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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 3

The Contextual Background to the Three-Step Test

The three-step test can be found in several provisions of international copyright law. At the 1967 Stockholm Conference for the revision of the Berne Convention, the test was introduced to pave the way for the formal acknowledgement of the general right of reproduction. In 1994, it reappeared in the TRIPs Agreement. The 1996 WIPO 'Internet' Treaties²⁰⁶ comprise the three-step test as well. Not surprisingly, its ambit of operation is no longer confined to the right of reproduction. Nowadays, it can be perceived as a clause generally preventing all kinds of copyright limitations from encroaching on the rights of authors. In view of this development, it appears necessary to consider the different connotations the three-step test has received due to the appearance in different areas of international copyright law before embarking on its interpretation in the ensuing chapter 4. Subsequently, the background to its incorporation into the Berne Convention (3.1), the TRIPs Agreement (3.2) and the WIPO 'Internet' Treaties (3.3) will accordingly be examined in some detail.

3.1 The Berne Convention

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

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

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

²⁰⁸ See Ricketson 1987, 41.

To ensure a progressive improvement of the system of the Berne Union, periodic revision conferences have occurred for the most part at roughly 20-year intervals since the adoption of the convention in 1886.²⁰⁹ In the course of these conferences, amendments aiming at the introduction of new minimum rights have proven to be challenges for the member countries. Objections to the broadening of the set of exclusive rights evolved, in particular, from their reluctance to abandon exemptions which were already imposed on the right in question in domestic legislation. Thus, it proved difficult to find a formula capable of covering the diversity of limitations which the countries of the Union sought to maintain. At the 1967 Stockholm Revision Conference, the outlined problem came to the fore in connection with the formal acknowledgement of the right of reproduction. It was finally solved through the introduction of the three-step test which is supposed to show sufficient deference to the interest of the member states to carry on their various limitations concerning the right of reproduction. Another solution had been found in respect of public performance rights at the 1948 Brussels Conference. Similar to the situation in 1967, the drafters of the Brussels Act had to face a large number of provisions in national laws permitting the unauthorised public performance of works under certain conditions. At the Conference, preference was given to an express mention of the possibility to make 'minor reservations'²¹⁰ in the general report instead of inserting a clause allowing the countries of the Union to retain existing exemptions in the text of the Berne Convention.

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

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

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

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

3.1.1 THE 'MINOR RESERVATIONS DOCTRINE' AS A PRECURSOR

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

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

²¹¹ See Documents 1948, 253.

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

²¹³ Cf. Ricketson 1987, 533.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²²⁴ See Documents 1948, 260-261.

²²⁵ See Documents 1948, 258.

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

The objective to permit only exemptions of a restricted nature lies accordingly at the core of the 'minor reservations doctrine'. The claim for the preclusion of any profit motive, however, is not expressly mentioned in Plaisant's report²²⁷ The final 'minor reservations doctrine' first and foremost rests on the *de minimis* principle.²²⁸ Other considerations, like the necessity of a non-commercial character, form the context in which this basic notion is embedded.²²⁹ Both the 'minor reservations doctrine' and the three-step test evolved from comparable situations. They are derived from similar reflections on the possible shape of copyright limitations.²³⁰ Why the drafters of the 1967 Stockholm Act preferred the incorporation of the three-step test into the text of the Berne Convention rather than the establishment of another implied limitation, will be discussed in the following subsection.

3.1.2 THE INTRODUCTION OF THE TEST AT THE 1967 STOCKHOLM CONFERENCE

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

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

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

²²⁸ Cf. Ricketson 1987, 536.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²³⁷ See Doc. S/1, Records 1967, 112.

²³⁸ See Doc. S/1, Records 1967, 112.

²³⁹ See Doc. S/1, Records 1967, 112.

²⁴⁰ See Doc. S/1, Records 1967, 112.

²⁴¹ See Doc. S/1, Records 1967, 112, footnote 2.

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

'It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works

- (a) for private use;
- (b) for judicial or administrative purposes;
- (c) in certain particular cases where the reproduction is not contrary to the legitimate interests of the author and does not conflict with a normal exploitation of the work.'²⁴³

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

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

²⁴³ See Doc. S/1, Records 1967, 113.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.1.3 NATIONAL LIMITATIONS AT THE TIME OF THE STOCKHOLM CONFERENCE

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

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

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

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

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

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

3.1.3.1 THE FEDERAL REPUBLIC OF GERMANY

The changes in the field of copyright law which took place on the eve of the 1967 Stockholm Conference in the Federal Republic of Germany (FRG) are particularly relevant to the introduction of the three-step test into international copyright law. Just before the 1967 Conference, a new Copyright Act entered into force in the FRG on January 1, 1966.²⁶¹ Its drafters aimed at paving the way for accession to the 1948 Brussels Act of the Berne Convention, so that German authors could profit from the advanced level of protection granted therein.²⁶² Nonetheless, the new Act contains certain features which reach beyond the international status quo reflected in the 1948 Brussels Act. Not surprisingly, it was deemed an ambitious and modern landmark piece of legislation.²⁶³ At the 1967 Stockholm Conference, the position of the chairman of Main Committee I was assigned to the German copyright specialist Ulmer. Main Committee I discussed the revision of substantial provisions of the Berne Convention and the introduction of the three-step test. Ulmer's teachings on copyright had a deep impact on the 1965 Copyright Act²⁶⁴ – a fact which in itself indicates that the solutions found in new German copyright law may have influenced the deliberations of Main Committee I of the Stockholm Conference.

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

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

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

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

²⁶⁴ Cf. Fromm 1965, 52.

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

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

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

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

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

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

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

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

²⁷⁰ Cf. Ulmer 1965, 30-31.

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

²⁷² Cf. Möhring 1966, 142.

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

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

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

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

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

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

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

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

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

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

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

²⁸¹ See Doc. S/13, Records 1967, 618.

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

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

Hence, German copyright law influenced the initial understanding of the three-step test. The 1965 Copyright Act of the FRG, however, is also of interest because it comprises a set of copyright limitations which yields many examples of exemptions from the right of reproduction. §§ 50 and 51 of the 1965 Act concern the reporting of current events and quotations. They belong to the group of limitations for which the Berne Convention specifically provides.²⁸⁵ The German copyright law of 1965, in general, extensively uses the special provisions of the Convention which permit certain limitations: public speeches concerning current affairs as well as articles dealing with current economic, political or religious topics may be reproduced by the press pursuant to §§ 48 and 49. Ephemeral recordings made by a broadcasting organisation are exempted by virtue of § 55. A compulsory licence in respect of the recording of musical works is laid down in § 61. Privileges for teaching purposes, moreover, can be found in §§ 46 and 47. Certain 'minor reservations' are eventually set out in § 52.²⁸⁶

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

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

²⁸⁴ For a detailed discussion, see subsection 4.6.4.2.

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

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

Besides these limitations that are based on special provisions of the Berne Convention, the 1965 Copyright Act contains numerous exemptions from the right of reproduction which, after the 1967 Stockholm Conference, fell directly under the three-step test of article 9(2) BC. As already pointed out, § 53(1) allows the making of single reproductions of a work for strictly personal use. Pursuant to § 53(2), the authorised user need not necessarily produce the copy himself but may ask another person to make the reproduction. This personal use concept is embedded in a broader private use system that is set out in § 54.²⁸⁷ A facet thereof, the internal use of copyrighted material in industrial undertakings, has already been discussed. The particulars of the private use system established in § 54 are as follows: § 54 No. 1 permits reproductions for scientific use. § 54 No. 2 exempts the reproduction of one's own copy of a work serving the inclusion of the work in a personal archive. Therefore, it is predominantly a library privilege. Pursuant to § 54 No. 3, broadcast works may freely be reproduced for one's own information on current affairs. Finally, § 54 No. 4, in general, permits reproductions for one's own use insofar as (a) only small parts of an already published work or single articles from a newspaper or periodical are concerned, or (b) the work is out of print and the right holder not to be found.

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

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

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

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

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

3.1.3.2 THE NETHERLANDS

At the time of the 1967 Stockholm Conference, the situation in the Netherlands resembled the one in the FRG insofar as substantial changes of copyright law were under discussion. A draft amendment which aimed at bringing Dutch copyright law into line with the 1948 Brussels Act of the Berne Convention was submitted to parliament in 1964.²⁹⁰ The legislative process, however, could not be completed before October 27, 1972. The revised text of the Dutch Copyright Act 1912 entered into force on January 7, 1973.²⁹¹ The participation of the Dutch delegation in the 1967 Stockholm Conference, thus, underlay the Dutch Copyright Act 1912, as in effect at that time, and the proposed amendments which had already taken shape. These amendments, in particular, concerned copyright limitations. On the one hand, the set of limitations for which the Dutch Copyright Act 1912 provided should be adapted to the rules set out in the 1948 Brussels Act. On the other hand, an appropriate reaction to the problems raised by the latest state of the copying art had to be formulated.²⁹²

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

²⁸⁹ Cf. in respect of all these provisions Fromm/Nordemann 1966, 215-219.

²⁹⁰ Cf. Cohen Jehoram 1973, 525; Vermeijden 1970, 205.

²⁹¹ See the law of October 27, 1972 amending the 1912 Copyright Act, Stb. 1972, 579. Cf. Cohen Jehoram 1973, 525-526.

²⁹² Cf. van Lingen 1969, 1112-1113.

²⁹³ See article 15 of the Dutch Copyright Act, as in effect at the time of the Stockholm Conference. Cf. Komen/Verkade 1970, 61-62; Pfeffer/Gerbrandy 1973, 154.

²⁹⁴ Cf. Cohen Jehoram 1973, 535; Pfeffer/Gerbrandy 1973, 166.

²⁹⁵ Cf. Cohen Jehoram 1973, 532; Pfeffer/Gerbrandy 1973, 154-156; Komen/Verkade 1973, 16.

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

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

This strategy for balancing the interests of authors and users, in particular, informed Dutch legislation in the field of private use privileges. The Dutch 1912 Copyright Act, as in effect at the time of the 1967 Stockholm Conference, merely contained one provision dealing with private use. Article 17 afforded users the opportunity to make a few copies of literary or artistic works provided that these copies solely serve personal practice, study or use.³⁰⁰ This rule was considered outdated at the time of the Stockholm Conference. The advances in the field of the copying art, enabling photomechanical reproductions as well as sound and visual recordings, inevitably led to reproduction practices that could hardly be reconciled with the wording of article 17.³⁰¹ It was stressed that the legislator of 1912 had envisioned the making of a copy by hand rather than vast numbers of photomechanical reproductions.³⁰² Furthermore, it was feared that the new copying practices could enter into competition with a work's normal exploitation.³⁰³ To render Dutch copyright law capable of keeping up with the new reproduction techniques, an amendment of article 17 was considered inevitable.

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

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

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

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

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

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

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

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

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

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

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

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

³⁰⁵ See article 17 of the 1964 government proposal.

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

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

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

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

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

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

issues raised at the Conference and the rules on private copying which finally, in 1972, were laid down in two separate provisions: articles 16b and 17 of the Dutch Copyright Act 1912.³¹²

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

On this basis, a copyright order completing the Dutch private use system was given in 1974.³¹⁴ The beneficiaries of the additional regulations are institutions in the public sector, non-profit libraries, non-profit educational institutions and other public welfare institutions. In line with article 16b, these institutions enjoy the freedom to reproduce small parts of literary works. Articles, reports or other pieces published in a newspaper or periodical, moreover, may generally be reproduced entirely. The aforementioned institutions may make reproductions for internal use of their employees insofar as necessary for the proper accomplishment of their tasks. Libraries may furthermore reproduce works which are no longer available, and articles, reports and other pieces taken from newspapers or periodicals on behalf of users which ask the library itself or another library for a copy. Educational institutions enjoy the additional freedom of making reproductions for their pupils or students provided that such reproductions are necessary for complementing the prescribed or recommended text books. The beneficiaries of the regulatory order are obliged to remunerate the authors. A certain amount of money must be paid per page. A reduced fee applies to educational institutions.³¹⁵

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

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

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

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

³¹⁵ Cf. van Lingem 1975, 77-80; Wink/Limberg 1975, 67-69.

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

rule that copies made for personal use may be passed on to another person for judicial or administrative purposes, was not set out in the initial 1964 government proposal, but entered the picture in 1969.³¹⁷ For administrative purposes, allowance was made in the copyright order of 1974. Whereas these parallels merely indicate that, to some extent, the Stockholm Conference may have influenced the drafting of article 16b, a line can obviously be drawn between the debate on the three-step test at the Conference and the last element of the Dutch private use system, separately laid down in article 17.

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

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

³¹⁷ Cf. van Lingen 1969, 1115.

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

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

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

³²¹ Cf. van Lingen 1975, 74.

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

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

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

3.1.3.3 FRANCE

The participation of the French delegation in the 1967 Stockholm Conference was based on the French copyright law of March 11, 1957.³²⁶ Since the end of the 19th century, French copyright law had rested on the groundwork laid by the representatives at the assemblies of the French Revolution. The few concise texts which express their thoughts were slightly enlarged in the course of the following 150 years. During this period, however, several attempts to create a copyright code setting forth detailed rules failed. Thus, the courts had to accomplish the task of ensuring that French copyright law kept pace with the actual needs of a time of substantial changes in the field of expression and diffusion of intellectual works.³²⁷

³²³ Cf. Dietz 1978, 181-183.

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

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

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

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

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

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

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

³²⁸ Cf. the two previous subsections.

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

³³⁰ Cf. Desbois 1966, 277.

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

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

³³³ See Desbois 1966, 277.

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

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

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

³³⁴ Cf. Desbois 1966, 315-317.

³³⁵ Cf. Desbois 1966, 317-319.

³³⁶ Cf. Desbois 1966, 317.

³³⁷ Cf. in this regard the practical example of the functioning of the three-step test given in the Report on the Work of Main Committee I, Records 1967, 1146. For the solutions espoused in the FRG and the Netherlands, see the two previous subsections.

³³⁸ Cf. Desbois 1966, 277.

³³⁹ See Minutes of Main Committee I, Records 1967, 858.

³⁴⁰ Cf. Desbois 1966, 278.

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

Interestingly, no substantial objections to the other exemptions from the right of reproduction proposed in the programme of the Stockholm Conference³⁴⁴ were raised by the French delegation. The plan to permit reproductions 'for judicial or administrative purposes' was supported even though French copyright law did not contain limitations serving these ends.³⁴⁵ As to the open formula in which the later three-step test was grounded, the French delegation signalled its general agreement. The delegation of the UK whose proposal determined the final wording of the three-step test,³⁴⁶ was merely asked to explain why it had introduced the phrase 'unreasonably prejudice'.³⁴⁷ The French 1957 Copyright Act comprised one further limitation which, like the already discussed private use system, was not rooted in a special provision of the Berne Convention and, therefore, fell directly under the three-step test. By virtue of article 41-4^o, the author is hindered from prohibiting '*la parodie, le pastiche et la caricature, compte tenu des lois du genre*'.³⁴⁸ Prior to 1957, French courts, furthermore, had developed a limitation allowing the reproduction of works which, permanently, are located in public places. Similar to Dutch law, as amended in 1972, it was made a condition that the copyrighted work does not constitute the main object of reproduction. The legislator of 1957, however, did not expressly provide for this limitation. At the time of the Stockholm Conference, it was thus concluded that this limitation had been abolished by the 1957 Copyright Act.³⁴⁹

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

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

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

³⁴⁴ See Doc. S/1, Records 1967, 113.

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

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

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

³⁴⁸ Cf. Desbois 1966, 288-290.

³⁴⁹ Cf. Desbois 1966, 291-292.

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

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

3.1.3.4 THE UNITED KINGDOM

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

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

³⁵¹ Cf. Desbois 1966, 288.

³⁵² Cf. Desbois 1966, 290-291.

³⁵³ Cf. Desbois 1966, 274.

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

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

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

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

³⁵⁵ See for an overview Rubinstein 1958, 5.

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

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

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

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

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

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

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

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

³⁶² Cf. Barker 1970, 19.

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

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

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

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

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

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

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

³⁶⁸ Cf. Skone James 1965, 177.

³⁶⁹ See Barker 1970, 20.

³⁷⁰ Cf. Barker 1970, 32-33.

³⁷¹ See Doc. S/13, Records 1967, 630.

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

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

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

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

³⁷³ Cf. Skone James 1965, 242-243; Carter-Ruck/Skone James 1965, 93.

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

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

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

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

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

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

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

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

³⁷⁹ Cf. subsections 3.1.3.1 and 3.1.3.2.

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

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

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

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

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

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

³⁸⁴ See section 178 of the CDPA 1988.

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

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

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

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

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

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

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

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

It can be concluded that in UK copyright law, numerous provisions are to be found which are directly subjected to the control of the three-step test. The freedom which national legislation enjoys because of the introduction of the test at the 1967 Stockholm Conference has largely been used by UK legislation. As to private use privileges, however, it must be emphasised that the UK refrained from exempting the making of multiple copies, for instance, for administrative purposes or internal use in public welfare institutions or industrial undertakings.³⁹⁰ The fair dealing defence for private study or research and the accompanying library privileges only allow the making of a single copy for strictly personal use. The government expressly proposed to introduce a levy on blank tapes to deal with home taping in the course of the preparatory work undertaken for the CDPA 1988.³⁹¹ Finally, the levy scheme did not become part of UK copyright law.

3.1.3.5 INDIA

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

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

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

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

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

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

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

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

privileges but with the approval of far-reaching compulsory licensing in the field of the right of reproduction. The relevant statute in effect at the time of the Stockholm Conference was the Indian Copyright Act 1957 which entered into force on January 24, 1958. It replaced the previous 1914 Act which leaned heavily on the UK Copyright Act 1911. In the Rajya Sabha, the Council of States, the ambitious bill containing the new copyright law had been introduced on October 1, 1955. Finally, it was enacted in less than two years on June 4, 1957.³⁹⁴ Not only the changed constitutional status of India but also the aim to accord with the 1948 Brussels Act of the Berne Convention had been a propelling force for the adoption of a self-contained copyright law in the seventh year of the Republic of India.³⁹⁵ As regards copyright limitations, a close connection to UK copyright law can hardly be denied. In section 52 of the Indian Copyright Act 1957, various limitations are enumerated, the majority of which call provisions of the UK Copyright Act 1956 to mind.

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

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

³⁹⁴ Cf. Baxi 1986, 500-501.

³⁹⁵ Cf. Baxi 1986, 502.

³⁹⁶ See Singhal 1968, 222.

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

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

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

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

In section 52 (c) of the Indian Copyright Act 1957, the reproduction of a work for the purpose of judicial proceedings or a report thereof is also exempted. Section 52 (d), moreover, permits a work's reproduction in material prepared by the secretariat of a legislative body exclusively for the use of the members of that body.⁴⁰² As regards artistic works permanently situated in public places and architectural works, limitations can be found in section 52 (s), (t), (u) and (x). They resemble those set out in the UK Copyright Act 1956.⁴⁰³ The complex library system established in UK copyright law, however, does not reappear in the Indian Copyright Act 1957. Instead, section 52 (o) simply allows the making of not more than three copies of a book, pamphlet, sheet of music, map, chart or plan by or under the direction of the person in charge of a public library for the use of the library if such material is not available for sale in India. As to educational use of copyrighted material, section 52 (g), in line with article 10(2) of the 1948 Brussels Act of the Berne Convention, allows the inclusion of short passages from a published work in anthologies intended for the use of educational institutions. The boundary lines of this privilege are drawn as restrictively as in the UK Copyright Act 1956.⁴⁰⁴ Section 52 (h) of the Indian Copyright Act 1957, moreover, exempts the reproduction of a work by a teacher or a pupil in the course of instruction.

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

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

⁴⁰¹ See Narayanan 1986, 156.

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

⁴⁰³ See for a more detailed description the previous subsection.

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

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

To understand the resistance to the adoption of the three-step test, the particular importance which has traditionally been attached to compulsory licensing in India must be brought into focus. Two exclusive rights, the right of reproduction and the right of translation, play a decisive role in this respect. Under the 1914 Copyright Act, the exclusive right of translation had already been restricted. Pursuant to section 4 of the 1914 Act, it was to subsist only for a period of ten years from the first publication of the work. However, the author was not divested of the translation right if he authorised the translation of his work within this period.⁴⁰⁶ As Baxi points out, the language of the 1914 Act 'might suggest a laudable policy of promoting wider diffusion of Indian works in one language into other Indian languages'.⁴⁰⁷ The objective to ensure wider diffusion of Indian works reappeared in the 1957 Act – in the shape of compulsory licences. Pursuant to section 31, a complaint can be made to the Indian Copyright Board if the right holder of any Indian work which has been published or performed in public refuses to allow the work's republication, public performance or communication by radio-diffusion.⁴⁰⁸ After giving the owner of the copyright a reasonable opportunity of being heard, the Copyright Board is entitled to arrange for the grant of a licence to the complainant if it is satisfied that the grounds for the right holder's refusal are not reasonable.⁴⁰⁹ In this case, the Board must determine the compensation to be paid to the right holder. Not only Indian works⁴¹⁰ but literary or dramatic works in any language are furthermore subjected to section 32. The latter provision vests in the Copyright Board the power to grant non-exclusive licences to publish a translation of a work. At the time of the Stockholm Conference, it was made a condition that a translation of the work had not been published within seven years of the first publication of the work, or that such translation was out of print. Moreover, the applicant for the compulsory licence must have unsuccessfully undertaken certain steps to obtain authorisation and satisfy the Copyright Board that he is capable of producing a correct translation and paying the determined royalties. The work must not have been withdrawn from circulation by the author, and the latter must have been given the opportunity of being heard.⁴¹¹

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

⁴⁰⁶ Cf. Baxi 1986, 500.

⁴⁰⁷ See Baxi 1986, 500.

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

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

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

⁴¹¹ Cf. Singhal 1968, 143-145.

'(a) for private use';

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

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

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

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

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

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

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

⁴¹² See Doc. S/1, Records 1967, 113.

⁴¹³ See the text submitted by India, Doc. S/86, Records 1967, 692.

⁴¹⁴ Cf. Alikhan 1986, 427.

⁴¹⁵ See Alikhan 1986, 425.

⁴¹⁶ See Plenary of the Berne Union, Records 1967, 807.

⁴¹⁷ See Plenary of the Berne Union, Records 1967, 807.

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

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

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

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

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

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

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

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

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

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

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

3.1.4 THE DUALISM INHERENT IN THE THREE-STEP TEST

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

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

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

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

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

⁴²⁵ See subsection 3.1.3.

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

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

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

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

⁴²⁸ See Doc. S/1, Records 1967, 113.

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

3.2 The TRIPs Agreement

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

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

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

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

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

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

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

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

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

3.2.1 THE DOUBLE INSERTION OF THE THREE-STEP TEST

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

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

⁴³⁶ See Reinbothe, 1992, 708.

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

⁴³⁸ Cf. Gervais 1998, 11.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2.2 ARTICLE 13 TRIPs AS A BERNE-PLUS ELEMENT

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

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

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

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

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

⁴⁵⁹ Cf. subsection 3.1.2.

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

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

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

⁴⁶⁰ Cf. Ricketson 1987, 682-685.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁶⁸ Cf. Ficsor 1997, 215.

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

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

3.3 The WIPO 'Internet' Treaties

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

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

⁴⁷¹ See Ficsor 1997, 197.

⁴⁷² Cf. Ficsor 1996, 79.

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

⁴⁷⁴ See Ficsor 1996, 80.

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

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

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

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

3.3.1 PREVIOUS DISCUSSIONS BASED ON THE THREE-STEP TEST

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

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

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

⁴⁷⁸ Cf. the overview given by Ficsor 2002a, 304-317.

⁴⁷⁹ See Experts on Unauthorized Private Copying 1984, 281.

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

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

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

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

⁴⁸⁰ See Experts on Unauthorized Private Copying 1984, 281.

⁴⁸¹ See Experts on Unauthorized Private Copying 1984, 282.

⁴⁸² This strategy of avoiding an unreasonable prejudice reminds of the solution set out in the 1965 Copyright Act of the FRG which also influenced the deliberations at the 1967 Stockholm Conference. Cf. subsection 3.1.3.1.

⁴⁸³ See Experts on Audiovisual Works and Phonograms 1986, 226.

⁴⁸⁴ The category of the 'printed word' was understood to comprise any writings included or to be included in books, newspapers, magazines, computer memories or electronic databases. Cf. Ficsor 2002a, 306.

⁴⁸⁵ See Experts on the Printed Word 1988, 63.

⁴⁸⁶ See Experts on the Printed Word 1988, 64.

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

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

Moreover, they added an example referring to cases where

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

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

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

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

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

⁴⁸⁷ See Experts on the Evaluation and Synthesis of Principles 1988, 452.

⁴⁸⁸ See Experts on the Evaluation and Synthesis of Principles 1988, 452.

⁴⁸⁹ See section 107 of the US Copyright Act.

⁴⁹⁰ See Experts on the Printed Word 1988, 64.

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

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

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

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

⁴⁹¹ See Experts on the Printed Word 1988, 64.

⁴⁹² Cf. Experts on a Berne Protocol 1992, 70-71.

⁴⁹³ Cf. Experts on a Berne Protocol 1992, 71.

⁴⁹⁴ Cf. Experts on a Berne Protocol 1992, 73 and Ficsor 2002a, 337-342.

⁴⁹⁵ Cf. Ficsor 2002a, 340 and 342.

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

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

3.3.2 THE DEBATE AT THE 1996 WIPO CONFERENCE

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

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

However, it was also pointed out that formally 'minor reservations' could in the course of a critical review of current limitations turn out to undermine important aspects of protection in the digital environment.⁴⁹⁸ Not surprisingly, the concern about sufficient breathing space for socially valuable ends played a decisive role in the deliberations concerning limitations. The Minutes of Main Committee I mirror the determination to shelter exemptions. The US sought to safeguard the 'fair use' doctrine.⁴⁹⁹ Denmark feared that the new rules under discussion could become 'a "straight jacket" for existing exceptions in areas that were essential for society'.⁵⁰⁰ Many delegations opposed the second paragraph of the draft provision set out in the basic proposal which additionally subjects current limitations under the Berne Convention to the three-step test.⁵⁰¹ Korea unequivocally suggested the deletion of paragraph 2⁵⁰² – a proposal which was approved by several other delegations.⁵⁰³

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

⁴⁹⁷ See WIPO Doc. CRNR/DC/4, § 12.09.

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

⁴⁹⁹ See WIPO Doc. CRNR/DC/102, § 488.

⁵⁰⁰ See WIPO Doc. CRNR/DC/102, § 489.

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

⁵⁰² See WIPO Doc. CRNR/DC/102, § 491.

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

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

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

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

⁵⁰⁴ See WIPO Doc. CRNR/DC/102, § 492.

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

⁵⁰⁶ See the last paragraph of the previous subsection.

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

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

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

⁵¹⁰ Cf. subsection 3.2.2.

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

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

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

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

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

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

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