevail,” (1996) 75:1 *Oregon Law Review* 291–297, <<http://www.gnu.org/philosophy/reevaluating-copyright.html>> at p. 294.

61. A type of network in which any computer can act as both a server (by providing access to its resources to other computers) and a client (by accessing shared resources from other computers).

62. The third generation of P2P software has anonymity features built in. Examples include ANts P2P, RShare, Freenet, I2P, GUNet and Entropy. Anonymity tools use a variety of routing and rerouting techniques. The user computer never has a direct link with the host. Instead, the information is relayed over several intermediate clients and each client only knows the IP address of its immediate neighbors, but not the IP of the original host. See <http://en.wikipedia.org/wiki/Talk:Anonymous_P2P>. This obviously makes it much harder for someone to identify who is downloading and offering files. Combined with strong encryption, traffic “sniffing” has also become harder. Everyone loses in this scenario because it becomes even more difficult to know what is happening on P2P networks. See also *BMG Canada Inc. v John Doe*, *supra* note 59 and, in the United States, *Recording Industry Association of America, Inc. v Verizon Internet Services* (USA DC Cir, 2003), <<http://pacer.cadc.uscourts.gov/docs/common/opinions/200312/03-7015a.pdf>>, 257 *Federal Supplement* 2d 244.

Belgium⁶³ and Germany. In Germany, one of the leading scholars on copyright and patent law, Josef Kohler, argued that one should not focus on the technical nature of the use, but its impact and intent.⁶⁴ This affected several European national systems. In the words of Professor Hugenholtz,

[C]opyright protects against acts of unauthorized communication, not consumptive usage [...]. [T]he mere reception or consumption of information by end-users has traditionally remained outside the scope of the copyright monopoly. Arguably, the right of privacy and the freedom of reception guaranteed in Articles 8 and 10 of the European Convention on Human Rights would be unduly restricted if the economic right encompassed mere acts of information reception or end use.⁶⁵

This strong tradition to protect the private sphere of uses (i.e. when the use is truly private and not related to professional or commercial activities) might explain why Germany was the first country to introduce a statutory license for private copying in 1965.⁶⁶ However, in a 1955 case, the German Supreme Court recognized that the protection of the private sphere was not absolute, especially if the effects of what was happening inside the sphere had an impact on commercial exploitation outside of it.⁶⁷

This crucial role of private use is also illustrated dialectically in the Swiss *Copyright Act of 1992*,⁶⁸ the development of which was informed doctrinally by the Germanic approach to authors' rights. The Act contains a very broad right to prevent use of a copyrighted work in Article 10(1), which reads as follows: "The author shall have the exclusive right to decide whether, when and how his work is to be used."⁶⁹ However, Article 19 provides that "[p]ublished works may be used for private purposes."⁷⁰

Canada's private copying regime, like Germany's, is a middle ground between the protection of the private sphere of users and the rights of authors, especially in the face of exponential possibilities to make private digital copies.⁷¹

63. See Strowel, "Droit d'auteur et accès à l'information," *supra* note 58.

64. Josef Kohler, *Das Autorrecht: eine zivilistische Abhandlung; Zugleich ein Beitrag zur Lehre vom Eigentum, vom Miteigentum, vom Rechtsgeschäft und vom Individualrecht* (Gustav Fischer, 1880), <<http://dlib-pr.mpiet.mpg.de/m/kleio/0010/exec/books/%22160676%22>> at p. 230 [Josef Kohler, *Author's Right: A Civil Law Treatise. Which is also a contribution to the theory of property, joint property, legal transactions and individual rights* (Published by Gustav Fischer, 1880)].

65. P Bert Hugenholtz, "Caching and Copyright: The Right of Temporary Copying," (2000) 22:10 *European Intellectual Property Review* 482-493 at pp. 482, 485-486. Early version available at <<http://www.ivir.nl/publications/hugenholtz/PBH-DIPPER.doc>>. See also JH Spoor, *Scripta manent* (Amsterdam, 1976), at pp. 137-138.

66. See Katerina Gaita and Andrew Christie, "Principles or Compromise: Understanding the Original Thinking Behind Statutory License and Levy Schemes for Private Copying," 2004:4 *Intellectual Property Quarterly* 422-447, <<http://www.ipria.org/publications/workingpapers/IPRIA%20WP%2004.04.pdf>>.

67. *GEMA v Grundig*, Bundesgerichtshof [BGH] (German Federal Supreme Court, 18 May 1955), 1955 *Gewerblicher Rechtsschutz und Urheberrecht* [GRUR] 492 (492) (F.R.G.).

68. Switzerland, *Federal Law on Copyright and Neighboring Rights (Federal Copyright Law)* (9 October 1992), <http://www.wipo.int/clea/docs_new/en/ch/ch004en.html>, (1993) *Recueil Officiel* 1798 [English translation by WIPO].

69. Switzerland, *Federal Copyright Law*, *supra* note 68. This broad "use right" is explicated using traditional terminology (reproduction, communication, etc.) in art. 19(2).

70. Switzerland, *Federal Copyright Law*, *supra* note 68. The exception is extended to copies for the user manufactured by persons other than the user and libraries that make copying apparatus available to their users. However, the exception does not apply to computer programs (arts. 19(2) and (3)).

71. Andrew Christie, "Private Copying and Levy Schemes: Resolving the Paradox of Civilian and Common Law Approaches," in David Vaver and Lionel Bently eds. *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish* (Cambridge University Press, 2004) 248-258, <<http://srn.com/abstract=690521>>.

Against this backdrop, can the principle of “free” private use be exported *tel quel* to the internet? It was not an obvious step for copyright on the internet to try to reach end-users who do not consider themselves to be pirates and who do not act with the intent of commercial gain. But as the Ninth Circuit noted in *Napster*,⁷² accessing a commercial copy for free, even if for use in the private sphere, may be analogized to a commercial use, if the copy should ordinarily have been purchased.⁷³ Put another way, if the main purpose of the private use is to avoid “paying the customary price,”⁷⁴ then the nature of private use has indeed changed.

In fact, this is exactly what has changed: private use may now be seen as a means of access to a commercial product, whereas its original purpose was to allow use in private and/or for personal purposes *after* access. This may be where the conceptual jump requires what André Lucas referred to as the need for a new balance, one that requires private use to be distinguished from “private access.”⁷⁵ At the level of principles, use of a copy once it has entered into and stays in the private sphere is one thing, and there are good normative reasons why it should remain free, in particular copyright’s balance against the right of privacy, whether as a constitutional right on the national level or as a principle of international human rights law. But private use applied to access to copies designed to circumvent commercial distribution channels is a different issue. There may be other reasons not to sue individual consumers, and the fact that the P2P phenomenon has thus far proven impossible to stop, and that there are good reasons to think it will continue that way, may well be a reason to shift the thinking towards the establishment of a liability regime.⁷⁶ However, this type of access is not “private use,” as the term has been used historically.

As Professor Paul Goldstein has noted, the fact that “performances of literary and artistic works migrate from public places—in which authors are compensated—to private places—in which they are not—[and hence] the failure to compensate for private use can seriously undermine the economics of authorship.”⁷⁷ If that is the case, it may well be that the changes brought about by the internet require, once the three-step test is factored into the equation, the establishment of a compensation mechanism. However, at the level of principles, the private use sphere should remain free of the reach of the exclusive right to prohibit. This would be subject to TPMs, but the imposition of an obligation to remove TPMs in order to empower the private use is a valid policy consideration, and the principles proposed below include a provision to that effect, subject to a proportionality test.

72. *A&M Records, Inc. v Napster, Inc.*, (USA 9th Cir, 2001), <[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/89AE13D39D4D4BAA88256B8700619C17/\\$file/0115998.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/89AE13D39D4D4BAA88256B8700619C17/$file/0115998.pdf?openelement)>, 239 *Federal Reporter* 3d 1004 [Napster].

73. See *Napster*, *supra* note 72 and Jane C Ginsburg, “Copyright Use and Excuse on the Internet,” (2000) 24 *Columbia-VLA Journal of Law & the Arts* 1–45 < <http://ssrn.com/abstract=239747>>.

74. See *Harper & Row, Inc. v Nation Enterprises* (USA Sup Ct, 1985), <<http://supreme.justia.com/us/471/539/case.html>>, 471 US 539, 562.

75. André Lucas, “Summary of the Proceedings of the Symposium,” in *WIPO Worldwide Symposium on the Future of Copyright and Neighboring Rights*, WIPO Publication No. 731 (Geneva: WIPO, 1994), at pp. 276–277.

76. See Gervais, “The Price of Social Norms,” *supra* note 30.

77. Paul Goldstein, “Copyright and Authors’ Rights in the Twenty-First Century,” in *WIPO Worldwide Symposium on the Future of Copyright and Neighboring Rights*, *supra* note 75 at p. 264.

2.3. Towards Principles for Limitations and Exceptions

What the above analysis suggests is that a proper design of limitations and exceptions must be better conceptualized and informed both by the need to maintain the intrinsic balance of copyright—a balance that may have been overlooked, at least normatively, in some of the revisions of the *Berne Convention*—and by the need to ensure copyright's compatibility with external norms, such as privacy, the right to free expression, information, culture, education and the more controversial right to development.⁷⁸ It is not possible to examine each of these rights in detail, but as the purpose of this article is to contribute to the development of a principled conceptualization for copyright limitations and exceptions at the international level, it will be assumed that these norms form part of the international legal order. As the Appellate Body of the World Trade Organization recognizes, these rights are indeed directly relevant in interpreting WTO Agreements, including the TRIPS Agreement.⁷⁹

2.3.1. A Conceptualization of Limitations and Exceptions

Any conceptualization must recognize that limitations and exceptions fulfill multiple purposes and functions. As a result, they are expressed in a variety of ways, which makes comparison and understanding more challenging. I suggest, however, that they can be organized according to the following categorization: whether they apply to some categories of users; whether they apply to some categories of use; whether they apply to some categories of countries; whether they apply to some categories of authors; and finally, whether they apply to some categories of works. A tabular illustration illuminates this approach more clearly.

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78. Ruth Okediji, "The Limits of Development Strategies at the Intersection of Intellectual Property and Human Rights," in Daniel Gervais, ed., *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era* (Oxford University Press, 2007) 355–384; and Robert J Gutowski, "The Marriage of Intellectual Property and International Trade in the TRIPS Agreement: Strange Bedfellows or a Match Made in Heaven?" (1999) 47 *Buffalo Law Review* 713–761 at pp. 713, 715.
79. The WTO Appellate Body found that the WTO Agreement "is not to be read in clinical isolation from public international law." *United States—Standards for Reformulated and Conventional Gasoline*, (19 April 1996) WTO Doc. WT/DS2/AB/R (Appellate Body Report), <http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDDFDOCUMENTS%2FT%2FWT%2FDS%2F2ABR%2EWPF%2EHTM> at para. 3, part B. This principle was reflected in this and subsequent decisions, which however relied, at a very general level only, on the case law of other international tribunals, namely the International Court of Justice, the European Court of Human Rights cases and the Inter-American Court of Human Rights, to interpret the provisions of the WTO Agreement. See *Japan – Taxes on Alcoholic Beverages*, (4 October 1996) WTO Doc. WT/DS8/AB/R (Appellate Body Report), <http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDDFDOCUMENTS%2FT%2FWT%2FDS%2F8ABR%2EWPF%2EHTM> at part D, footnote 19.

Table 2. Possible Principles for a Conceptualization of Limitations and Exceptions

CATEGORIZATION	CATEGORIES	INTERNAL BALANCE	EXTERNAL NORMS
By type of user	Limited ability users	Braille copies	Non-discrimination
	Consumers	Private sphere/ difficult enforcement	Privacy, consumer protection
	Government		Education, culture, information (national security)
	Institutional ⁸⁰		Education, culture, information
	All	Reuse by quotation	Information, free expression
By type of use	Consumptive	Private sphere/ difficult enforcement	Privacy, consumer protection, education, information, culture
	Creative/transformativ	Limit right to prohibit when beyond need; public interest balance	Free expression, culture, information
	Informational	Public interest balance	Information, free expression
By type of country	Developing country		Right to development; education
By type of author	Governmental works	No incentive needed	Information
By type of work	Computer software	Public interest function does not require prohibition of reverse engineering ⁸¹	Competition
	Printed publications	Access does not interfere with copyright's function	Education, information

It should also be pointed out at this juncture that international norms concerning limitations and exceptions can be categorized by their *legal nature*. Some are mandatory (for example, the quotation right in the *Berne Convention*); others are declaratory in nature and designed to signal the compatibility of certain limitations and exceptions with the international legal order. This, however, is not directly relevant in examining the underlying principles, though it becomes relevant when implementing the principle.

Before proceeding from the above conceptualization systematically, the reader no doubt has noticed that the categorization *not* found above is by *type of right*. Downstream, such a categorization would be useless because (a) many uses do not involve a single right, but rather several (for example, uploading material to the internet may involve the right of reproduction, the right of public performance/communication, the right of display, where applicable, and the right of adaptation);⁸² (b) now that copyright is increasingly applied to end-users, it has become even more illusory to expect that individual consumers can parse which right or sub-right fragment they may need. Upstream, I suggest that it is an *unprincipled* approach to make an exception dependent on the technical nature of the right. Put differently, as a matter of principle the legislator should not grant a limitation or exception because it is, for example, the right of reproduction that is involved rather than the right of adaptation, but should do

80. For example, libraries, museums, archives and educational institutions.

81. See Pam Samuelson and Suzanne Scotchmer, "The Law & Economics of Reverse Engineering" (2002) 111 *The Yale Law Journal* 1575-1663, <<http://yalelawjournal.org/images/pdfs/200.pdf>>.

82. Even if only one right is involved (e.g. reproduction), that right itself may have been fragmented contractually by, for example, the type of market, user, language, or country.

so because of the underlying public interest (both as a matter of internal copyright balance and to reflect external normative forces and the search for new equilibria). This means that limitations and exceptions should be expressed in terms that are *independent of the technical nature* of the use (reproduction, communication, performance, etc.) unless this is contextually required. For instance, use in the private sphere (whether expressed as private performance, private copying, or teleologically as, say, private study) should not be subject to exclusive copyright rights.

This approach is fully supported by the three-step test, which is the filter through which limitations and exceptions must pass to be or remain TRIPS-compatible. The test, as we will see in the next section, is effects-based and independent of the technical mode of use (i.e., not linked to the rights fragment(s) that may be affected by the limitation or exception).

2.3.2. Proposed Principles

As I have just argued, limitations and exceptions should be expressed in terms of their effects in order to allow policy makers to align limitations and exceptions with underlying objectives. However, because rights are still dominantly expressed in terms of technical acts such as reproduction, performance, or communication (though contracts rarely do: a right to use a film for broadcasting is probably unlikely to specify how many acts of reproduction, communication, etc., can be done; it will authorize the “broadcasting” of a work for a period of time and in or to a specific market), it may still be necessary when drafting national laws to express them in such terms. Even then, a paradigmatic shift in the expression of limitations and exceptions (a) may be better to achieve the policy alignment; and (b) would provide courts with an enhanced toolbox to ensure proper application in each case.

It is not possible in this paper to provide a complete set of exceptions, but international rules should allow exceptions and limitations in the cases identified in Table 2. The underlying principles, if they can be grouped at a higher level of abstraction, probably would look like this:

- a) Copyright rights should not prohibit use in the private sphere of users;⁸³
- b) Copyright rights should not prohibit access in countries or to groups of users who have otherwise no reasonable means of access to copyright content;⁸⁴
- c) Copyright rights should not prevent educational uses that cannot be reasonably licensed;⁸⁵

83. If a need for enforcement arises, it will be because the user has stepped out of her private sphere and her actions have reached a level where a commercial impact is perceptible. From an effects-based perspective, it should not matter which type of content is used or whether the issue is space, time, or format-shifting, if there is no significant market in selling (“selling” is used here generically, and not to refer to copying, performing, etc.) additional copies when compared to the burden on the consumer.

84. This would include educators in less economically developed areas.

85. From an effects-based perspective, it should not much matter whether the teaching is done “on the premises” or at a distance. As a public interest matter, it may, however, matter whether or not the teaching is done for profit. “Reasonably licensed” in this context refers to the availability of a transaction at a price and with conditions including transaction costs that one would consider ordinary in light of market practices. The concept of “accepted market practices” in competition (antitrust) law might be a useful reference.

- d) Copyright rights should not prohibit access by institutions whose purpose is to document and preserve cultural assets;⁸⁶
- e) Copyright rights should not prevent uses and reuses that serve the public interest in free expression, including the creation and dissemination of culture and information. This includes quotation, parody, and other similar “transformative” uses.⁸⁷ It also includes research,⁸⁸ and criticism and review (subject to (i) below);
- f) Courts should have the latitude not to apply exclusive rights when they interfere unreasonably with the right of information or the rights of a free press;⁸⁹
- g) Copyright rights should not prevent governmental use in the public interest (though generally with compensation). Internal and commercial uses by the government would, however, remain subject to exclusive rights;
- h) Copyright rights should not prevent access and (at least non-commercial) use of governmental publications of a general nature;⁹⁰
- i) All limitations and exceptions, except arguably with respect to (e) above, may be limited to uses that will not demonstrably affect the normal commercial exploitation and to non-commercial uses;
- j) In cases where the public interest justifies the exception but it will cause a loss of income, a compensation mechanism should be in place.

In terms of enforcement and procedure, most exceptions do not require specific mechanisms, and no new *international* norms seem necessary in this area. Users usually invoke limitations and exceptions as defenses to infringement actions. Where available, declaratory rulings may also be used. Logically, uses covered by an exception should not be “circumvented” by TPMs. This requires a governmental mechanism (courts or a specialized agency or tribunal⁹¹) to order that a TPM be removed in whole or in part in cases where the use permitted by the exception or limitation is not possible. The competent authority should, however, be allowed to refuse the remedy and perhaps offer compensation instead (for example, in cases where unlocking the TPM is liable to cause harm

86. Based on the three-step test, the focus should not be on considerations such as whether one or two copies are made, in which format, and whether they are permanent or not, but rather on modes of public access to those copies that may interfere with normal commercial exploitation.

87. In the wording of the initial versions of the *Berne Convention*, namely works that “*present the character of a new original work.*” This is a good start for an international definition of what is a “transformative” (as opposed to a mere derivative) work. However, “transformative” should probably be measured using a more complex test of societal value and the impact of the commercial exploitation on the work from which it is derived.

88. As a result of the application of the three-step test, “research” could include some communication among a research team but not public dissemination of results using copyrighted material belonging to third parties.

89. This right, perhaps the most foundational of democratic systems and the most potentially transformative in fledgling democracies, should be of paramount importance, though the commercial nature of the media should not be completely ignored. This equilibrium is reflected by the use of the term “reasonably” and the inherent content of the right of information.

90. “Of a general nature” in this context means publications not specifically destined for a market constituted mainly by users who benefit from the exception.

91. For example, the “*Autorité de régulation des mesures techniques,*” established under art. L. 331-17 of the *French Intellectual Property Code*, as amended by the *Loi n° 2006-961 du 1er août 2006 relative au droit d’auteur et aux droits voisins dans la société de l’information*, (3 August 2006) no. 178 *Journal officiel de la République Française* p. 11529. <<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000266350&dateTexte=>>.

to the rightsholder and this harm outweighs the user's interest in unlocking a particular work for a given purpose). However, enforcement is also linked to statutory damages. The application of this type of damages, while it is necessary in commercial piracy cases to ensure deterrence, should not interfere with *bona fide* recourse to exceptions developed under the above set of principles.

Some limitations and exceptions in national and regional legislation are worded in terms that mirror some of the above principles fairly closely (for example, private use). Clearly, however, a number of existing limitations and exceptions may serve multiple purposes. For example, reverse engineering of computer programs is necessary to allow research and to perform certain private uses. This follows from the fact that exceptions are expressed in terms of the technical act (for example, decompilation/reverse engineering) and not their purpose. Such exceptions need not be changed, though their interpretation and application in a particular case should be informed by the underlying purpose they are designed to achieve.

★

3. THE THREE-STEP TEST

3.1. *Historical Background*

AT THE 1967 STOCKHOLM *BERNE CONVENTION REVISION CONFERENCE*, a general rule known as the "three-step test" was added to the *Berne Convention* to limit exceptions to the right of reproduction—a right which was added to the Convention at the same Revision Conference. According to the Study Group set up by BIRPI⁹² (the predecessor of the World Intellectual Property Organization (WIPO))⁹³ and the Swedish government to prepare the Conference, because the right of reproduction was added to the Convention, a "satisfactory formula would have to be found for the inevitable exceptions to that right."⁹⁴ The Group noted that,

while it was obvious that all forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance must in principle be reserved to the authors [...] it should not be forgotten that domestic laws already contained a series of exceptions in favour of various public and cultural interests and [...] it would be vain to suppose that countries would be ready at this stage to abolish these exceptions to any appreciable extent.⁹⁵

The Group also recommended that exceptions should be "made for clearly specified purposes"⁹⁶ and, using language that is not dissimilar to the

92. *Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle* (United International Bureaux for the Protection of Intellectual Property).

93. See <www.wipo.int>.

94. Quoted in Mihály Ficsor, *The Law of Copyright and the Internet* (Oxford University Press, 2002), at s. 5.51.

95. *Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967* (Geneva: WIPO, 1971), at p. 111[*Records of the Stockholm Conference*].

96. *Records of the Stockholm Conference*, *supra* note 95 at p. 112.

traditional US fair use jurisprudence (discussed below), added that a limitation on the exclusive right of the author “should not enter into economic competition with” protected works.⁹⁷ These considerations would inform the work of the Conference and the interpretation of the test.

The work of the Study Group was handed over at the Conference to a Working Group whose mandate was to try to operationalize the findings of the Study Group in the text of the Convention. At the outset, the Working Group proposed a text that would have allowed exceptions (a) for private use; (b) for judicial or administrative purposes; and (c) “in certain particular cases where the reproduction is not contrary to the legitimate interests of the author and does not conflict with a normal exploitation of the work.”⁹⁸ The debates at the Conference initially focused on the merits of adding a list of well delineated exceptions (which included (a) and (b), but not (c), above). Instead, because the outcome of the debate was taking the form of a shopping list, the Conference opted to follow a British proposal to take out (a) and (b) entirely and to replace them with a general provision along the lines of (c).⁹⁹

The Conference also provided guidance on the interpretation of the test, and indicated that the first logical step (the Conference did not consider the “special case” requirement to be a separate step, a view with which I agree and to which I will return below) was to determine whether there was a conflict with normal commercial exploitation. If not, then either a compulsory license or a full exception could be introduced in national law. The compulsory license (with remuneration) would then counterbalance the level of prejudice in the last step, i.e. it would render such prejudice reasonable where this was necessary.¹⁰⁰

The test adopted at the 1967 Convention was thus intended to guide national legislators as to the proper scope of exceptions to the right of reproduction.¹⁰¹

3.2. Interpretation

The test contained in Article 9(2) of the *Berne Convention* allows exceptions to the right of reproduction

- in certain special cases;
- that do not conflict with the normal commercial exploitation of the work; and
- do not unreasonably prejudice the legitimate interests of the author.

The test was relatively obscure until 1994. That year, with the adoption

97. *Records of the Stockholm Conference*, *supra* note 95.

98. *Records of the Stockholm Conference*, *supra* note 95 at p. 113.

99. Ficsor, *The Law of Copyright and the Internet*, *supra* note 94 at s. 5.53.

100. *Records of the Stockholm Conference*, *supra* note 95 at para. 85 of the Report of Main Committee I.

101. See Daniel Gervais, *The TRIPs Agreement: Drafting History And Analysis*, 2d ed. (Sweet & Maxwell, 2003), at pp. 144–147; Mihály Ficsor, “How Much of What? The Three-Step Test and its Application in Two Recent WTO Dispute Settlement Cases,” (2002) 192 *Revue internationale du droit d’auteur* 111–251, at pp. 231–242.

of the WTO TRIPS Agreement,¹⁰² it became the cornerstone for almost all exceptions to all intellectual property rights in international law. It is now used as the model for exceptions to *all copyright rights* in TRIPS (article 13), to the rights created by the *WIPO Copyright Treaty*¹⁰³ (article 10), and the *WIPO Performances and Phonograms Treaty* (article 16). Interestingly, in TRIPS, it is also the basis for exceptions to industrial design protection (article 26(2)), and patent rights (article 30). There is, however, a crucial difference in the case of patent rights, which may impact how the rule is interpreted when applied to copyright: the last (third) step of the test in article 30 requires that exceptions not unreasonably prejudice the legitimate interests of the patent owner, “taking account of the legitimate interests of third parties.”¹⁰⁴

3.2.1. “Certain Special Cases”

There are two ways to interpret this first step. The first finds its origin in the history of the *Berne Convention*. In the first edition of his seminal book on the *Berne Convention*,¹⁰⁵ Professor Sam Ricketson opined that “special” meant that the exception must have a purpose and be justified by public policy.¹⁰⁶ This purpose-oriented (or “teleological”) interpretation of the Convention is seemingly reinforced by the use of the phrase “to the extent justified by the purpose” in articles 10(1) and 10(2) of the Convention (which allow exceptions to be made for quotation and teaching), and article 10*bis*(2) (which allows reporting of current events).¹⁰⁷ Public information (or the public’s right to know)¹⁰⁸ is clearly the policy basis for the latter exception and for the possible exclusion from copyright of certain official texts.

The 2000 WTO panel decision concerning section 110(5) of the US *Copyright Act*¹⁰⁹ adopted a different approach to interpret the first part of the three-step test, namely the meaning of “special.” This was the first time it was interpreted by an international tribunal. The panel was aware of Ricketson’s

102. TRIPS Agreement, *supra* note 5. The TRIPS Agreement also contains a list of material excluded for copyrightability (art. 9(2)), namely “ideas, procedures, methods of operation or mathematical concepts as such.” Article 13 also extends the three-step test of the *Berne Convention* to cover any copyright right (including, e.g. public performance).

103. This treaty was implemented in the United States by the *Digital Millennium Copyright Act*, Pub. L. no. 105–304, 112 *Statutes at Large* 2860, s. 10 and preamble, <<http://www.copyright.gov/legislation/dmca.pdf>>. The *WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998* is title I of the DMCA. The treaty has at least two interesting features for our purposes, namely the application of the three-step test in its art. 10 and the following declaration in its 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*.”

104. TRIPS Agreement, *supra* note 5, art. 30 (emphasis added). I am indebted to Dr. Mihály Ficsor, who shared his views on the WTO panel decision dealing with s. 110(5) of the US *Copyright Act*, *infra* note 109).

105. Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works 1886-1986* (Sweet & Maxwell, 1987).

106. Ricketson, *The Berne Convention*, *supra* note 105 at p. 482. A different approach is presented in the new edition of his commentary, coauthored with Professor Ginsburg. See Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford University Press, 2006), vol. 1, at ss. 13.10–13.12.

107. *Berne Convention*, *supra* note 4 at art. 10.

108. As embodied in part in s. 2(b) of the *Canadian Charter of Rights and Freedoms*, <<http://laws.justice.gc.ca/en/charter/>>.

109. *United States—Section 110(5) of the US Copyright Act*, (15 June 2000) WTO Doc. WT/DS160/R (WTO Dispute Settlement Panel Report), <http://www.wto.org/english/tratop_e/dispu_e/dispu_e/1234da.pdf> [*United States—Section 110(5) Panel Report*].

view¹¹⁰ but opted to look at the *Oxford Dictionary*:¹¹¹

The term “special” connotes “having an individual or limited application or purpose”, “containing details; precise, specific”, “exceptional in quality or degree; unusual; out of the ordinary” or “distinctive in some way”. This term means that more is needed than a clear definition in order to meet the standard of the first condition. In addition, an exception or limitation must be limited in its field of application or exceptional in its scope. In other words, *an exception or limitation should be narrow in quantitative as well as a qualitative sense.*¹¹²

The approach chosen by the panel is understandable. For valid normative reasons,¹¹³ in previous decisions the WTO Appellate Body preferred to adhere to the ordinary meaning of words, notably to avoid introducing “unbargained for” concessions in the WTO legal framework.¹¹⁴ This approach is arguably compatible with the Stockholm Study Group, which had requested that any exception to the right of reproduction be “for clearly specified purposes.”

The “dictionary approach” has been criticized as a form of textualism rather than contextualism, that is, an incomplete and result-oriented approach and not necessarily the best way to identify the “ordinary meaning.”¹¹⁵ However, it seems that, with the WTO as arbiter of international intellectual property disputes concerning both the TRIPS Agreement and the *Berne Convention* (as incorporated into TRIPS), the “dictionary approach,” which sees the first step as requiring some clear definition of the contours of an exception, is here to stay. That being said, the other view, namely that there is (also) a normative element to the first step and that it requires the demonstration of the existence of a valid public policy, is compatible with the analysis of both panels, especially the *Canada Pharmaceuticals* panel report.¹¹⁶

It is worth noting also that, at the 1967 Stockholm Conference, this first step was really a *last filter*:

If it is considered that reproduction¹¹⁷ conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that

110. *United States—Section 110(5) Panel Report*, *supra* note 109 at note 114.

111. *United States—Section 110(5) Panel Report*, *supra* note 109 at paras. 6.108–6.110.

112. *United States—Section 110(5) Panel Report*, *supra* note 109 at para. 6.109 (emphasis added; omitting footnote in the original to the *Oxford Dictionary*).

113. Essentially, that trade agreements are bargained for and should not, therefore, be “completed” or amended by interpretation. See e.g., *United States—Standards for Reformulated and Conventional Gasoline*, *supra* note 79, in which the Appellate Body stated that “applying the basic principle of interpretation that the words of a treaty, like the *General Agreement*, are to be given their ordinary meaning, in their context and in the light of the treaty’s object and purpose.”

114. Gervais, *The TRIPS Agreement*, *supra* note 101, at p. 146.

115. Dongsheng Zang, “Textualism In GATT/WTO Jurisprudence: Lessons For The Constitutionalization Debate,” (2006) 33 *Syracuse Journal of International Law & Commerce* 393–444, at pp. 428–434.

116. In a second panel report dealing with article 30 (another instantiation of the test) dealing with limitations contained in the Canadian *Patent Act*, the first step was interpreted as meaning “limited” (such as, for patents, limited to an area of technology). Those interpretations are more likely to guide future WTO panels called upon to apply the three-step test. See *Canada—Patent Protection of Pharmaceutical Products* case, <http://www.wto.org/english/tratop_e/dispu_e/7428d.pdf>, (2000) WTO Doc. WT/DS114/R. An exception must thus be limited to a reasonably narrow use or category of users.

117. This quote relates to the three-step test contained in art. 9(2) of the *Berne Convention*, where it only applies to the right of reproduction. In art. 13 of TRIPS, it was extended to all copyright rights.

reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment.¹¹⁸

In sum, most purpose-specific, limited exceptions should pass the first step of the test. One could argue that an exception limited to a class of users is similarly limited in scope. It is less clear, however, that an open-ended “fair use” provision would necessarily meet this part of the test.

3.2.2. Interference with Normal Commercial Exploitation

What is the meaning of “exploitation” in the context of the second step of the test? It seems fairly straightforward: any use of the work by which the copyright owner tries to extract or maximize the value of her right.¹¹⁹ “Normal” is more troublesome. Does it refer to what is simply “common” or does it refer to a normative standard? The question is relevant in particular for new forms and emerging business models that have not thus far been common or “normal” in an empirical sense. As noted above, at the revision of the *Berne Convention* in Stockholm in 1967, the concept was used to refer to “all forms of exploiting a work which [had], or [were] likely to acquire, considerable economic or practical importance.”¹²⁰

Professor Paul Goldstein notes that the purpose of the second step is to “fortify authors’ interests in their accustomed markets against local legislative inroads.”¹²¹ It thus seems that the condition is normative in nature: an exception is not allowed if it covers any form of exploitation which has, or is likely to acquire, considerable importance. In other words, if the exception is used to limit a commercially significant market or, *a fortiori*, to enter into competition with the copyright holder, the exception is prohibited.¹²²

Professor Mihály Ficsor and the WTO panel on the US section 110(5) case agreed with this approach. The WTO panel concluded as follows:

[I]t appears that one way of measuring the normative connotation of normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance.¹²³

118. *Records of the Stockholm Conference*, *supra* note 95 at p. 1145

119. Ficsor, *The Law of Copyright and the Internet*, *supra* note 94 at s. 5.56.

120. *Records of the Stockholm Conference*, *supra* note 95 at p. 112.

121. Paul Goldstein, *International Copyright: Principles, Law, and Practice* (Oxford University Press, 1998) at p. 295. See also Ficsor, *The Law of Copyright and the Internet*, *supra* note 94 at p. 516.

122. One could see the scope of an exception based on non-commercially significant use in the *Database and Collections of Information Misappropriation Act* (USA 2003), Bill H.R. 3261, 108th Congress, <<http://thomas.loc.gov/cgi-bin/query/z?c108:H.R.3261.IH:>> at s. 4(b) which would allow: the making available in commerce of a substantial part of a database by a nonprofit educational, scientific, and research institution, including an employee or agent of such institution acting within the scope of such employment or agency, for nonprofit educational, scientific, and research purposes [...] if the court determines that the making available in commerce of the information in the database is reasonable under the circumstances, taking into consideration the customary practices associated with such uses of such database by nonprofit educational, scientific, or research institutions and other factors that the court determines relevant.

123. *United States—Section 110(5) Panel Report*, *supra* note 109 at para. 6.180.

The impact of the second step on specific exceptions is discussed below.

3.2.3. Unreasonable Prejudice to Legitimate Interests of Rightsholder

The third step is perhaps the most difficult to interpret. What is an “unreasonable prejudice” and what are “legitimate interests”?

Let us start with the term “legitimate.” It could have two meanings: (a) conformable to, sanctioned or authorized by law or principle; lawful; justifiable; proper; or (b) normal, regular, conformable to a recognized type, according to the *Oxford English Dictionary*. To put it differently, are legitimate interests only “legal interests”? If a broader view of the interests involved is preferred, the third step would then reflect the need to balance the rights of copyright holders and users.¹²⁴

At the 1967 Stockholm Conference, the United Kingdom took the view that legitimate meant simply “sanctioned by law,” while other countries seemed to take a broader view of the term as meaning “supported by social norms and relevant public policies.”¹²⁵ The WTO panel¹²⁶ adjudicating on the US section 110(5) case concluded that the combination of the notion of “prejudice” with that of “interests” pointed clearly towards what the WTO panel refers to as a “legal-normative” approach, one with clear positivist overtones. “Legitimate interests,” the panel concluded, are simply those that are protected by law.

This leaves open one key question: what is an “unreasonable” prejudice?¹²⁷ Clearly, the word “unreasonable” indicates that *some level* or degree of prejudice is justified. For example, while a country might exempt entirely the making of a small number of private copies, it may be required to impose a compensation scheme, such as a levy, when the prejudice level becomes unjustified.¹²⁸ To buttress this view, the French version of the *Berne Convention*, which governs in case of a discrepancy between the linguistic versions,¹²⁹ uses the expression “*ne cause pas un préjudice injustifié*,” which one would translate literally as “does not cause an unjustified prejudice.” The Convention translators opted instead for “does not unreasonably prejudice.”¹³⁰

124. To the same effect, see Martin Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer, 2004), at pp. 226–227:

[C]opyright law is centred round the delicate balance between grants and reservations. On one side of this balance, the economic and non-economic interests of authors of already existing works can be found. On the other side, the interests of users—a group encompassing authors wishing to build upon the work of their predecessors—are located. If a proper balance between the concerns of authors and users is to be struck, both sides must necessarily take a step towards the centre. The two elements of the third criterion [legitimate interests and unreasonable prejudice] mirror these two steps. The authors cannot assert each and every concern. Instead, only legitimate interests are relevant. As a countermove, the users recognise that copyright limitations in their favour must keep within reasonable limits.

125. Ficsor, “How Much of What,” *supra* note 101, at p. 143.

126. *United States—Section 110(5) Panel Report*, *supra* note 109 at paras. 6.223–6.229. At para. 6.224 the panel somehow tried to reconcile the two approaches:

[T]he term relates to lawfulness from a legal positivist perspective, but it has also the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights.

127. It is worth noting that “not unreasonable prejudice” is not quite the same as “reasonable prejudice.” The Panel noted that “[n]ot unreasonable” connotes a slightly stricter threshold than “reasonable.” (*United States—Section 110(5) Panel Report*, *supra* note 109 at para. 6.225). It seems to assume that prejudice is unreasonable unless shown otherwise.

128. *Records of the Stockholm Conference*, *supra* note 95 at 883.

129. *Berne Convention*, *supra* note 4 at art. 37(1)(c).

130. *Records of the Stockholm Conference*, *supra* note 95 at p. 1145, s. 84.

The inclusion of a justification criterion, which is present in the French version, would allow legislators to establish a balance between, on the one hand, the rights of authors and other copyright holders and, on the other, the needs and interests of users. In other words, *there must be a public interest justification* to limit copyright.

Unfortunately, the WTO panel essentially conflated the second and third steps when it concluded that “prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.”¹³¹ A public interest imperative may lead a government to impose an exception to copyright that may translate into a loss of revenue for copyright holders. To ensure that the prejudice is not unreasonable, a compensation mechanism must then be established.¹³²

3.2.4. Market-Oriented Impacts

The net result of the WTO decisions is that any *exception* to copyright (i.e. without compensation to the rightsholders) must be measured against any demonstrable loss of income for rightsholders. The policy tool that would seem best to embody this is to situate the exception on an income stream target. At the centre of the target are core income streams. To translate this in commercial terms, would the exception significantly limit existing sales or licensing income or, under the second step, prevent the rightsholder from trying to sell or license their copyright rights (i.e. the “trial and error” establishment of commercial exploitation)? Any exception that results in either of these two possibilities is almost certainly incompatible with the second and probably also the third step of the test. Exceptions that demonstrably affect significant income streams also interfere with normal commercial exploitation, unless no commercial transaction or license is possible under the circumstances. To pass the test, an exception must thus be narrowly defined (the first step) and touch essentially peripheral income streams.

131. *United States—Section 110(5) Panel Report*, *supra* note 109 at para. 6.229.

132. This is reinforced by a later finding by an arbitration panel, which had been convened to decide the level of harm caused by the US refusal to modify its law to bring it into conformity with the Panel’s findings. Under the WTO Dispute Settlement Understanding (DSU) that governs the WTO dispute-settlement process, a party may ask for arbitration if another party fails to implement an adopted panel (or Appellate Body) decision. Because the US failed to implement the Panel report, the European Union asked for arbitration and a decision on the level of harm, which was determined to be approximately \$1.3 million per year. The European Union has proposed levying a fee on copyrighted material against United States nationals unless the United States reforms its law. See *United States—Section 110(5) of the U.S. Copyright Act (Complaint by the European Communities)* (1 March 2002) WTO Doc. WT/DS160/22 (Communication from the Arbitrator), <http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28%40meta%5FSymbol+WT%FCDS160%FC%2A%29&doc=D%3A%2FDDFDDOCUMENTS%2FT%2FWT%2FDS%2F160%2D22%2EDOC%2EHTM>; *United States—Section 110(5) of the U.S. Copyright Act (Complaint by the European Communities)* (19 February 2002), WTO Doc. WT/DS160/21 (Note by the Secretariat), <http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28%40meta%5FSymbol+WT%FCDS160%FC%2A%29&doc=D%3A%2FDDFDDOCUMENTS%2FT%2FWT%2FDS%2F160%2D21%2EDOC%2EHTM>; *United States—Section 110(5) of the U.S. Copyright Act (Complaint by the European Communities)* (11 January 2002), WTO Doc. WT/DS160/19 (Recourse by the European Communities to Article 22.2 of the DSU), <http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28%40meta%5FSymbol+WT%FCDS160%FC%2A%29&doc=D%3A%2FDDFDDOCUMENTS%2FT%2FWT%2FDS%2F160%2D19%2EDOC%2EHTM>; *United States—Section 110(5) of the U.S. Copyright Act (Complaint by the European Communities)* (15 January 2001), WTO Doc. WT/DS160/12 (Award of the Arbitrator), <http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28%40meta%5FSymbol+WT%FCDS160%FC%2A%29&doc=D%3A%2FDDFDDOCUMENTS%2FT%2FWT%2FDS%2F160%2D12%2EDOC%2EHTM>.

Could a public interest justification “compensate” for *prima facie* incompatibility? A limitation (with compensation negating the loss of income) would pass the third step of the test. However, meeting the requirements of the second step is more difficult. If a rightsholder can show that the exception prevents him from exploiting a “market,” then the normative quality of the justification would not necessarily compensate for the lost income. It becomes a matter of degree and, yes, balance.

That said, “public interest” remains completely relevant. As Part I has endeavoured to demonstrate, it has always formed part of international copyright law and policy. It was also used successfully as a defence in a few UK cases, but those cases dealt with particular works (for example, a photograph of Princess Diana on the day of her accident or the text of a ministerial briefing note¹³³) and not with classes of works or users. In addition, in those cases users had a positive right to exercise against the copyright: namely, freedom of expression and information.

It would thus be theoretically possible to consider a provision allowing courts not to enforce copyright when a countervailing public interest justification supports this application. Others might argue that this is unnecessary because courts can (based on equitable rules) refuse certain remedies (for example, injunctions). More importantly, such an “exceptional cases” exception would not address broader concerns in education, research, or other similar areas.

In sum, the three-step test restricts the availability of uncompensated exceptions.¹³⁴ The second step prohibits open-ended exceptions that demonstrably affect core or significant income streams.

How can a rightsholder demonstrate the existence of a market? If a market is already established in Canada for the form of exploitation concerned, then the burden of proof is easily met. If that is not the case, the rightsholder could demonstrate the existence of a market in a different yet relevant jurisdiction. For example, if a US rightsholder could show that an important market is successfully exploited in the United States, but that the rightsholder is prevented from doing so in Canada because of an exception, then *prima facie* incompatibility is established.

A more difficult question is the impact on prospective markets. Interpreting the test as applying only to established markets might stifle investment in new technology and new markets. Conversely, interpreting the test to consider interference with any prospective market, no matter how remote, would basically prohibit almost all exceptions. The test does not go that far. First, the interference must affect an income stream (whether actual or prospective)

133. *Ashdown v Telegraph Group, Ltd.*, 2001 EWCA Civ 1142, <<http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2001/1142.html&query=ashdown&method=boolean>>, 2002 Law Reports, Chancery Division 149, 2002:6 Reports of Patent, Design and Trade Mark Cases 235; *Hyde Park Residence Ltd v Yelland et al.*, 2000 EWCA Civ 37, <<http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2000/37.html&query=Hyde+and+Park+and+Residence+and+Limited&method=boolean>>, 2001 Law Reports, Chancery Division 143, (2000) Entertainment and Media Law Reports 363.

134. As Okediji notes in “Toward an International Fair Use Doctrine,” (2000) 39 *Columbia Journal of Transnational Law* 75–176, at p. 112:

The option of using compulsory licensing under the auspices of Article 9(2) places some pressure on the interpretation of what qualifies as a “special case” particularly where free use is permitted by national legislation as is the case with the American fair use doctrine. The possibility of a compulsory license scheme under Article 9(2) suggests that the Berne Convention does not generally favor “free use” as a legitimate paradigm for access to copyrighted works.

that is sufficiently close to the centre of the target. Second, the prospective market must be reasonably predictable.¹³⁵

3.3. Impact of the Test on Policy

The first lesson to be drawn is that the three-step test is in reality a two-step test when applied directly in national law because the “special case” nature of an exception is but an instruction addressed to lawmakers to provide reasonably narrow exceptions (a quantitative component), with a well-defined public interest justification (the normative/qualitative component). As in the Section 110(5) case,¹³⁶ the first step may be used (here by a WTO panel) to decide whether an exception is sufficiently narrow. This argues against open-ended exceptions because it is hard to defend an exception when its outer limits, whether in quantity or purpose, cannot be readily ascertained.

The second step of the test prohibits exceptions that interfere demonstrably with commercial exploitation. The focus here is akin to a finding of adverse trade impact in an antidumping case:¹³⁷ will the measure significantly prevent a rightsholder from maximizing revenue? It is clear from all interpretations of the test that normalcy of exploitation modes is *not* a purely empirical (and then necessarily mostly historical) notion. In other words, it is *not* simply a question of what modes are actively exploited *now*, but also of what modes are likely to become significant income streams. To recall the Stockholm Conference’s phrase noted above, the test covers “all forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance.”

Determining what is likely to acquire importance is educated guesswork. However, courts should look at market developments and ask rightsholders to make at least a *prima facie* case of interference. Once the case has been made, however, it would seem reasonable that the burden should shift to the user to show that there is no interference.

The third step is a logical extension of the second: If there is no interference because the exception does not significantly impinge upon the rightsholders’ mode(s) of commercial exploitation, then perhaps the rightsholders can still show a substantial loss of income. If that loss of income is unreasonable, then financial compensation should be provided.

Both the incorporation of the three-step test in international copyright law by the TRIPS Agreement (which went well beyond the *Berne Convention* in this regard) and, more broadly, the movement of copyright from a property right based on natural law to a trade-related right may have made it *easier* to provide exceptions. This is because the approach taken is not, or is no longer, concerned with the theoretical interference with a property right (by analogy, actual damage is not required to establish a cause of action in trespass to land), but is rather a pragmatic approach involving the actual impact on rightsholders.

135. As was decided by the French Supreme Civil Court in 2006 (*Cour de cassation*): Cassation Civile 1^{re}, 28 February 2006, <http://www.courdecassation.fr/jurisprudence_publications_documentation_2/actualite_jurisprudence_21/premiere_chambre_civile_568/arrets_569/05_16.002_8777.html>, *La Semaine Juridique: Juris Classeur Periodique* 2006. II. 10084 (Annot. A. Lucas).

136. See *United States—Section 110(5) Panel Report*, *supra* note 109.

137. I use this analogy because the incorporation of copyright rules in the WTO framework, where disputes are decided by trade experts, leads to a rapprochement of trade and intellectual property rules.

Put differently, as a result of the paradigmatic nature of the three-step test, the policy focus is not whether a technical restricted act (reproduction, adaptation, communication, etc.) has taken place, but: (a) whether revenue will be (demonstrably) lost because of lost (normal, i.e. reasonably expected) commercial transactions; and (b) whether the loss is proportionally justified on public policy grounds. One then looks at how many dollars will be lost and whether a compensation mechanism should be put in place.

3.4. Scope of Application of the Three-Step Test

One crucial issue that remains after the above analysis of the three-step test is to determine to which exceptions and limitations the test applies. Specifically, to which limitations and exceptions does the test as it is contained in article 13 of the TRIPS Agreement apply, in a dispute-settlement context in particular? First, does it apply to exceptions existing at the time the TRIPS Agreement came into force or only to those adopted afterwards (January 1, 1995 for countries other than developing and least-developed ones)?¹³⁸ Second, does it apply only to general exceptions or also to use- or user-specific exceptions provided for specifically in the *Berne Convention* or the TRIPS Agreement? The answer to the first question was given in the 110(5) case:¹³⁹ the test applies both to exceptions in place at the time of entry into force and those adopted afterwards.

The second question is more difficult to answer. It would seem unnecessary to apply the three-step test as a further barrier to validity because, as a matter of treaty interpretation, exceptions such as articles 10(1) and 10(2) of the Convention include a different test, namely the reference to compatibility with fair practice. While this position is defensible, it does not solve the issue entirely. Respected commentators have expressed the view that this reference to "fair practice" should be interpreted as a rule of reason referring back to the three-step test.¹⁴⁰ This view may be adopted by a WTO panel, notably to simplify and enhance the uniformity of standards used to interpret the *Berne Convention* (and in turn by the TRIPS Agreement in which it was incorporated).

Additionally, those specific exceptions contain other limitations. First, with regards to the use of the words "by way of illustration," there is controversy as to whether the whole of a work may be used "for illustration." However, leading commentators believe that, in appropriate circumstances, the use of an entire work may be acceptable.¹⁴¹ Second, records from the successive revision Conferences of the *Berne Convention* show that "teaching" as used in article 10 comprises elementary as well as advanced teaching and works intended for self-instruction.¹⁴² But there is considerable debate as to whether commercial (for-profit) teaching activities can benefit from the exception.¹⁴³ Finally, article 10(2) extends the exception to include works in a broadcast for schools or other

138. TRIPS Agreement, *supra* note 5 at art. 65.

139. *United States—Section 110(5) Panel Report*, *supra* note 109 at para. 6.94 ("neither the express wording nor the context of Article 13 or any other provision of the TRIPS Agreement supports the interpretation that the scope of application of Article 13 is limited to the exclusive rights newly introduced under the TRIPS Agreement.")

140. Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*, *supra* note 106 at s. 13.45.

141. Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*, *supra* note 106 at s. 13.45.

142. Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*, *supra* note 106 at s. 13.45.

143. Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*, *supra* note 106 at s. 13.45; Thomas Dreier and P Bernt Hugenholtz, eds, *Concise European Copyright Law* (Kluwer Law, 2006) at p. 45.

educational institutions, but not to on-demand transmissions. The Convention treats broadcasting and transmissions (article 11*bis*(1)) differently.¹⁴⁴

The three-step test thus may apply as a proxy for the rule of reason contained in articles 10(1) and 10(2) of the *Berne Convention* through the reference to fair practice. Conversely, because the exceptions contained in articles 10*bis*(1)¹⁴⁵ and (2)¹⁴⁶ of the Convention do not contain this reference to fair practice, they would not be subject to the three-step test. However, article 10*bis*(1) allows rightsholders to prevent recourse to this exception and article 10*bis*(2) includes a reference to the justification of the extent of the use, which seems to be a different and less demanding threshold than the three-step test.

Another consideration is whether the test applies to limitations expressly provided for in the *Berne Convention*, such as compulsory licences for mechanical reproduction or retransmission. There are two reasons to think it would not. That being said, there is also a strong reason to think it would: article 13 of the TRIPS Agreement provides that WTO Members must “confine limitations or exceptions” (generally) to those that pass the three steps of the test. At first glance, this covers all limitations and exceptions, including compulsory licenses. Indeed, the history of article 13 suggests a broad scope of application, including to all so-called minor exceptions and a prohibition of compulsory licenses *other than* those expressly provided for in the Convention.¹⁴⁷ There, are however, two arguments not to apply the test to licenses expressly provided for in the Convention. First, the Convention specifically expresses those limitations in clear, unlimited terms, though using different legal techniques.¹⁴⁸ Second, especially if the application of the three-step test is applied to an exception otherwise provided in the Convention, then arguably it must be read contextually, looking at the Convention in its entirety. In cases where the Convention combines the grant of a right with a possible compulsory license, the right is arguably not, or is no longer, exclusive. Article 13 of the TRIPS Agreement applies only to “exclusive rights.” Additionally, as a matter of internal coherence, while it may make sense to apply the test “across the board,” as it were, why provide for some, but not all, possible exceptions in the Convention and the Agreement (and then superimpose the three-step test)?

It should also be mentioned that the test would not apply to *exclusions from copyright protection*, such as those contained in articles 2(2), 2(4), 2(7) and 2*bis*(1) of the *Berne Convention* (respectively unfixed works; “official texts of a legislative, administrative and legal nature, and to official translations of such

144. Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*, *supra* note 106 at s. 13.45.

145. *Berne Convention*, *supra* note 4 at art. 10*bis*(1):

reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved.

146. *Berne Convention*, *supra* note 4 at art. 10*bis*(2): reproduction and making available to the public “for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose [...]”

147. Gervais, *The TRIPS Agreement*, *supra* note 101 at pp. 144–147.

148. *Berne Convention*, *supra* note 4: In arts. 11*bis*(2) and (3), the Convention uses the ubiquitous “[i]t shall be a matter for legislation in the countries of the Union to determine the conditions [...]”, while in art. 13(1), it is expressed as a possible reservation or condition: “Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work [...]”

texts"; works of applied art; and "political speeches and speeches delivered in the course of legal proceedings") or in article 9(2) of the TRIPS Agreement ("ideas, procedures, methods of operation or mathematical concepts as such"). Those are not limitations or exceptions to exclusive copyright rights proper, but are rather statements of exclusion of subject matter. In other words, the provision deals with the type of works to which copyright applies and not to the scope of rights, which is the focus of limitations and exceptions (as the term is used in the *Berne Convention* and this Article).

3.5. Locus of the Three-Step Test

A question closely related to the issue of whether the three-step test applies in addition to the (few) additional exceptions contained in the *Berne Convention* is at which level it applies. Is it merely an international norm or does it, or could it, apply at the national level?¹⁴⁹ In countries where international treaty norms are directly applicable in the national legal order, this would be the case, which raises interesting interpretative issues. Clearly, however, the direct application of the test in national legislation is becoming more widespread.

The European Union's Information Society ("InfoSoc") Directive¹⁵⁰ contains exceptions that are all purpose-specific. In other words, there is no set of criteria comparable to the US fair use doctrine.¹⁵¹ However, the preamble to this Directive, which serves as a guideline for the interpretation of the operative part of the text,¹⁵² refers to "permitting exceptions or limitations in the public interest for the purpose of education and teaching"¹⁵³ and to the need to safeguard a "fair balance of rights and interests between the different categories of rightsholders, as well as between the different categories of rightsholders and users"¹⁵⁴ through exceptions and limitations, which "have to be reassessed in the light of the new electronic environment."¹⁵⁵ The InfoSoc Directive also refers to the three-step test as an overarching test for all permitted exceptions. Article 5(5) reads:

The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.¹⁵⁶

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149. In the now famous Mulholland Drive case, a consumer organization argued that anti-circumvention technology (TPM) prevented the making of a (lawful) private copy. The Court of First Instance in Paris refused to grant the relief sought. The Paris Court of Appeal disagreed and concluded that there was no evidence that private copying would interfere with normal commercial exploitation. The Civil Supreme Court (cour de cassation) found that copying of digital copies of a film could constitute a violation of at least the second step (normal commercial exploitation): *M. Stéphane P., UFC Que Choisir c/ SA Films Alain Sarde, SA Universal pictures video France et autres*, Cassation Civile 3^e, 30 April 2004, <<http://www.foruminternet.org/telechargement/documents/tgi-par20040430.pdf>>, "Attendu que la copie d'une œuvre filmographique éditée sur support numérique ne peut ainsi que porter atteinte à l'exploitation normale de l'œuvre" (emphasis added). Note the double negative.
150. EC, 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, (2001) Official Journal of the European Union L 167/10, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>> [InfoSoc Directive].
151. US Copyright Act, *supra* note 8 at s. 107.
152. InfoSoc Directive, *supra* note 150, preamble.
153. InfoSoc Directive, *supra* note 150 at para. 14.
154. InfoSoc Directive, *supra* note 150 at para. 31.
155. InfoSoc Directive, *supra* note 150 at para. 31.
156. InfoSoc Directive, *supra* note 150 at art. 5, para. 5.

The reference to the test is seen as a “guiding principle” rather than an effective means to effectively harmonize exceptions in the national laws of the 27 EU Member States.¹⁵⁷ Indeed, at the level of national laws, the three-step test may be refined by enumerating certain specific cases¹⁵⁸ or by providing additional guidance on the interpretation of the three steps. It remains a flexible test that could, however, be used by courts in cases where no such specific exception exists, if permitted under domestic law. The EU reference to the three-step test in the InfoSoc Directive may also be interpreted as a commitment to the test as a guide for regional policy, but not necessarily as the expression of the view that it is the best normative tool at the level of national laws.

The InfoSoc Directive is not the first to refer to the test. A version of the test is also included in the Software Directive, where it is used both as a guide in the preamble¹⁵⁹ and as a restriction on the scope of exceptions in article 6(3).¹⁶⁰ It is also contained in article 8(2) of the Database Directive, where it forms part of the main provisions.¹⁶¹

In implementing the InfoSoc Directive, a number of EU Member States decided to include the test. In doing so, however, they usually skipped the first step, presumably because they took the view¹⁶² that there are really only two operational steps.¹⁶³ EU countries where steps 2 and 3 form part of national law now include at least: Croatia, France, Spain, Portugal, and Greece.

There is another clear illustration of the trend to incorporate the three-step test in national legislation. In Australia, the *Copyright Amendment Act*

157. Senftleben, *Copyright, Limitations and the Three-Step Test*, *supra* note 124 at pp. 246–248.

158. Bernt Hugenholtz, “Why the Copyright Directive Is Unimportant, and Possibly Invalid,” (2000) 22:11 *European Intellectual Property Review* 499–505, <<http://www.ivir.nl/publications/hughenoltz/opinion-EIPR.html>> at p. 501:

What makes the Directive a total failure, in terms of harmonisation, is that the exemptions allowed under Article 5 are optional, not mandatory (except for 5.1). Member States are not obliged to implement the entire list, but may pick and choose at will. It is expected that most Member States will prefer to keep intact their national laws as much as possible. At best, some countries will add one or two exemptions from the list, now bearing the E.C.’s seal of approval. So much for approximation!

See also an illuminating study prepared for the European Commission on the InfoSoc Directive, recently made available by the University of Amsterdam: Institute for Information Law, *Study on the Implementation and Effect in Member States’ Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* (Final Report) (University of Amsterdam, February 2007), <http://www.ivir.nl/publications/guibault/Infosoc_report_2007.pdf>.

159. *Computer Programs Directive*, *supra* note 39 at preamble: “such an exception to the author’s exclusive rights may not be used in a way which prejudices the legitimate interests of the rightholder or which conflicts with a normal exploitation of the program [...]”

160. *Computer Programs Directive*, *supra* note 39 at art. 6(3): “the provisions of this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the right holder’s legitimate interests or conflicts with a normal exploitation of the computer program.”

161. EC, *Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases*, (1996) *Official Journal of the European Union* L 077, 002–0028, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0009:EN:HTML>> at art. 8(2):

A lawful user of a database which is made available to the public in whatever manner may not perform acts which conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.

162. Gervais, *The TRIPS Agreement*, *supra* note 101 at pp. 144–147.

163. The Greek copyright law also contains the first step. See Greece, *Law 2121/1993, Copyright, Related Rights and Cultural Matters*, as last amended by Law No. 2435 of 2003, <http://www.wipo.int/clea/docs_new/pdf/en/gr/gr219en.pdf> at art. 28C (added by art. 81(2) of Law no. 3057/2002): “The limitations provided for in Section IV of Law 2121/1993, as exists, shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other protected subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.”

2006,¹⁶⁴ which received Royal Assent on December 11, 2006, contains the following provision:

Section 200AB: Use of works and other subject-matter for certain purposes

(1) The copyright in a work or other subject-matter is not infringed by a use of the work or other subject-matter if all the following conditions exist:

- (a) the circumstances of the use (including those described in paragraphs (b), (c) and (d)) amount to a special case;
- (b) the use is covered by subsection (2), (3) or (4);
- (c) the use does not conflict with a normal exploitation of the work or other subject-matter;
- (d) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright.

This provision applies to exceptions contained in that section, but not (by operation of sections 200AB(1)(b) and 200AB(6)) if the use of the work is non-infringing for another reason (such as a reproduction of less than a substantial part or a limitation on the right itself, as for example in the provision concerning the making of a Braille version of a published literary work, which contains what amounts to a compulsory license).

The three-step test was not only incorporated in the Australian provision (all three steps, contrary to most other national implementations which focus only on the last two): it was a central consideration in preparing this Bill. In addition to being addressed directly to courts in section 200AB, the three-step test was used to justify limitations in the formulation of exceptions. For example, on private copying the Government declared during the debate on the Bill: "The 'one copy in each format' condition is to protect copyright owners from this exception being abused, as well as to ensure that the exception complies with the three-step test."¹⁶⁵

A Senate Committee struck to examine the constitutionality of the Bill noted that it had "received evidence which highlighted opposing views on how the three-step test should be implemented in domestic legislation. Proposed section 200AB seeks to provide an open-ended exception in line with the US model, and allows courts to determine if other uses should be permitted as exceptions to copyright."¹⁶⁶ Critics pointed to the lack of clarity of the test and the move towards a "lawyer-based copyright regime—a litigious model."¹⁶⁷

164. Australia (Commonwealth), *Copyright Amendment Act 2006*, no. 158, <[http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/E53C3691BD9BAA0ACA257307001B2EC7/\\$file/1582006.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/E53C3691BD9BAA0ACA257307001B2EC7/$file/1582006.pdf)> (emphasis added).

165. Submission 69A to the Senate Standing Committee on Legal and Constitutional Affairs re Provisions of the *Copyright Amendment Bill 2006*, 8 November 2006, <http://www.aph.gov.au/senate/committee/legcon_ctte/copyright06/submissions/sub69A.pdf> at p. 3.

166. Australia, Commonwealth, Senate, *Senate Standing Committee on Legal and Constitutional Affairs: Copyright Amendment Bill 2006 [Provisions]*, (Report) (Senate Printing Unit, 2006), <http://www.aph.gov.au/senate/committee/legcon_ctte/copyright06/report/report.pdf> at p. 24 [Senate Report on *Copyright Amendment Bill 2006*].

167. Senate Report on *Copyright Amendment Bill 2006*, *supra* note 166 at pp. 24–25.

The Government's response on this key point was as follows:

We are aware that some user interests think that it is unduly restrictive. Given that the three-step test already has to be complied with, there is an argument that should be enough, that the government should go as far as the three-step test allows. But we note in passing that the three-step test is not an obligation; you only have to go as far as you can go under the treaty obligations. The government is also aware that some copyright owner interests think that the provision is too broad and that the commercial advantage test should be narrowed even further. In the present drafting the government has sought to find a balance between those interests, recognising that this is a new exception that is different in form to some of the specific exceptions already in the Copyright Act. Therefore, the government is minded to try to balance what are reasonable interests on both sides—the copyright owners and users. [...]

The Government introduced the "commercial advantage" test in recognition of concerns about the potential scope of the new exception. Indeed the Government notes arguments on behalf of some copyright owners that s. 200AB is presently too wide in being potentially available to for-profit schools and libraries in commercial companies and should be narrowed so that no commercial advantage, direct or indirect, can be obtained from reliance on this section.¹⁶⁸

For its part, the Labor party (which, incidentally, has formed the government since November 24, 2007) noted the following in the Senate report:

Labor Senators are of the view that the particular way the Government has chosen to embody the three-step test in the Bill is problematic and an example of poor drafting that will no doubt lead to confusion and uncertainty in practice. Not only will judges be required to interpret the three-step test, but so will the users to which the exceptions apply. This is not only impractical, but also potentially costly to those user groups who may have to seek expert advice on how to properly interpret the three-step test.¹⁶⁹

The 2006 Australian Act is an almost ironclad guarantee of TRIPS compatibility, which was clearly a dominant consideration in making the policy decision. Only if Australian courts were to stray too far from WTO panel interpretations would a possible case of incompatibility with TRIPS be made. This is highly unlikely because their deliberations will no doubt be guided in that respect by section 200AB(7), which defines "conflict with a normal exploitation" and "unreasonably prejudice the legitimate interests" as having "the same meaning as in Article 13 of the TRIPS Agreement." The new provision is still too recent to have been interpreted by courts.

168. Senate Report on *Copyright Amendment Bill 2006*, *supra* note 166 at pp. 25–26.

169. Senate Report on *Copyright Amendment Bill 2006*, *supra* note 166 at p. 47.

From the above, a few concluding observations can be made. First, the three-step test is emerging as an unavoidable norm in copyright law but also in other areas of intellectual property.¹⁷⁰ The test was originally conceived as a political compromise to limit exceptions to the right of reproduction. Its extension to all copyright rights and to other areas of intellectual property is likely a reflection of both the flexible nature of the test and the pragmatic approach of the trade negotiators who drafted the TRIPS Agreement. Second, the locus of the test is unstable. There remains a considerable margin of uncertainty with respect to its domestic application by national courts. The first step is generally not universally viewed as a message addressed to law-makers to narrow the scope of the application of exceptions. The third step seems to require compensation for exceptions that, while justified, cause a significant degree of harm. This could in theory be implemented by a national court, but would be more appropriately the subject of arbitration or an administrative proceeding (in that it would resemble tariff-setting processes).¹⁷¹ This leaves the second step, namely interference with normal commercial exploitation, a dynamic and evolving notion, at the center of the picture.

This will not be unfamiliar to those familiar with fair use jurisprudence in the United States and, more particularly, the *Folsom* test.¹⁷² Courts must, according to *Folsom*, “in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”¹⁷³

The US fair use doctrine was codified in 1976 and “the effect of the use upon the potential market for or value of the copyrighted work” is the fourth and last of the criteria mentioned in section 107 of the US *Copyright Act*.¹⁷⁴ In *Harper & Row Publishers, Inc. v Nation Enterprises*,¹⁷⁵ the US Supreme Court stated that the fourth factor was “undoubtedly the single most important element of fair use,”¹⁷⁶ adding that once a copyright holder had established “with reasonable probability the existence of a causal connection between the infringement and a loss of revenue, the burden properly shifts to the infringer to show that this damage would have occurred had there been no taking of copyrighted expression.”¹⁷⁷

170. Including patents and designs in TRIPS Agreement, *supra* note 5 at arts. 26 and 30.

171. For example, in the United States see *Copyright Royalty and Distribution Reform Act of 2004*, Pub. L. no. 108-419, <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_public_laws&docid=f:publ419.108.pdf> from which the Copyright Royalty Board derives its statutory authority. In Canada see *Copyright Act*, *supra* note 38 at s. 66 and foll. (establishing the Copyright Board of Canada).

172. So named because of Justice Story's famous decision in *Folsom v March* (US 1st Cir, 1841), 9 *Federal Cases* 342 [*Folsom v March*].

173. *Folsom v March*, *supra* note 172 at p. 348.

174. *US Copyright Act*, *supra* note 8 at s. 107. The three other criteria are the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; and the amount and substantiality of the portion used in relation to the copyrighted work as a whole.

175. *Harper & Row, Publishers, Inc. v Nation Enterprises* (USA SC, 1985), <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=471&invol=539>>, 471 *United States Supreme Court Reports* 539. *The Nation* magazine had obtained an unauthorized copy of the soon-to-be published manuscript of the memoirs of ex-president Gerald Ford. It quoted 300 words from the memoirs. *The Nation* claimed that the relatively small taking was fair use. The district court found that the use of the material was infringing, which was reversed by a 2-1 decision of the Court of Appeals for the Second Circuit. The focus at the Supreme Court (based on *Folsom v March*, *supra* note 172) was on whether the fair use superseded the use of the original.

176. *Harper & Row Publishers*, *supra* note 175 at p. 566.

177. *Harper & Row Publishers*, *supra* note 175 at p. 567.

US fair use jurisprudence shows that at least the second step of the test may be used by national courts. It acts as a proxy for determining fairness of the use. Perhaps this will mean broader application of US fair use cases in other jurisdictions. A similar situation occurred with respect to originality after the US Supreme Court found in a 1991 case¹⁷⁸ that a modicum of creativity was constitutionally required to benefit from copyright protection.¹⁷⁹

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4. CONCLUSION : THE WAY FORWARD

HISTORICALLY, AUTHORS' RIGHTS WERE ANCHORED in the public interest, one that requires a working copyright system for the benefit of authors and users of copyright works. The public interest requires a balance, one that may impose limits on exclusive copyright rights. At the international level, this principle has formed part of the normative framework since before the inception of the *Berne Convention* in 1886, which recognizes, for example, the quotation right (as a mandatory exception) and the rights of, broadly speaking, a free press. As rights were added to the Convention, normative work on limitations and exceptions remained largely non-systematic and conceptually unsatisfactory. The situation has now become much more complex owing to the emergence and increasing presence of copyright in the private sphere of users and consumers, and the new role of users in generating and disseminating "content." Those users have rights, such as the right to privacy or rights contained in consumer protection statutes, that clash with copyright. New equilibria, both within copyright and in relation to these other bodies of law, must be found. This article has tried to offer a context for the formulation of limitations and exceptions at the international level and a conceptualization of the principles that should undergird such limitations and exceptions.

Those principles should first be operationalized in a new international protocol that could be negotiated to recognize both mandatory and declaratory limitations and exceptions, thus providing guidance on the interpretation and application of the three-step test.¹⁸⁰ This instrument would list the underlying principles of limitations and exceptions in a preamble, provide for specific exceptions in a few provisions, and state compatibility with (and possible interpretation of) the three-step test in an accompanying statement.

Second, the WTO could adopt a Ministerial Declaration, at least with respect to the exceptions that apply more directly to developing countries. For instance the 1971 Appendix to the *Berne Convention* contains a series of administrative measures, few of which are required to meet the underlying developmental objectives and safeguard the rightsholders' interests. A Declaration could state, for example, that WTO Members will not use the WTO

178. *Feist Publications, Inc. v Rural Telephone Service Co., Inc.* (USA SC, 1991), <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=499&invol=340>>, 499 *United States Supreme Court Reports* 340.

179. See Daniel Gervais, "Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law," (2002) 49 *Journal of the Copyright Society of the USA* 949-981, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=733603#PaperDownload>.

180. P Bernt Hugenholtz & Ruth L Okediji, *Conceiving An International Instrument On Limitations And Exceptions To Copyright: Final Report* (6 March 2008), <http://www.ivir.nl/publications/hughholtz/limitations_exceptions_copyright.pdf>.

dispute-settlement mechanism in respect of violations of those unessential parts of the Appendix (thereby making it easier and simpler to use). Easier and broader use of the Appendix may prompt rightsholders, especially publishers, to respond better to the needs of the developing world.

Third, a set of principles could be developed to explicate the issues arising from the unregulated nature of the policy space reserved for limitations and exceptions, and to provide information and guidance to national policy makers and courts. This would be helpful in light of not only extant state practice but also of emerging understandings about the impact of a properly calibrated intellectual property regime to stimulate domestic innovation policies and cultural development, including the amelioration of educational systems.¹⁸¹

Operationally, as a number of countries have begun doing, the three-step test could be used to craft limitations and exceptions that allow use for public interest purposes that do not demonstrably affect commercial exploitation. When a substantial loss of income can be shown to exist or be reasonably foreseen based on relevant experiences in other jurisdictions as a result of an exception, then a compensation mechanism can be put in place. Exceptions based on Articles 10 and 10bis of the *Berne Convention* as well as exclusions based on Articles 2 and 2bis of the Convention would remain unaffected by the test and the need to provide for compensation.

As a political matter, because the objectives of defining proper limitations and exceptions are not incompatible with the fight against commercial piracy, the two issues could be joined in a single new instrument with a view to increasing enforcement measures available against “pirates,”¹⁸² while recognizing the principles and application of limitations and exceptions. This type of dual-purpose instrument would be a forceful refocusing of copyright on its core mission and the purpose for which it was originally designed.

As a parallel set of measures, especially in grey areas that are likely to lead to heavy litigation (especially in cases where revenue streams could be affected), contractual solutions could be encouraged, notably by furthering international research in this area. In broad-ranging licensing agreements, including recourse to extended collective repertoires (which essentially transforms a collective scheme from opt-in to opt-out and seems compatible with both the *Berne Convention* and TRIPS¹⁸³), parties could agree to disagree on the exact scope of an exception and/or the three-step test but agree to pay both a licensing fee for uses that require an authorization and a (discounted) fee for the grey area possibly covered by the exception. Logically, in countries where such a mechanism is available,¹⁸⁴ governmental authorities setting collective tariffs

181. See generally Daniel Gervais, ed. *Intellectual Property, Trade and Development* (Oxford University Press, 2007).

182. As was done in the TRIPS Agreement, *supra* note 5 at art. 61, I refer here to those who infringe copyright knowingly and on a commercial scale.

183. See Daniel Gervais, “Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation,” (Study prepared for the Department of Canadian Heritage) (2003) <http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/regime/regime_e.pdf> .

184. For example the Copyright Board of Canada determined the scope of the research and educational exceptions in a decision concerning a tariff filed by the reprography collective Access Copyright for certain educational uses. See *statement of Royalties to be Collected by Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire (Educational Institutions—2005-2009)*, Decision of 26 June 2009, corrected on 17 July 2009, <<http://www.cb-cda.gc.ca/decisions/2009/Access-Copyright-2005-2009-Schools.pdf>>. At para. 89, the Board noted: “Research occurs provided that effort is put into finding, regardless of its nature or intensity.”

could take account of both exceptions and the three-step test, and adapt tariffs to reflect the exceptions appropriately.

Naturally these three ways forward are not mutually exclusive.