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Copyright, Limitations and the Three-step test. An Analysis of the Three-Step Test in International and EC Copyright Law

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Chapter 2

The Three-Step Test Within the Copyright System

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

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

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

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

2.1 Rationales of Copyright Protection

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

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

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

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

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

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

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

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

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

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

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

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

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

2.1.1 THE HISTORICAL INTERPLAY OF NATURAL LAW AND UTILITARIAN NOTIONS

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

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

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

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

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

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

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

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

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

²⁵ Cf. Strowel 1993, 185-190.

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

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

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

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

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

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

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

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

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

³² See Ginsburg 1994, 147-151.

³³ See Ginsburg 1994, 146.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁵ Cf. Michelman 1967, 1203-1204.

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

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

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

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

⁴⁷ Cf. Grosheide 1986, 129-133.

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

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

⁵⁰ See Michelman 1967, 1209-1210.

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

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

⁵¹ Cf. Michelman 1967, 1211-1212.

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

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

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

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

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

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

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

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

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

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

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

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

⁶⁰ See Gordon 1982, 1605-1606.

⁶¹ See Netanel 1996, 312-315.

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

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

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

⁶² Cf. Gordon 1982, 1608 and 1613.

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

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

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

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

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

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

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

⁶⁸ Cf. Grosheide 1986, 136-139.

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

⁷⁰ Cf. Alikhan 1986, 428-429.

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

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

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

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

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

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

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

2.1.3 THE CULTURAL RATIONALE AS THE ESSENTIAL FOUNDATION OF COPYRIGHT

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

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

⁷⁷ Cf. Grosheide 1986, 139-143; Dommering 2000, 452-455.

⁷⁸ Cf. Hugenholtz 2000b, 483.

⁷⁹ See the preamble of the Berne Convention.

⁸⁰ See the preamble of the TRIPs Agreement.

⁸¹ Cf. Reichman 1989, 800-805.

⁸² See the preamble of the WIPO Copyright Treaty.

⁸³ See articles 9(2) BC, 13 TRIPs and 10 WCT.

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

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

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

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

⁸⁴ See Dreier 1994, 54-55, referring to Foucault, Barthes and Derrida.

⁸⁵ See Dreier 1994, 55.

⁸⁶ See Dreier 1994, 58.

⁸⁷ See Jaszi 1992, 304, and 1994 62-63.

⁸⁸ Cf. the picture drawn by Dreier 1994, 56.

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

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

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

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

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

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

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

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

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

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

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

⁹² See the previous subsection.

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

⁹⁴ See Sterk 1996, 1197-1198.

⁹⁵ Cf. Calandrillo 1998, 316-317.

⁹⁶ See Breyer 1970, 351.

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

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

⁹⁷ Cf. Calandrillo 1998, 323-326.

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

⁹⁹ See the previous subsection.

¹⁰⁰ Cf. Sterk 1996, 1244-1246.

¹⁰¹ Cf. the previous subsection.

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

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

2.2 Justifications for Copyright Limitations

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

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

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

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

¹⁰⁶ Cf. Guibault 2002, 15-16.

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

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

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

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

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

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

¹¹¹ Cf. Alikhan 1986, 427-431.

¹¹² Cf. Ulmer 1971, 427-434.

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

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

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

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

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

2.2.1 FREEDOM OF EXPRESSION AND INFORMATION

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

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

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

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

¹¹⁸ Cf. van Dijk/van Hoof 1998, 558.

¹¹⁹ See Lucas 1998, 182.

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

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

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

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

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

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

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

¹²³ See Benkler 1999, 358 and 363.

¹²⁴ See Benkler 1999, 358.

¹²⁵ See Benkler 1999, 393.

¹²⁶ Cf. Benkler 1999, 393.

¹²⁷ See subsection 2.1.3.

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

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

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

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

¹²⁹ Cf. Benkler 1999, 400.

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

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

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

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

¹³⁴ See Nimmer 1970, 1189.

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

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

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

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

¹³⁶ See Nimmer 1970, 1197.

¹³⁷ Cf. Nimmer 1970, 1198-1200.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2.2 THE DISSEMINATION OF INFORMATION

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

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

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

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

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

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

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

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

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

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

¹⁵⁶ Cf. Guibault 2002, 78-87.

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

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

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

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

¹⁶¹ Cf. Reinbothe 2000, 257.

¹⁶² Cf. Elkin-Koren 1996, 265-269.

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

2.2.3 THE RIGHT TO PRIVACY

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

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

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

¹⁶³ See Guibault 2000, 131-132.

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

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

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

2.2.4 THE ENHANCEMENT OF DEMOCRACY

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

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

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

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

¹⁶⁶ Cf. the previous subsection.

¹⁶⁷ Cf. Gordon 1982, 1615; Bell 1998, 583; Merges 1997, 132.

¹⁶⁸ Cf. Cohen 1998, 551-555; Loren 1997, 48-56; Netanel 1996, 341.

¹⁶⁹ See Cohen 1998, 555.

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

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

2.3 Copyright's Delicate Balance

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

¹⁷⁰ See Netanel 1996, 341 (emphases in the original text).

¹⁷¹ See Netanel 1996, 347.

¹⁷² See Netanel 1996, 347.

¹⁷³ See Netanel 1996, 373.

¹⁷⁴ See Netanel 1996, 375.

¹⁷⁵ See Netanel 1996, 376.

¹⁷⁶ See Netanel 1996, 381.

¹⁷⁷ See Netanel 1996, 341: 'The democratic paradigm is hostile neither to economic analysis nor to neoclassicist insights regarding the operation of copyright markets.'

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

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

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

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

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

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

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

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

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

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

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

¹⁸⁶ Cf. Senftleben 2003, 12-13.

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

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

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

¹⁸⁷ See Locke 1698, book II chapter 5 § 27.

¹⁸⁸ Cf. Weinreb 1998, 1224; Fisher 1988, 1700.

¹⁸⁹ See Guibault 2002, 9.

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

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

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

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

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

¹⁹¹ Cf. Gordon 1993, 1556-1557.

¹⁹² Cf. Gordon 1993, 1557-1558.

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

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

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

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

¹⁹⁵ Cf. Weinreb 1998, 1224.

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

¹⁹⁷ Cf. Gordon 1993, 1557-1558.

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

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

In the context of the three-step test, this question must be raised in respect of copyright limitations. Exemptions from authors' rights must be viewed through the prism of intergenerational equity. This perspective first of all yields the insight that limitations which exempt transformative²⁰⁰ uses rank above all other limitations.²⁰¹ Undoubtedly, the interest of the later author in using the material of his predecessors is the strongest, if he depends on the use of such material for creating a new work. Furthermore, it appears safe to assume that all generations of authors have shared this strong interest in the possibility of freely using copyrighted material insofar as necessary for freely expressing themselves. References and allusions to already existing literary and artistic works are a feature of works of the intellect which runs all the way through the different epochs of intellectual creation. The notion of intergenerational equity underlines the paramount importance of exempting transformative uses of copyrighted material. The constitutional guarantee of freedom of expression forms the background to this finding.²⁰² The most important copyright limitations are therefore those which permit quotations and exempt the use of copyrighted material for transformative purposes such as caricature, parody and pastiche.

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

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

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

²⁰¹ Cf. Gordon 1993, 1568-1570.

²⁰² See subsection 2.2.1 above.

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

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

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

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

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

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

²⁰³ Cf. Macmillan 1999, § 42.

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

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

