Chapter 4

The Interpretation of the Three Criteria

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

4.1 Principles of Interpretation

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

4.1.1 THE VIENNA CONVENTION ON THE LAW OF TREATIES

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

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

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

‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’

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

\[\text{Cf. de Visscher 1963, 52-54; Bernhardt 1967, 497.}\]
\[\text{Cf. the overview given by Sinclair 1984, 114-115. See also the ILC’s commentary to the final draft of the Vienna Convention, presented by Rauschnig 1978, 250.}\]
\[\text{Cf. ILC commentary, Rauschnig 1978, 251; Sinclair 1984, 119.}\]
\[\text{Cf. Sinclair 1984, 120; de Visscher 1963, 50.}\]

100
objective, textual approach to treaty interpretation over the subjective or
teleological method. The starting point of treaty interpretation, thus, is the
elucidation of the meaning of the text. The parties are to be presumed to have that
intention which appears from the ordinary meaning of the terms used by them.\textsuperscript{519}
These terms, however, are not to be determined in the abstract. Article 31(1) does
not demand a purely grammatical or linguistic analysis. By contrast, the interpreter
is obliged to consider the ordinary meaning of a term systematically, in the context
of the whole treaty, and in the light of its object and purpose.\textsuperscript{520}

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

\textquote{a) any agreement relating to the treaty which was made between all the
parties in connection with the conclusion of the treaty;

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

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

\textquote{a) any subsequent agreement between the parties regarding the interpretation
of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes
the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between
the parties.'}

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

\textsuperscript{519} Cf. ILC Commentary, Rauschning 1978, 252-253; Sinclair 1984, 115; Bernhardt 1967, 497.
\textsuperscript{520} Cf. Bernhardt 1967, 498; Sinclair 1984, 121.
\textsuperscript{521} See ILC commentary, Rauschning 1978, 253-254; de Visscher 1963, 121-122.
\textsuperscript{522} Cf. Sinclair 1984, 138; de Visscher 1963, 123; Bernhardt 1967, 499.
\textsuperscript{523} See Sinclair 1984, 138.
To a certain extent, the general rule of interpretation set out in article 31(1) of the Vienna Convention recognises the aforementioned teleological approach to treaty interpretation. Besides the context in which a treaty term is embedded, the light of the object and purpose of the treaty must be shed on the term in question to discern its meaning. It is worth noting that this principle is not meant to encourage departure from the primacy of the treaty text. The reference to the object and purpose of a treaty rather is a secondary or ancillary process to confirm or modify the conclusions drawn on the basis of an inquiry into the ordinary meaning of a treaty term in its context. Moreover, when connected with the principle of good faith, the reference to the object and purpose of a treaty can serve as a vehicle to lend weight to the principle of effectiveness which is missing among the canons of interpretation reflected in the Vienna Convention. The latter principle rests on the maxim ut res magis valeat quam pereat and calls on the interpreter to give the provisions of a treaty the greatest effect possible. Commenting on the 1966 final draft of the Vienna Convention, the International Law Commission explicitly mentioned the possibility of attaching some importance to the principle of effectiveness:

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

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

526 See ILC commentary, Rauschnling 1978, 251.
THE INTERPRETATION OF THE THREE CRITERIA

'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.'

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

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

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

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

528 See Briggs 1971, 709 and 712.
529 Cf. ILC commentary, Rauschning 1978, 255.
of a complete consensus ad idem, or lack of sufficient time to co-ordinate the texts may result in minor or even major discrepancies in the meaning of the texts'. Therefore, a conflict rule which deals with the potential ambiguity flowing from the plurality of the texts can be found in article 33(4):

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

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

4.1.2 THE MATERIAL AVAILABLE FOR INTERPRETATION

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

532 See ILC commentary, Rauschning 1978, 262.
533 Sinclair 1984, 150-152, argues that this solution still should be applied in particular cases.
4.1.2.1 The Wording of the Three-Step Test

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

4.1.2.2 The Context Surrounding the Three-Step Test

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

---

535 See chapter 3.
536 Compare articles 9(2) BC, 13 TRIPs and 10 WCT one with another.
537 See articles 9(2) BC, 13 TRIPs and 10 WCT which all comprise these expressions in the given sequence. The reference to authors in articles 9(2) BC and 10 WCT on the one hand and right holders in article 13 TRIPs on the other, does not affect the test's general structure. However, it nuances the meaning of its last criterion. See subsections 4.6.2 and 4.6.3.
538 See article 31(1) of the Vienna Convention.
539 See article 31(2) of the Vienna Convention.
540 See Records 1967, 1134.
Another characteristic feature of the context surrounding the three-step test comes to the fore in the TRIPs Agreement. It might be called the phenomenon of 'interwoven contexts'. Articles 1 to 21 of the Berne Convention, with the exception of article 6bis, are incorporated into TRIPs by reference. The included provisions of the Berne Convention form part of the context of article 13 TRIPs which contains the three-step test. Similarly, the three-step test of article 10 WCT is intertwined with the Berne Convention. Like in the TRIPs Agreement, articles 1 to 21 of the Berne Convention are incorporated into the WCT by reference. Again, the context of the three-step test, thus, extends to the Berne Convention. As a result of this specific legislative technique, the substantive provisions of the Berne Convention appear as a kind of common ground. They are always a part of the context in which the three-step tests of international copyright law are embedded.

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

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

---

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

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

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

4.1.2.3 The Role of WTO Panel Reports

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

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

550 See article 30 TRIPs.
It can be argued in favour of the qualification of panel reports as definitive interpretations that at least insofar as a report has been adopted by the Dispute Settlement Body (DSB), the members of the WTO have signalled their principle approval of the findings of the panel. This conclusion can be made on the basis of the rules set out for the procedure of the DSB. Pursuant to article IV(3) of the Agreement Establishing the World Trade Organization (WTO Agreement), the General Council of the WTO discharges the responsibilities of the DSB. As the General Council is composed of representatives of all members of the WTO, all contracting parties are represented when a panel report is to be adopted. The two reports under discussion have passed this procedure. The interpretation of the discussed three-step tests, thus, has been countenanced by the DSB and appears as the shared view of all WTO members.

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

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

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


555 Cf. article 16 DSU.

556 In the case of the three-step test, the Council for TRIPs (cf. article 68 TRIPs) would therefore have to be heard first.
posits that allowance can only be made for 'concordant subsequent practice common to all the parties'.\textsuperscript{557} The fact that the two panel reports under discussion have been adopted by the DSБ strongly weighs in favour of a qualification as subsequent practice. However, as Jackson points out,

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

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

---


\textsuperscript{558} See Jackson 2000, 129.

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


\textsuperscript{561} See Jackson 2000, 127.

\textsuperscript{562} Cf. WTO Panel – Copyright 2000, §§ 7.1 and 7.2.

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

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

4.1.2.4 THE INTERCONNECTION OF SUPPLEMENTARY SOURCES

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

565 This participation is not necessarily limited to being represented when the panel report is adopted. By contrast, WTO members may participate in the panel proceedings as third parties. In the patent case, Australia, Brazil, Columbia, Cuba, India, Israel, Japan, Poland, Switzerland, Thailand and the US used this possibility (see WTO Panel – Patent 2000, § 1.1). In the copyright case, Australia, Brazil, Canada, Japan and Switzerland reserved third party rights (see WTO Panel – Copyright 2000, § 1.4).
566 See article 9(1) TRIPs.
567 Cf. sections 3.2 and 3.3 above. See the analysis conducted in section 4.2.
provision under examination or leads to manifestly absurd or unreasonable results. No means of interpretation is expressly excluded by article 32.658 Therefore, at this stage of an interpretative analysis, diverse materials, like decisions of national courts, commentary literature or articles concerning the three-step test may enter the picture.659 Two sources, however, are of particular importance and have explicitly been emphasised in article 32: the preparatory work of the treaty and the circumstances of its conclusion. As the three-step test can be found in no fewer than three international copyright treaties, these two expressly mentioned categories encompass a wide variety of documents. By and large, the material which is relevant to the interpretation of the three-step test consists of those documents which have already been sifted in chapter 3. For this reason, its different facets will not again be named and enumerated here.

Instead, an interesting phenomenon shall be brought into focus which inevitably arises when consulting the travaux préparatoires of the Berne Convention, the TRIPs Agreement and the WIPO Copyright Treaty. It has already been pointed out in respect of the context surrounding the three-step test that articles 1 to 21 of the Berne Convention constitute a kind of common ground. The substantive provisions of the Berne Convention are always a part of the context in which the three-step test is embedded in international copyright law. A similar effect of interconnection comes to the fore in the field of supplementary sources. As already noted in chapter 3, the drafters of the TRIPs Agreement conceived of the three-step test as a manifestation of the standard of protection reached in the Berne Convention. When reproducing the wording of article 9(2) BC with slight alterations in article 13 TRIPs, they did not aim at establishing completely new principles. By contrast, they bore article 9(2) BC in mind.570 The preparatory work of the WIPO Copyright Treaty is even clearer with regard to the relation between article 9(2) BC and article 10 WCT. It was unequivocally stated in the basic proposal for substantive provisions of the later WCT that the interpretation of the three-step test ‘should follow the established interpretation of Article 9(2) of the Berne Convention’.571 Furthermore, the explanation of its functioning given in the report on the work of Main Committee I of the 1967 Stockholm Conference is cited.572 When wishing to observe the basic rule of article 31 of the Vienna Convention, and interpreting article 13 TRIPs and article 10 WCT in good faith, it is thus inevitable to show considerable deference not only to the travaux préparatoires which directly concern these provisions but also to the entire acquis relating to

569 Cf. cf. the enumeration of possible sources by Ricketson 1987, 135-142.
570 Cf. section 3.2 and Reinboth 1992, 711. The fact that the wording of article 13 TRIPs has carefully been shifted into line with article 9(2) BC even though more detailed language was proposed (see GATT Doc. MTN.GNG/NG11/W/14/Rev.1, 8), already bears witness to the close relationship between article 9(2) BC and article 13 TRIPs.
571 See WIPO Doc. CRNR/DC/4, § 12.05.
572 See WIPO Doc. CRNR/DC/4, § 12.05.
article 9(2) BC. The background to article 9(2) BC, including especially the preparatory work undertaken for this first three-step test of international copyright law and the circumstances of its adoption, may thus always serve as a supplementary means of interpretation irrespective of whether article 9(2) BC itself or one of the ensuing three-step tests of article 13 TRIPs and 10 WCT is under discussion. The approach of the two aforementioned WTO panels which dealt with the three-step test confirms this finding. Both panels did not hesitate to trace the development of the three-step test in international copyright law back to the travaux préparatoires of the 1967 Stockholm Conference although one of the cases concerned the Canadian protection regime of pharmaceutical products and thus not even copyright but patent law.

4.1.2.5 THE US FAIR USE DOCTRINE

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

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

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

576 See section 107 of the US Copyright Act. The list is understood as an open, non-exclusive enumeration.
the author. Certain elements of the fair use doctrine inevitably call to mind the criteria of the three-step test. The fourth fair use factor, for instance, deals with the effect of the use upon the potential market for the copyrighted work. The second criterion of the three-step test, similarly, inhibits copyright limitations from coming into conflict with a normal exploitation of the work. These similarities already suggest that, to a certain extent, the same questions will arise in the course of the interpretation of the three-step test which are also begged by the fair use doctrine. The latter, however, has a much longer tradition than the three-step test and operates against the backdrop of a wealth of experience for which established case law gives evidence.\footnote{578} Hence, one might be tempted to solve the problems arising in connection with the three-step test with an eye to the fair use doctrine.

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

4.1.2.6 THE LANGUAGE SITUATION

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

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

\footnote{579}{Doubt has been cast upon the compliance of fair use with the three-step test, for instance, by Cohen Jehoram 2001b, 808 and Bomkamm 2002, 21-22.}
annex 1C to the WTO Agreement, the same rule applies to its provisions. When looking for an authentic text of article 13 TRIPs, therefore, the English, French or Spanish version of TRIPs may be consulted. The Berne Convention, traditionally, has been authenticated solely in French. Under the 1948 Brussels Act, however, the situation changed and a further authentic text was afforded in English. The actual Paris Act of the Berne Convention still mirrors this development. In article 37(1)(a) thereof, it is stated that the authentic texts of the Convention are to be in French and English. In the case of ‘differences of opinion’, however, the French text prevails pursuant to article 37(1)(c). Ultimately, preference must therefore be given to the French version of the Convention.

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

583 See the statement of the Dutch delegate, Minutes of Main Committee I, Records 1967, 858.
584 Cf. the discussion in Main Committee I, Records 1967, 883-885.
585 Cf. the approach taken by Ricketson 1987, 133.
4.1.3 The Circle of Relevant Limitations

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

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

The same rule applies to a case of a less theoretical nature: member state B of the Berne Union, which is also a contracting party to the WIPO Copyright Treaty, defines the right of reproduction so as to exclude transient and incidental temporary acts of reproduction, such as caching. Arguably, this exclusion from protection runs counter to article 9(1) BC which encompasses a work’s reproduction ‘in any manner or form’. At the 1996 WIPO Diplomatic Conference finally adopting the WIPO ‘Internet’ Treaties, this kind of temporary reproduction was under dispute.\(^ {588}\)

To solve the problem, an agreed statement accompanying article 1(4) WCT was adopted which reads as follows:

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

\(^ {586}\) See as to the use of the term ‘limitation’ the introductory remarks made in section 2.2.  
\(^ {587}\) Additionally, the limitation is subjected to article 13 TRIPs and 10(2) WCT. Cf. subsections 3.2.2, 3.3.2 and 4.2.2.  
particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.\textsuperscript{589}

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

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

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

\textsuperscript{589} See WIPO Doc. CRNR/DC/96. Cf. Ricketson 2003, 56-60.
\textsuperscript{591} Additionally, article 13 TRIPs and 10(2) WCT must be observed. Cf. subsections 3.2.2, 3.3.2, 4.2.2.
\textsuperscript{592} Cf. Ricketson 1999, 81-82.
[significant] national differences, and it is therefore difficult to see how Article 13 TRIPs, with its reference to "legitimate interests", can be given a meaningful operation with respect to such a provision.\textsuperscript{593} In fact, this result is not surprising. The three-step test is devised so as to be applied to limitations but not to instances where protection may be denied altogether. Articles 2(4), 2(8) and 2bis(1) BC further delineate the protection granted by the Berne Convention. They exclude certain areas just as article 8 WCT excludes private communications. The three-step test, therefore, does not affect articles 2(4), 2(8) and 2bis(1) BC.\textsuperscript{594}

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

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

\textsuperscript{593} See Ricketson 1999, 81.
\textsuperscript{594} Theoretically, article 13 TRIPs and 10(2) WCT could be applied to these provisions. Cf. subsections 3.2.2, 3.3.2 and 4.2.2.
\textsuperscript{595} See the explanations given in subsections 3.1.2, 3.1.3.1, 3.1.3.5 and 4.5.4.4.
\textsuperscript{596} See Ricketson 1999, 82; Reinbothe/von Lewinski 2002, 130-131; Ficso\r 2002a, 257.
\textsuperscript{598} These three-step tests may be applied to limitations permitted in the Berne Convention. Cf. subsections 3.2.2, 3.3.2 and 4.2.2.
CHAPTER 4

4.2 Two Different Functions

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

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

4.2.1 Controlling Limitations Directly

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

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

---

599 This is clearly stated in article 10(2) WCT. The same conclusion, however, must be drawn in the context of article 13 TRIPs when read against the backdrop of article 20 BC. Cf. section 3.3.
Article 13 TRIPs and article 10(1) WCT function in the outlined way with regard to the rights newly granted under the corresponding international treaty. This means that national legislators wishing to impose limitations must merely ensure compliance with the three-step test. The latter constitutes the sole constraint placed by international copyright law. Naturally, the situation arising in practice may nuance the outlined general rule. This can already be seen when examining article 9(2) BC, the only function of which is to directly control limitations on the right of reproduction. In this connection, other provisions of the Berne Convention must also be factored into the equation. Limitations on the reproduction right are not only under control of the three-step test laid down in article 9(2), but also of articles 10, 10bis, 11bis and 13 BC. In these provisions, rules are set out for national limitations concerning diverse issues, such as quotations, illustrations for teaching, press privileges and ephemeral recordings. In the report on the work of Main Committee I of the 1967 Stockholm Conference, articles 10, 10bis, 11bis and 13 have been qualified as ‘special exceptions’. The report explicitly invokes the maxim *lex specialis legi generali derogat* to illuminate their relationship to the three-step test of article 9(2). The latter must be perceived as a general clause which gives way to the surrounding, more specific provisions. National legislators who want to set limits to the right of reproduction set out in article 9(1) must first of all observe articles 10, 10bis, 11bis and 13. Only if the limitation does not fall under one of these special provisions is the three-step test of article 9(2) directly applicable and functions in the outlined way as a direct control mechanism.

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

---

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

602 See Records 1967, 1134.

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

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

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

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

\textsuperscript{605} Cf. Gervais 1998, 91.

\textsuperscript{606} These exclusive rights can be qualified as new insofar as the Berne Convention does not provide for a right of distribution for all categories of works, but only for cinematographic works. See article 14(1)(i) and 14bis(1) BC. Cf. Ficsor 1997, 209 and 212.

\textsuperscript{607} The European Copyright Directive 2001/29/EC illustrates the close relationship between the reproduction and the distribution right, in particular, with regard to limitations. Pursuant to article 5(4) of the Directive, the member states may provide for the same limitations in the field of the right of distribution 'to the extent justified by the purpose of the authorised act of reproduction'.

THE INTERPRETATION OF THE THREE CRITERIA

precede the general criteria of the three-step test. Therefore, a constellation arises which corresponds to the situation in the field of the reproduction right of article 9 BC: article 10(1) WCT is only directly applicable and functions as a direct control mechanism if no special provisions of the Berne Convention concerning limitations are relevant.

The three-step test of article 10(1) WCT is nonetheless far from being deprived of any practical importance because the general right of communication to the public, granted in article 8 WCT, includes the making available of works to the public ‘in such a way that members of the public may access these works from a place and at a time individually chosen by them’. This right of making available governs the on-demand transmission of works on the internet, and is accordingly of crucial importance in the digital environment. As it was granted in the WIPO Copyright Treaty, no special provisions of the Berne Convention are applicable. The three-step test of article 10(1) WCT, thus, is the sole and direct control mechanism which sets limits to potential national limitations. When considering the whole spectrum of instances in which the three-step test may directly be applied to national limitations, the direct control of limitations on the right of making works available on-line (article 8 WCT), besides the examination of exemptions from the right of reproduction (article 9(1) BC), can even be qualified as the most important aspects of the direct control function of the three-step test.

4.2.2 SERVING AS AN ADDITIONAL SAFEGUARD

The additional safeguard function emerged in the course of the three-step test’s development in international copyright law. It is a feature of article 13 TRIPs and article 10(2) WCT concerning the exclusive rights of the Berne Convention. When a limitation on these rights already complies with the prerequisites set forth in the Convention itself, the three-step test must additionally be observed. This *modus operandi* leads to the following sequence:

(a) imposition of a national limitation on an internationally recognised exclusive right;
(b) compliance with relevant special provisions of the Berne Convention;
(c) additional application of the three-step test of international copyright law.

In article 10(2) WCT, the additional safeguard function is directly given expression:

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

---

609 Cf. the explanations given by Ficsor 1997, 207-212.
611 Cf. the overview given in chapter 3.
Thus, the application of those provisions of the Berne Convention which allow the adoption of limitations is additionally subject to the three-step test. Article 13 TRIPs is also furnished with the additional safeguard function. With regard to the rights granted authors in the Berne Convention, article 13 does not serve as an alternative basis for the imposition of limitations besides the specific norms of the Convention itself. This conclusion is to be drawn on account of article 20 BC. Instead, article 13 must be used exactly like article 10(2) WCT.

The canon of limitations countenanced by the Berne Convention commences in article 2bis(2) with the reproduction, broadcasting and communication to the public of lectures, addresses and similar works. In article 9(2), the three-step test re-enters the picture. In this case, the control of the three-step test is consequently doubled. Article 10(1) BC allows the use of works for making quotations. If articles from newspapers or periodicals are concerned, these quotations may also take the form of press summaries. The utilisation of works in publications, broadcasts or recordings for teaching purposes is regulated in article 10(2) BC. Article 10bis establishes certain press privileges. Paragraph 1 provides for the reproduction, broadcasting or communication to the public of articles or broadcasts on current economic, political or religious topics. Paragraph 2 deals with the reproduction and making available to the public of works seen or heard in the course of the reporting of current events. The exercise of the broadcasting and related rights granted in article 11bis(1) can be subjected to conditions which are to be determined by national legislation pursuant to article 11bis(2). A right to equitable remuneration is guaranteed in this context. Ephemeral recordings made by broadcasting organisations, and possibly preserved in official archives, may be exempted by virtue of article 11bis(3). Finally, article 13(1) allows for compulsory licences with regard to the recording of musical works. Besides these limitations which are laid down in the text of the Berne Convention, implied exemptions must be taken into account. The so-called ‘minor reservations doctrine’, for instance, has explicitly been considered in connection with the three-step test in the preparatory work for the later WIPO Copyright Treaty. Further implied exemptions can be found in the field of the translation right recognised in article 8 BC. Whereas it appears safe to assume that limitations on the right of reproduction, such as articles 2bis(2), 9(2), 10(1) and (2) and 10bis(1) and (2), are also applicable to the translation right of article 8 in conformity with fair practice, the situation is contested and unclear as regards articles 11bis and 13.

612 Cf. section 3.3; Reinbothe/v. Lewinski 2002, 130-132.
613 Cf. subsection 3.2.2; Ficsor 2002a, 302-303.
614 Cf. Ricketson 1987, 477-537 for a detailed description of these limitations.
615 See the basic proposal for substantive provisions of the later WCT, WIPO Doc. CRNR/ DC/4, §§ 12.06-12.08. Cf. subsection 3.1.1 for a more detailed discussion of the ‘minor reservations doctrine’.
THE INTERPRETATION OF THE THREE CRITERIA

Considering this extensive set of permissible limitations with, at least partially, quite detailed provisions, one is inevitably left to wonder why the three-step test should additionally be invoked, and what its ambit of operation may be. Against the backdrop of the substantial changes which digital technology brings about, the explanation comes to mind that potential extensions of the enumerated traditional limitations in the digital environment shall be curbed. The basic proposal for substantive provisions of the later WIPO Copyright Treaty seems to support this assumption. Therein, it is stated that, 'in the digital environment, formally “minor reservations” may in reality undermine important aspects of protection.'\(^\text{617}\) The final outcome of the 1996 WIPO Diplomatic Conference, however, again obscures the task of the three-step test. With regard to article 10(2) WCT, the following agreed statement has been adopted:

'It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.'\(^\text{618}\)

As already pointed out, this statement is of particular importance, as it forms part of the context in which article 10(2) is placed. It also affects article 13 TRIPs.\(^\text{619}\) Thus, it weighs heavily that the additional safeguard function, pursuant to the agreed statement, is not intended to modify the scope of the traditional provisions of the Berne Convention. This has the corollary that the impact of the three-step test on the traditional set of Berne limitations must necessarily be quite limited. Otherwise, there would inevitably be a contradiction between the agreed statement and the operation of articles 10(2) WCT and 13 TRIPs.\(^\text{620}\)

Although the additional safeguard function is far from making the three-step test a powerful control instrument, it has nonetheless some merit which shall not be concealed. In a study prepared by the International Bureau of WIPO, dealing with the impact of article 13 TRIPs on the Berne system of permissible limitations, it is stated that

'none of the limitations and exceptions permitted by the Berne Convention should, if correctly applied, conflict with a normal exploitation and none of them should, if correctly applied, prejudice unreasonably the legitimate interests of the right holder. Thus, generally and normally, there is no conflict between the Berne Convention and the TRIPs Agreement as far as exceptions and limitations to the exclusive rights are concerned.'\(^\text{621}\)

---

\(^{617}\) See WIPO Doc. CRNR/DC/4, § 12.08.

\(^{618}\) See WIPO Doc. CRNR/DC/96.

\(^{619}\) Cf. subsection 4.1.2.2.

\(^{620}\) Cf. Ricketson 1999, 90.

The study points out the possibility to conceive of the three-step test as a yardstick for the correct application of the Berne Convention. This notion corresponds to the qualification of the three-step test as a materialisation of the standard of protection reached in the Berne Convention.\textsuperscript{622} When understood in this sense, the additional safeguard function can help to clarify the scope of those provisions of the Convention, the open wording of which offers a gateway for the criteria of the three-step test.\textsuperscript{623} In article 10(1) BC, for instance, quotations from a work are permitted ‘provided that their making is compatible with fair practice’. Similarly, article 10(2) BC allows the utilisation of works for teaching purposes ‘provided such utilisation is compatible with fair practice’. These rules referring to ‘fair practice’ can be concretised with the help of the three-step test. In particular, the prohibition of an unreasonable prejudice to the author’s legitimate interests may serve as a useful basis for the necessary balancing of interests. A similar field of application is opened by the implied limitations of the Berne system. The conceptual contours of the so-called ‘minor reservations doctrine’, for instance, may be drawn more precisely with the help of the three-step test.

The possibility to consult the three-step test in order to clarify certain provisions of the Berne Convention has inclined commentators to speak of the additional safeguard function as a mere interpretation tool.\textsuperscript{624} Although this qualification, in principle, appears correct because the three-step test is barred from extending or reducing the scope of Berne provisions by the agreed statement which accompanies article 10(2) WCT, it may nevertheless be misleading. It obscures the fact that a real accumulation of conditions takes place in cases where the wording of the Berne provisions may be concretised by the three-step test. The three criteria of the test must then be observed just like the conditions set out in the relevant provision of the Berne Convention itself and, therefore, are more than a mere interpretation tool.

In general, it is to be noted that the flexible three-step test constitutes an important counterpart of the out-dated edifice of permissible limitations erected in the Berne Convention. It is not unlikely that its abstract criteria will yield precious clues for the adaptation of limitations to the digital environment, and that it will be invoked for exactly that reason by courts and legislators alike – irrespective of the conservative agreed statement concerning article 10(2) WCT that was made in the WIPO Copyright Treaty.\textsuperscript{625}

\textsuperscript{623} Cf. Ricketson 1987, 491-492; Ficsor 2002a, 262 and 269.
\textsuperscript{624} Cf. Reinbothe 2000, 264; Ficsor 2002a, 519.
\textsuperscript{625} Not surprisingly, Ricketson 1999, 90, suggests that the agreed statement could be regarded ‘as being limited to those exceptions and limitations presently allowed and applied by national laws under the Berne Convention’.  

124
4.3 The System of the Three Criteria

The three-step test sets forth three abstract criteria. As a general rule, limitations are allowed in certain special cases (criterion 1). This rule is delineated by the two subsequent criteria determining that there may neither be a conflict with a normal exploitation of the work (criterion 2) nor an unreasonable prejudice to the legitimate interests of the author (criterion 3). Viewed from a structural perspective, the three-step test therefore consists of a basic rule (criterion 1) and two conditions delimiting its scope (criteria 2 and 3).\(^{626}\) The wording of article 9(2) BC gives evidence of this structural edifice. The basic rule restricting limitations to certain special cases is laid down in the main clause, followed by the two remaining conditions:

'...permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.'\(^{627}\)

Article 13 TRIPs displays the same structure. The two substantial provisions of criteria 2 and 3 appear in a relative clause which is directly related to the 'certain special cases' of criterion 1: ‘...confine limitations or exceptions to exclusive rights to certain special cases which do not conflict [...] and do not unreasonably prejudice...’\(^{628}\) The same is true for the three-step tests embodied in article 10 WCT: ‘in certain special cases that do not conflict...’\(^{629}\)

The three criteria of the test have always been understood to be cumulative.\(^{630}\) The report on the work of Main Committee I of the 1967 Stockholm Conference already reflects this understanding.\(^{631}\) That limitations have to meet all three criteria to be considered permissible, can also be derived from the wording of the three-step test itself. The basic rule of criterion 1 is laid down in the main clause and inescapable. The two conditions delimiting its scope are linked together with the conjunction 'and'. In the following subsections, the regulatory system which is established by the three criteria will be examined in more detail. In subsection 4.3.1, the importance which may be attached to the basic rule of criterion 1 (certain special cases) will be discussed. In the following subsection 4.3.2, the relationship between criterion 2 (no conflict with a normal exploitation) and criterion 3 (no unreasonable prejudice to legitimate interests) will be analysed. Finally, in subsection 4.3.3, a survey of the system of the three-step test will be conducted.


\(^{627}\) See article 9(2) BC (emphasis added).

\(^{628}\) See article 13 TRIPs (emphasis added).

\(^{629}\) See the two paragraphs of article 10 WCT (emphasis added).


\(^{631}\) See Records 1967, 1145-1146.
4.3.1 The Basic Rule

The specific structure of the three-step test has given rise to the question whether the general rule of criterion 1, that limitations must be certain special cases, can be qualified as one of the substantial ‘tests’ of the so called three-step test.\(^{632}\) While Ricketson treats the ‘three distinct conditions’ of article 9(2) BC equally in the course of his interpretative analysis,\(^{633}\) early comments on article 9(2) BC do not lend much weight to the restriction of limitations to certain special cases or simply ignore criterion 1 and speak of two conditions, thereby referring to criteria 2 (no conflict with a normal exploitation) and 3 (no unreasonable prejudice to legitimate interests).\(^{634}\) In this vein, Gervais merely spoke of ‘two tests contained’ in article 13 TRIPs in 1998, thereby addressing criterion 2 and criterion 3.\(^{635}\) He did not explain this reduction to a two-step test with the specific background to article 13 TRIPs. On the contrary, he based his interpretation on article 9(2) BC.\(^{636}\) Indeed, this line of reasoning calls to mind a certain passage of the report on the work of Main Committee I of the 1967 Stockholm Conference:

‘The Committee also adopted a proposal by the Drafting Committee that the second condition should be placed before the first, as this would afford a more logical order for the interpretation of the rule. If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment.’\(^{637}\)

This explication of the mode of operation of article 9(2) BC underlines the importance of criteria 2 and 3 whereas the basic rule that limitations must be certain special cases is merely mentioned in passing. Moreover, the Committee refers to criteria 2 and 3 as the first and the second condition of the three-step test.\(^{638}\)

\(^{632}\) Froitz 1986, 120 and 122, for instance, explicitly addresses this issue.

\(^{633}\) See Ricketson 1987, 482-485.


\(^{635}\) See Gervais 1998, 90. However, see also Gervais 2003, 145-146, where he distinguishes different approaches which seems to indicate that he departed from the position taken earlier. The exclusion of criterion 1 from the circle of relevant tests may be deemed appropriate in the context of the European Copyright Directive 2001/29/EC. Cf. Dreier 2002, 35; Bornkamm 2002, 43. See subsection 5.3.1.2.

\(^{636}\) See Gervais 1998, 90.

\(^{637}\) See Report on the Work of Main Committee I, Records 1967, 1145-1146 (emphasis added).

\(^{638}\) The Chairman of Main Committee I, Ulmer, also referred to these two criteria as ‘the conditions restricting the right of reproduction’. See Minutes of Main Committee I, Records 1967, 885.
Nonetheless, it is unlikely that Main Committee I did not regard the restriction of permissible limitations to certain special cases as one of the substantial conditions of the three-step test. Firstly, the fact that it included this criterion in the three-step test weighs heavily against this assumption. Undoubtedly, it would have been possible to devise article 9(2) BC so as to avoid mention of the restriction to certain special cases. The wording of the three-step test, as the primary source of interpretation, thus, does not support the conclusion that the circle of relevant tests is solely constituted by criteria 2 and 3.

Secondly, the foregoing structural analysis contradicts this finding. It has already been pointed out that the restriction to certain special cases represents a general rule within the system of the three criteria. The conceptual contours of this rule are drawn more precisely by the subsequent criteria establishing further conditions. The wording of article 9(2) BC mirrors this structure by placing criterion 2 (no conflict with a normal exploitation) and criterion 3 (no unreasonable prejudice to legitimate interests) into a subordinate clause starting with ‘provided that’. Therefore, it makes sense that Main Committee I addressed criteria 2 and 3 as the first and second condition. They are indeed the two conditions which delineate the basic rule set out in the main sentence. Owing to its general nature, Main Committee I probably conceived of the necessity to confine limitations to certain special cases as a matter of course, the specific importance of which need not be stressed expressly in the report on its work. This, however, hardly justifies the exclusion of criterion 1 from the circle of relevant ‘tests’. On the contrary, there is substantial reason to observe not only the conditions delineating a certain rule of a general nature but also the basic rule itself. Hence it follows that, in line with Ricketson’s approach, all three criteria of the three-step test must be deemed relevant ‘tests’ deserving the same interpretative effort.

4.3.2 THE TWO CONDITIONS

The above-quoted passage, taken from the report on the work of Main Committee I of the 1967 Stockholm Conference, gives rise to a further question concerning the relationship between criterion 2 (conflict with a normal exploitation) and criterion 3 (unreasonable prejudice to legitimate interests). These two building blocks of the three-step test both serve the purpose of delineating the basic rule of criterion 1

---

639 See section 4.1.
641 The comments made by C. Masouyé 1981, § 9.6, clearly reflect this understanding. He points out the basic rule that limitations are only permitted in certain special cases. Subsequently, he explains that the freedom which national legislation enjoys pursuant to this rule (limitations in certain special cases instead of no limitations at all) is restricted by two conditions.
more precisely. Nonetheless, Main Committee I was of the opinion that they would have to be arranged in a certain sequence to 'afford a more logical order for the interpretation of the rule'. In the initial draft of article 9(2) BC, criterion 3 preceded criterion 2. The reproduction of works should be permitted 'in certain special cases, provided that such reproduction does not unreasonably prejudice the legitimate interests of the author and does not conflict with a normal exploitation'. The considerations which finally led to the reversal of these elements are of particular interest for an inquiry into their relation to one another. The initiative to restructure the draft came from the chairman of Main Committee I, Ulmer. He asserted that 'the first essential was that the normal exploitation of the work should be safeguarded, and the question of prejudicing the legitimate interests of the author was only a secondary one'. From his point of view, the second step, which inhibits copyright limitations from conflicting with a normal exploitation, obviously constitutes a centre of gravity within the subsystem of the two conditions delimiting the basic rule of criterion 1.

Due to the formulation chosen in the report on the work of Main Committee I, it is not entirely clear which practical consequences the Committee inferred from the reversion of the two conditions delimiting criterion 1. The beginning of the relevant passage, explaining the mode of operation of the three-step test, has already been cited above. The Committee elaborates that reproduction is not permitted at all if it conflicts with a normal exploitation of the work. In the absence of such a conflict, the last criterion of the test would have to be taken into consideration. Accordingly, it must be examined whether the reproduction in question unreasonably prejudices the legitimate interests of the author. The Committee finally concluded that

'only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment'.

This statement, when read independently, allows the introduction of a compulsory licence only in the absence of an unreasonable prejudice. The payment of equitable remuneration would accordingly not prevent a limitation from being found to unreasonably prejudice the legitimate interests of the author. By contrast, the payment of equitable remuneration may not be factored into the equation at all when determining whether or not a limitation causes an unreasonable prejudice. The clarity of this statement, however, is obscured by the subsequent practical example given in the report on the work of Main Committee I which deals with photocopying for various purposes. The Committee explains:

645 See Minutes of Main Committee I, Records 1967, 885.
646 Cf. Desbois/Francon/Kerever 1976, 205.
THE INTERPRETATION OF THE THREE CRITERIA

‘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.’

This example obviously nuances the foregoing statement. In accordance with the practical example, the payment of equitable remuneration has a mitigating effect on the finding of an unreasonable prejudice. There is no unreasonable prejudice because equitable remuneration is paid. Pursuant to the foregoing statement, by contrast, the absence of an unreasonable prejudice is a prerequisite for the introduction of a compulsory licence regime. A compulsory licence would thus be impossible if the reproduction, when assessed without considering the remuneration paid, unreasonably prejudices the legitimate interests of the author.

In commentary literature, it has been doubted whether article 9(2) BC allows the introduction of compulsory licences at all. Desbois, Françon and Kéréver regard the possibility to provide for compulsory licences as an unjustified interpolation into article 9(2). They reduce the possible outcome of the test procedure to either the permission or prohibition of the reproduction in question. This view cannot be endorsed for various reasons. First of all, it can be gathered from the background to article 9(2) that a compromise solution lies at the core of the introduction of the three-step test into the Berne Convention. It served as a basis for the reconciliation of the contrary opinions expressed by the members of the Berne Union. The possibility to provide for compulsory licences forms an indispensable part of this compromise. In the course of the deliberations of Main Committee I, it was pointed out in Main Committee I that ‘the countries of the Union were, however, entitled to introduce a compulsory license in some cases, as was done by the German legislation which the Delegation of India had mentioned’. Not surprisingly, commentators commonly agree with the report on the work of Main Committee I and accept the possibility of introducing a compulsory licence. The rigid approach of Desbois, Françon and Kéréver cannot be followed.

This line of reasoning leads back to the question begged by the unclear report on the work of Main Committee I. Does the payment of equitable remuneration influence the finding of an unreasonable prejudice? An affirmative answer would broaden the ambit of operation of limitations. To illustrate this result, it might be assumed that a certain national limitation unreasonably prejudices the legitimate interests of the author. For this reason, the national legislator decides to mitigate the corrosive effect of the limitation and provides for the payment of equitable

---

649 See Desbois/Francon/Kerever 1976, 207.
651 See Minutes of Main Committee I, Records 1967, 884. Cf. Ulmer 1969, 17, and subsection 3.1.3.5.
remuneration. If this payment of equitable remuneration can be taken into account when inquiring into an unreasonable prejudice to the legitimate interests of the author (criterion 3), the limitation can potentially fulfil the third criterion under the new circumstances. If not, the payment of equitable remuneration does not change anything. It is irrelevant to the determination of an unreasonable prejudice. Thus, the limitation would still be incapable of passing the third test.

Apparently, the drafters of the three-step test agreed on the first alternative. The decision on whether a limitation causes an unreasonable prejudice should be influenced by the payment of equitable remuneration. The Minutes of Main Committee I clearly point in this direction. Ulmer, the chairman of the Committee, enunciated in the course of the deliberations that ‘in the case of photocopies made by industrial firms, it could be assumed that there would be no “unreasonable” prejudice to the legitimate interests of the author if the national legislation stipulated that adequate remuneration should be paid’.\textsuperscript{653} This statement did not provoke any disagreement. Hence, the practical example given in the final report on the work of Main Committee I seems to reflect the opinion of the Committee correctly: a certain reproduction ‘may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid’.\textsuperscript{654} The statement which precedes the practical example in the report and points in the opposite direction gives the false impression that no allowance should be made for the payment of equitable remuneration. It can be understood to merely underscore that national legislation may either provide for a compulsory licence or for use without payment. Therefore, the payment of equitable remuneration is relevant to the third criterion.\textsuperscript{655}

This conclusion defines the relationship between criterion 2 (no conflict with a normal exploitation) and criterion 3 (no unreasonable prejudice to legitimate interests). To understand its impact on the subsystem of these two conditions delimiting the basic rule of criterion 1, a last insight must be taken into account: the payment of equitable remuneration has never been considered capable of averting the finding that a limitation conflicts with a normal exploitation.\textsuperscript{656} Solely with regard to an unreasonable prejudice to legitimate interests, the influence of the payment of equitable remuneration was discussed at the 1967 Stockholm Conference and declared permissible in the final report:

\textsuperscript{654} See Report on the Work of Main Committee I, Records 1967, 1145-1146.
\textsuperscript{656} Compulsory licences have always been regarded as impossible in the context of the second criterion. Cf. C. Masouyé 1981, § 9.7. Discussing private copying, P. Masouyé 1982, 86-87, nevertheless favours the payment of equitable remuneration instead of the prohibition of private copying even though he sees a conflict with a normal exploitation. Thereby, however, it has to be taken into account that he pursues the objective to introduce private copying as a new exploitation mode as a response to market failure. Cf. in addition Kerever 1975, 331.
'If [photocopying for various purposes] consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid.'

Thus, if a conflict with a normal exploitation arises, this is automatically an end of the matter. The limitation cannot pass the three-step test and is impermissible — regardless of whether or not equitable remuneration is paid. Only an unreasonable prejudice to legitimate interests may be prevented by the payment of equitable remuneration. Against this background, it becomes understandable why Main Committee I placed the prohibition of a conflict with a normal exploitation before the condition that legitimate interests of the author may not be unreasonably prejudiced. Indeed, this reversion of the two conditions affords 'a more logical order for the interpretation of the rule', as the Committee points out in the report on its work. If a conflict with a normal exploitation arises, the limitation is inevitably doomed to failure. It does not comply with the three-step test and cannot be permitted. The test procedure, automatically, comes to an end. Thus, it is logical to examine first whether or not a limitation conflicts with a normal exploitation (criterion 2) before turning to the question of whether an unreasonable prejudice to legitimate interests is caused (criterion 3).

4.3.3 OVERVIEW OF THE REGULATORY FRAMEWORK

The test's regulatory framework can be summed up as follows:

Criterion 1: basic rule: limitations must be certain special cases
Criterion 2: first condition delimiting the basic rule: no conflict with a normal exploitation — compulsory licences impossible
Criterion 3: second condition delimiting the basic rule: no unreasonable prejudice to legitimate interests — compulsory licences possible

---

658 This conclusion is undisputed in academic literature. See Ricketson 1987, 484: 'It also seems clear from the Report of Main Committee I that "unreasonable prejudice to the legitimate interests of the author" may be avoided by the payment of remuneration under a compulsory licence (although this would not, of course, "cure" a use that conflicted with the normal exploitation of the work — by definition, the receipt of royalties under a compulsory licence could not be regarded as part of the normal exploitation of a work).' Cf. Ricketson 1999, 70; C. Masouyé 1981, 58-59; du Bois 1997, 4; Bornkamm 2002, 46-47; Ficosor 2002a, 288.
660 Cf. du Bois 1997, 4-5.
That it is correct to delineate the system of the three criteria in this way can be substantiated by a teleological line of argument: the three-step test is located at the interface between the authors’ exclusive rights and privileged uses. Its three steps make it possible to approach the core of copyright’s balance in stages. The first step is the furthest from the core and correspondingly of a general nature. It sets forth a basic rule, the restriction to certain special cases. Copyright limitations which are incapable of fulfilling this criterion are inevitably doomed to fail. The second step delineates the basic rule of criterion 1 more precisely: a conflict with a normal exploitation is not permissible. This criterion is located halfway to the core. At this stage, no additional instruments for the reconciliation of the interests of authors and users, like the payment of equitable remuneration, are necessary. Limitations which fail to meet this condition cannot be countenanced at all. The third step, however, is the closest to the core. The wording of this condition contains elements that can be applied for the exact calibration of copyright’s balance. The prejudice has to be ‘unreasonable’ and the interests of the author ‘legitimate’. In this situation, where the divergent interests of copyright law finally meet, the possibility to provide for the payment of equitable remuneration is indispensable. It serves as a means to establish a balance between the interests at stake. Without the help of this adjusting tool, it might be impossible to deal with certain constellations challenging copyright’s balance. In particular, this is true in times of upheavals within the copyright system caused, for instance, by technical developments. The mere decision between permission and prohibition of limitations is then too imprecise.

On this basis, a final comment on the relationship between the two conditions delimiting the scope of criterion 1 can be made. Within the subsystem of the two conditions, the first one which forbids a conflict with a normal exploitation is often perceived as kingpin.\(^661\) This understanding seems to be rooted in statements made at the 1967 Stockholm Conference. As already mentioned, the chairman of Main Committee I. Ulmer, referred to the question of prejudicing the legitimate interests of the author as a ‘secondary’ essential of the three-step test whereas he qualified the prohibition of a conflict with a normal exploitation as ‘first essential’.\(^662\) However, it is wrong to deduce any kind of hierarchy between these two conditions from this statement which merely assigns a subordinate role to the prohibition of an unreasonable prejudice to the author’s legitimate interests.\(^663\) As already elaborated, this last criterion is the closest to the core of copyright’s balance. The divergent interests of authors and users must ultimately be reconciled with its help. As a success in safeguarding copyright’s balance thus finally depends on criterion 3, this last criterion, if any, is the kingpin of the three-step test.\(^664\)

---

\(^{661}\) Cf., for instance, Desbois/Francon/Kerever 1976, 205.
\(^{662}\) Cf. Minutes of Main Committee I, Records 1967, 885.
\(^{663}\) Nevertheless, the second step of the test is often brought into focus when applying the three-step test. Cf. Desbois/Francon/Kerever 1976, 205. Ricketson 1987, 482 states clearly: ‘As to the second and third conditions, the second is the more important.’
Ultimately, the system of the three criteria can be described as follows: the basic rule that limitations must be certain special cases and the further condition that they may not conflict with a normal exploitation of the work serve as a gateway to the core of copyright’s balance. Copyright limitations, when assessed in the light of these two criteria, can be prohibited or passed to the following step. In particular, the payment of equitable remuneration has no influence on the decision whether or not a limitation conflicts with a normal exploitation. The last criterion, that the legitimate interests of the author may not be unreasonably prejudiced, lies at the core of copyright’s balance. Solely those exemptions from exclusive rights reach this stage of the test procedure which already fulfil criteria 1 and 2. Thus, only the ‘hard nuts to crack’, challenging the balance in copyright law, remain. Accordingly, compulsory licensing as an additional measure besides the mere permission or prohibition of a limitation is offered as an additional possibility. Furnished with this additional instrument, criterion 3 allows the final balancing of the interests at stake.

4.4 Certain Special Cases

In article 9(2) BC, the basic rule of the three-step test finds expression in the following wording: ‘It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases...’ Similarly, article 10(1) WCT permits ‘to provide for limitations or exceptions to the rights granted to authors [...] in certain special cases’. In article 13 TRIPs, it is stated: ‘Members shall confine limitations or exceptions to exclusive rights to certain special cases...’ In article 10(2) WCT, the same language is used.

In the following subsections, the meaning of the restriction of limitations to certain special cases will be examined in order to develop an appropriate test procedure. Subsection 4.4.1 deals with certainty, subsection 4.4.2 with speciality. In subsection 4.4.3, it will be discussed which impact the resulting test procedure has on internationally recognised limitations set out in the Berne Convention. In the ensuing subsection 4.4.4, certain types of national limitations, namely personal use privileges and open norms, like the US fair use doctrine, will be scrutinised in the light of the developed test procedure.

4.4.1 CERTAINTY

The prerequisite that there must be something special about limitations is central to the first criterion. However, it also comprises the word ‘certain’. Limitations are only allowed in ‘certain special cases’. Therefore, the first question is what the

---

665 Cf. Collova 1979, 133.
666 The existing differences in the wording of article 9(2) BC (‘permit [...] in certain special cases’) and article 13 TRIPs (‘confine [...] to certain special cases’) do not indicate that there are any differences in the meaning of criterion 1. Cf. Heide 1999, 105.
word ‘certain’ means in this context and how it influences the test procedure. One of its ordinary meanings is ‘determined, fixed, settled; not variable or fluctuating’.667 Associating legal certainty with the word ‘certain’, it can be posited on this basis that a limitation must be clearly defined. The WTO Panel reporting on section 110(5) of the US Copyright Act took this position. It elaborated that the term ‘certain’ means that ‘an exception or limitation in national legislation must be clearly defined’.668 The evolution of the three-step test in international copyright gives evidence of several attempts to make a clear definition a separate prerequisite. The draft provision which later became article 13 TRIPs originally contained the formula that limitations should be confined to ‘clearly and carefully defined special cases’.669 Prior to the 1996 WIPO Diplomatic Conference, the view that limitations should be restricted to ‘precisely defined special cases’ was again taken by governmental experts.670

However, the term ‘clearly defined’ never made its way to the three-step test. The latter allows limitations in ‘certain special cases’ instead of insisting on ‘clearly defined special cases’. For this reason, doubt must be cast upon the assumption that the term ‘certain’ was really inserted to underline the necessity of an exact and precise definition. The word ‘certain’ also refers to something ‘of positive yet restricted (or of positive even if restricted) quantity, amount, or degree’.671 Certain cases, therefore, could simply mean ‘some definitely, some at least, a restricted or limited number of’672 cases. The French text of the Berne Convention, which is to prevail in the context of the Berne Convention,673 clearly indicates that the drafters of the three-step test, indeed, had this meaning of the term ‘certain’ in mind. Whereas the English text speaks of ‘certain special cases’, the expression ‘certain cas spéciaux’ is used in the French text instead of cas certains et spéciaux. The word order of the French text shows that the word ‘certain’ was not understood to carry a further substantial prerequisite besides the claim for speciality. On the contrary, it appears safe to assume that the word ‘certain’ was inserted because the drafters of the three-step test bore in mind a number of limitations which existed at the national level at the time of the Stockholm Conference.674 Hence, the expression ‘certain special cases’ can be equated with the formula ‘some special cases’.

667 See the Oxford English Dictionary.
669 This language was proposed by the US. See GATT Doc. MTN.GNG/NG11/W/70, 6. In the course of further deliberations it has gradually been approximated to the wording of article 9(2) BC. Cf. subsection 3.2.1.
670 See Experts on the Printed Word 1988, 63. Cf. subsection 3.3.1.
671 See the Oxford English Dictionary.
672 Cf. the Oxford English Dictionary.
673 See article 37(1)(c) BC. Cf. subsection 4.1.2.6.
674 In the course of the preparatory work for the Stockholm Conference, the 1965 Committee of Governmental Experts, indeed, took the view that ‘the main difficulty was to find a formula which would allow of exceptions, bearing in mind the exceptions already existing in many domestic laws’. See Doc. S/1, Records 1967, 113 (emphasis added). See the overview given in subsection 3.1.3.
This analysis of the wording does not deny the necessity of a clear definition altogether. By contrast, it is to be posited that a clear dividing line between different limitations must be drawn. Privileged 'special cases' must be distinguishable from each other to become discernible as 'some special cases'. Hence, an incalculable, shapeless provision exempting a wide variety of uses would not be allowed. The comments on article 9(2) BC made by Ricketson point in this direction. He states that 'a broad kind of exemption would not be justified'. In this vein, the prerequisite that a clear definition is necessary can be upheld. However, it is to be noted that it is nuanced by the insight that the formula 'certain special cases' simply means 'some special cases'. This analysis of the wording deprives the requirement of a clear definition of the rigidity which would result from the opposite postulation that 'certain special cases' means 'determined, fixed, settled; not variable or fluctuating' special cases.

To illustrate the potential harm flowing from the latter, rigid approach, certain comments on the three-step test can be brought to the fore which have been made in literature. Reinboth and von Lewinski, for instance, elaborate in line with Ricketson that 'national law has to contain sufficient specifications, which identify the cases to be exempted from the rights. Unspecified wholesale limitations or exceptions are not permitted'. However, they hasten to add that, 'in essence, exceptions have to be well defined and to be of limited application'. Similarly, Ficso r states that 'the use to be covered must be specific – precisely and narrowly determined'. Apparently, these commentators strive for an alignment of international copyright law with the continental European dogma of restrictively delineated exceptions. The formula that 'exceptions have to be well defined and to be of limited application' as well as the statement that exempted uses 'must be specific – precisely and narrowly determined' point in this direction.

Such an interpretation, however, can scarcely be deemed appropriate in the context of the three-step test. Being loath to make allowance for the characteristics of both legal traditions of copyright law is anything but conducive to interpreting a provision which serves the proper adjustment of copyright’s balance at the international level. If the requirement of a clear definition were to be understood in the sense of the civil law approach, open-ended norms evolving from the Anglo-American copyright system would automatically be rendered incapable of surmounting the first hurdle of the three-step test. Espousing this result would

675 See Ricketson 1987, 482. In the context of article 13 TRIPs, this view has been endorsed by Ficso r 2002b, 129.
676 See the Oxford English Dictionary.
679 See Ficso r 2002a, 516.
680 Cf. subsection 2.1.
682 See Ficso r 2002a, 516.
inevitably lead to the suppression of the specific way in which the common law system sets limits to the exclusive rights of authors.

The specific merit of the nuanced approach resulting from the insight that ‘certain special cases’ simply means ‘some special cases’ lies in the fact that it thwarts plans to misuse the three-step test as a means to intersperse international copyright law with questionable continental European dogmata. It shows instead that the espousal of a clear definition has its limits. A ‘determined, fixed, settled; not variable or fluctuating’ set of special cases is not required. The exempted special cases must merely be distinguishable from each other to become discernible as ‘some special cases’. Arguably, the task to draw this dividing line between special cases need not necessarily be fulfilled by national legislation but may also be left to the courts. Besides the mere wording of a limitation, the influence which the courts have on the definition of a limitation’s scope can therefore be taken into account. Within the realm of the Anglo-American copyright tradition, established case law can accordingly be of influence as regards open-ended limitations.

At the international level, this practice has become widespread. In respect of the expression ‘prescribed by law’ set out in article 10(2) of the European Convention on Human Rights, the European Court of Human Rights, for instance, elaborated:

'It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not “prescribed by law” on the sole ground that it is not enunciated in legislation: this would [...] strike at the very roots of [a common-law] State’s legal system.'

In the opinion of the Court, two requirements must be met to secure a sufficient degree of legal certainty. Legal rules must firstly be adequately accessible and secondly be formulated with sufficient precision so that the consequences which a given action entail become foreseeable. With an eye to rules evolving from the common law, the Court adds:

'Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.'

The WTO Panel reporting on Section 110(5) of the US Copyright Act similarly conceded after emphasising the necessity of a clear definition:

---

683 See the Oxford English Dictionary.
685 See the Sunday Times case, E.C.H.R. Judgement of April 26, 1979, Series A No. 30, §49.
'However, there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal certainty.'

Embracing these findings, the following conclusions can be drawn: the expression ‘certain special cases’ can be equated with the formula ‘some special cases’. National copyright limitations must accordingly be distinguishable from each other. An incalculable, shapeless provision exempting a wide variety of different uses is impermissible. Instead, privileged special cases must be known and particularised so that it becomes foreseeable whether or not a given use of a work is subjected to the authors’ control. The task of making privileged special cases distinguishable need not necessarily be accomplished by national legislation, but may also be left to the courts. Hence, copyright limitations need not be precisely and narrowly defined in the sense of copyright’s civil law tradition.

4.4.2 Speciality

A ‘special case’ can be understood to be ‘of such a kind as to exceed or excel in some way that which is usual or common; exceptional in character, quality, or degree’. Thus, two distinct boundary lines come to the fore. Firstly, it can be understood to require that a limitation has ‘an individual, particular, or limited application, object, or intention; affecting or concerning a single person, thing, circumstance’. This is the quantitative aspect of speciality. It requires that a limitation has a limited scope so that it enables only a limited number of privileged uses. Secondly, the term ‘special’ refers to the state of being ‘marked off from others of the kind by some distinguishing qualities or features; having a distinct or individual character’. This is the qualitative aspect of speciality which refers to a distinctive, exceptional objective. In this vein, it can be posited that a sufficiently strong justification must be given for a limitation.

In the ensuing subsections, the question must be asked how these two distinct aspects of speciality – the quantitative and the qualitative connotation – can be applied so as to establish a suitable test procedure. To lay groundwork for an appropriate response, some remarks of a general nature will be made first in the following subsection 4.4.2.1. Subsequently, the concept will be discussed in subsection 4.4.2.2 which has been developed by the WTO Panel reporting on section 110(5) of the US Copyright Act. The Panel laid an emphasis on the

---

688 See the Oxford English Dictionary.
689 Cf. Gervais 2003, 146.
690 Cf. the Oxford English Dictionary.
691 Cf. the Oxford English Dictionary.
quantitative connotation of the word 'special'. It will be seen that this approach must be rejected for various reasons. A qualitative concept which is suitable for identifying special cases will be developed in subsection 4.4.2.3. The resulting definition of special cases in the sense of the three-step test will be given in subsection 4.4.2.4. To establish the qualitative test procedure, reference will be made to the 'legitimate interests of the author' to which the third criterion of the three-step test refers. Therefore, it is advisable to clarify the relationship between the first and the third criterion in the final subsection 4.4.2.5.

4.4.2.1 ASSESSING QUANTITATIVE AND QUALITATIVE CONSIDERATIONS

At the core of the quantitative aspect of speciality lies the consideration that a limitation, if it has only a restrictively-delineated ambit of operation, enables merely a limited number of unauthorised uses. Due to their small number, these privileged uses appear special when compared with the potentially countless number of normal uses made in the course of 'a normal exploitation of the work'.\(^{693}\) A corresponding inquiry would have to focus on the circumstances under which the limitation in question permits the use of copyrighted material. Does the limitation allow for multiple ways of application? Will it be invoked repeatedly in respect of the same work? What is the impact of the limitation on different kinds of works? How many beneficiaries will potentially profit from the limitation?

Responses to these questions are inevitably doomed to vagueness and insecurity. The precise number of beneficiaries profiting from a private use privilege, for instance, is hard to ascertain. The moment additional factors are taken into account, such as the various ways of using a work which the privilege exempts, and the wide array of works which it concerns, the problems are multiplied. Further difficulties arise if the quantitative element is also applied to the size of the work itself. Should the question of whether a limitation permits to use the whole of a work or solely portions thereof be factored into the equation as well? Must the quantity of the freely used material in relation to the work as a whole be taken into consideration? Should a distinction be made between substantial and insubstantial portions of a work? How should the line between these two categories be drawn?\(^{694}\)

On account of the outlined difficulties, it will be impossible in almost all cases to ascertain the exact number of privileged uses enabled by a specific limitation. A concrete number or an exact percentage of uses which could be exempted without jeopardising the approval of the three-step test would thus be presented in vain. The regulatory capacity of the quantitative meaning of the term 'special' is therefore quite limited. Refuge must be taken in a rough assessment of a limitation's potential

\(^{693}\) Cf. WTO Panel – Copyright 2000, § 6.109; Collova 1979, 127; Ricketson 1987, 482.

\(^{694}\) Cf. the US Supreme Court decision Harper & Row v. Nation Enterprises, 471 U.S. 539, section IV, where the question of the amount and substantiality of the used material was answered in the context of the fair use doctrine. See Fisher 1988, 1675-1678, for a discussion of the Court's considerations.
for sanctioning free uses. That such a superficial assessment constitutes a firm basis for the identification of special cases is at least doubtful.

The qualitative meaning of the term 'special' refers to a distinctive or exceptional objective which is pursued with the limitation in question.\textsuperscript{695} The initial draft of the three-step test of article 9(2) BC indeed referred to 'specified purposes' instead of 'certain special cases'.\textsuperscript{696} The study group which prepared the material for the 1967 Stockholm Conference emphasised that 'exceptions should only be made for clearly specified purposes, e.g., private use, the composer's need for texts, the interests of the blind'.\textsuperscript{697} Although this enumeration appears unsystematic, it gives evidence that qualitative considerations influenced the drafting process of the three-step test. This is in line with the general framework in which the first three-step test of international copyright law was enshrined. The Berne Convention makes allowance for numerous socially valuable ends. The exemption of quotations as an integral part of intellectual activity, the permission of the utilisation of works for teaching purposes, press privileges promoting the free flow of information and reservations for religious ceremonies may serve as examples.\textsuperscript{698} Not surprisingly, it was underlined with regard to the three-step test in the preparatory work for the 1996 WIPO Diplomatic Conference that

'when a high level of protection is proposed, there is reason to balance such protection against other important values in society. Among these values are the interests of education, scientific research, the need of the general public for information to be available in libraries and the interests of persons with a handicap that prevents them from using ordinary sources of information.'\textsuperscript{699}

Against this backdrop, the specific merit of the qualitative aspect of speciality can hardly be denied: in international copyright law, considerations of a qualitative nature traditionally play a decisive role in the field of limitations.\textsuperscript{700} The notions underlying internationally recognised limitations, as reflected in the Berne Convention, provide guidance for the development of a suitable qualitative test procedure. Therefore, it appears advisable to base the identification of special cases on a qualitative inquiry. This is all the more true as it can already be foreseen that a quantitative test procedure is not unlikely to give rise to insoluble problems.

\textsuperscript{695} Cf. Ricketson 1987, 482; Ficsor 2002b, 133; Reinbothe/von Lewinski 2002, 124.
\textsuperscript{696} See Doc. S/1, Records 1967, 112.
\textsuperscript{697} See Doc. S/1, Records 1967, 112.
\textsuperscript{698} See articles 10(1) and 10(2), 10bis and 2bis(2) BC. Cf. in respect of the so-called 'minor reservations doctrine' subsection 3.1.1.
\textsuperscript{699} See WIPO Doc. CRNR/DC/4, § 12.09.
\textsuperscript{700} The deliberations at the 1884-1886 diplomatic conferences which preceded the formation of the Berne Convention already bear witness to the influence of qualitative considerations. Numa Droz who presided over the first diplomatic conference in 1884, for instance, reminded that 'limitations on absolute protection are dictated, rightly in my opinion, by the public interest'. Cf. Ricketson 1999, 61; Cohen Jehoram 2001b, 807-808. In the WIPO 'Internet' Treaties, considerations of this kind are directly reflected in the preamble. Cf. subsection 3.3.2.
4.4.2.2 Rejecting the Quantitative Concept of the WTO Panel

The way in which the WTO Panel reporting on section 110(5) of the US Copyright Act dealt with the two aspects of speciality contradicts this conclusion. The Panel did not rely on qualitative considerations. Instead, it posited that ‘an exception or limitation should be narrow in quantitative as well as a qualitative sense. This suggests a narrow scope as well as an exceptional or distinctive objective’.701 Hence, the starting point of the Panel is the postulation that both facets of speciality are cumulative conditions. Obviously, the Panel did not fear the substantial problems evolving from a quantitative examination of limitations.

The way in which the Panel proceeded confirms this impression. Instead of preferring qualitative considerations to circumvent the problems raised by the quantitative connotation of the term ‘special’, the Panel did the exact opposite. It refused to judge the legitimacy of the public policy objective underlying section 110(5) of the US Copyright Act and rebutted the argument of the EC that the term ‘certain special cases’ requires a special purpose.702 The Panel took the view that ‘it is difficult to reconcile the wording of Article 13 [TRIPs] with the proposition that an exception or limitation must be justified in terms of a legitimate public policy purpose in order to fulfill the first condition of the Article’.703

The qualitative aspect of speciality was therefore de facto ignored. Accordingly, the Panel departed from its initial postulation that the two aspects of speciality must be applied cumulatively by stating that ‘a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned’.704

Obviously, the Panel eschewed the subjection of national public policy decisions to the qualitative aspect of speciality. In an international trade context, this refusal to judge the legitimacy of a nation state’s policy choices may be deemed appropriate.705 ‘Too big an interference with national sovereignty certainly poses its own threat to the acceptance and efficiency of an international dispute settlement system heavily depending on voluntary compliance by participating members.706 The qualitative minimum requirement which remains pursuant to the Panel’s approach, however, only necessitates the mere existence of any public policy and has no regulatory substance. The qualitative aspect of speciality, therefore, was de facto sacrificed on the altar of national sovereignty. This begs the question whether

703 See WTO Panel – Copyright 2000, § 6.111.
705 Cf. Oliver 2002, 150.
the Panel, fearing to infringe too much upon national policy decisions, has not gone too far down the road of deference to national actors\(^\text{707}\) – an issue that will be dealt with in more detail in the ensuing subsection. Virtually, the applied test procedure is a quantitative inquiry excluding any qualitative considerations. This means that the Panel had to run the risk of focusing on the problematic quantitative connotation of the expression ‘special cases’.

In the course of the following quantitative inquiry, the Panel agreed with the EC that ‘it is the scope in respect of potential users that is relevant for determining whether the coverage of the exemption is sufficiently limited to qualify as a “certain special case”’.\(^\text{708}\) For the identification of relevant normal cases, the Panel relied on the preparatory works for the 1948 Brussels Conference and concluded that ‘Article 11bis(iii) of the Berne Convention (1971) was intended to provide right holders with a right to authorize the use of their works in the types of establishments covered by the exemption contained in Section 110(5)(B)’.\(^\text{709}\) It failed to see ‘how a law that exempts a major part of the users that were specifically intended to be covered by the provisions of Article 11bis(1)(iii) could be considered as a special case in the sense of the first condition of Article 13 of the TRIPS Agreement’.\(^\text{710}\)

When viewed superficially, the Panel’s quantitative inquiry does not lack powers of persuasion. Apparently, the Panel succeeded in solving the specific problem raised by the quantitative aspect of speciality. In the previous subsection, it was assumed that it would be impossible in almost all cases to ascertain the exact number of privileged uses enabled by a specific limitation. On account of this assumption, it has been concluded that the regulatory capacity of the quantitative connotation of the term ‘special’ is quite limited, and that refuge would ultimately have to be taken in a rough assessment of a limitation’s potential for sanctioning free uses. The Panel, by contrast, was provided with factual information on the beneficiaries of section 110(5)(B) which, even though the presented figures were estimations, led to a clear finding. The Panel elaborated that

‘the factual information presented to us indicates that a substantial majority of eating and drinking establishments and close to half of retail establishments are covered by the exemption contained in subparagraph (B) of Section 110(5) of the US Copyright Act. Therefore, we conclude that the exemption does not qualify as a “certain special case” in the meaning of the first condition of Article 13.’\(^\text{711}\)


\(^\text{708}\) See WTO Panel – Copyright 2000, § 6.127 (emphasis in the original text).

\(^\text{709}\) See WTO Panel – Copyright 2000, § 6.131.

\(^\text{710}\) See WTO Panel – Copyright 2000, § 6.131 (emphasis in the original text).

\(^\text{711}\) See WTO Panel – Copyright 2000, § 6.133. See also §§ 6.118-6.124.
Has the Panel thus solved the problem of a quantitative inquiry convincingly? To answer this question, it must be borne in mind that the Panel based its quantitative inquiry on article 11bis(1)(iii) BC. It chose a small exclusive right. Using this restricted reference point, the Panel was capable of drawing the aforementioned conclusions. However, it was obviously not aware of the additional difficulties entailed by a reference to an individual exclusive right, as delineated at the international level. The Berne Convention, for instance, reflects compromise solutions and responses to technical developments rather than a system of exclusive rights without areas of overlap.\(^{712}\) The right of cinematographic reproduction, enshrined in article 14(1) BC, for instance, coexists with the general right of reproduction of article 9(1) BC although allowance is also made for the specific circumstances of cinematographic reproductions in article 9(3) BC.\(^{713}\) The right of mechanical reproduction of musical works, initially embodied in article 13(1) BC, by contrast, was abolished at the 1967 Stockholm Conference. It was asserted that it is included within the general right of reproduction of article 9(1) anyway.\(^{714}\) If the reference point of a quantitative inquiry is chosen in the way in which the Panel proceeded, exemptions from cinematographic reproduction rights would have to be assessed in the light of the small exclusive right granted separately in article 14(1). Limitations to mechanical reproduction rights, by contrast, could be assessed in the light of the broad general right of reproduction, set out in article 9(1). The establishment of a different standard of comparison, however, appears arbitrary.\(^{715}\)

As a matter of course, it could be contended that the overlap between exclusive rights in the field of the right of reproduction is a special case itself which does not justify deprecating the concept of the Panel altogether. However, the exclusive right chosen by the Panel is anything but exempted from the outlined dilemma. As article 8 WCT demonstrates, a general right of communication is emerging in international copyright law which already overlaps with article 11bis(1)(i) and (ii) BC. Admittedly, article 11bis(1)(iii) BC itself which was used by the Panel as a reference point is not covered yet. If an exemption from article 11bis(1)(i) or (ii) BC is to be examined, however, a decision must be taken. Should the corresponding number (i) or (ii) of article 11bis(1) be chosen as a reference point, or the general article 8 WCT instead? If preference is given to the cases listed separately in article 11bis(1) BC, a compelling argument must be presented for choosing a reference point which differs markedly in scope from article 8 WCT. The reference point for cases which solely fall within article 8 WCT, like the making available of a work online, is obviously the broad article 8 WCT itself. The cases dealt with in article 11bis(1) BC, by contrast, would have to be assessed in the light of a substantially

\(^{712}\) Cf. the description of the Convention's development given by Ricketson 1987, 81-125.

\(^{713}\) Cf. Ricketson 1987, 384.

\(^{714}\) Cf. Ricketson 1987, 382.

\(^{715}\) Cf. Ricketson 1987, 384, concluding that 'article 14(1), insofar as it refers to reproduction by means of cinematography is strictly unnecessary, but that it serves a useful purpose in making the existence of this right more explicit'.
smaller reference point. As all these cases concern the communication of a work to the public, the outlined differences appear arbitrary. Inevitably, the question would arise whether article 11bis(1) BC would really have survived, had the WCT not complemented the Berne Convention, but become part of the Convention itself, incorporated in the course of a 1996 Geneva Conference for the revision of the Berne Convention.716

Besides the described dilemma, the quantitative approach of the Panel poses insuperable difficulties if a limitation does not concern only one individual exclusive right. Besides the so-called ‘minor reservations doctrine’ which was invoked as the basis of section 110(5) of the US Copyright Act,717 the Berne Convention permits limitations which are neither necessarily linked with individual exclusive rights nor even shifted into line with the system of exclusive rights.718 Their mechanism rather consists of the delineation of the specific circumstances portraying the kind of use which is to be exempted. The number of exclusive rights involved might differ significantly. For instance, an exemption allowing the use of articles on current economic, political or religious topics, and of broadcast works of the same character might touch upon the general right of reproduction (article 9(1) BC), the right of broadcasting (article 11bis(1) BC) and the right of communication to the public (article 11ter(1) BC) in accordance with article 10bis(1) BC. Correspondingly, the number of potential uses empowered by such a horizontal limitation would have to be assessed against the backdrop of a combination of exclusive rights. How this task could ever be accomplished, is hard to imagine.

Would the Panel undertake a quantitative inquiry in the field of each individual right that is affected? And, if so, what would be the outcome? The number of unauthorised reproductions of an article on current topics which are made by other newspapers is not unlikely to exceed the number of reproductions made by the newspaper which first published the article. Should the three-step test, therefore, erode the privilege laid down in article 10bis(1) BC? Is the same true for publications, broadcasts or sound or visual recordings of a work for teaching purposes which are made in accordance with article 10(2) BC? In this case, the number of reproductions of a poem in a school book might go beyond the number of reproductions made by the original publisher.

The approach of the Panel leaves the interpreter in the dark in these cases. If the legitimacy of the purpose which underlies a limitation, in the aforementioned cases the utilisation of a work for teaching purposes and for the information of the public,

716 At the time of the WCT's inception, a renewed revision of the Berne Convention was out of reach. The predictions in respect of its possible outcome were anything but positive due to the fear of unexpected and undesirable results, such as a decreased level of protection. Cf. Ficsor 1996, 79. Therefore, the participants of the 1996 WIPO Diplomatic Conference, held in Geneva, focused on the adoption of instruments which complement the Convention. One of the new treaties is the WIPO Copyright Treaty. Cf. section 3.3 above.


are barred from entering the picture, its speciality cannot be assessed appropriately. A mere quantitative inquiry is manifestly unsuitable. In cases where a limitation serves socially valuable ends, the first criterion would be blinded to the crucial importance of the limitation and the legitimacy of the underlying public policy considerations. Instead, the limitation would probably not survive the quantitative scrutiny and be rendered incapable of fulfilling the first criterion.

A further objection to the quantitative approach of the Panel must be raised. On its merits, the Panel divests the test’s first criterion of any independent meaning. By relying on quantitative findings, the Panel reduces the meaning of the expression ‘special cases’ to an anticipated inquiry into a conflict with ‘a normal exploitation of the work’. Such an inquiry, however, is necessitated by the second criterion anyhow. Not surprisingly, the Panel’s conclusion that section 110(5)(B) of the US Copyright Act ‘exempts a major part of the users that were specifically intended to be covered by the provisions of Article 11bis(1)(iii)’719 seems to be a response to the question whether the limitation conflicts with a normal exploitation rather than to the problem of speciality.720 On account of the outlined difficulties, the approach of the Panel must be rejected. Instead of demonstrating how the problems of a quantitative analysis can be solved, it poses numerous additional difficulties. It multiplies the problems in the context of the first criterion.

4.4.2.3 **BRINGING QUALITATIVE CONSIDERATIONS INTO FOCUS**

As the closer inspection of the quantitative approach of the WTO Panel has shown, the quantitative connotation of the term ‘special’ does not constitute a firm basis for an examination of limitations in the light of the first criterion.721 It is thus advisable to bring the qualitative connotation of the term ‘special’ into focus instead. In this respect, the comments which Ricketson made on article 9(2) BC can serve as a useful starting point. Besides other prerequisites,722 Ricketson emphasises that there must be something special about the purpose of the privileged use in question. He elaborates that ‘special’ here means that the purpose ‘is justified by some clear reason of public policy or some other exceptional circumstance’.723 This view is widely shared. In the context of article 13 TRIPs, Ficstor follows Ricketson’s approach.724 Seeking to clarify the formula given by Ricketson, he underlines that more is necessary

719 See WTO Panel – Copyright 2000, § 6.131 (emphasis in the original text).
720 Viewed from this perspective, it is not surprising that section 110(5)(B) also failed the second criterion, as interpreted by the Panel. See WTO Panel – Copyright 2000, § 6.211.
722 See Ricketson 1987, 482. Cf. subsection 4.4.1.
723 See Ricketson 1987, 482. It is to be noted that Ricketson departed from this position recently. See Ricketson 2003, 22, stating that ‘the preferable view is that the phrase “certain special cases” should not be interpreted as requiring that there should also be some “special purpose” underlying it’.
724 See Ficstor 2002b, 129.
THE INTERPRETATION OF THE THREE CRITERIA

'than that policy makers wish to achieve any kind of political objective. There is a need for a clear and sound political justification, such as freedom of expression, public information, public education; it is not allowed to curtail author’s rights in an arbitrary way.'

Similarly, Reinbothe and von Lewinski explain in respect of article 10 WCT that

'limitations and exceptions should be based on a specific and sound policy objective. [...] Such policy areas of concern or relevance to limitations and exceptions may be public education, public security, freedom of expression, the needs of disabled persons, or the like.'

Before further clarifying the qualitative standard of review on this basis, it is to be emphasised that a fine line must be walked here. As already indicated in the previous subsection, it can be assumed that the WTO Panel had reason to elude a judgement on the legitimacy of the policy objective underlying a national limitation. The international treaties governing copyright law are devised so as to serve as minimum standard regimes. National actors are not compelled to create a rigidly uniform intellectual property code. Broad discretion is particularly enjoyed in the field of limitations. The possibility to impose certain restrictions on copyrights allows states to strike their own unique balance between authors’ rights and competing cultural, social and economic interests. From the debates at the 1967 Stockholm Conference, it can be inferred that especially the three-step test can be perceived as an exponent of the freedom traditionally conceded to national policy makers in this field.

WTO panels would be ill-advised to do away with this freedom. As Crole y and Jackson point out, ‘inappropriate panel “activism” could well alienate members, thus threatening the stability of the GATT/WTO dispute settlement procedure itself’. Drawing a line between the WTO dispute settlement mechanism and the practice of the European Court of Human Rights (ECHR), Helfer stresses by the same token the importance of the so-called ‘margin of appreciation doctrine’. The latter gives evidence of the ECHR’s willingness to grant national decision makers a certain degree of discretion. This breathing space permits the balancing of the protection of civil and political liberties against other pressing societal concerns. The ECHR has particularly made plain that it will refrain from ‘taking the place of

---

725 See Ficsor 2002b, 133. The same position is taken by Ficsor with regard to article 10 WCT. See Ficsor 2002a, 284 and 516.


729 See Jackson 2000, 160.


the competent national authorities’.732 Helfer’s analysis suggests that the margin of appreciation doctrine is ‘an essential ingredient of the ECHR’s success in fashioning an effective system of adjudication’.733

Against this backdrop, it can be concluded that the qualitative standard of review to be developed here, in any case, should not interfere too much with national policy decisions. Instead, a prerogative must be given to national authorities. Helfer even contends that ‘states should enjoy the most deference when they seek to strike a balance between exclusive rights of authors and the rights and interests of the public and future authors in obtaining access to copyrighted works’.734 However, it must be borne in mind that the quantitative connotation of the term ‘special’ has proven to be manifestly unsuited for identifying special cases. The remaining qualitative standard of review will therefore ultimately form the sole hurdle to be surmounted by national limitations when it comes to decide on compliance with the three-step test’s first criterion. That the WTO Panel reporting on section 110(5) of the US Copyright Act, basically, was ready to accept any public policy invoked by a member state,735 can thus hardly be considered an appropriate solution. It would deprive the first criterion of any regulatory potential. The standard of review discussed by Croley and Jackson, by contrast, points in the right direction:

‘So long as a member’s interpretation of the [TRIPs] Agreement is permissible — within the realm of the plausible, in some general sense — deference on the part of the reviewing panels may be sensible.’736

When the necessity to justify a limitation by some clear reason of public policy is seen in this light, it can be posited that the legislative decision to set limits to author’s rights must be plausible considering the reasons given for the limitation’s adoption. The three-step test itself offers further guidance with regard to the task that national policy makers must accomplish. The third criterion of the test prohibits an unreasonable prejudice to the legitimate interests of the author. If a line is drawn between this criterion and the prerequisite that limitations must be special cases, the conceptual contours of the required policy decision can be traced more precisely: a legislative process in which the legitimate interests of authors are carefully weighed against competing interests is central to securing that a limitation forms a special case. To give some clear reason of public policy for a limitation, the national legislator must clearly refer to an interest which constitutes a rational basis for a limitation and makes it plausible why the scales were finally tipped to the side of the users. As a minimum requirement, it is thus inevitable that there exists a conflict of interests. Otherwise, there is no need to enter into the weighing process at all.

735 See WTO Panel – Copyright 2000, § 6.111.
To ensure compliance with this standard of review, national legislation may invoke a wide variety of justifications. Considerations that are of particular importance, such as the defence of fundamental rights and freedoms, and the aim to disseminate information or to enhance democracy, have been discussed in chapter 2. Guidelines were also given at the 1996 WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions. In the preparatory work for the Conference, it is underlined with regard to the proposed three-step test that

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

In this vein, the need ‘to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention’, is expressly recognised in the preamble of the WIPO Copyright Treaty. These statements show which justifications may be regarded as a firm basis for limitations in the context of the three-step test.

Considerations of intergenerational equity which are used here as a signpost for the application of the three-step test, also provide guidance. To be able to create a work, an author may depend on the possibility of building upon the works of his predecessors. This is evident when a work is quoted or used for purposes such as criticism and review, or caricature, parody and pastiche. However, in line with the broad concept of intergenerational equity developed above, numerous further limitations are to be taken into account as well. Privileges for private study and consumptive private use, as well as for library and teaching activities also contribute to the realisation of intergenerational equity. They grant access to diverse sources of information. In this context, the legitimate interests of the author must be reconciled with the specific needs of other authors who take the position of users under the given circumstances. A limitation which is drafted so as to react adequately to this conflict of interests can be considered a special case.

---

[738] See section 2.3.
[739] See the 'Germania 3'-decision of the German Federal Constitutional Court that has been discussed in subsection 2.2.1.
[740] Cf. section 2.3. It is noteworthy in this context that the study group which prepared the material for the 1967 Stockholm Conference emphasised that 'exceptions should only be made for clearly specified purposes, e.g., private use, the composer’s need for texts, the interests of the blind'. See Doc. S/1, Records 1967, 112. From the qualification of the 'composer’s need for texts' as a clearly specified purpose, it may be inferred that the use of copyrighted material in the course of the creation of a new work was considered a special case.
[741] See subsections 2.2.1 and 2.3.
CHAPTER 4

The drafting history of article 9(2) BC and 10 WCT is a reservoir of further examples of special cases. The original draft of article 9(2) BC explicitly permitted free reproductions ‘for private use’ and ‘for judicial or administrative purposes’. At the 1967 Stockholm Conference, no agreement on the precise delineation of these cases could be reached. Hence, it was finally decided to refrain from their explicit enumeration. This decision, however, was not meant to indicate that the formerly listed cases are not permissible. By contrast, the conviction was expressed that the remaining abstract formula which now constitutes the three-step test would comprise those cases anyhow. The UK delegation, for instance, underscored that the three abstract criteria ‘can take care of legitimate cases of private use and judicial and administrative purposes’. The question whether corresponding limitations should be adopted or maintained on the national level, and how their scope should be delineated was confidently left to national legislation. The exemption of reproductions for private use and for judicial or administrative purposes, therefore, has been regarded as a special case in the sense of the three-step test at the 1967 Stockholm Conference. Moreover, the general report of the Conference expressly mentions the exemption of scientific use of copyrighted material. The practical example given therein with regard to article 9(2) BC refers to ‘individual or scientific use’. As scientific use, thus, was chosen to explain the functioning of the three-step test, it was obviously also qualified as a special case. The deliberations at the Stockholm Conference, furthermore, concerned libraries. The UK stressed that

‘the general idea of the United Kingdom amendment was that there should be no licensing in cases in which the author normally exploited the work himself. With libraries, however, a compulsory licensing system might be desirable, provided that it would not prejudice the author’s legitimate interests. If it did, the author should be remunerated.’

742 This does not mean that they are incompatible with article 13 TRIPs. In the course of the debates on TRIPs, however, permissible special cases were not discussed in detail. The drafting history of article 13 TRIPs does not yield further examples that could be listed here.

743 See Records 1967, 113 (Doc. S/1).

744 See subsection 3.1.2.

745 See Records 1967, 630 (Doc. S/13). Cf. the observations of Greece, ibid., 689 (Doc. S/56) and Denmark, ibid., 615 (Doc. S/13). See also the statement which the Danish delegate made in Main Committee I, ibid., 857.

746 See Collova 1979, 125-127, who elaborates in respect of private use: ‘La disparition, dans le texte définitif, de l’expression usage privé signifie, à notre avis, que le législateur international n’a pas voulu maintenir cette notion en tant que catégorie dogmatique autonome. En d’autres termes, il a manifesté par là l’intention de ne pas donner au législateur national d’indications spécifiques et a préféré laisser à ce dernier la faculté de déterminer si l’usage privé peut être considéré ou non comme faisant partie des cas spéciaux, en lui indiquant également les limitatives à suivre.’ Cf. Ricketson 1987, 485-487.

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

748 See Minutes of Main Committee I, Records 1967, 857.
As it was the UK amendment which finally determined the wording of the three-step test, this statement is of particular importance. The UK espoused a solution of the problems raised by library activities on the basis of the third criterion of the three-step test. Obviously, it was therefore convinced that limitations in favour of libraries are a special case in the sense of the first criterion. Besides the UK, the delegation of Italy sought to bring the needs of libraries into focus. It envisioned

'a compromise solution which would involve finding a general formula [...] while making provision for certain exceptions which would allow reproduction for judicial or administrative purposes and, where applicable, for the internal use of libraries and record libraries and for private use'.

Further examples of concerns forming a rational basis for limitations can be found among the circle of traditional limitations which were already known in 1967. The freedom of reproducing a portrait which is traditionally offered the portrayed person by some members of the Berne Union reconciles the personality right of the portrayed person with the legitimate interest of the author in controlling the reproduction of the portrait. The widespread limitation which allows the owner of an artistic work the work's reproduction in a catalogue if he wishes to sell it, reacts to the conflict between the author's copyright and the owner's property right in the work's physical manifestation. Naturally, the circle of special cases is not restricted to the traditional limitations known in 1967. Otherwise, the three-step test would be rendered impervious to technical advances requiring new limitations to solve an emerging new conflict of interests. The technical developments which have occurred since 1967, including the spectacular growth of the internet, can serve as an example in this context. In the digital environment, there is substantial reason to qualify the exemption of temporary transient or incidental reproductions as a special case. This exemption, in contrast to traditional limitations, is rooted in technical necessities. By allowing temporary acts of reproduction, such as caching, the efficient functioning of internet transmission systems can be safeguarded. Ultimately, the survival and continuing growth of the internet can be perceived as the plausible policy objective underlying this special case.

---

749 Cf. subsection 3.1.2.
750 Otherwise, the third criterion would not be reached. See subsection 4.3.3.
751 See Minutes of Main Committee I. Records 1967, 858.
752 See subsections 3.1.3.1 (FRG) and 3.1.3.2 (Netherlands).
753 See subsections 3.1.3.1 (FRG), 3.1.3.2 (Netherlands) and 3.1.3.4 (UK).
754 Cf. the agreed statement concerning article 10 WCT. It is underlined therein that article 10 WCT should be understood 'to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment'.
756 Cf. recital 33 of Directive 2001/29/EC.
757 Cf. Hugenholtz 2000b, 482.
So far, only examples of limitations have been given which can be qualified as a special case. The developed standard of review, however, also excludes certain types of limitations. Section 110(5)(B) of the US Copyright Act may serve as an example. The WTO Panel reporting on section 110(5) concluded on the basis of a quantitative inquiry that subparagraph B of the provision cannot be regarded as a special case. Although the quantitative approach of the Panel had to be rejected,\textsuperscript{758} it must be conceded that the Panel nevertheless drew the right conclusion. Section 110(5)(B) is not a special case. Under this so-called ‘business exemption’, commercial establishments such as bars, shops, and restaurants which do not exceed a certain size or which meet certain equipment requirements, may play radio and TV music without paying any royalty fees to collecting societies. In the course of the dispute settlement procedure, the US claimed that ‘the specific policy objective pursued by this exemption is fostering small businesses and preventing abusive practices of CMOs’.\textsuperscript{759} It contended that

‘small businesses play a particularly important role in the American social fabric. They foster local values and innovation and experimentation in the economy. Small businesses also create a disproportionately greater number of economic opportunities for women, minorities, immigrants, and those formerly on public assistance, and thus are an essential mechanism by which millions enter the economic and social mainstream.’\textsuperscript{760}

Against this backdrop, it is not surprising that the WTO Panel avoided an inquiry into the legitimacy of the outlined public policy purpose and focused on quantitative findings instead.\textsuperscript{761} It is not evident why a copyright limitation was chosen to pursue the delineated policy objective. Undoubtedly, there are more effective ways of fostering small businesses. Moreover, it is not apparent why the purpose of preventing these businesses from abusive practices of collecting societies led to a copyright limitation. Instead, as the applied practices are abusive, better control could be exerted on the societies. The furtherance of small businesses and their protection against abusive practices consequently cannot be qualified as a clear reason of public policy. At the core of the limitation lie merely considerations of political usefulness.\textsuperscript{762} Hence, section 110(5)(B) is not a special case.

\textsuperscript{758} See the description and discussion of the Panel’s concept in the previous subsection.
\textsuperscript{759} See WTO Panel – Copyright 2000, § 6.115.
\textsuperscript{760} See Responses of the US to written questions from the panel – first meeting, WTO Doc. WT/DS160/R, attachment 2.3, Q.17. The background to the adoption of the provision, however, reveals that it might also be regarded as the result of the intervention of certain interest groups. Cf. Goldman 1999, 505-506.
\textsuperscript{762} Cf. Oliver 2002, 150, asserting that ‘the “policy” basis of § 110(5) (the fostering of “mom and pop” businesses) was an economic trade-off made by the U.S. in response to lobbying by those groups’. In the course of the WTO dispute settlement procedure, Australia also took the view that section 110(5) cannot be qualified as a special case. In its written submission, WTO Doc. WT/160R/R.
Certain European limitations, however, also cannot meet the developed qualitative standard of review. In the European Copyright Directive 2001/29/EC, it is deemed permissible to exempt the use of copyrighted material in connection with the demonstration or repair of equipment. A long-standing limitation for these ends can be found in German legislation. Businesses which sell or repair TV sets, radios, recording equipment and the like as well as blank material supports, such as tapes and cassettes, can profit from § 56 of the German Copyright Act. The provision allows the making of visual or sound recordings, the public communication of such recordings and of broadcasts insofar as necessary for demonstrating or repairing the described equipment. This provision helps to explain the functioning of the proposed qualitative test procedure because a distinction must necessarily be made between aspects which are special and those which are not capable of meeting this standard.

Insofar as the proprietor of a shop selling and repairing relevant equipment is hindered from running his business due to the control exerted by the authors, the limitation can be qualified as a special case. Under these circumstances, the legislator reacts to a conflict between the interest in running a business without being straitjacketed by the author's control and the interest of the author in controlling any performance of his work. It can easily be imagined that, while demonstrating a radio for sales purposes, some copyrighted piece of music might become audible. Similarly, it is not unlikely that copyrighted material will be heard or seen when a repaired TV set is switched on in order to show that the repair has been successful and the client will get value for money. In these cases, where the use of copyrighted material is incidental, it is justified to speak of a special case. If the proprietor of a shop would have to obtain the authorisation of the authors even for the described incidental performance of a work that can furthermore hardly be avoided in the normal course of events, he could rightly assert that copyright interferes with his business. The legislator is thus free to react to the resultant conflict of interests.

Another aspect of the limitation, however, can hardly be regarded as special. If the possibility of freely using copyrighted works to demonstrate equipment leads to a permanent performance of works throughout the hours that a shop is open, the boundaries of a special case are overstepped. Taking advantage of the limitation in this way is certainly not necessary to enable the proprietor of the shop to run his business. It simply facilitates his commercial activity. The permanent playing of music or showing of copyrighted works on TV may be perceived as a useful

---

attachment 3.1, Australia elaborates: 'There is no indication that the criteria chosen to define this exception were driven by public policy objectives, comparable to use in research, educational or religious context'. It maintains that 'there does not appear to be any identification of "special use" or "exceptional circumstances" behind the S.110(5) exemption [...]. Rather, the threshold applied is justified by contingent considerations about the practicalities of collecting royalties.'

763 See article 3(3)(1) of the Copyright Directive.
764 This is an example given by Fromm/Nordemann 1966, 216.
background to the sale of equipment and attracts passers-by in the street outside. The interest in these positive side effects of a permanent performance of works, however, does not call for reconciliation with the legitimate interests of the author. The legislative decision to impose a limitation, thus, does not become plausible. It is not a special case.  

4.4.2.4 DEFINING A SPECIAL CASE

On the basis of the preceding inquiry, the following conclusions can be drawn: it is not advisable to rely on the quantitative connotation of the term ‘special’ when seeking to identify special cases in the sense of the three-step test. Instead, preference should be given to a qualitative test procedure. Some clear reason of public policy must underlie the adoption of a copyright limitation. To give some clear reason of public policy, the national legislator must enter into a careful weighing process. The legitimate interests of the author, to which the third criterion of the three-step test refers, must be weighed carefully against the competing interests at stake. The legislative decision to set limits to the author’s exclusive rights must be a reaction to an understandable need for the reconciliation of the user interests at stake with the author’s legitimate interests. That the national legislator considers the imposition of a limitation politically useful, is not sufficient. In sum, a limitation that rests on a rational justificatory basis making its adoption plausible constitutes a special case in the sense of the three-step test.

4.4.2.5 CLARIFYING THE INTERPLAY WITH THE THIRD CRITERION

Against the quantitative approach of the WTO Panel, it has been contended that the Panel divests the test’s first criterion of any independent meaning. By eschewing a qualitative judgement of a limitation’s legitimacy, the Panel reduces the meaning of the expression ‘special cases’ to an anticipated inquiry into a conflict with a normal exploitation of the work – an inquiry which is necessitated by the second criterion of the three-step test. It has been asserted that any response to the question of a limitation’s speciality which is given on the basis of the Panel’s quantitative approach, already determines the outcome of the limitation’s examination in the light of the second criterion. In consequence, the prohibition of a conflict with a normal exploitation of the work would be rendered meaningless. To avoid this result, the quantitative approach of the WTO Panel has been rejected.

---

767 Cf. subsection 4.4.2.2.
768 Cf. Ricketson 1987, 482.
769 Cf. Ficior 2002b, 133.
770 See subsection 4.4.2.2.
Pursuing the establishment of a suitable qualitative test procedure, however, the third criterion of the three-step test has been factored into the equation. It has been enunciated that the user interests at stake must be capable of competing with the legitimate interests of the author to which the third criterion refers. A very similar objection can therefore be raised here: would an inquiry into the speciality of a limitation which is based on the developed qualitative test procedure not anticipate an examination in the light of the third criterion, just as the Panel’s quantitative approach anticipates an examination in the light of the second criterion?

The response to this question depends particularly on the fact that the prejudice to the author’s legitimate interests is qualified in a specific way in the context of the third criterion. As some harm to the author’s legitimate interests will inevitably flow from any limitation, the third criterion does not forbid a prejudice as such. It only forbids an unreasonable prejudice. This formulation can be understood as a reference to the principle of proportionality: although strong user interests may underlie a limitation, the prejudice to the legitimate interests of the author must be proportionate. In the framework of the third criterion, the legislator’s weighing process which is necessitated by the first criterion is scrutinised more thoroughly. The central question, then, is whether the legislator succeeded in striking a proper balance between the interests at stake. In particular, it must be decided whether it is necessary to provide for the payment of equitable remuneration.

Hence, the qualitative test procedure of the first criterion merely ensures that a basic requirement is fulfilled which is indispensable to the more thorough scrutiny required by the third criterion. If a limitation’s adoption is not plausible, it makes no sense to proceed further. Ultimately, it would inevitably have to be concluded that the limitation is not permissible because a proportional relation to the legitimate interests of the author is out of reach. Thus, it is appropriate to secure in the context of the first criterion that a plausible argument supports the limitation. There is a mutual relationship between the first and the third criterion but no area of overlap. The mere existence of a plausible competing user interest indicating that a careful weighing process has taken place on the national level is central to the first criterion. In the context of the third criterion, the content of the weighing process is controlled.

4.4.3 THE IMPACT ON INTERNATIONALY RECOGNISED LIMITATIONS

The question of the relationship between the open-formulated three-step test as the general norm and other, more specific limitations was already addressed at the 1967 Stockholm Conference. The Conference report expressly referred of the principle *lex specialis legi generali derogat* to clarify the relationship between article 9(2)

---

772 For a detailed discussion of this concept, see subsection 4.6.2.
773 See subsections 4.3.2 and 4.3.3.
BC and articles 10, 10bis, 11bis and 13 BC. The drafters of the first three-step test in international copyright law sought to draw a clear boundary line between the general three-step test and more specific provisions of the Berne Convention. Within the ambit of operation of these provisions, the three-step test should have no role to play. Consequently, the question of the impact of its abstract criteria on one of the other internationally recognised limitations did not have to be raised.

In practice, however, courts were attracted by the general guidelines given in the three-step test and did not hesitate to apply an amalgam of the test’s abstract criteria and more specific provisions of the Berne Convention. In the case ‘Zienderogen Kunst’ of June 22, 1990, for instance, the Dutch Supreme Court, the Hoge Raad, had recourse to the three-step test of article 9(2) BC even though the case concerned quotations made in a schoolbook and thus the domain of the more specific article 10 BC. The publisher Malmberg distributed a schoolbook in which works of art were reproduced. As these reproductions were unauthorised, the Dutch collecting society Stichting Beeldrecht sued for payment of equitable remuneration. It took the view that the reproductions fell under the schoolbook privilege laid down in article 16 sub (a) of the Dutch Copyright Act, as in effect at that time. This provision leaned on article 10(2) BC and provided for the payment of equitable remuneration. To justify the unauthorised reproduction even though no remuneration had been paid, Malmberg invoked the right of quotation, as delineated in article 16 sub (b) of the Dutch Copyright Act in accordance with article 10(1) BC. Article 16 sub (b) did not oblige beneficiaries to pay equitable remuneration.

If the Hoge Raad had strictly observed the boundary line drawn between the three-step test and more specific limitations of the Berne Convention in the report of the 1967 Stockholm Conference, it would merely have been possible to refer to article 10 BC. The first paragraph of article 10 deals specifically with quotations, the second with a work’s utilisation by way of illustration in publications for teaching. Instead, the Hoge Raad elaborated that the right of quotation, as delineated in article 16 sub (b) of the Dutch Copyright Act of that time, only allows an unauthorised taking which does not substantially impair the right holder’s interest in a work’s exploitation, as protected by copyright law. Seeking to concretise this formula, the Court held that the free reproduction of a work of art must be subjected to the text, with which it is connected, in such a way that it can no longer be regarded as a form of exploitation of the artistic work involved. This standard of control was not derived from the international rules given in article 10

774 See Records 1967, 1134. Cf. subsection 3.1.2 for a preliminary draft of the later three-step test tabled in 1964 which already reflected the intention to leave more specific provisions of the Berne Convention untouched. Cf. subsection 4.1.2.2 for a more detailed description.
775 See Records 1967, 1134.
776 See for a description of this provision subsection 3.1.3.2.
778 See Hoge Raad, Nederlandse Jurisprudentie 1991, 268, § 3.3.
779 See Hoge Raad, Nederlandse Jurisprudentie 1991, 268, § 3.3.
BC but from article 9(2) BC. Accordingly, the Hoge Raad intermingled the rules governing quotations and illustrations for teaching with the general rule enshrined in article 9(2) BC.\footnote{See Hoge Raad, Nederlandse Jurisprudentie 1991, 268, § 3.4. Cf. Cohen Jehoram 1991, 678.}

Nowadays, this way of applying the three-step test to situations for which the Berne Convention provides specific rules is reflected in international copyright law. Article 13 TRIPs and article 10(2) WCT serve as additional safeguards.\footnote{See subsections 3.2.2, 3.3.2 and 4.2.2.} They carry on where the specific provisions of the Berne Convention left off. If a national limitation already complies with the prerequisites set forth in the Berne Convention, it must \textit{additionally} fulfil the three criteria of the test.\footnote{See subsection 4.2.2.} If a national legislator nowadays wants to exempt the making of quotations or the utilisation of a work by way of illustration for teaching, it is no longer sufficient to ensure compliance with article 10 BC. Additionally, the national legislator must secure that the envisioned limitation is capable of fulfilling the abstract criteria of the three-step test. The application of an amalgam of specific provisions of the Berne Convention and the general three-step test, as anticipated by the Hoge Raad, has become a necessity.

Accordingly, the question arises what impact the rule that limitations must be confined to special cases has on more specific provisions of the Berne Convention. One might think of a national legislator who is about to introduce a press privilege facilitating the reporting of current events. Aiming to fulfil international obligations, the national legislator consults the Berne Convention and comes across article 10\textit{bis}(2) which deals specifically with this kind of copyright limitation. In accordance with the rules set forth in article 10\textit{bis}(2), the national legislator determines that copyrighted material seen or heard in the course of a press report concerning a current event may only be reproduced and made available to the public to the extent justified by the informative purpose. Afterwards, however, the legislator also learns of the additional safeguard function fulfilled by the three-step tests of article 13 TRIPs and article 10(2) WCT. Studying article 10(2) WCT, he learns that he ‘shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases...’ Has the legislator still not done enough? Does article 10(2) WCT call upon him to form a special case of article 10\textit{bis}(2) BC? Is the national legislator therefore barred from enjoying the full freedom offered by article 10\textit{bis}(2) BC? Or is the restriction of limitations to special cases in article 10(2) WCT de facto rendered meaningless because the specific Berne provisions and thus also article 10\textit{bis}(2) BC are already special cases in the sense of the three-step test?

Various arguments can be advanced in favour of the latter assumption. In the context of article 10 WCT, Reinbothe and von Lewinski point out that ‘some guidance on the question as to which “special cases” international legislators have had in mind, and which ones might qualify under Article 10 WCT, is revealed in
the explicit exceptions listed in the Berne Convention.\textsuperscript{783} Hence, they recommend orienting the decision whether a national limitation is a special case in the sense of the three-step test towards the other, more specific limitations set out in the Berne Convention.\textsuperscript{784} This position implies that the Berne limitations themselves are special cases in the sense of the three-step test. As to article 13 TRIPs, Ficsor similarly seeks to align the decision whether a national limitation constitutes a special case with the set of limitations laid down in the Berne Convention. Agreeing with Ricketson that some clear reason of public policy is necessary to consider a limitation a special case,\textsuperscript{785} he elaborates that

'if one looks at the text of the provisions of the Berne Convention on special cases of exceptions to the right of reproduction and other rights, one may find that the revision conferences have always introduced exceptions on the basis of, as Ricketson puts it, some clearly identified reasons of "public policy."'\textsuperscript{786} Pursuant to the qualitative standard developed above, a limitation can be qualified as a special case in the sense of the three-step test if it rests on a rational basis making its adoption by national legislation plausible.\textsuperscript{787} Arguably, this hurdle will always be surmounted if national authorities shape a limitation so as to comply with a specific provision of the Berne Convention which explicitly permits the limitation's adoption. It can hardly be considered not to be plausible to use the room to manoeuvre especially created at the international level for fashioning an appropriate national copyright balance. This postulation has the merit that it avoids a conflict between the general three-step test and more specific limitations approved by the Berne Convention. It is in line with the agreed statement concerning article 10(2) WCT: 'Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.'\textsuperscript{788} From this statement, it can be inferred that the additional safeguard function was not intended to cause any tension between the existing set of Berne limitations and the three-step test. As a national limitation is subjected to the three-step test only after already fulfilling the requirements set out in the Berne Convention in this connection, approval has already been given to the objective underlying the limitation in the context of the Convention. The additional claim for some justifying clear reason of public policy in article 13 TRIPs or article 10(2) WCT is tautological.\textsuperscript{789} Against

\textsuperscript{783} See Reinbothe/von Lewinski 2002, 125.
\textsuperscript{784} They explicitly refer to article 2bis(2), 10(1), 10(2), 10bis(1) and 10bis(2) BC. Cf. Reinbothe/von Lewinski 2002, 125.
\textsuperscript{785} Cf. subsection 4.4.2.3.
\textsuperscript{786} See Ficsor 2002b, 129.
\textsuperscript{787} See subsection 4.4.2.4.
\textsuperscript{788} See WIPO Doc. CRNR/DC/96, agreed statement concerning article 10 WCT. This statement is applicable mutatis mutandis to article 16 WPPT. See WIPO Doc. CRNR/DC/97.
\textsuperscript{789} The agreed statement concerning article 10 WCT is also to be taken into account in the context of article 13 TRIPs. Cf. subsection 4.1.2.2.
this background, it can be enunciated that the relevant provision of the Berne Convention itself forms the necessary rational basis making the limitation's adoption plausible. To doubt the legitimacy of a corresponding national limitation, could be equated with calling the legitimacy of the underlying specific provision of the Berne Convention as such into doubt.

Hence, it is to be concluded that all limitations for which the Berne Convention specifically provides are special cases in the sense of the three-step test. A national limitation which complies with the Berne Convention, therefore, always constitutes a special case in the sense of the three-step test and passes the first step of article 13 TRIPs and article 10(2) WCT automatically. The claim for speciality is nothing but a reminder for national legislation in this context. It calls on the national legislator to use Berne provisions permitting copyright limitations with sense and reason. Instead of thoughtlessly exhausting the room to manoeuvre offered by the Convention, the national legislator should moderately use the existing freedom. A careful analysis of the specific needs of the user group which is to be privileged must precede the adoption of a limitation. In the context of the additional safeguard function, the expression 'special cases' therefore underlines the particular responsibility of national legislation. As posited in subsection 4.4.2.3, it is always expected to carefully weigh the legitimate interests of the author against competing user interests. The outcome of this procedure must be a limitation drawing only those resources away from authors’ rights which are necessary for reacting adequately to the existing conflict of interests.

4.4.4 THE IMPACT ON REMAINING NATIONAL LIMITATIONS

After clarifying in how far the restriction of limitations to special cases influences the set of limitations for which the Berne Convention specifically provides, certain types of national limitations must finally be discussed. In literature, it has been contended that, particularly in the digital environment, private use has become too broad a category to be regarded as a special case in the sense of the three-step test any longer. Moreover, it has been called into doubt whether copyright limitations that are laid down in open-ended norms, such as the US fair use doctrine, comply with the three-step test’s first criterion. Subsequently, it will therefore be examined whether or not the basic rule that copyright limitations must be confined to special cases really abridges these types of limitations. In subsection 4.4.4.2, the question will be raised in how far personal use privileges can be qualified as special cases in the sense of the three-step test. In subsection 4.4.4.3, it will be examined whether copyright limitations which are laid down in open-ended norms, like the US fair use doctrine, are nonetheless compatible with the requirement that such provisions, pursuant to the three-step test, must be confined to special cases.

790 See the overview given in subsection 4.2.2 above. Cf. subsection 4.1.3.
4.4.4.1 PERSONAL AND INTERNAL USE

In academic literature, it has been doubted whether limitations which exempt the personal use of copyrighted material can be qualified as a special case in the sense of the three-step test. Ricketson, for instance, has stated that, to be considered a certain special case, the privileged use ‘must be for a specific, designated purpose: a broadly framed exemption, for example, for private or personal use generally, would not be justified here.’ Ricketson draws similar conclusions on the grounds that the market failure argument supporting the exemption of personal use in the analogue world loses weight in the digital environment. He contends that the digital reproduction for the purpose of personal use, consequently, can no longer be regarded as a ‘certain special case’ unless it is defended on another basis but the market failure rationale.

Neither Ricketson’s view nor the one taken by Reinboth is endorsed here. Instead, it has already been pointed out that private use privileges have obviously been perceived as a ‘certain special case’ at the 1967 Stockholm Conference. The survey of traditional limitations which has been conducted in chapter 3 corroborates this finding. From a historical perspective, there is thus substantial reason to rebut the argument that private use is not a special case. As regards the market failure rationale, it has already been enunciated in chapter 2 that considerations of this kind are manifestly unsuited for justifying limitations anyway. Personal use privileges affording the use and enjoyment of copyrighted material in privacy can be justified on the grounds that they contribute to the dissemination of information instead. Additionally, the right to privacy supports this type of limitation. Hence, personal use privileges rest on a firm justificatory basis irrespective of whether or not the market failure argument still is relevant in the digital environment. This is all the more true as considerations of intergenerational equity also call for the exemption of the use of intellectual works for the purpose of private study.

Nevertheless, the critique must be taken seriously. In particular, Ricketson’s comment that a broadly framed exemption for private or personal use would not be permissible gives rise to a final review of personal use privileges. At the 1967 Stockholm Conference, a broad private use concept was under discussion. Against the initial proposal to list ‘private use’ explicitly as a permissible exemption from

791 See Ricketson 1999, 69. Cf. Ginsburg 1997, 14: ‘Note also that as more and more works are marketed directly to end users, private copying should no longer be characterized as “certain special cases”: it will become the leading mode of exploitation.’
792 See Reinboth 2000, 257. Cf. subsection 2.2.2.
793 See Reinboth 2000, 257.
794 Cf. subsections 3.1.2 and 4.4.2.3.
796 Cf. subsection 2.2.2.
797 See subsections 2.2.2 and 2.2.3.
798 See section 2.3.
the reproduction right.\textsuperscript{799} Kerever, speaking on behalf of France, asserted that 'it was clear that the phrase "private use" would cover corporate bodies, which would perhaps be going too far'.\textsuperscript{800} Obviously, the conceptual contours of private use were not traced narrowly at the Conference. Irrespective of Kerever's critique, the inclusion of industrial undertakings, ultimately, has even been reflected in the final report on the work of Main Committee I:

'If [photocopying for various purposes] implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that [...] equitable remuneration is paid.'\textsuperscript{801}

As already elaborated above, this statement can be traced back to the solution of the problem of photomechanical reproductions espoused in the 1965 Copyright Act of the FRG.\textsuperscript{802} As the statement places copies made in enterprises in the context of the third criterion prohibiting an unreasonable prejudice to the author's legitimate interests, 'use in industrial undertakings' was obviously regarded as a special case in the sense of the test's first criterion at the Stockholm Conference.\textsuperscript{803}

The different facets of the agreement reached at the 1967 Stockholm Conference can be gathered from ensuing Dutch legislation. As pointed out above, three different groups of users can be identified when analysing the Dutch private use regime established in 1972. These groups can be sketched as follows: the first group uses copyrighted material solely for personal study, learning and enjoyment. The use can accordingly be called strictly personal use. The second category is formed by non-profit organisations, such as public welfare institutions, including instances serving administrative purposes. The third category comprises enterprises and comparable profit organisations. This somewhat oversimplified\textsuperscript{804} characterisation of the three distinct groups is a useful starting point for shedding the light of the three-step test's first criterion on different facets of personal use.

As to the first group, it can clearly be stated on the basis of the explanations already given that the use of copyrighted material for personal study, learning and enjoyment in privacy undoubtedly constitutes a certain special case in the sense of the three-step test. Limitations of this kind contribute substantially to the dissemination of information. They rest on the fundamental right to receive information, are necessitated by considerations of intergenerational equity and were widespread throughout the countries of the Berne Union at the time of the 1967

\textsuperscript{799} See Doc. S/1, Records 1967, 113.
\textsuperscript{800} See Minutes of Main Committee I, Records 1967, 858.
\textsuperscript{801} See Report on the Work of Main Committee I, Records 1967, 1146 (emphasis added).
\textsuperscript{802} See subsection 3.1.3.1.
\textsuperscript{803} The three criteria of the three-step test are cumulative conditions. The third criterion, thus, can only be reached if the first (special cases) is already fulfilled. Cf. subsection 4.3.3.
\textsuperscript{804} For a detailed description, see subsection 3.1.3.2.
Chapter 4

Stockholm Conference. A legislator who exempts the outlined strictly personal use reconciles the authors' interest in the exploitation of their works with the user interest in free pathways through society's cultural landscape which allow the participation in cultural life as well as the discovery and development of one's own creative potential.

With regard to the second group, encompassing non-profit organisations such as public welfare institutions and instances accomplishing administrative tasks, it must be borne in mind that it is insufficient to adopt a limitation just because it is considered politically useful. National legislation may particularly be tempted to follow the dictates of political usefulness if the envisioned limitation serves charitable ends or helps to reduce the costs of administration. On account of these tendencies, it is to be reiterated that, pursuant to the qualitative standard developed above, the legislative decision to set limits to authors' rights must be a reaction to an understandable need for the reconciliation of the user interests at stake with the authors' legitimate interests. Such a rational basis exists especially where non-profit organisations are involved in the dissemination of knowledge and would potentially be hindered from fulfilling their tasks properly were authors to exert control over their activities. Against this backdrop, privileges for libraries, archives and educational institutions can easily be qualified as a special case in the sense of the three-step test.

Limitations exempting non-commercial uses made in hospitals or prisons can also be deemed a special case. The German Federal Constitutional Court once defended the playing of radio and TV music without paying royalties in prisons on the grounds that the isolation of prisoners entails the danger of intellectual impoverishment. It considered a copyright limitation exempting this kind of use an appropriate means for preventing prisoners from losing contact with cultural life outside prison. Although it is arguable that the limitation, at least in part, rests on considerations of political usefulness because it helps to reduce the costs of running prisons and hospitals, its adoption nevertheless becomes plausible on the basis of the explanation given by the Court. Prisons are obliged to offer prisoners the chance of participating passively in cultural life outside. If they want to fulfil their tasks properly, they therefore depend on the use of intellectual works. Viewed from this perspective, an understandable need for the reconciliation of this user interest with the author's legitimate interest can indeed be ascertained.

805 See subsections 2.2.2, 2.2.3, 2.3, 3.1.2 and 3.1.3.
806 Cf. subsections 2.3 and 4.4.2.3.
807 See subsection 4.4.2.3. Cf. Ficsor 2002b, 133.
808 See subsection 4.4.2.3.
809 Cf. subsections 2.2.2, 2.3 and 4.4.2.3.
810 A limitation of this kind can be found in article 5(2)(e) of the European Copyright Directive 2001/29/EC.
811 See BVerfGE 79, 29 (42-43).
812 Cf. BVerfGE 79, 29 (42-43).
As to the use of copyrighted material for administrative purposes, however, it must be stressed that the exemption is not a special case insofar as it merely serves the facilitation of administrative tasks and is considered politically useful for this reason. Only if the control exerted by authors would interfere with the proper fulfilment of the administrative tasks at stake is a copyright limitation appropriate and can be qualified as a special case. If an administrative body depends on access to copyrighted material so that it would be rendered incapable of accomplishing its tasks if the required use is denied, this condition is met. Here, legislative action becomes plausible. A broadly framed exemption for administrative purposes in general, however, simply helps to reduce the costs of administration. This objective does not constitute a rational basis. A limitation of this type is not a special case.

To answer the question whether the last category—use of copyrighted material in industrial undertakings—is a special case in the sense of the three-step test, it is advisable to consider the German solution of the problem of photomechanical reproductions in industrial undertakings which impacted on the position taken at the Stockholm Conference. The 1965 Copyright Act of the FRG exempted not only reproductions for strictly personal use but also the internal use of works in industrial firms on condition that the authors are remunerated. This development must be viewed through the prism of the market imperfections of the pre-digital world. At the time of the Stockholm Conference, an effective control mechanism enabling the control of internal uses of intellectual works in industrial undertakings was out of reach. The payment of equitable remuneration was best suited for safeguarding that the authors receive at least some reward. It appears safe to assume that the solution found in the FRG was countenanced at the Stockholm Conference for this reason. As the market failure rationale is no longer available, however, the time is ripe for a reassessment of the exemption. The appropriate standard of control once again forms the qualitative concept developed above: a limitation must rest on a rational justificatory basis so that its adoption becomes plausible.

Numerous arguments which support the exemption of strictly personal use can also be invoked in favour of internal use in industrial undertakings. It can be asserted that corresponding user privileges serve the dissemination of information, thereby facilitating and promoting the creation of new works. Considerations of this kind also have overtones of intergenerational equity between authors employed by a company and the authors upon whose work they want to build their intellectual production. However, it can hardly be overlooked that all these arguments are overshadowed by the fact that the use serves commercial ends. On its merits, the exemption redistributes profits. The author must content himself with a lump sum.

813 In the field of judicial purposes, this situation arises in the context of the search of offences. If the reproduction of copyrighted portraits or photos for this end could be denied, the search of offences would be hindered.

814 See for a more detailed description subsection 3.1.3.1.

815 See subsection 4.4.2.3.

816 Cf. subsections 2.2.2 and 2.3.
The economic activities of industrial undertakings, by contrast, are fostered. The profit motive underlying internal uses in enterprises silences arguments supporting its exemption. That there is an understandable need for privileging the internal use of works in industrial undertakings, is questionable. In the digital environment, it appears preferable not to consider this facet of personal use a certain special case in the sense of the three-step test insofar as digital technology enables its control. Hence, Reinbothe's view that personal use privileges are affected by the redress of market failure in the digital environment can be endorsed in this connection.

In sum, the following conclusions can be drawn: limitations exempting the use of copyrighted material for personal study, learning and enjoyment in privacy can be qualified as a special case. Ricketson's argument that broadly framed exemptions for private or personal use are impermissible must be rebutted as regards this area of strictly personal use. Further ramifications of the personal use concept, however, must be scrutinised thoroughly in the light of the developed qualitative standard. As to limitations for administrative purposes, it can be stated in line with Ricketson that broadly framed limitations are not special cases. Ultimately, the internal use of copyrighted material in industrial undertakings should not be deemed a special case insofar as digital technology enables the exertion of control. Corresponding limitations must be restricted to the analogue environment.

4.4.4.2 Fair Use

Doubt has also been cast upon the permissibility of open-ended norms, such as the US fair use doctrine. Cohen Jehoram, for instance, is of the opinion that fair use undermines any legal security by leading to open court decisions taken on a case-by-case basis. For this reason, he considers the US fair use doctrine incompatible with the basic rule that copyright limitations must be 'certain special cases'. From his point of view, particularly the requirement of legal certainty laid down in the word 'certain' militates against the approval of fair use under the three-step test because of the great latitude allowed the courts. Similarly, Bornkamm opposes the qualification of open norms like the fair use doctrine as a 'certain special case'. His point of departure, however, is not an insufficient degree of legal security. Instead, he argues that a 'special case' requires that a limitation is delineated so as to privilege only the use for a specific purpose. Any regulatory scheme which is not sufficiently confined to a narrow and specific purpose, consequently, is not a special case and is impermissible. In this context, Bornkamm gives the example of fair use.

---

817 See Reinbothe 2000, 257.
818 See Cohen Jehoram 2001b, 808.
820 See Bornkamm 2002, 45-46. Cf. Ricketson 2003, 68: "Fairness" is an insufficiently clear criterion to meet the first part of the three-step test."
Insofar as these lines of reasoning aim to subvert the mechanism traditionally serving the determination of copyright limitations in common law countries – court decisions taken case by case – they must be rebutted. The three-step test must not be misused to divest common law countries of regulatory models rooted in their specific copyright tradition. Anyhow, it is not an appropriate means for eroding open-ended limitations. The three-step test itself constitutes such an open-ended norm. Like the US fair use doctrine, it is established by a set of abstract criteria. At the 1967 Stockholm Conference, it was particularly the UK delegation which espoused the adoption of an abstract formula. The three-step test is thus an element of international copyright law which stems from copyright’s common law tradition. As such, it constitutes an important link between continental European and Anglo-American copyright. Being loath to make allowance for the characteristics of both legal traditions of copyright is therefore anything but conducive to developing an appropriate interpretation of the three-step test.

In this vein, it has already been pointed out above that the requirement of certainty, as part of the expression, ‘certain special cases’, must not be misconstrued so as to necessitate an exact and precise definition of copyright limitations in the sense of the civil law tradition. By contrast, a careful analysis of the wording brings to light that copyright limitations must merely be distinguishable from each other to be sufficiently ‘certain’ in the sense of the three-step test. The task of making different privileged uses discernible need not necessarily be accomplished by the legislator. It may confidently be left to the courts instead.

Hence, there is ample room to factor established case law into the equation when scrutinising the US fair use doctrine in the light of a claim for certainty. Its long tradition can be emphasised. Courts and commentators alike do not hesitate to invoke the decision Folsom v. Marsh, dating back to the year 1841, as a basis for the doctrine’s application. A wealth of court decisions thus forms the background to rulings on fair use. In 1976, the US legislator embedded the fair use doctrine in the Copyright Act. Fair use which had hitherto been entirely a judicial doctrine was explicitly mentioned in section 107. To offer some guidance to the courts, four factors, stated in abstract terms, were listed in section 107. They were distilled from the set of criteria developed by the courts. It was recognised in this context that,

'since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts... The bill endorses the purpose and general scope of the judicial doctrine of fair use [...] but there is no disposition to freeze the doctrine in the statute... Beyond a very broad statutory explanation of what fair use is and

821 Cf. subsection 4.1.2.5.
822 See subsections 3.1.2 and 3.1.3.4. Cf. Sentfleben 2003, 14.
823 See subsection 4.4.1.
some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.826

In this vein, US courts sought to preserve the doctrine’s flexibility rather than using section 107 to confine fair use to a fixed and settled framework. The Supreme Court enunciated that the task of determining whether a use is fair ‘is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis’.827 The specific problems which this conception raises have been addressed frankly in academic writing. Litman elaborates that the

‘invitation for particularized examination gives fair use its flexibility, and permits it to seem to be all things to all people. Cases that appear to come out the right way are rightly decided; cases that seem to have gone astray can be minimized or ignored on the ground that the particular facts in the case led the court to some unfortunate, overbroad language that surely won’t govern the next case to arise on similar facts.’828

The crucial question, then, is whether this flexible disposition forms an obstacle to qualifying the doctrine as sufficiently ‘certain’ in the sense of the three-step test. Cohen Jehoram answers in the affirmative.829 The response given here, however, is no. The case-by-case analysis is a typical feature of the common-law approach to copyright limitations. Each holding of a US court rendered on the basis of the fair use doctrine clarifies whether or not a given, specific use under examination can be deemed fair. Therefore, the determination of ‘certain cases’ is anything but alien to the fair use concept. Each court decision accepting the fair use defence particularises a new case and makes it known. Considering a case’s specific circumstances, US courts thus constantly delineate ‘certain cases’ on the basis of the fair use doctrine. The outcome of this procedure differs from the civil law approach in that it leads to numerous clearly identified cases. For this reason, a clear path may sometimes be difficult to find. It is to be conceded, however, that continental European judges are groping for solutions in times of upheavals within the copyright system just like their colleagues in the US. That the continental European system of a small number of restrictively-delineated limitations is better suited for informing court decisions when copyright’s delicate balance is shaken is thus questionable. In favour of the fair use doctrine, it can moreover be asserted that a flexible set of abstract criteria has a much larger potential for reacting to new and unexpected constellations.830

826 See Senate and House Committee Reports, as quoted by Seltzer 1978, 19-20.
830 Cf. Alberdingk Thijm 1998b, 176
If copyright's balance is shaken, US courts will seek to recalibrate it on the basis of the fair use doctrine. Relevant decisions will trigger a heated debate. In the course of ensuing discussions, the fair use doctrine will occupy centre stage and diverse solutions as to its correct application will be espoused. Complaints will potentially also be made about its flexibility. In continental European countries, a comparable centre of gravity and an identifiable scapegoat are missing. Instead, policy makers will simply call for an amendment of the existing set of restrictively-delineated limitations. The fact that the fair use doctrine is brought into focus and possibly criticised whenever difficult situations arise should therefore not be overestimated. In the normal course of events, the groundwork laid for applying the fair use doctrine, reaching back to the year 1841, yields a sufficient supply of well-known cases. It offers the possibility of foreseeing the consequences resulting from a given action. The position taken by Cohen Jehoram must therefore be rejected. The US fair use doctrine is a limitation that can be qualified as sufficiently 'certain' in the sense of the three-step test.

This conclusion does not leave Bornkamm's position untouched. He opposes the qualification of the fair use doctrine as a 'certain special case' on the grounds that a 'special case' requires that a limitation is delineated so as to privilege only the use for a specific purpose. On its merits, this line of reasoning points towards the necessity of specific, precisely and narrowly determined limitations in the sense of the civil law tradition just like Cohen Jehoram's argument and must consequently also be rejected. Bornkamm, however, chooses the requirement of speciality as a starting point instead of focusing on certainty. His critique makes it necessary to scrutinise the US fair use doctrine not only in the light of the claim for legal certainty but also as regards its speciality.

Before turning to the US fair use doctrine in this context, a comment on fair dealing provisions which can be found in the UK and India seems appropriate. In both countries, a fair dealing with a copyrighted work for the purposes of research or private study, criticism and review, and for reporting current events is exempted. 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 10bis BC, are merged in the fair dealing concept. In consequence, it can profit from the automatism in favour of national limitations resting on special provisions of the Berne Convention. Insofar as the making of quotations for criticism and review and the reporting of current events are concerned, the fair dealing provisions automatically constitute a special case in the sense of the three-step test. As to the remaining purposes of research or

---

831 See Bornkamm 2002, 45-46.
832 Cf. also the view taken by Ficor 2002a, 516, which has been discussed in subsection 4.4.1.
833 See subsections 3.1.3.4 and 3.1.3.5.
834 Cf. subsection 4.4.3.
private study, it must be borne in mind that the scope of this defence has traditionally been considered fairly limited. The making of 'multiple copies by a third party for use by a plurality of such persons' for instance, is qualified as unjustified.\footnote{See Laddie/Prescott/Vitoria 1995, 132. Cf. subsection 3.1.3.4.} It can therefore be assumed that, by and large, privileged dealings with a work for the purpose of research or private study will fall under the category of 'strictly personal use' that has been declared a special case in the sense of the three-step test in the previous subsection. The outlined fair dealing provisions, thus, do not pose difficulties in the context of the test's first criterion.

As regards the US fair use doctrine, this analysis is of particular interest because section 107 of the US Copyright Act which enshrines the doctrine enumerates certain purposes that are most appropriate for a finding of fair use. The statute refers to 'purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research',\footnote{See section 107 of the US Copyright Act.} thereby inevitably calling to mind the aforementioned UK fair dealing provisions. Like the latter provisions, the fair use doctrine may therefore profit from the automatism in favour of national limitations resting on special provisions of the Berne Convention, such as articles 10(1), 10(2) and 10bis. Moreover, 'scholarship or research' – just like 'research or private study' – can be considered a special case in line with the rules concerning personal use privileges which have been developed in the previous subsection. Hence, the preamble's enumeration is unproblematic.\footnote{Cf. Goldstein 2001, 295. It is also to be noted that the purposes listed in the preamble, in general, do not reach beyond those countenanced internationally. Cf. subsection 4.4.2.3.} Further ramifications, however, may nonetheless stymie the qualification of fair use as a special case. As the words 'such as' indicate, the enumerated purposes should be taken into account by the courts among others that are not specifically listed. It has even been held that it would be an error for the trial court to refrain from considering the four fair use factors on the ground that the use did not fall within the enumeration.\footnote{Cf. Nimmer 2002, § 13.05A[A][1][a], 13-155.} This feature lends the fair use doctrine the air of incalculability. It can hardly ever be said precisely which set of purposes is privileged under the statute. To do justice to the very nature of the fair use doctrine, however, compliance with the three-step test must not be denied before consulting analyses of case law elucidating the doctrine's ambit of operation.

In this respect, Seltzer pointed out in 1978 that fair use 'has always had to do with the use by a second author of a first author's work'.\footnote{Cf. Seltzer 1978, 24. Cf. Ginsburg 1997, 5.} If this were still true, the fair use doctrine could readily be declared a special case. A concept which, first and foremost, exempts transformative uses corresponds to the considerations of intergenerational equity which are embraced here as a guideline for the application of the three-step test.\footnote{Cf. subsections 2.3 and 4.4.2.3.} The more recent survey of case law conducted by Nimmer...
shows that the question of whether a productive use is made of a copyrighted work is still of crucial importance to the fair use analysis. In Campbell v. Acuff-Rose Music, Inc., the US Supreme Court elaborated that

"the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright."

As an intruder into the fair use world of privileged transformative uses, Seltzer perceived photocopying for private use: 'It is this "copying for private use" that is at the crossroads of traditional fair use notions and the intrinsic-use questions of infringement posed by photocopying.' Later, in the decision Sony Corporation of America v. Universal City Studios, Inc., the US Supreme Court really deemed the practice of time-shifting and thus a facet of private use fair. For this reason, an uncompromising alignment of the fair use doctrine with transformative use cannot be concluded. However, strictly personal use has already been qualified as a special case in the sense of the three-step test in the previous subsection - regardless of whether it is of a productive or consumptive nature. This departure from the transformative use requirement is thus compatible with the three-step test.

Naturally, it is beyond the scope of the present inquiry to dive into the depths of established case law in order to plumb exactly the extent to which the US fair use doctrine fully complies with the requirement of speciality set out in the three-step test. Potentially, some decisions are to be found which do not seem to comply with the qualitative standard developed above. On the basis of the findings at hand, it nevertheless appears not unreasonable to assume that on balance, the fair use doctrine meets this qualitative standard. The purposes explicitly enumerated in the doctrine do not militate against this conclusion. The particular importance attached to transformative uses fits into the framework of intergenerational equity in which the three-step test ought to be interpreted.

A pragmatic argument additionally supports the qualification of fair use as a 'certain special case'. When the US finally adhered to the 1971 Paris Act of the Berne Convention in 1989, they were not obliged to amend section 107 in order to bring the fair use doctrine into line with article 9(2) BC. Apparently, it was understood that the doctrine complies with the three-step test. Later, at the 1996 Diplomatic Conference, Kushan, speaking on behalf of the US, underscored that

---

845 Cf. section 2.3.
CHAPTER 4

'it was essential that the [WIPO “Internet” Treaties to come] permit the application of the evolving doctrine of “fair use”, which was recognized in the laws of the United States of America, and which was also applicable in the digital environment’.

He went on to stress that the three-step test ‘should be understood to permit Contracting Parties to carry forward, and appropriately extend into the digital environment, limitations and exceptions in their national laws which were considered acceptable under the Berne Convention’. Shall it really be deemed pure chance that just this language – used by Kushan with an eye to the US fair use doctrine – finally made its way to the agreed statement which accompanies the three-step tests of article 10 WCT?

4.5 Conflict with a Normal Exploitation

Limitations which are ‘certain special cases’ may furthermore not ‘conflict with a normal exploitation of the work’. This language is used in articles 9(2) BC, 13 TRIPs and 10 WCT alike. The term ‘normal’ offers two possibilities. Firstly, it means ‘regular, usual’. The expression ‘a normal exploitation’ can accordingly be understood as a reference to the usual or regular course of events. It connotes normality in an empirical sense. Secondly, the term ‘normal’ can be understood as a reference to a state ‘constituting, conforming to, not deviating or differing from, the common type or standard’. It has accordingly a normative connotation as well.

In the following subsections, the precise meaning of the prohibition of a conflict with a normal exploitation will be examined along the lines of these two different connotations. In subsection 4.5.1, the historical approach of Bornkamm will be discussed before turning to Ricketson’s empirical approach in subsection 4.5.2. It will be seen that neither Bornkamm nor Ricketson traces the conceptual contours of a ‘normal exploitation’ appropriately. As their rather empirical approaches prove to be unsuited, an emphasis must be laid on the normative meaning of the term ‘normal’ instead. Hence, a normative concept will be developed in subsection 4.5.3. Its impact on special provisions of the Berne Convention will be discussed in subsection 4.5.4. National limitations that are directly based on the three-step test will finally be examined in subsection 4.5.5. In this context, the problem of private use in the digital environment will be addressed.

---

847 See Minutes of Main Committee I, WIPO Doc. CRNR/DC/102, 70.
848 See Minutes of Main Committee I, WIPO Doc. CRNR/DC/102, 70. Cf. Ricketson 1999, 88.
850 Cf. the Oxford English Dictionary.
851 Cf. the Oxford English Dictionary.
4.5.1 THE HISTORICAL APPROACH OF BORNKAMM

Inquiring into the meaning of the prohibition of a conflict with a normal exploitation of the work, Bornkamm focuses on the initial understanding of the three-step test at the 1967 Stockholm Conference. In particular, he consults the comments made by Ulmer, the chairman of Main Committee I, on the outcome of the Conference. Ulmer elaborates that article 9(2) BC clarifies that limitations to the right of reproduction are impermissible in the realm of a normal exploitation of the work.\(^\text{853}\) He regards the reproduction of literary works by letterpress printing and the production of a new edition of a work by means of photomechanical reproduction as parts of a normal exploitation. The making of single photocopies, however, is not a normal way of exploitation according to Ulmer:

‘The formulation [chosen in article 9(2)] clarifies that exceptions to the right of reproduction, on principle, are impermissible in the area of a normal exploitation of the work. This applies for instance to the reproduction of literary works by way of letterpress printing or to the production of a new edition by means of photomechanical reproduction. No normal way of exploitation, however, is for instance the making of single photocopies. In this regard, it depends on whether the legitimate interests of the author are unreasonably prejudiced.’\(^\text{854}\)

Embracing this explanation, Bornkamm draws the conclusion that a conflict with a normal exploitation shall only be assumed if the exempted use in question enters into direct competition with traditional forms of exploitation.\(^\text{855}\) He maintains that a detrimental indirect effect on a work’s exploitation which, for instance, may result from photocopying for personal use, is to be considered only in the framework of the ensuing third criterion prohibiting an unreasonable prejudice to the author’s legitimate interests.\(^\text{856}\) The ambit of operation of the second criterion is consequently confined to direct inroads made into the field of traditional forms of exploitation, such as letterpress printing. According to Bornkamm, the specific merit of this approach lies in the possibility of drawing a clear boundary line between the second (conflict with a normal exploitation) and the third (unreasonable prejudice to legitimate interests) criterion of the three-step test.\(^\text{857}\)

---

\(^{853}\) Cf. subsections 3.1.2, 4.3.2 and 4.3.3.


\(^{855}\) See Bornkamm 2002, 34.

\(^{856}\) See Bornkamm 2002, 34.

Admittedly, a clear distinction between the field of application of the second and the third criterion is of particular importance. Whereas limitations which cannot fulfil the second criterion must definitely be qualified as impermissible – irrespective of whether or not equitable remuneration is paid – the third criterion allows for a much more flexible solution: an unreasonable prejudice to the author’s legitimate interests can be avoided by providing for the payment of equitable remuneration. The clear boundary line which can be drawn between the second and the third criterion on the basis of Bornkamm’s approach, therefore, constitutes a strong point of his concept. Nonetheless, certain shortcomings can hardly be denied. The confinement of the scope of the second criterion to traditional ways of exploitation will gradually deprive the three-step test of one of its elements. Should the digital revolution really take place, the importance of letterpress printing and the production of a new edition of a work by means of photomechanical reproduction will dwindle. In the information society, the possibility of making digital copies towers above all other means of reproducing copyrighted material. To the same extent to which traditional, pre-digital forms of exploitation lose their importance, the prohibition of a conflict with a work’s normal exploitation will lose its field of application under Bornkamm’s approach. Ultimately, it could even be rendered meaningless. A two-step test would remain.

This result would probably be welcomed by commentators casting doubt upon the appropriateness of the three-step test because of the inflexibility of its second criterion. Indeed, the fact that a conflict with a normal exploitation cannot be avoided by securing the payment of equitable remuneration is a relic mirroring the market imperfections of the analogue world which turns out to be a serious flaw inhering in the functional system of the three-step test in the digital environment. Nevertheless, Bornkamm’s historical approach cannot be considered an appropriate means for bypassing this problem. The three-step test is to be interpreted so as to give meaning to each of the three criteria. It should accordingly not be deprived of the second criterion by assigning to it an out-dated field of application. Any problem posed by one of the criteria, by contrast, must be solved by redefining its function within the system of the three criteria. In this vein, it has already been pointed out that it is wrong to conceive of the second criterion as the kingpin of the three-step test as has frequently been done in the analogue environment.

A further objection to Bornkamm’s historical approach must be raised. It is to be feared that the reduction of the scope of the second criterion to traditional forms of exploitation, ultimately, will lead to an unequal treatment of different categories of works. Potentially, analogue and digital possibilities of marketing a work will be

---

858 Cf. subsection 4.3.2.
860 This issue will subsequently be discussed in more detail in the context of the development of a normative standard for identifying a conflict with a normal exploitation of the work.
861 See subsection 4.3.3.
combined in the future. A novel, for instance, may be made available online but still be placed on the shelves of booksellers. It is foreseeable, however, that the attractiveness of the digital environment for commercialising copyrighted material will differ from product to product. Whereas the digital environment may become important for the exploitation of newspaper articles, academic writings and dictionaries, the analogue world will potentially still constitute the centre of gravity as regards the marketing of the aforementioned novel. If the prohibition of a conflict with a normal exploitation, in this situation, is restricted to traditional, analogue forms of exploitation, this decision favours authors of works, the commercialisation of which still rests primarily on analogue distribution channels. They will profit from the rigidity of the second criterion which is unaffected by the payment of equitable remuneration. Authors whose works are coming to be exploited predominantly in the digital environment, however, is denied the protection arising from the prohibition of a conflict with a work's normal exploitation. This unequal treatment is unjustified.

Thus, Bornkamm's historical approach must be rejected. By reducing the field of application of the second criterion to limitations which directly compete with traditional forms of exploitation, such as letterpress printing, the prohibition of a conflict with a work's normal exploitation is rendered meaningless in the digital environment. To the same extent to which traditional, pre-digital forms of exploitation lose their importance, the second criterion loses its field of application. Ultimately, Bornkamm's approach could even lead to a two-step test. Insofar as analogue and digital possibilities alike will be used for deriving profit from a work in the future, Bornkamm's approach, moreover, entails the danger of an unequal treatment of authors. The less a work's commercialisation still depends on traditional, analogue ways of exploitation, the weaker the work's protection in the context of the second criterion.

4.5.2 The Empirical Approach of Ricketson

Ricketson has suggested focusing on the author and his usual way of deriving profit from a work. Thus, he lays an emphasis on the empirical connotation of the term 'normal' when tracing the conceptual contours of a normal exploitation as follows:

'However, common sense would indicate that the expression "normal exploitation of a work" refers simply to the ways in which an author might reasonably be expected to exploit his work in the normal course of events. Accordingly, there will be kinds of use which do not form part of his normal mode of exploiting his work – that is, uses for which he would not ordinarily expect to receive a fee – even though they fall strictly within the scope of his reproduction right.'

862 See Ricketson 1987, 483.
CHAPTER 4

The specific problem this approach entails comes to light the moment a survey of various modes of exploiting intellectual works is conducted in order to identify an author’s normal way of exploitation. Uses which are exempted by virtue of a limitation do not form part of an author’s normal mode of exploiting a work. Naturally, authors are not expected to exploit their work in areas which are placed beyond their control by a copyright limitation. Their normal way of deriving economic value from creative works is strongly influenced by the limits set to exclusive rights. Ricketson’s empirical approach, thus, leads to a circular argumentation sheltering copyright limitations. Not surprisingly, the US made the following statement on the basis of Ricketson’s concept in the course of the WTO Panel proceedings concerning article 110(5) of the US Copyright Act:

‘In the case of Section 110(5)(B), a significant portion of the establishments exempted by that section had already been exempted, for almost a quarter of a century, by the homestyle exception. Owners of copyrights in nondramatic musical works had no expectation of receiving a fee from these establishments.’

Following Ricketson’s line of reasoning, it can therefore easily be contended that a limitation does not conflict with a normal exploitation because the authors, normally, do not gather revenue in the exempted area. The reason for the authors’ reticence is the limitation itself. Due to its existence, they refrain from exploiting their works in the privileged cases and concentrate on other areas. Their mode of exploitation simply mirrors the specific national system of grants and reservations of copyright law. Focusing on the author and his normal way of exploitation thus means etching the actual status quo of copyright law in stone.

To avoid the described regulatory dilemma, recourse may be had to the situation existing before the relevant limitation was introduced. The corresponding argument runs as follows: if, prior to the adoption of the limitation, the work was not exploited in the area which is now exempted, the limitation does not conflict with a normal exploitation because the authors voluntarily refrained from exploiting their

---

863 Cf. WTO Panel – Copyright 2000, § 6.188, elaborating that ‘where a particular use of works is not covered by the exclusive rights conferred in the law of a jurisdiction, the fact that the right holders do not license such use in that jurisdiction cannot be considered indicative of what constitutes normal exploitation’. Cf. Lucas 2001, 432; Goldstein 2001, 295.

864 Cf. Hugenholtz 2000d, 201. Ricketson 2003, 23, himself is alert to this obvious circularity. As a way out, he seeks to interpolate normative considerations ‘as to what the copyright owner’s market should cover’. See Ricketson, ibid., 24 (emphasis in the original text). Cf. Ginsburg 2001, 23; Oliver 2002, 158. However, Ricketson, ibid., 26, admits that this solution ‘leaves the application of the second step of Article 9(2) more open-ended and uncertain’. It is therefore preferable to make allowance for the considerations, which Ricketson, ibid., 25, wants to include, in the context of the first criterion, as is proposed here. See subsection 4.4.2.3.


866 See the examples given by Ricketson 1999, 70. Cf. WTO Panel – Copyright 2000, § 6.198.
works in the now exempted area before the limitation was introduced. The inquiry into normal ways of exploitation is based on the situation existing prior to the introduction of the limitation. Consequently, it is not subverted by the limitation under examination itself. Once again, the line of argument developed by the US in the course of the WTO Panel proceedings can serve as an example. The US asserted that, when section 110(5)(A) was adopted,

'Congress intended that this exception would merely codify the licensing practices already in effect by the right holders and their licensing organizations… Since 110(5)(A) only affected establishments that were not likely otherwise to enter into a licence, or would not have been licensed under the practices at that time, it did not conflict with the expectations of right holders concerning the normal exploitation of their works.'

This solution, however, merely shifts the problem. Its flaw is the concentration on historical facts. In the case of a limitation which was introduced into national copyright law 50 years ago, an inquiry into the authors’ normal mode of exploitation only yields insights into the situation at that time. Current data are not available because the limitation superimposes the potential area of exploitation. A judgement based on the circumstances existing 50 years ago would have the effect of setting the relevant historical situation in stone – instead of today’s status quo of copyright. As this situation led to the adoption of the limitation under examination, it is likely that no conflict with the authors’ normal mode of exploitation at this time is to be found. The outlined way of escaping the regulatory dilemma thus does not solve the problem. Moreover, it will be impossible to ascertain the historical situation in cases where a limitation has a venerable tradition rendering the objective observer incapable of tracing the authors’ normal way of exploitation back to the time of its inception. Even if it is possible to bring to light some insights into the situation existing long ago, the suitability of the historical findings for actual decisions in the field of copyright law is doubtful.

At the international level, a comparative analysis might present a further possibility of solving the problem of a circular argumentation. References to countries with a similar level of socio-economic development could serve as point of comparison. The corresponding argument runs as follows: if uses exempted in a certain country do not form part of the authors’ normal way of exploitation in other countries, which serve as reference point for the comparative analysis, the limitation does not conflict with a normal exploitation. The envisioned comparative analysis, however, raises more problems than it solves. First of all, it has to be stressed that its applicability is quite limited. To a certain extent, the same

---

867 Cf. WTO Panel – Copyright 2000, first written submission of the US (attachment 2.1), § 30.
868 Cf. WTO Panel – Copyright 2000, § 6.198, also fearing that “any current state and degree of exercise of an exclusive right by right holders could effectively be “frozen”.
869 This notion has also been discussed by the WTO Panel – Copyright 2000, § 6.189.
limitations will be found in all countries with similar level of socio-economic development, even though they may be given different expression in the respective national laws. Limitations which are recognised in the Berne Convention or which were discussed in the course of the 1967 Stockholm Conference reflect the achieved degree of harmonisation. Exemptions for research, teaching, private use or administrative and judicial purposes, for instance, will prove to be widespread.\(^{870}\) The outlined approach is inapplicable to these cases.

It is furthermore to be noted that national legislation enjoys the freedom of estimating the necessity of copyright limitations differently. The formulation ‘It shall be a matter for legislation in the countries of the Union…’, which is often used in the Berne Convention,\(^{871}\) reflects this freedom. Whether and how a corresponding limitation is incorporated into national law, is left to the national legislator. This freedom of varying responses to national needs and traditions could easily be eroded by inferring a conflict with a normal exploitation from a comparative analysis. For instance, such an analysis could threaten the press privilege to reproduce articles on current economic, political or religious topics set out in article 10bis(1) BC. According to the analysis conducted by Guibault, limitations of this type differ substantially in scope in France, Germany, the Netherlands and the US. Whereas the limitation has remained of rather limited significance in France and the US, the Dutch and German copyright acts traditionally provide for a broad exemption.\(^{872}\)

A comparative analysis would therefore yield the following results: insofar as the limitation does not exist, or has a narrow scope in France and the US, the reproduction of articles on current topics forms part of the authors’ normal mode of exploitation in these countries. Consequently, it must be concluded that the broader limitations known in Dutch and German copyright law conflict with a normal exploitation of articles on current topics. The comparative analysis thus leads to maximum protection among countries with a similar level of socio-economic development. Existing differences are levelled out without considering the particularities of a country’s copyright balance. The specific system of permissible limitations, set out in the Berne Convention, would moreover be eroded. According to the given example, the Dutch and German limitation would fail the second step of article 9(2) BC, even though article 10bis(1) BC explicitly provides for the possibility of exempting the described use of articles on current topics.\(^{873}\) Insofar as the limitation permitted by article 10bis(1) BC does not become widespread among countries with a similar level of socio-economic development, a comparative analysis bars national legislation from its adoption.

---

870 Cf. subsection 3.1.2 and the overview given in subsection 3.1.3.
871 For example, this wording can be found in articles 9(2), 10(2), 10bis(1), 10bis(2) BC.
872 Cf. Guibault 2002, 57-65. See also subsection 3.1.3.
873 See in respect of the latter provision Ricketson 1987, 504-506.

174
THE INTERPRETATION OF THE THREE CRITERIA

Hence, a comparative analysis, just like recourse to the historical situation existing prior to a limitation’s introduction, is manifestly unsuited to alleviating the problem of circularity inhering in Ricketson’s approach.\textsuperscript{874} A regulatory dilemma thus prevents the application of an empirical concept in connection with the second criterion: the three-step test functions as a control mechanism for limitations and encompasses long-standing exemptions. Its potential for exerting control, however, is impoverished insofar as its regulatory substance, the three criteria, is defined through its regulatory object, the various limitations. To enable the test to effectively control currently existing limitations, influences of these limitations on its regulatory framework must be avoided to the greatest extent possible.\textsuperscript{875} The empirical approach developed by Ricketson, however, allows currently existing limitations to inform the regulatory substance of the three-step test. As authors are not expected to exploit their work in areas which are placed beyond their control by a copyright limitation, their normal way of deriving economic value from creative works is strongly influenced by the current set of limitations. The moment a limitation is incorporated into national law, the empirical approach aligns the second criterion of the three-step test with the authors’ normal mode of exploiting a work, as modified by the now existing limitation.

The potential harm flowing from this automatism can finally be elucidated by reviewing Ricketson’s approach from the perspective of right holders and users alike. On the side of right holders, it is to be feared that Ricketson’s empirical concept could lead to the gradual and uncontrolled abridgement of exclusive rights in cases where technical advances offer new possibilities for taking advantage of a limitation.\textsuperscript{876} In the basic proposal for substantive provisions of the later WIPO Copyright Treaty, this danger was clearly pointed out in connection with the proposed adoption of the three-step test:

'It bears mention that this Article is not intended to prevent Contracting Parties from applying limitations and exceptions traditionally considered acceptable under the Berne Convention. It is, however, clear that not all limitations currently included in the various national legislations would correspond to the conditions now being proposed. In the digital environment, formally “minor reservations” may in reality undermine important aspects of protection.'\textsuperscript{877}

On the side of users, it is to be feared that legislators could be hindered from imposing new limitations that are appropriate in the digital environment.\textsuperscript{878} As the current exploitation scheme of the authors is safeguarded by Ricketson’s approach,  

\textsuperscript{874} Cf. WTO Panel – Copyright 2000, § 6.189.  
\textsuperscript{875} Cf. subsection 3.1.4.  
\textsuperscript{876} See section 2.4 above. Cf. Hardy 1995, 1-3.  
\textsuperscript{877} See WIPO Doc. CRNR/DC/4, § 12.08.  
\textsuperscript{878} This possibility, however, has explicitly been reflected in the agreed statement concerning the three-step tests of article 10 WCT. See subsection 3.3.2.
new restraints might be placed on exclusive rights solely in areas which are not actually exploited by the authors in the normal course of events. Otherwise, a conflict with a normal exploitation inevitably arises. This postulation renders the current exploitation scheme of authors somewhat sacrosanct. Normally exploited segments of the authors’ reproduction right are automatically removed from the national legislator’s sphere of influence. Legislation in the field of copyright law would accordingly be dictated by the actual shape of the market for literary and artistic works. This outcome can hardly be reconciled with the picture of a national legislator pursuing certain public policy objectives. Empirical findings may underlie his decisions. He might even favour the codification of widespread licensing practices. This decision, however, ought to be the consequence of normative considerations, like the conviction that the alignment of the system of grants and reservations of copyright law with actual markets is best suited for shaping the national copyright balance. Depriving the legislator of the freedom to intervene in actual licensing practices prevents him from actively safeguarding copyright’s balance.

The danger evolving from Ricketson’s approach can clearly be seen in the digital environment. Digital technology improves not only the state of the copying art, but also offers new possibilities of controlling the particulars of individual uses of a work. As a result, new ways of contracting and new markets emerge. If new areas of normal exploitation were to be automatically put beyond the reach of the national legislator, his ability to react adequately, in pursuit of his specific public policy concept, to the new situation would be unduly curtailed. The real sovereign would be the market which does not lend weight to the necessity of copyright protection on the one hand and justifications for limitations on the other in order to strike a proper balance. This result raises the spectre of national copyright systems being subject to market powers without an initial decision of the legislator and beyond his control. Furthermore, it erodes a basic feature of the three-step test. The latter has always been understood to allow national legislation great latitude. This finding is irreconcilable with the picture of the national legislator in the straitjacket of the dictates of the market. On account of these findings, Ricketson’s empirical approach, focusing on the authors’ normal mode of exploitation, must be rejected. Preference should be given to a standard of control based on normative considerations instead.

880 As a matter of course, the legislator himself might draw the conclusion that the copyright balance evolving from free market powers is exactly what he wants to enact. In this case, however, the corresponding decision is initially based on his public policy objective. The approach to copyright, which has evolved in the US from neo-classical economic property theory, could underlie such a decision. Cf. subsections 2.1.2 and 2.2.4.
4.5.3 THE DEVELOPMENT OF A NORMATIVE CONCEPT

The background to the three-step test does not provide much guidance in respect of normative concepts. The test’s drafters allowed national legislation great latitude and confined themselves to a few observations of a general nature. Indications given at the 1967 Stockholm Conference, nevertheless, can serve as a starting point for the development of a normative standard. They will be discussed in the following subsection 4.5.3.1. On account of the technological changes which have occurred since 1967, the meaning of the normative guideline taken from the materials of the Stockholm Conference must be clarified. It will be adapted to the advances in the field of digital technology in subsection 4.5.3.2. In subsection 4.5.3.3, a comparative analysis of the fourth factor of the US fair use doctrine on the one hand, and the second criterion of the three-step test on the other, will be conducted to solve the problems arising from this adaptation. In the ensuing subsection 4.5.3.4, the correct reference point for the application of the normative concept resulting from this comparable analysis must be determined. The question will be asked whether preference should be given to each individual exclusive right as a reference point or the overall commercialisation of a work enabled by the whole bundle of exclusive rights. A final definition of a conflict with a normal exploitation will be given in subsection 4.5.3.5.

4.5.3.1 THE GUIDELINE GIVEN AT THE STOCKHOLM CONFERENCE

According to the preparatory work for the 1967 Stockholm Conference, the second criterion reflects the concern that the utilisation of a work might enter into economic competition with normal ways of exploitation. The study group which tabled the proposals for revising the substantive provisions of the Berne Convention initially proposed the following formulation:

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

According to the explanation by the study group, the latter condition is intended to give expression to the principle that

‘all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors.’

882 See Records 1967, Doc. S/1, 112.
This statement provides a useful guideline for the development of a normative standard. As it forms the background to the prohibition of a conflict with a normal exploitation in the final the three-step test, it shows that not only actual markets, on which the empirical concept put an emphasis, but also potential ones, which might emerge in the future, should constitute the object of the second criterion.

The reference to both actual and potential forms of exploitation is an important dynamic element.\(^{884}\) If a currently exploited market loses its considerable economic or practical importance, it no longer numbers among those forms of exploitation which are safeguarded by the second criterion. The exemption of this area of exploitation, therefore, becomes possible on the condition that it does not unreasonably prejudice the legitimate interests of the author, as set forth by the third criterion. The emergence of a new form of exploitation, however, which is likely to acquire considerable economic or practical importance, renders an already existing limitation which covers the corresponding potential market, incapable of fulfilling the test’s second criterion any longer. The respective limitation must be amended or abolished. The outlines of a normal exploitation, therefore, do not depend on the actual status quo of copyright law. Neither the problem of an out-dated field of application inhering in Bornkamm’s approach, nor the problem of circularity which led to the rejection of the empirical approach of Ricketson,\(^{885}\) thus, arises in the context of the guideline given at the Stockholm Conference. Not surprisingly, the WTO Panel reporting on Section 110(5) of the US Copyright Act also embraced the quoted statement as a normative guideline and drew similar conclusions:

‘Thus it appears that one way of measuring the normative connotation of normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance.’\(^{886}\)

The Panel, dealing with the three-step test of article 13 TRIPs, adopted the statement of the preparatory work for the Stockholm Conference even though it concerns article 9(2) BC. The identical wording of the second criterion of article 9(2) BC and article 13 TRIPs supports this procedure.\(^{887}\) The drafting history of article 13, however, was not invoked by the Panel although its examination shows further lines of intersection between both provisions. In the course of the meetings of the negotiation group, dealing with copyright in preparation for the GATT Uruguay Round, the US proposed a formulation which was later transformed into the three-step test of article 13 TRIPs and touched upon the question of the effect on actual and potential markets:

\(^{884}\) Cf. WTO Panel – Copyright 2000, §§ 6.178-6.182.

\(^{885}\) See subsections 4.5.1 and 4.5.2.


\(^{887}\) See the introduction given in section 3.2.4 above and WTO Panel – Copyright 2000, § 6.74.
The interpretation of the three criteria

‘Any limitations and exemptions to exclusive economic rights [...] in any event shall be confined to clearly and carefully defined special cases which do not impair actual or potential markets for, or the value of, copyrighted works.’

Explaining the proposal, the US representative pointed out that ‘although he recognised that the US proposal used language a little tighter than that in the text of the Berne Convention, he believed that the proposal constituted a clarification of the Berne Convention rather than a substantive change’. Indeed, the US proposal reflects considerations which are also given expression in the statement taken from the preparatory work for the Stockholm Conference. The concern that limitations could enter into competition with normal ways of exploitation reappears, as well as the dynamic element embodied in the reference to actual and potential markets. In general, the participants of the GATT Uruguay Round sought to follow the line of the Berne Convention with regard to copyright limitations. Against this backdrop, it is not surprising that the formulation of the United States was finally replaced with the wording of article 9(2) BC to enshrine the outlined shared considerations in the TRIPs Agreement. In view of the similar undercurrent and identical wording of both provisions, the utilisation of the guideline given at the Stockholm Conference is appropriate in the context of article 13 TRIPs.

Moreover, its use can be justified with regard to the three-step test of article 10 WCT. The drafting history of article 10 elicits that it was intentionally moved into line with article 9(2) BC. The basic proposal for substantive provisions of the later WCT explicitly recommended in respect of the proposed three-step test to ‘follow the established interpretation of article 9(2) of the Berne Convention’. Against this background, the statement made in the preparatory work for the Stockholm Conference can also be adopted as a normative guideline in the context of article 10 WCT. Therefore, the development of a normative standard, affording the determination of a conflict with a normal exploitation of intellectual works, can be based on the guideline given at the Stockholm Conference with regard to all three-step tests of international copyright law. A normal exploitation encompasses all forms of exploiting a work, which have already acquired, or are likely to acquire considerable economic or practical importance.

888 See GATT Doc. MTN.GNG/NG11/W/14/Rev.1, 8. Cf. subsection 3.2.1.
889 See the explanation given in GATT Doc. MTN.GNG/NG11/14, 15.
890 See subsection 3.2.1 above.
891 See section 3.3 above.
892 Cf. WIPO Doc. CRNR/DC/4, § 12.05. See Doc. CRNR/DC/5, comments on articles 13 and 20, in respect of the corresponding three-step test of article 16 WPPT.
4.5.3.2 ADAPTING THE GUIDELINE TO THE DIGITAL ENVIRONMENT

To understand the meaning of this definition of ‘a normal exploitation’ properly, the background to the Stockholm Conference must be taken into consideration. The pre-digital world of 1967 created various practical difficulties of ensuring authors adequate reward for their expressive work. The fact that market failure was often considered a basis for limitations in the analogue world mirrors the degree of market imperfection.\textsuperscript{893} At the Conference, importance was attached to the latest state of the copying art. In particular, the problem of photocopying was discussed. The intention to expressly declare private use privileges permissible in article 9(2) raised objections. Ultimately, the drafters of the three-step test refrained from explicitly mentioning private use as a permissible limitation and left this issue to national legislation instead.\textsuperscript{894} The moment reprography as well as sound and visual reproduction became widespread, the potential danger from private use privileges as a mass phenomenon came to the fore. In 1981, Ficsor noted that

‘it very soon became evident that the Diplomatic Conference had been wise to eliminate a direct provision on reproduction for private use. Technological progress has accelerated and in the cases of reprography and of sound and visual reproduction private use has become such a mass phenomenon that it obviously conflicts with the normal exploitation of protected works and unreasonably prejudices the legitimate interests of authors.’\textsuperscript{895}

It was feared that private copying could even erode the reproduction right.\textsuperscript{896} Against this backdrop, the statement that ‘all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors’,\textsuperscript{897} simply clarifies that the right of reproduction is indeed due to the authors and should not be sacrificed for user privileges even though they may be socially valuable.

The digital environment, however, sheds a different light on the guideline given at the Stockholm Conference. Digital technology affords authors the opportunity of monitoring precisely the particulars of individual uses. New forms of exploitation evolve from the combination of digital rights management systems with new ways of contracting, like click-wrap licences.\textsuperscript{898} Owing to the dramatic reduction of

\textsuperscript{893} Cf. subsection 2.2.2.
\textsuperscript{894} Cf. Collova 1979, 124-126. See the explanations given in subsection 3.1.2 above.
\textsuperscript{895} See Ficsor 1981, 60-61.
\textsuperscript{897} See Doc. S/1, Records 1967, 112.
\textsuperscript{898} Cf. the analysis of the discussion concerning the UCITA by Dreier/Sensfleben 2001, 92-106.
transaction costs in the digital environment, market failure is not unlikely to be largely redressed in the long run. In particular, private use privileges are rendered vulnerable to this development.  

The new possibilities offered by digital technology could lead to the understanding that a normal exploitation, defined as a reference to all forms of exploitation of considerable economic or practical importance, encompasses nearly all ways of using and enjoying works of the intellect. In particular, advocates of the neo-classical approach to copyright described in chapter 2 seek to vest authors of literary and artistic works with all actual and potential markets in order to ensure the entry of intellectual resources into the market process to the greatest extent possible.  

The threshold for showing considerable economic or practical importance would be extremely low according to neo-classicists. The mere fact that a market as such, regardless of its profitability, currently exists or will potentially take shape in the future, would have to be deemed sufficient to answer the question of considerable importance in the affirmative. Only those areas where a market is hindered from emerging because of the personal resistance of the authors, are placed beyond the control of the second criterion and can be exempted. The authors’ resistance to placing specific applications of their work on the market, however, scarcely represents a source of numerous user privileges. Merely the utilisation of copyrighted works for objectionable uses, such as criticism and parody, might escape the pervasive market power of the authors. The corrosive effect of such an interpretation on the system of the three criteria has been described by Heide as follows:

"In an environment where few, if any, practical problems prevent contracting directly with the end user for the user’s desired use of a work and where online contracts and technological devices enable an author to monitor the use of his work, such an interpretation potentially transforms the three-step test into a one-step test."  

Therefore, a normal exploitation cannot be equated with full use of all exclusive rights. If authors were to draw on the full panoply of digital exploitation forms, the second step of the test would be insuperable for almost all limitations, and provisions containing the three-step test would be rendered meaningless. Instead, it could simply be enunciated that limitations are not permissible at all. The mere existence of three distinct criteria suggests that there are indeed ‘certain special cases’ causing no conflict. Something less than full use of all exclusive rights

---

900 See subsection 2.1.2.
903 Cf. Patry/Perlmutter 1993, 688-689 and Bell 1998, 592-596, who would even subject these uses to the control of the authors.
constitutes a normal exploitation.\textsuperscript{905} The practical example given in the general report of the 1967 Stockholm Conference to explain the functioning of the three-step test, strengthens this line of reasoning:

‘If [the photocopying] consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.’\textsuperscript{906}

The second criterion merely has the function to sort out the category of limitations which exempt ‘a very large number of copies’. The remaining cases of a ‘rather large’ and a ‘small number of copies’ are subjected to the control of the third criterion. Copyright’s adaptation to digital technology should not be misused to erode these conceptual contours. This conclusion can be undergirded by a further observation. It concerns the guideline given in the preparatory work for the Stockholm Conference itself. When explaining the conditions on which limits may be set to the right of reproduction,\textsuperscript{907} the study group merely referred to the principle that actual and potential markets of considerable importance must be reserved for the authors. Initially, this principle was embedded in a framework which underlined the necessity of a compromise solution to make allowance for the interest of the members of the Berne Union in the maintenance of traditional limitations.\textsuperscript{908} In this broader context, the study group elaborated that,

‘on the one hand, it was obvious that all the forms of exploiting a work, which had, or were likely to acquire, considerable economic or practical importance, must in principle be reserved to the authors; exceptions that might restrict the possibilities open to authors in these respects were unacceptable. On the other hand, it should not be forgotten that domestic laws already contained a series of exceptions in favour of various public and cultural interests and that it would be vain to suppose that countries would be ready at this stage to abolish these exceptions to any appreciable extent.’\textsuperscript{909}

This statement underlines that a normative concept tracing the outlines of a normal exploitation must create sufficient room for balancing the divergent interests of authors and users. The quoted passage refers not only to ‘all the forms of exploiting a work, which have, or are likely to acquire, considerable economic or

\textsuperscript{905} Cf. WTO Panel – Copyright 2000, § 6.167.
\textsuperscript{906} See Report on the Work of Main Committee I, Records 1967, 1145-1146 (emphases added).
\textsuperscript{907} See Doc. S/1, Records 1967, 112.
\textsuperscript{908} Cf. Doc. S/1, Records 1967, 111. See subsection 3.1.2 above.
\textsuperscript{909} See Doc. S/1, Records 1967, 111-112.
practical importance’, but also to ‘various public and cultural interests’ which should not be threatened by the three-step test. Similarly, the necessity of striking a proper copyright balance was underscored at the 1996 WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions. In the basic proposal for substantive provisions of the later WCT, the following comment was made in respect of the proposed three-step test:

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

By the same token, the preamble of the WCT recognises ‘the need to maintain a balance between the rights of authors and the larger public interest’. These statements are of particular importance because the WCT is a reaction to the challenges of the digital environment. Obviously, it was not intended to dismantle the existing edifice of permissible limitations by incorporating the three-step test into the WCT. Its adaptation to the digital environment should accordingly not lead to this result. By contrast, it can be stated that sufficient room must be provided for public and cultural interests.

Hence, concepts like the neo-classical model are unsuitable for informing the interpretation of the expression ‘a normal exploitation’. In contrast to neo-classical convictions, the conceptual contours of ‘all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance’ must not be drawn too wildly. Otherwise, it will be difficult to ensure sufficient flexibility for the establishment of a proper copyright balance. Some room to manoeuvre is offered by the developed definition of a normal exploitation itself. The reference to exploitation forms of considerable economic or practical importance clarifies that not necessarily each and every market segment has a share in a normal exploitation. The hurdle of considerable importance need not be surmounted by all parts of the overall commercialisation of a work.

Thus, the question arises where the line should be drawn between exploitation forms of considerable importance and those which do not meet this standard. A response to a similar problem can be found in the Anglo-American copyright tradition. Just as the three-step test requires an inquiry into a conflict with a normal

---

912 See the preamble of the WCT. Cf. Ficor 1997, 198.
913 Not surprisingly, the neo-classical approach to copyright has triggered a heated debate in the US. In particular, the imperviousness to public and cultural needs is chosen as a starting point by the critics of the neo-classical model. See subsection 2.2.4. Cf. Cohen 1998, 551-555; Loren 1997, 48-56; Netanel 1996, 341.
914 See Doc. S/1, Records 1967, 112.
exploitation, the fourth factor of the US fair use doctrine requires that the impact which a limitation has on a work’s market be considered. Whether the line drawn in the context of the fair use doctrine can serve as a basis for the establishment of a normative concept for the determination of a conflict with a normal exploitation, will be examined in the following subsection.

4.5.3.3 BRINGING THE ECONOMIC CORE OF COPYRIGHT INTO FOCUS

The question of the extent to which the exemption of a certain use impairs the market for a creative work, is central to the fair use doctrine. Its fourth factor explicitly calls on the courts to consider ‘the effect of the use upon the potential market for or the value of the copyrighted work’. In Sony Corporation of America v. Universal City Studios, Inc., a firm position was taken by the US Supreme Court in respect of the tolerable degree of market impairment. Justice Stevens, who delivered the opinion of the Court enunciated that, to successfully challenge the exemption of a certain use,

‘actual harm need not be shown [...]. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists.’

According to this rigid principle, the mere possibility of any potential market impairment is sufficient for eroding a user privilege. The practice of time-shifting enabled by home videotape recorders, which was at stake in this decision, could only survive the corresponding scrutiny because Justice Stevens embraced the District Court’s conclusion that ‘no likelihood of harm was shown at trial, and plaintiffs admitted that there had been no actual harm to date’. Thus, it was deemed a fair use. Justice Blackmun, however, disagreed. He took the view that the advent of home videotape recorders created a potential market:

‘That market consists of those persons who find it impossible or inconvenient to watch the programs at the time they are broadcast, and who wish to watch them at other times. These persons are willing to pay for the privilege of watching copyrighted work at their convenience.’

915 In Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985), IV, the fourth factor of the fair use doctrine was deemed ‘undoubtedly the single most important element of fair use’. However, cf. Leval 1990, 1124, elaborating that ‘the Supreme Court has somewhat overstated its importance’.

916 See Section 107 of the US Copyright Act.


918 See Sony v. Universal, ibid., IV B.


920 See Sony v. Universal, ibid., dissenting opinion of Justice Blackmun, IV B.

184
In accordance, Justice Blackmun contended that the studios can show harm from videotape recorders use ‘simply by showing that the value of their copyrights would increase if they were compensated for the copies that are used in the new market. The existence of this effect is self-evident.’ 921 Hence, he drew the outlines of an inquiry into market impairment even more rigidly.

The same problem which has already been brought to the fore in the context of the three-step test, therefore, also arises in connection with the fair use doctrine. If a normal exploitation is understood to encompass each and every possibility of deriving pecuniary profit from a work, the room for the satisfaction of user interests is exceedingly limited. Not surprisingly, this issue is also raised in comments on the fair use doctrine. Patry and Perlmutter, for instance, emphasise that

‘too broad an interpretation of the potential market, however, presents its own dangers. If taken to a logical extreme, the fourth factor would always weigh against fair use since there is always a potential market that the copyright owner could in theory license.’ 922

Irrespective of the potential danger from an unduly broad definition of the potential market, however, Justice Blackmun’s dissenting opinion influenced the decision Harper & Row v. Nation Enterprises. 923 Justice O’Connor, writing for the Court in Harper & Row, took the position that ‘fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied’. 924 This view triggered substantial criticism. Fisher asserted that Justice O’Connor failed to recognise that, ‘in almost every case in which the fair use doctrine is invoked, there will be some material adverse impact on a “potential market” as Justice Blackmun — and now the Court — define that phrase.’ 925 He therefore concluded that

‘the market-impact factor adopted in Harper & Row will almost always tilt in favour of the plaintiff — and is therefore nearly useless in differentiating between fair and unfair uses of copyrighted materials. To be helpful, it must be modified. [...] A] court confronted with a fair use defense must estimate the magnitude of the market impairment caused by privileging the defendant’s conduct; merely ascertaining the existence of adverse impact will not suffice.’ 926

To determine the extent of market impairment which is relevant in the context of the fair use doctrine, the core of the authors’ exploitation right is brought into focus.

921 See Blackmun, ibid., VI. (emphasis in the original text).
925 See Fisher 1988, 1671 (emphasis in the original text).
926 See Fisher 1988, 1672 (emphasis in the original text).
Patry and Perlmutter ask the question of 'how to circumscribe the scope of the relevant potential market so as to ensure that the fourth factor has independent meaning and does not become circular, while still protecting the core economic interests of the copyright owner'.'927 Ultimately, they embrace a concept which Leval developed by focusing on the utilitarian goals of copyright.'928 He elaborates:

'By definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties. Therefore, if an insubstantial loss of revenue turned the fourth factor in favor of the copyright holder, this factor would never weigh in favor of the secondary use. [...] The market impairment should not turn the fourth factor unless it is reasonably substantial. When the injury to the copyright holder's potential market would substantially impair the incentive to create works for publication, the objectives of the copyright law require that this factor weigh heavily against the secondary user.'929

The critique did not leave the practice of the US Supreme Court unaffected. In Campbell v. Acuff-Rose Music, Inc. — a case concerning a rap version of Roy Orbison's and William Dees' song 'Oh, Pretty Woman' which the rap group 2 Live Crew had composed to satirise the intact world built up in the original — Justice Souter, who delivered the Court's opinion, first of all sought to create some room to manoeuvre. As the legitimacy of a free use of copyrighted material for the purpose of parody was challenged, he elaborated that when the unauthorised use is transformative, 'market substitution is at least less certain, and market harm may not be so readily inferred'.930 Although the Court did not suggest that a parody may not harm the market at all, it nevertheless unequivocally stated that 'when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act'. Justice Souter concluded that 'the role of the courts is to distinguish between biting criticism that merely suppresses demand and copyright infringement, which usurps it'.931 To undergird its line of reasoning, the Court furthermore presented an argument concerning the market for potential derivative uses. Justice Souter elaborated that this market includes only those uses

'that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.'932

---

928 See Patry/Perlmutter 1993, 697-698. See Leval 1990, 1107-1110. The focus on the utilitarian premises of US copyright law is criticised by Weinreb 1990, 1140.
929 See Leval 1990, 1124-1125.
931 See Campbell v. Acuff, ibid., II D.
932 See Campbell v. Acuff, ibid., II D.
On the basis of these explanations, parody was placed beyond the scope of the fourth factor of the fair use doctrine. The exemption of parody, however, is not the sole outcome of the examination of fair use by the Court in Campbell v. Acuff. As parody, in this case, appeared in the guise of rap music, Justice Souter also devoted attention to an impairment of the derivative market for rap music. However, he did not demand, in line with the decision of the Court in Sony v. Universal, merely 'some meaningful likelihood of future harm' as a threshold for denial of fair use. On the contrary, he stated that only 'evidence of substantial harm to [the derivative market for rap music] would weigh against a finding of fair use'. This statement calls to mind Fisher's proposal to estimate the magnitude of the market impairment caused by a privileged use instead of merely ascertaining the existence of adverse impact on the market, as well as Leval's postulation that the market impairment should not turn the fourth factor unless it is reasonably substantial.

With regard to the question of a normal exploitation, which arises in the context of the three-step test, the decision Campbell v. Acuff yields two important insights. Firstly, it suggests that a conflict with a normal exploitation should only be assumed if the limitation causes a substantial market impairment. Markets that authors would in general neither develop nor license others to develop would be irrelevant in this context. Secondly, the way in which a limitation affects the market for a work might justify not considering the market impact of the limitation at all. If a corrosive effect on the market for a work evolves indirectly from the exempted use, for instance, owing to its criticism of the original work, the market impairment would not be factored into the equation. Whether these assumptions are suitable for informing the interpretation of the prohibition of a conflict with a normal exploitation must be examined separately.

Lines of intersection between the three-step test and the first assumption that a substantial market impairment is necessary, can be brought to light by surveying the materials of the Stockholm Conference. As already pointed out in the previous subsection, the practical example given in the general report of the Conference delineates the ambit of operation of the second criterion as follows: 'If [the photocopying] consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work.' Thus, the prohibition of a conflict with a normal exploitation has the function to sort out limitations which exempt 'a very large number of copies'. Against this backdrop, it appears appropriate to devote attention only to limitations which deprive authors of a major source of revenue, thereby causing a substantial market impairment.

934 See Campbell v. Acuff, ibid., II D (emphasis added).
935 See Fisher 1988, 1672 (emphasis in the original text).
936 See Leval 1990, 1125.
938 See in this regard also the explanations given by Ulmer 1967, 17.
The comments made by Ulmer, the chairman of Main Committee I, on the outcome of the Conference, point in the same direction. As already explained in the context of Bornkamm's historical approach, Ulmer regards the reproduction of literary works by letterpress printing and the production of a new edition of a work by means of photomechanical reproduction as parts of a normal exploitation. These ways of exploiting a work undoubtedly constitute major sources of income. Their exemption would lead to piracy in the guise of a copyright limitation and substantially impair the market. The making of single photocopies, however, is not a normal way of exploitation according to Ulmer. In this regard, it must be borne in mind that the problem of photocopying was just emerging at the time of the Stockholm Conference. Due to the market imperfections of the pre-digital world, the exertion of control over photocopying for personal uses was out of reach. It did not form a potential major source of revenue. The authors were incapable of either developing the market for personal use or of licensing others to do so. Therefore, Ulmer’s comments are in line with the assumption that only those limitations are to be considered which cause a substantial market impairment by depriving the authors of a major source of income.

There is thus substantial reason to endorse the view that substantial harm, flowing from a limitation to a market that authors would in general develop or license others to develop, is necessary. It can be posited that the prohibition of a conflict with a normal exploitation only protects the economic core of copyright from erosion. It concerns those ways of using an intellectual work from which major royalties accrue. If a minor source of royalty revenue is eroded, the market is not substantially impaired and a conflict with a normal exploitation does not arise.

This postulation can be undergirded by the system of the three criteria. Criteria 1 and 2 serve as a gateway to the core of copyright’s balance. They function as a filter before copyright’s balance is finally recalibrated in the light of the third criterion which forbids an unreasonable prejudice to the author’s legitimate interests. A limitation which conflicts with a normal exploitation and thus does not fulfil the preceding second criterion, inevitably fails the three-step test. The limitation must be abolished and cannot be used for the final balancing of interests. Hence, from

---

939 See subsection 4.5.1.
940 See Ulmer 1967, 17.
941 See Ulmer 1967, 17.
943 Cf. Patry/Perlmutter 1993, 689. In the German civil law tradition, the principle of the ‘Institutsgarantie des Eigentums’ could potentially be invoked in this connection. See Stern/Sachs 1988, 754-876 for a detailed discussion of this principle. The German Constitutional Court (Bundesverfassungsgericht) emphasises on the basis of this principle that on its merits, private property is characterised by the possibility of use for private benefit and at the owner’s disposal. See BVerfGE 24, 367 (389); 31, 229 (240); 49, 382 (394). Cf. Badura 1984, 552-560; Herzog 1987, 1422-1426; Wendt 1985, 253-258. However, see also the critical comments made by Kutschera 1990, 118-123.
944 See section 4.3.
945 Cf. subsection 4.3.2.
a functional perspective, a conflict with a normal exploitation should only be assumed if a market is affected by a limitation which, because of its particular importance, is not available for the final balancing of interests anyway. Otherwise, resources may be drawn away that are necessary for the establishment of a proper balance. It is thus consistent to posit that the second criterion only protects those parts of the authors’ exploitation right which cannot be used for socially valuable ends because they constitute the economic core of copyright.\footnote{The first assumption of the US Supreme Court in Campbell v. Acuff can be embraced in the context of the second criterion of the three-step test.}

What remains is the second assumption of the US Supreme Court concerning uses which indirectly encroach upon the exploitation of a work, for instance, by criticizing or ridiculing the original work.\footnote{However, the time for discussing certain kinds of using copyrighted material, like parody, in more detail has not yet come. Before embarking on such an inquiry, it is indispensable to further clarify the prohibition of a conflict with a normal exploitation. So far, it has only been stated that the economic core of copyright is to be sheltered from erosion. The outline of the core, however, has not been traced yet. The reference point for an inquiry into a conflict with a normal exploitation is of particular importance in this respect.}

4.5.3.4 \textit{Determining the Correct Reference Point}

In the previous subsection, it has been concluded that only an encroachment upon the economic core of copyright is relevant when it comes to decide whether a limitation conflicts with a normal exploitation. As to the delineation of the core area, the reference point chosen constitutes a focal point. Is it sufficient that a potentially small exclusive right is affected by a limitation, or must a limitation, to conflict with a normal exploitation, substantially impair the market for a work as such? In other words: should an encroachment upon copyright’s core be determined separately for each individual exclusive right recognised in international copyright law? Or does a work’s overall commercialisation, enabled by the whole bundle of exclusive rights, constitute the right reference point?

Pursuant to the first alternative – each individual exclusive right as a reference point – the core of copyright would have to be subdivided along the lines of the international system of exclusive rights. For assuming a conflict with a normal exploitation, a substantial impairment of the market reserved to the authors by one of the internationally recognised exclusive rights would accordingly already suffice. The scope and economic importance of the exclusive right at stake would be irrelevant. Pursuant to the second alternative – the whole bundle of exclusive rights as a reference point – the overall commercialisation of different categories of works

\footnote{The approach of Ulmer 1967, 17, points in the same direction. He focuses on those technical processes from which the lion’s share of revenue accrues.}

would have to be factored into the equation instead. The crucial question would not be whether a limitation substantially impairs a specific sub-market for a work, as delineated by the separate grant of a certain exclusive right, but the possibility of marketing a work as such – offered by the whole bundle of exclusive rights. Copyright’s economic core, thus, would have to be subdivided along the lines of different categories of works. To conflict with a normal exploitation, a limitation would have to deprive the authors of affected works of a major source of income.

The WTO Panel reporting on Section 110(5) of the US Copyright Act dealt with the question of the correct reference point in the context of article 13 TRIPs. It clearly stated that ‘whether a limitation or an exception conflicts with a normal exploitation of a work should be judged for each exclusive right individually’.

Dealing with article 11bis(1) BC, the Panel even refused to conceive of the three subparagraphs of this provision as parts of only one exclusive right comprising three different and separately-mentioned aspects. Instead, it elaborated:

‘If it were permissible to limit by a statutory exemption the exploitation of the right conferred by the third subparagraph of Article 11bis(1) simply because, in practice, the exploitation of the rights conferred by the first and second subparagraphs of Article 11bis(1) would generate the lion’s share of royalty revenue, the “normal exploitation” of each of the three rights conferred separately under Article 11bis(1) would be undermined.’

Therefore, the Panel followed meticulously the approach which focuses on each individual exclusive right. Within the realm of an exclusive right, the Panel saw a conflict with a normal exploitation arising,

‘if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work […] and thereby deprive them of significant or tangible commercial gains’.

An inescapable dilemma evolves from this alignment of an inquiry into a conflict with a normal exploitation with the inconsistent system of internationally recognised exclusive rights. Were the Panel to approach the general right of reproduction, as set out in article 9(1) BC, with the same meticulousness as article 11bis(1), its broad scope would have to be subdivided into small portions – a procedure creating insuperable difficulties. It could be attempted to achieve an appropriate subdivision by distinguishing between the technical processes enabling a reproduction. This procedure, however, is unlikely to yield portions which are comparable in respect of their sizes. In the digital environment, the existing variety

---

950 See WTO Panel – Copyright 2000, § 6.183. Accordingly, the Panel focused on major potential sources of royalties accruing from the exercise of each individual exclusive right. Cf. also § 6. 206.
of methods, moreover, dwindles. The digital reproduction occupies centre stage. A
distinction between the purposes underlying a reproduction is unlikely to lead to
portions of comparable sizes as well. Furthermore, any arrangement of possible
purposes would appear arbitrary. The undertaking to subdivide the right of
reproduction is therefore doomed to failure. Even if this task could be
accomplished, doubt would have to be cast upon the appropriateness of the
outcome. It is not unlikely that many limitations would be held to conflict with a
normal exploitation after subdividing the formerly broad exclusive right into small
portions comparable with article 11bis(1)(iii). In consequence, the approach of the
WTO Panel would resemble the neo-classical approach to copyright which is
manifestly unsuited for informing the interpretation of the second criterion.\textsuperscript{951}

Therefore, it must be assumed that the general right of reproduction as a whole
would constitute the reference point in accordance with the Panel’s approach. In
consequence, limitations could, proportional to its broader scope, draw more
resources away from the reproduction right than from a small exclusive right. Even
a limitation, the scope of which exceeds the ambit of operation of a small exclusive
right, could potentially be countenanced. Thus, the approach tends to shelter small
exclusive rights more effectively from erosion than broad ones. This result could
become acceptable when embarking on an assessment based on percentages instead
of absolute numbers. Theoretically, it could be stated that the authors can be
divested, for instance, of 25% of each exclusive right to supply public and cultural
needs. Differences in profitability within the bundle of exclusive rights, however,
cannot be factored into the equation irrespective of an orientation by absolute
numbers or percentages. Exempting only 10% of a highly profitable broad
exclusive right obviously has a more corrosive effect on the exploitation of a work
than the withdrawal of 90% of a small exclusive right which does not yield
appreciable revenue. The approach of the WTO Panel bars the economic reality
from entering the picture. Instead, it exaggerates the international system of
exclusive rights.

To strengthen the Panel’s position, it could be asserted that the establishment of a
separate small exclusive right underlines that the relevant way of using a work is of
particular importance. However, this argument must fail. Instead of the endeavour
of erecting a consistent edifice of exclusive rights, from which the particular esteem
for each of the separately recognised elements could be inferred, the international
system of exclusive rights, as set out in the Berne Convention, testifies to a century
of compromise solutions and responses to technical challenges.\textsuperscript{952} Prior to the 1967
Stockholm Conference, the general exclusive right of reproduction, for instance,
was not explicitly recognised in the Berne Convention. Instead, the members of the
Berne Union could merely reach an agreement on small portions thereof, like the
right of mechanical reproduction of musical works. This former exclusive right,

\textsuperscript{951} Cf. subsections 2.1.2 and 2.2.4.
\textsuperscript{952} Cf. Ricketson 1987, 39-125.
which was set out in article 13(1) of the 1948 Brussels Act, is now included within the general right of reproduction. Pursuant to the actual appearance of the Berne Convention, exemptions from the former separate right of mechanical reproduction of musical works, would thus merely have to be assessed against the backdrop of the general right of reproduction of article 9(1) BC. In the context of the 1948 Brussels Act, by contrast, the small exclusive right itself would have constituted the basis for the examination of a limitation.

The general rule of article 8 WCT demonstrates that the distinct subparagraphs of article 11bis(1) BC could be influenced by a similar development in the field of rights concerning the communication to the public. The circumstances of uses which are actually explicitly listed in the three subparagraphs of article 11bis(1) could be encompassed by a comprehensive clause to come. On the basis of the Panel’s approach, this change would have the corollary that the particular importance which the Panel currently attaches to each of the three subparagraphs would immediately vanish. Limitations on one of the small rights explicitly listed in article 11bis(1) would have to be assessed in the light of the newly introduced general right of communication instead. The replacement of several small exclusive rights with one general exclusive right, however, obviously leaves the economic importance of the corresponding sub-markets unaffected. The actual shape of the international system of exclusive rights does not indicate reliably economic importance. The introduction of small exclusive rights does not necessarily reflect the crucial importance of their voice within the choir of all rights. By contrast, it is not unlikely that no agreement on the adoption of a broad exclusive right could be reached at the international level. For this reason, merely those facets of the envisioned broad exclusive right were recognised in a number of small exclusive rights to which approval was given. It is to be reiterated that the approach of the WTO Panel turns a deaf ear to the economic reality. This deafness is anything but conducive to the determination of a conflict with a work’s normal exploitation.

Apparently, the WTO Panel felt obliged to interpolate the international system of exclusive rights into the framework of the second criterion. It stressed that ‘a copyright owner is entitled to exploit each of the rights for which a treaty […] provides’.

This statement is a truism. The necessity to align the second criterion of the three-step test with the inconsistent international system of exclusive rights, however, need not be inferred therefrom. It is sufficient when the three-step test as a whole gives deference to the framework set out in international copyright law. The second criterion is followed by a third one which offers the possibility of lending weight to those parts of the spectrum of exploitation forms which were not previously taken into account. The already examined relationship between the second and the third criterion strengthens this line of reasoning. It is wrong to allege a hierarchy between these two conditions. The inquiry into a potential conflict with

954 See WTO Panel – Copyright 2000, § 6.175.
a normal exploitation of the work is not at all the kingpin of the test. By contrast, the final decision on compliance with the three-step test can confidently be left to the third step of the test. Due to the possibility of factoring the payment of equitable remuneration into the equation, this last step is better equipped for striking a proper copyright balance.\textsuperscript{955} In this context, the interest of the authors in profiting from each individual exclusive right recognised in international copyright law can be considered. Hence, an inquiry into compliance with the second criterion need not be burdened with the inconsistent international system of exclusive rights. Preference can be given to an approach focusing on those aspects of the authors’ exploitation rights which really are economically important. Each individual exclusive right should not be chosen as a reference point for an inquiry into a conflict with a normal exploitation.

The rejection of each individual exclusive right as a reference point predicts the final response to the question of compliance with the second criterion: the profitability of a market plays a decisive role. The share which a specific form of exploitation has in the overall commercialisation of a work must be taken into account. Careful analysis is required to identify the areas in which the authors of works affected by a limitation typically reap the lion’s share of royalty revenue. The second criterion of the three-step test, thus, necessitates an economic inquiry of considerable complexity. A careful market analysis is to be conducted in the field of different categories of works.\textsuperscript{956} On this basis, the limitation’s impact on the exploitation of affected works must be estimated. A limitation only conflicts with a normal exploitation of a copyrighted work if it substantially impairs the overall commercialisation of that work by divesting the authors of a major source of income. If this condition is fulfilled, it encroaches upon the economic core of copyright and fails to fulfil the second criterion of the three-step test.

\textbf{4.5.3.5 DEFINING A CONFLICT WITH A NORMAL EXPLOITATION}

On the basis of the preceding discussion, the following conclusions can be drawn: a conflict with a normal exploitation arises if the authors are deprived of an actual or potential market of considerable economic or practical importance.\textsuperscript{957} The circle of these actual or potential markets is solely formed by those possibilities of marketing a work which typically constitute a major source of income and, consequently, belong to the economic core of copyright.\textsuperscript{958} For determining these major sources of income, the overall commercialisation of works of a category affected by the limitation in question must be considered instead of focusing on the international

\begin{flushright}
\textsuperscript{955} See subsections 4.3.2 and 4.3.3.
\textsuperscript{956} See for an examination that reflects the complexity of this task for instance the economic analysis conducted by Fisher 1988, 1698-1744.
\textsuperscript{957} Cf. subsections 4.5.3.1 and 4.5.3.2.
\textsuperscript{958} Cf. subsection 4.5.3.3.
\end{flushright}
system of exclusive rights with all its inconsistencies. In sum, a conflict with a normal exploitation arises when authors are divested of an actual or potential, typical major source of royalty revenue that carries weight within the overall commercialisation of works of the relevant category.

### 4.5.4 THE IMPACT ON INTERNATIONALLY RECOGNISED LIMITATIONS

Pursuant to the rules developed in the previous subsection 4.5.3, an inquiry into a conflict with a normal exploitation is a matter of some complexity. In particular, a careful market analysis is central to an appropriate examination of limitations. Needless to say, such a detailed economic analysis is beyond the scope of the present inquiry. The ensuing discussion of several types of limitations which are permitted under the Berne Convention will merely yield a rough assessment of the limitation’s permissibility. Nonetheless, the method is not without value. Firstly, it at least gives an outline of the problems raised by the limitation under discussion and may serve as a starting point for more detailed economic analyses. Secondly, it leads to a better understanding of the relationship between the three-step test and limitations for which the Berne Convention specifically provides. The identification of problem areas might encourage a critical review of Berne limitations that is conducive to the further development of international copyright law. Thirdly, it illustrates the abstract standard of control that has been developed above. Particularly this illustrative nature of the ensuing discussion should be borne in mind. In the following subsection 4.5.2.1, the exemption of the use of copyrighted material for the purposes of criticism and parody will be discussed. Subsequently, the utilisation of works for teaching will be examined in subsection 4.5.4.2. The so-called ‘minor reservations doctrine’ will be scrutinised in the light of the second criterion in subsection 4.5.4.3. Compulsory licences based on article 11bis(2) BC will finally be discussed in subsection 4.5.4.4.

#### 4.5.4.1 CRITICISM AND PARODY

Pursuant to article 10(1) BC, ‘it shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose...’ Arguably, the use of portions of a work for purposes such as criticism or parody can be regarded as a specific form of quotation. In this line of reasoning, it falls under article 10(1) BC. The time has therefore come to

---

959 Cf. subsection 4.5.3.4.
961 If this assumption is called into doubt, corresponding limitations can alternatively be based on the three-step test of article 9(2) BC. Whether article 10(1) or 9(2) BC is invoked as a basis has no influence on the further conclusions drawn here. Merely the point of departure changes.
return to the decision Campbell v. Acuff-Rose of the US Supreme Court. As already elaborated above, two assumptions of the Court are of particular interest in the context of the prohibition of a conflict with a normal exploitation. Firstly, the Court assumed that a substantial market impairment must be caused by a limitation to justify its abolition. This condition has already been discussed and countenanced above. The second assumption, however, concerns uses which encroach upon the exploitation of a work indirectly by criticising or ridiculing the original work. The corrosive effect of these uses on the market, so runs the Court's argument, is irrelevant because the free utilisation of the work merely suppresses demand for the original instead of usurping it. ⁹⁶²

Before turning to the crucial question of whether the indirect market harm flowing from criticism and parody is relevant, it is to be noted at the outset that the exemption of criticism and parody as such does not conflict with a normal exploitation of copyrighted material in the sense of the three-step test. As elaborated in the previous subsection, only those segments of the overall commercialisation of an intellectual work which typically yield major royalties are to be factored into the equation in this connection. However, authors will most often refrain from developing or licensing others to develop a market for criticism or parody. ⁹⁶³ It can therefore be concluded that there simply is no market — let alone one of considerable economic or practical importance. Even if authors were to license the utilisation of their works for purposes such as criticism and parody, ⁹⁶⁴ this market would not have to be counted as being part of the economic core of copyright. It cannot be expected to typically become a major source of royalty revenue. Its exemption does not cause a substantial market impairment.

As to the corrosive indirect effect which criticism or parody may have on the economic core of copyright, it is to be emphasised that the specific rule which the US Supreme Court developed in Campbell v. Acuff-Rose is unnecessary in the context of the three-step test. A distinction between uses which merely suppress demand for the original and others which usurp it, as proposed by the Court, ⁹⁶⁵ is superfluous in respect of criticism and parody. Pursuant to the standard of control developed above, the impact which a limitation, in general, has on the overall commercialisation of works of a certain category must be considered. Admittedly, biting criticism or parody have the potential for depriving authors of substantial sources of income. Sometimes, they might even kill demand for the original work,

---

⁹⁶³ Cf. Campbell v. Acuff, ibid., II D.
⁹⁶⁴ By contrast to the US Supreme Court in Campbell v. Acuff, ibid., II D, Bell 1998, 595-596, indeed takes the view that right holders should license criticism and parody. On the basis of neo-classical property theory (cf. subsection 2.1.2), he argues: 'Requiring payment in such circumstances arguably makes more sense, for the same reasons that support the spread of licensing generally. Furthermore, excusing non-payment might encourage over-production of reuses that aim, for purely economic reasons, to offend copyright owners.'
thereby depriving the author of the fruit of his labour altogether. A general rule, however, can hardly be inferred from single occurrences. That unauthorised uses of this kind, in general, prove to destroy markets cannot be posited so readily. A critique or parody may also induce people to purchase a copy of the original or go to its public performance. A corrosive effect reaching a level that justifies speaking of an impairment even of the overall commercialisation of the original work is unlikely to be found in the majority of cases. It seems to be an exception rather than the rule. Criticism or parody, thus, does not generally encroach upon the economic core of copyright. The potential indirect market harm is irrelevant just like the exemption of the use as such. Limitations of this type do not conflict with a work’s normal exploitation either directly or indirectly.

It is noteworthy that this finding corresponds to the concept of intergenerational equity developed in chapter 2. On the basis of Locke’s labour theory, it has been posited that an author acquires a copyright only on the condition that he leaves enough and as good in common for later authors. Viewed from this perspective, a normal exploitation of intellectual works can only be a way of deriving economic profit from a work that stops short of marketing areas which must necessarily be left in common to ensure that later authors, just like their predecessors, find a world of constantly renewed intellectual resources.966

As explained above, these considerations of intergenerational equity support particularly the exemption of transformative uses of copyrighted material. They allow later authors, depending on the use of existing works for freely expressing themselves, the creation of new works. The making of quotations as well as the use of a work for purposes such as caricature, parody and pastiche lie at the core of this category of limitations.967 On account of their paramount importance for attaining intergenerational equity, these limitations must be left in common and should not constitute part of a work’s normal exploitation. Otherwise, it is to be feared that the aforementioned limitations, which are virtually the right of later authors to be asserted against their predecessors, could be unduly curtailed in favour of the authors of existing works.968 Therefore, it is right to enunciate that the exemption of the use of copyrighted material for purposes such as criticism and parody does not conflict with a normal exploitation. That this conclusion is to be drawn on the basis of the developed standard of control confirms its appropriateness.

---

966 See subsection 2.3. Cf. Dreier 2001, 51-81, who generally discusses and gives guidelines for the division of markets for innovative goods, such as works of the intellect.
967 Cf. section 2.3.
968 Cf. section 2.3. It is to be noted that the strict distinction between ‘authors of already existing works’ on the one hand, and ‘later authors’ on the other, is chosen here to make the point. In practice, it will be impossible to draw such a line. In the normal course of events, authors of intellectual works will be found on both sides. The author who exerts control over the use and enjoyment of already created works becomes a ‘later author’ the moment he embarks on building the creation of a new work upon the works of predecessors and so forth.
4.5.4.2 Utilisation for Teaching

Article 10(2) BC permits 'the utilisation, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilisation is compatible with fair practice'. A conflict with a normal exploitation arises if the authors of relevant works are deprived of a typical major source of royalty revenue. As to the circle of relevant works, it is to be noted that article 10(2) BC may be universally applied to a wide variety of intellectual productions. For the purpose of teaching, literary, musical and artistic works alike are relevant. Within these categories, a restriction on certain kinds of works is unlikely. Novels, essays, poems, plays and articles, symphonies, string quartets, pop songs and jazz, paintings, sculptures, installations and buildings alike may be used for teaching purposes.

That the authors of works included in a publication, broadcast or recording for teaching are deprived of a major source of royalty revenue, however, cannot so readily be assumed. It is to be borne in mind that the work's overall commercialisation must be taken into account. If a passage from a famous pop song is included, it appears safe to assume that the potential royalty revenue is negligible when compared with the income accruing from the sale of CDs and the song's playing on the radio. Similarly, a major source of income need not be expected when passages are taken from a novel, play or symphony. Here, the sale of copies, scores and the work's public performance occupy centre stage. However, the teaching privilege might indeed deeply impact on the exploitation of certain works. If, for instance, paintings or poems, that are well known only among experts, are included in schoolbooks, this may divest the author of a potential major source of royalty revenue. The poem will possibly be reproduced more often than in the original publication. The painting may even be reproduced for the first time.

Nonetheless, it need not be concluded that the inclusion triggers a conflict with a normal exploitation under these circumstances. In the majority of cases, including poems and paintings, the utilisation of a work for teaching is not a typical source of income. Not each and every work makes its way into schoolbooks. Only some works are picked in the end. The large majority of intellectual productions will never become illustrative material employed for education. The use of a work for the purpose of teaching, thus, can hardly be regarded as a pillar of a work's exploitation that, in general, forms part of its overall commercialisation. If a work is finally chosen, this may be a welcome extra income. However, it does not necessarily constitute a typical, reliable potential source of royalty revenue. Hence, it can be posited that article 10(2) BC, by and large, is unlikely to conflict with a normal exploitation for two reasons: firstly, the utilisation of a work for teaching will often not constitute a potential major source of income when compared with

969 Cf. in respect of the reference to fair practice subsection 4.6.5.
970 Cf. subsection 4.5.3.3.
other possibilities of exploiting the relevant work. Secondly, even if the use for teaching theoretically ranks among the circle of potential major sources of income, a conflict with a normal exploitation nevertheless does not arise because it does not constitute a typical source of royalty revenue.

This is not to say, however, that the use for teaching never conflicts with a work's normal exploitation. A limitation to be found in the UK, serving the educational use of copyrighted material, helps to make the point here. As regards the inclusion of short passages from a published work in anthologies intended for the use of schools, UK legislation makes it a condition that an affected work is not itself intended for the use in schools.\textsuperscript{971} This additional condition is appropriate. If a work is intended for the use in schools, like a schoolbook, the utilisation for teaching constitutes a major source of royalty revenue. It even forms the centre of the work's overall commercialisation. Moreover, the utilisation for teaching is not atypical but normal. In contrast to the writer of a novel or poem who cannot foresee whether his work will finally be used for teaching, the author of a schoolbook particularly aims at such use and relies thereon. Thus, both arguments supporting article 10(2) BC -- not a major source of income and not a typical source of income -- do not carry weight with regard to schoolbooks.

Hence, a differentiated result comes to the fore. By and large, article 10(2) BC does not conflict with a normal exploitation. The utilisation of a work for the purpose of teaching, in many cases, will not constitute a potential major source of income from the beginning. Where a potential major source of royalty revenue can hardly be denied, the envisaged extra money cannot so readily be qualified as a typical facet of a work's overall commercialisation. Only in the case of works that are specifically intended for teaching purposes does a conflict with a normal exploitation arise. Here, the utilisation for teaching forms the centre of the work's overall commercialisation and constitutes the normal way of using the work instead of being atypical.

\textbf{4.5.4.3 The 'Minor Reservations Doctrine'}

The more precise delineation of the so-called 'minor reservations doctrine' has explicitly been left up to the three-step test. Forming an implied limitation accepted by the members of the Berne Union, the doctrine's conceptual contours are vague. This issue has been addressed in the context of the proposal to incorporate the three-step test into the later WIPO Copyright Treaty:

'It bears mention that [the proposed three-step test] is not intended to prevent Contracting Parties from applying limitations and exceptions traditionally considered acceptable under the Berne Convention. It is, however, clear that not all limitations currently included in the various national legislations would

\textsuperscript{971} See subsection 3.1.3.4.
correspond to the conditions now being proposed. In the digital environment, formally “minor reservations” may in reality undermine important aspects of protection. Even minor reservations must be considered using sense and reason.972

The ‘minor reservations doctrine’ is traditionally restricted to public performance rights.973 The analysis conducted by Ficsor suggests that, nowadays, it covers articles 11(1), 11bis(1), 11ter(1), 14(1) and 14bis(1) of the 1971 Paris Act of the Berne Convention.974 At the 1948 Brussels Conference, where the doctrine was invented and finally expressly mentioned in the general report, a reference was made to ‘exemptions allowed for religious ceremonies, military bands and the needs of child and adult education’.975 For present purposes, it is sufficient to concentrate on the public performance of copyrighted material during religious ceremonies. Pursuant to the test procedure developed above, a conflict with a work’s normal exploitation arises if a limitation encroaches upon the economic core of copyright by depriving authors of works of a category affected by the limitation of a typical major source of royalty revenue.976

So far, little has been said about the envisioned process of forming different categories of works to determine major sources of revenue. The example of ‘minor reservations’ for use during religious ceremonies can serve to elucidate this process. Consulting the definition of the exclusive rights affected by the ‘minor reservations doctrine’, it becomes obvious that a wide variety of works may be subjected to corresponding limitations. Article 11 BC covers dramatic, dramatico-musical and musical works, article 11ter BC is applicable to literary works and article 14bis(1) BC, finally, concerns cinematographic works. As to public performances during religious ceremonies, musical works seem to constitute the centre of gravity.977 In respect of their exploitation, the US elaborated in the framework of the WTO Panel proceedings concerning article 110(5) of the US Copyright Act that the rights most important to copyright owners of works of this category ‘include the right to reproduce their work in copies and phonorecords, the right to distribute and sell those copies and phonorecords, and the right to perform their music publicly’.978

972 See the basic proposal for substantive provisions of the later WCT, WIPO Doc. CRNR/DC/4, § 12.08.
973 Cf. subsection 3.1.1.
975 See the General Report, Records 1948, 100. Cf. subsection 3.1.1.
976 See subsection 4.5.3.4.
977 The public recitation of literary works may also play an important role. The following inquiry would therefore also have to be undertaken with regard to works of this category. As the outcome, however, would be very similar to the conclusions that will subsequently be drawn in the field of musical works, such a separate analysis is not conducted here.
978 See WTO Panel – Copyright 2000, first written submission of the United States (attachment 2.1), § 28.
The exemption of public performances in the course of religious ceremonies, thus, apparently touches upon one of the major sources from which the income of authors of musical works typically flows. The crucial question, then, is how to draw the circle of relevant musical works so as to permit an appropriate evaluation of the limitation's impact on the market for public performances of musical works. Referring to musical works in general is obviously inappropriate. The majority of musical works will never even be considered for a public performance during religious ceremonies. A distinction between popular and classical music does not lead any further. On the contrary, the exempted use itself must govern the process of determining the relevant section of musical works. As the 'minor reservation' under examination serves religious purposes, it is therefore necessary to focus on works which are of a religious nature or otherwise related to religious activities. If musical works not belonging to this circle are nevertheless publicly performed during a religious ceremony from time to time, this clearly seems to be an exception rather than the rule. These exceptional cases will hardly ever become a form of exploitation from which authors of musical works, typically, derive major profits.

As to the outlined circle of works that are somehow related to religious activities, the following observations can be made: public performances of these works during religious ceremonies need not necessarily feature prominently in the work's overall commercialisation. A piece written for organ, for instance, may primarily aim at affording the player the opportunity of demonstrating virtuosity and the spectacular range of organ sounds. First and foremost, the piece will accordingly be performed in organ concerts. Further pillars of the work's exploitation might be the sale of scores and its recording. Although it cannot be excluded that the work will also be performed in the framework of religious ceremonies, it appears nevertheless safe to assume that this potential market covered by the 'minor reservation' does not constitute a major source of income. The market impairment, thus, is insubstantial. The same is true as regards oratorios. Musical works of this kind often involve contributions of an orchestra, choir and several soloists. Their performance during religious ceremonies will accordingly hardly ever become widespread. If single parts of an oratorio, for instance a certain tune, are nevertheless used in religious ceremonies, these public performances can hardly be qualified as a potential major source of income which typically forms part of the exploitation of oratorios.

The prohibition of a conflict with a work's normal exploitation, however, becomes crucial with regard to works that are specifically written for use during religious ceremonies. If the composer of a song or a piece written for organ or choir particularly aims at enriching religious ceremonies and, therefore, creates the work with an eye to use during a mass, it would be inconsistent not to conclude that the 'minor reservation' under examination divests this author of a major source of

---

979 Admittedly, Wagner's famous tune taken from his opera 'Lohengrin' which occupies centre stage whenever people dare to marry, is an exception to this rule. However, this is a special case. Hence, a typical major source of royalty revenue is not at stake. Cf. subsection 4.5.3.5.
income. What he intends is precisely the work’s public performance during a religious ceremony. In consequence, other possibilities of marketing the work are hard to imagine. The piece is not written for attracting attention in concerts. Admittedly, the sale of scores may play a role besides the work’s public performance during religious ceremonies. Nonetheless, the fact remains that a potential market of paramount importance for this type of musical work is covered by the ‘minor reservation’. Insofar as a national limitation privileging religious ceremonies exempts the public performance of musical works that are specifically written for such ceremonies, it thus conflicts with a normal exploitation of these works and does not fulfil the second criterion of the three-step test.\textsuperscript{980} A corresponding proviso is necessitated by the three-step test when limitations serving religious ceremonies are based on the ‘minor reservations doctrine’. As pointed out in the previous subsection, a similar rule governs the educational use of copyrighted material.

4.5.4.4\quad\textit{Compulsory Broadcasting Licences}

There is substantial reason to doubt whether article 11\textit{bis}(2) BC is compatible with the three-step test’s second criterion. Admittedly, both provisions, article 11\textit{bis}(2) and the three-step test alike, allow compulsory licences. Whereas article 11\textit{bis}(2) generally permits national legislation to determine the conditions under which the broadcasting and related rights granted by article 11\textit{bis}(1) may be exercised,\textsuperscript{981} the three-step test, however, offers the possibility of providing for compulsory licences solely in the context of its third criterion. An unreasonable prejudice to the author’s legitimate interest can be avoided by ensuring the payment of equitable remuneration.\textsuperscript{982} Before reaching the third criterion, a limitation must pass the two preceding steps. It may therefore not conflict with a ‘normal exploitation of the work’. The introduction of a compulsory licence is therefore not at all declared generally permissible, like in article 11\textit{bis}(2).

The potential incompatibility of compulsory licences based on article 11\textit{bis}(2) with the three-step test thus results from the great latitude allowed to national legislation. Article 11\textit{bis}(2) fails to make it a condition that the economic core of copyright is to be left untouched, as required by the second criterion of the three-step test.\textsuperscript{983} There is no safeguard preventing national legislation from encroaching upon the core when determining the conditions under which the rights granted in article 11\textit{bis}(1) BC may be exercised. That particularly broadcasting, subjected to the authors’ control by article 11\textit{bis}(1)(i), constitutes a major source of income,

\textsuperscript{980}The broad article 5(3)(g) of the European Copyright Directive 2001/29/EC which permits ‘use during religious celebrations’ is thus not in line with the three-step test.

\textsuperscript{981}Cf. for a more detailed description Ricketson 1987, 522-527; Fisco\textsuperscript{r} 2002a, 273-275.

\textsuperscript{982}Cf. subsections 4.3.2 and 4.3.3.

\textsuperscript{983}Cf. subsection 4.5.3.
however, can hardly be denied, for instance, in the field of cinematographic works. The fact that article 11bis(2) obliges national legislation to ensure the payment of equitable remuneration, is irrelevant in the context of the prohibition of a conflict with a normal exploitation. It does not reconcile the two provisions.\footnote{984}

At the international level, the substantial difference between the three-step test and article 11bis(2) came to the fore at the 1967 Stockholm Conference. India espoused the imposition of a compulsory general licence on the right of reproduction, as permitted in the field of broadcasting by article 11bis(2). As already explained in some detail in subsection 3.1.3.5, this proposal was finally rejected. Instead, only the limited possibilities of compulsory licensing offered by the three-step test were approved. Speaking on behalf of India, Singh opposed this outcome of the Conference by stating that it appeared ‘odd to him that while compulsory licensing was accepted as normal in recording and broadcasting, it should evoke opposition in regard to reproduction’.\footnote{985} The fact that the three-step test is irreconcilable with a compulsory general licence, as permitted by article 11bis(2), thus was clearly brought to light at the Stockholm Conference. Nonetheless, the ambit of operation of the three-step test was extended to article 11bis(2) when the additional safeguard function was assigned to article 13 TRIPs and article 10(2) WCT.\footnote{986} Nowadays, the great latitude allowed to national legislation by article 11bis(2), thus, is hanging by the thread of the agreed statement concerning article 10(2) WCT which hinders the three-step test from reducing the scope of applicability of article 11bis(2).\footnote{987}

4.5.5 THE IMPACT ON REMAINING NATIONAL LIMITATIONS

Turning to national limitations not resting on special provisions of the Berne Convention, the issue of personal use and library activities must be addressed. In the digital environment, limitations in this field raise substantial problems. The impact of private copying and library activities on a work’s exploitation depends on the state of copying techniques. Over the last decades, technical innovations have markedly increased the attractiveness of limitations of this kind.\footnote{988} Nowadays, they have the potential for blocking the development of promising future markets. In the following subsection 4.5.5.1, strictly personal use will be discussed against this backdrop. Subsection 4.5.5.2 concerns the role which libraries may play in the future. As the issue is an extremely complex one, it is to be emphasised at the outset that the ensuing discussion cannot be expected to deal with the problem of private

\footnotesize{984} Cf. subsections 4.3.2 and 4.3.3.
986 Cf. subsections 3.2.2, 3.3.2 and 4.2.2.
987 See WIPO Doc. CRNR/DC/96, agreed statement concerning article 10 WCT.
copying and library activities in depth. The determination of a conflict with a
normal exploitation always requires a careful market analysis. An inquiry of this
kind in the complex field of private copying and library activities is clearly beyond
the scope of the present examination and must confidently be left to academic
treatises to come. The following discussion merely seeks to give guidelines so that
future, more comprehensive analyses do not go astray.

4.5.5.1 **Strictly Personal Use**

The facet of personal use which is of interest for the present inquiry has been
described as ‘strictly personal use’ above. In contrast to the internal use of
copyrighted material in public welfare institutions, administrations and industrial
undertakings, strictly personal use can generally be qualified as a ‘certain special
case’ in the sense of the three-step test, regardless of whether it occurs in the
analogue or digital environment. It can be defined as the personal use of a work
for the purposes of study, learning and enjoyment in privacy. There are personal use
privileges of this type which are unproblematic. The practice of time-shifting, for
instance, does not divest the authors of a major source of income. In the case of
cinematography, the showing in cinemas, later TV broadcasts and the sale of copies
constitutes the economic core of a work’s overall commercialisation. Time-shifting,
however, does not encroach upon any of these ways of exploitation. The film’s
showing in cinemas precedes the TV broadcast offering the chance to make a copy
for personal use. The royalty revenue for the broadcast itself is left unaffected as
well. That the value of further broadcasts is substantially reduced because of time-
shifting can hardly be assumed. Moreover, it would have to be demonstrated first
that rebroadcasts typically constitute a major source of income.

That the possibility of time-shifting substantially impairs the market for selling
copies of the work cannot readily be inferred as well. That consumers profiting
from time-shifting would otherwise be prompted to purchase a video cassette or
DVD is a view which cannot be endorsed for lack of empirical evidence. Admittedly, it can hardly be ruled out that some beneficiaries might be tempted to
purchase a copy and finally refrain from doing so because of the possibility of time-
shifting. That these potential purchasers amount to a number that would justify
speaking of a substantial impairment of the sale of copies, however, is questionable.
What remains is the possibility that the potential market for time-shifting itself
forms a potential major source of income. When compared with the showing and
broadcasting of a film and the sale of copies thereof, however, this conclusion can
hardly be drawn. If beneficiaries of exempted time-shifting were made to pay, it is

---

989 Cf. subsection 4.4.4.1.
990 The importance of this potential market was underlined in the framework of the decision Sony
See his dissenting opinion, IV B.
likely that they would reduce their activity. A major source of income need therefore not necessarily be expected. In the analogue environment, the existing market imperfections must furthermore be considered. On balance, time-shifting does therefore not fall within the scope of the prohibition of a conflict with a normal exploitation. The issue may be left to the ensuing third criterion of the three-step test.

Copyright limitations for strictly personal use, thus, need not necessarily have a deep impact on a work's overall commercialisation. Nonetheless, it is to be conceded that there remain numerous 'hard nuts to crack'. If a specific privilege, like the exemption of time-shifting, does not pose substantial difficulties, a broad limitation generally privileging strictly private use in the digital environment certainly does. As already pointed out above, it has been questioned in the analogue world whether unauthorised private copying as a mass phenomenon complies with the prohibition of a conflict with a normal exploitation. How will it be possible to cope with this situation in the digital environment (which offers even more possibilities for taking advantage of private use privileges)? To approach this problem, the aspect of intergenerational equity will subsequently be factored into the equation. As argued above, particularly considerations of this kind provide guidance for the right application of the three-step test. As to the present inquiry, this guidance is strongly needed. It helps to arrive at more balanced results instead of lumping all forms of strictly private use together and hastily declaring them impermissible. As there is a whole universe of different activities to determine, this cautious approach appears appropriate.

When viewed through the prism of intergenerational equity, the problem of private copying receives an additional connotation. First of all, it is to be noted that the exemption of strictly personal use may assist in the creation of a new literary or artistic work. By virtue of private use privileges, an author can, while creating a new work himself, access certain works to receive fresh ideas and impulses for his own creativity and to study the technique of his predecessors. In the digital environment, he may wish to browse the internet and download for personal use. If an unauthorised private use is of a purely consumptive nature at the time it occurs, it may nevertheless pave the way for creative processes taking place in the future. A pupil learning of Schönberg's music at school, for instance, may be induced to search the internet for recordings and scores of his pieces and explanations of the underlying compositional theory. If these activities were to be covered by the personal use privilege, this could have a positive effect on his own creativity. Being fascinated by Schönberg's work, he may decide to intensify his musical activities and potentially embark on the creation of musical works himself in the future.

---

991 See Ficso 1981, 60-61. Cf. subsection 4.5.3.2.
992 Cf. subsection 2.3.
993 Cf. subsection 2.3.
The problem here is not the personal use as such. It appears safe to assume that uses of this kind are rare enough not to rank among the circle of potential major sources of royalty revenue. The problem is, however, that these uses are not distinguishable from others that, in the end, turn out to contribute neither directly (author) nor indirectly (pupil) to the creation of intellectual works. It is not foreseeable whether a consumptive use of today will ultimately lead to an intellectual production of tomorrow. The aforementioned pupil, for instance, need of course not necessarily become a composer himself just because he came in contact with Schönberg’s music. At the best of times, this may happen. In the majority of cases, however, it cannot be precluded that the interest will simply flag.

The point is that considerations of intergenerational equity necessitate the opening of free pathways through the cultural landscape serving, for instance, the sketched forms of strictly personal use irrespective of whether or not these uses are distinguishable from others. If only one in a thousand uses, sooner or later, proves to be somehow related to the creation of a new work, it would be wrong to erode the user privilege. The 999 fruitless uses are an investment in the rare talent of the one creative user in a thousand. It may turn out to be a good investment. Just this sole use may ultimately contribute to the creation of intellectual works of particular importance — either in terms of commercial success or the promotion of knowledge and culture. In the digital environment, however, the fact must faced that the 999 other uses, undoubtedly, deeply impact on a work’s overall commercialisation. As digital technology allows for the establishment of corresponding markets, it would be self-delusion not to conclude that there is a promising potential market for the 999 uses not contributing to the realisation of intergenerational equity. This market may even become a major source of income for authors of a wide variety of different works. Hence, it is necessary to reconcile two opposite findings: on the one hand, intergenerational equity can only be realised by leaving open free pathways through the cultural landscape. On the other hand, personal use is a promising potential market in the digital world that should not be withheld from the authors.

Obviously, the central problem here, thwarting the reconciliation of these opposite principles, is the fact that personal uses serving intergenerational equity, ex ante, are not distinguishable from the vast majority of other, fruitless uses. If it were to become possible to sort out those transformative or consumptive uses that, sooner or later, prove to be somehow related to the creation of a new work, intergenerational equity could be ensured by exempting just these few uses not constituting a major source of income. As this solution is out of reach, however, a digital personal use system must be devised which at least aims at privileging specific uses supporting intergenerational equity. A personal use framework ought to be established online which to the greatest extent possible, is aligned with the use

994 See subsections 2.2.2 and 2.3.
995 See subsection 2.1.2.
of copyrighted material for ends serving intergenerational equity. The general
exemption of personal use in the digital environment is unsuitable for achieving this
goal. It privileges uses regardless of whether or not they are likely to contribute
sooner or later to the creation of new works.

Two conclusions can therefore be drawn. Firstly, it is inevitable to conclude that
the broad privileges serving strictly personal use which are known from the
analogue world are likely to conflict with a normal exploitation of copyrighted
material in the digital environment. If the digital revolution really takes place and
more and more works are directly marketed to end-users, this emerging ‘leading
mode of exploitation’ will be threatened by the general exemption of private
copying. That the privilege would then erode the economic core of a wide variety of
works can hardly be denied. It would encroach upon a typical major source of
income.

Secondly, however, it is to be underlined that there are certain facets of strictly
personal use that must not fall prey to the prohibition of a conflict with a normal
exploitation. The example of uses supporting intergenerational equity has been
given above. On the basis of other rationales, further aspects can easily be brought
to light. It may for instance be asserted that personal use privileges contribute
substantially to the appropriate distribution of information resources in the
information society. Moreover, it may be posited that they serve the enhancement
of democracy. Against this background, it becomes obvious that traditional
limitations serving private use should not be ‘adapted’ to the digital environment by
simply abolishing them altogether. Instead, those areas must be carved out from
existing broad privileges which are indispensable for realising the aforementioned
objectives. Remaining smaller privileges are to be enshrined in appropriate new
limitations to come. One hurdle that is to be surmounted in order to succeed in
restructuring private use in the digital environment has already been pointed out
above. As regards uses serving intergenerational equity, it is the problem that the
latter can hardly be distinguished from other, fruitless uses. Potentially, however,
recourse to library activities is conducive to taking this hurdle.

4.5.5.2 Libraries

Typical tasks to be accomplished by libraries are the collection, preservation,
archiving and dissemination of information. In the framework of the prohibition of
a conflict with a work’s normal exploitation, solely the latter aspect is of interest.
The preservation and archiving of information can neither be qualified as a potential
major source of royalty revenue nor does it encroach upon one. To illustrate the

---
996 Cf. for instance subsections 3.1.3.1 (FRG) and 3.1.3.2 (Netherlands).
998 Cf. subsection 2.2.2.
999 Cf. subsection 2.2.4.
potential harm flowing from the dissemination of information in the digital environment, a decision of the German Federal Court of Justice can be cited. The decision concerned the copying practice of the Technical Information Library Hannover (TIB). The TIB specialises in literature on technology/engineering, chemistry, informatics, mathematics and physics. On request by single persons and industrial undertakings, the library effectuates copies of articles published in periodicals which it dispatches via mail or fax. To facilitate the choice of articles, the TIB makes an electronic catalogue of its holdings accessible online.\footnote{Cf. BGH, Juristenzeitung 1999, 1000-1001. The Court clarified expressly that its decision does not concern the practice of making articles themselves available online. See BGH, ibid., 1000.}

Discussing this library practice, the Court had recourse to the three-step test. It took the view that the reproduction and dispatch of articles on demand, as undertaken by the TIB, constitutes a ‘certain special case’ owing to its connection with personal use, and the importance of the affected public interest in unhindered access to information.\footnote{See BGH, ibid., 1004. This view confirms the qualitative standard developed above. Cf. subsections 4.4.2.3 and 4.4.4.1.} As to the market impact of the TIB’s practice, the Court elaborated that the dispatch of copies, in view of the technical and economic developments of recent years, is functionally capable of complementing the regular way of communicating a work through its publishing.\footnote{See BGH, ibid., 1004.} It maintained that the practice of dispatching copies made by the library itself tends to come close to a publisher’s activity.\footnote{See BGH, ibid., 1004: ‘Durch die Übersendung selbst hergestellter Vervielfältigungsstücke übt der Kopienversandsdienst eine Funktion aus, die nicht nur die Tendenz in sich trägt, sich der Tätigkeit eines Verlegers anzunähern, sondern die auch mit der Werkvermittlung durch Abrufdatenbanken verglichen werden kann.’} Nonetheless, the Court refrained from assuming a conflict with a work’s normal exploitation. Instead, it pointed out that part of an author’s legitimate interests which the three-step test seeks to protect, at least, is his appropriate participation in each form of exploiting his work which, because of the technical and economic development, can be considered an economically important way of exploiting the work.\footnote{See BGH, ibid., 1004. Cf. subsection 4.5.1.2.} On this basis, it held that the TIB’s practice may be placed beyond the author’s control of the reproduced articles provided that equitable remuneration is paid in future.\footnote{See BGH, ibid., 1002.} In view of technical and economic developments in recent years, the Court deemed a claim to equitable remuneration necessary to fulfil the requirements of the three-step test.\footnote{See BGH, ibid., 1003. Cf. Baronikians 1999, 130-131.} It solved the problems raised by the practice of the TIB in the framework of the third criterion of the three-step test. An unreasonable prejudice to the author’s legitimate interests can be avoided by ensuring the payment of equitable remuneration. A conflict with a normal exploitation, however, cannot be averted by remunerating the authors.\footnote{Cf. subsections 4.3.2 and 4.3.3.}
For present purposes, it is noteworthy in particular that the practice of the TIB was not deemed permissible on account of a copyright limitation which specifically exempts library activities of this kind.\textsuperscript{1008} By contrast, the Court held that § 53(2) No. 4(a) of the German Copyright Act is applicable to the TIB’s practice of dispatching copies. This provision concerns personal use. The authorised user, however, need not necessarily produce the copy himself but may ask another person to make the reproduction.\textsuperscript{1009} The Court took the view that a library, albeit offering additional services like the TIB, can be such ‘another person’ in the sense of § 53(2).\textsuperscript{1010} This finding shows that a library is apparently capable of fulfilling an intermediary role. The Court permitted the TIB to provide a framework within which the personal user can take advantage of his user privilege.

The merit of this construction becomes evident when considering the difficulties posed by strictly personal use in the digital environment. In the previous subsection, it was concluded that the maintenance of a general personal use privilege in the digital environment is not advisable. Such a limitation would have a deep impact on the exploitation of a wide variety of works. Instead, those areas should be carved out from traditional broad private use privileges which are indispensable for the realisation of certain objectives of paramount importance, like the promotion of intergenerational equity. Instead of permitting private users to knock down all fences around the cultural landscape by generally exempting personal use in the digital environment, a refined system of digital pathways through the cultural landscape, thus, is to be established.

The TIB decision of the German Federal Court of Justice suggests that libraries could play a decisive intermediary role in this connection. The crucial advantage of a library system in comparison to a broad personal use privilege is that the circle of beneficiaries can be confined to a certain group of users which the library can identify and individualise. Libraries may thus become guards at the entrance of the cultural landscape giving access to the different free pathways.\textsuperscript{1011} The assignment of this task to libraries would entail an enhancement of their powers. Instead of merely supporting the dispatch of copyrighted material electronically by making a catalogue available online, libraries should be entitled to make works directly available online. Users of the new digital service should have the possibility of sifting through the online catalogue and downloading material that attracts their attention. As a countermove, libraries would have to drastically reduce the circle of users profiting from the digital service. From the TIB’s practice of dispatching articles, not only single persons, but also industrial undertakings may profit.\textsuperscript{1012} This ambit of operation is much too broad. Considerations of intergenerational equity,
for instance, would merely justify to offer the envisioned digital service to private individuals who are not unlikely to use works in a way that contributes – sooner or later – to the creation of new works.

To give an example of how the outlined private use infrastructure could operate, university libraries can be brought into focus. Pursuant to the developed concept, they would be entitled to make copyrighted material available online so that users can choose and download works they want to use personally. A university library is capable of controlling access to its holdings. It can confine the circle of beneficiaries to students and researchers. Moreover, the access to works can be restricted. A student or researcher need not be given access to works that are not related to his subject. While generally allowing browsing, downloads can moreover be confined to a small number. In the case of a university library, the group of beneficiaries is not unlikely to engage in the creation of a new work themselves. With regard to researchers, this effect is self-evident. As for students, it is to be noted that they are the generation of researchers to come. The knowledge accumulated by them today may assist in the creation of works tomorrow. A similar library system could be maintained by other educational institutions. It may furthermore be established for certain groups of users. Viewed from the perspective of intergenerational equity, it can be posited that especially authors of intellectual works should feature among the circle of beneficiaries.

These few observations of a general nature show that a refined library system has certain merits indeed. If libraries were to play an intermediary role, they could potentially steer and bridle strictly personal use in the digital environment so as to avoid a conflict with a normal exploitation. It may therefore be advisable to assign the task of providing sufficient breathing space for private study, learning and enjoyment of intellectual works to a refined digital library system. In particular, a library's potential for reacting to the specific needs of certain groups of users is important in this context. It qualifies libraries for the task of specifically privileging the beneficiaries of indispensable facets of personal use, like the promotion of intergenerational equity. Preference should therefore be given to the library option rather than thoughtlessly transferring undifferentiated personal use privileges known from the analogue world to the digital environment.

---

1013 Cf. as to the appropriate confinement of limitations in the digital environment Xalabarder 2003, 165-168, who discusses digital distance education.

1014 See for a more detailed discussion of this notion subsection 2.3.

1015 The complex UK library system could serve as a starting point for the development of an appropriate digital library system which administers personal use. Cf. subsection 3.1.3.4. See also the conclusions drawn by Krikk 2000, 163-170. In the US, Netanel has taken into consideration a collective licensing system administering private use licences. He envisions a ‘system of state regulation to ensure that user licence fees remain within reasonable limits’. See Netanel 1996, 376.
4.6 Unreasonable Prejudice to Legitimate Interests

If a limitation does not conflict with a normal exploitation, it may furthermore 'not unreasonably prejudice the legitimate interests of the author'. This last criterion was formulated differently in international copyright law. Whereas article 9(2) BC and article 10 WCT enunciate that limitations are permissible in certain special cases that do not 'unreasonably prejudice the legitimate interests of the author', article 13 TRIPs refers to 'the legitimate interests of the right holder'. The lack of consistency shows that the different contexts in which the three-step test has been placed in international copyright law impacted on the formulation of the third criterion.\(^{1016}\)

The regulatory framework of the third criterion is established by three elements: firstly, it refers to the interests of authors and right holders, but not to their rights. Authors and users of intellectual works thus meet on an equal footing. Secondly, the circle of relevant interests is reduced to 'legitimate' ones. Not each and every conceivable concern must be considered. Thirdly, prejudices to the circle of legitimate interests are permissible insofar as they are not 'unreasonable'. Every copyright limitation causes some detriment to the authors. This result is accepted as long as the arising harm does not reach an unreasonable level.\(^{1017}\)

At the 1967 Stockholm Conference, it was feared that the three-step test was 'too typically British to be easily understood by judges in continental countries'.\(^{1018}\) Its final wording can be traced back to the proposal tabled by the UK.\(^{1019}\) In particular, the terms used in the framework of the third criterion may have triggered the quoted comment. All criteria of the three-step test comprise abstract, open formulations. What is a special case? How is a normal exploitation to be defined? However, it can hardly be overlooked that expressions of this kind are accumulated in the context of the third criterion. Even the term 'interests' which is the reference point of the third criterion has the air of vagueness. Furthermore, the author's interests must be 'legitimate'. The prejudice thereto may not be 'unreasonable'.

However, if all these terms are understood as a reference to the principle of proportionality, a useful functional concept for the final balancing of interests comes to the fore: as already mentioned, every limitation causes some detriment to the authors. For this reason, the third criterion insists on a qualified, unreasonable prejudice. It requires the distinction between permissible, reasonable losses and forbidden, unreasonable damages. Insofar as the objective underlying a limitation justifies the entailed prejudices to the author's legitimate interests, it can be approved. Excessive, disproportionate harm, however, cannot be countenanced and constitutes an unreasonable prejudice. Authors need not endure exposure to an interference with their legitimate interests beyond the limits of what is appropriate


\(^ {1017}\) Cf. Ricketson 1987, 483-484; Desbois/Francon/Kerever 1976, 205.

\(^ {1018}\) See the statement of the Dutch delegate, Minutes of Main Committee I, Records 1967, 858.

\(^ {1019}\) Cf. subsections 3.1.2 and 3.1.3.4.
and necessary for achieving the aim underlying a limitation. It can be posited that
the detriment to the authors must be reasonably related to the benefit of the users. In
other words, it must be proportionate. The open terms ‘interest’, ‘legitimate’, and
‘unreasonable’ all point in this direction.

The assumption that the prohibition of an unreasonable prejudice to legitimate
interests requires a proportionality test can be supported by developments in British
law itself. As EC law gradually infiltrates British administrative law, a line has been
drawn between the traditional concept of unreasonableness and the continental
principle of proportionality. The EC law principle of proportionality has been
described by Beatson as requiring ‘there be a reasonable relationship between
the end achieved and the means used to achieve it’. It has been suggested that
proportionality be conceived of as manifestation and clear indicator of so-called
Wednesbury reasonableness. In this vein, Slynn stated that

‘the notion of proportionality is not so far away from unreasonableness when
it comes to deciding whether a decision has been exercised properly, or
whether excessive means have been adopted to attain a permissible objective.
To strike down a decision which is “disproportionate” would seem to be one
aspect of “unreasonableness”.

Birnhack elaborates that, in recent years, the ‘traditional Wednesbury
reasonableness test which usually applied to the administrative decisions has been
replaced with the test of proportionality’. As a matter of course, the use of the
term ‘unreasonable’ in the three-step test need not be equated with the British
concept of unreasonableness. At the international level, the expression acquires an
independent meaning. The aforementioned considerations, however, elicit that the
notion of unreasonableness, as construed in UK administrative law, can indeed be
understood as referring to a proportionality test.

Furthermore, the postulation that the elastic expressions establishing the third
criterion refer to a proportionality test corresponds to the system of the three
criteria. The third criterion is the last regulatory element of the three-step test. It
serves the final balancing of interests. With its help, copyright’s delicate balance
must ultimately be recalibrated. Limitations which, finally, are to be scrutinised in

---

1020 The requirement to engage in a balancing exercise between the injury to individual rights and the
 corresponding gain to the community, for instance, forms part of the principle of proportionality in
 Germany (Angemessenheit) and France (le bilan coût-avantages). Cf. the analyses by Jowell/Lester

1021 See Beatson 1988, 180.

1022 The so-called Wednesbury-Test has been developed in Associated Provincial Picture House Ltd. v.
 Wednesbury Corporation (CA) [1948] 1 K.B. 223. The discussion about the inclusion of the
 principle of proportionality in British law focuses on this test. Cf. Marauhn 1994, 74. The proposal
 was made by Woolf L.J. in connection with R. v. Brent L.B.C., ex parte Assegai, The Times, June


1024 See Birnhack 2003, 28.
the light of the prohibition of an unreasonable prejudice to the author's legitimate interests, have already fulfilled the two preceding criteria. They have passed through the gateway to copyright's balance. Hence, it appears safe to assume that they are either of a de minimis nature or 'hard nuts to crack'. In the latter case, a refined solution must be sought.

In this situation, the political prerogative of the legislator plays a decisive role. It is up to the national legislator to shape a country's copyright balance. The freedom national legislation enjoys pursuant to the three-step test can be used to react adequately to a country's individual situation. In this vein, Heide stated that 'the adopted formulation was intended to be flexible enough [...] to provide a sufficient margin of freedom to craft inevitable exceptions in order to address important social or cultural needs'. The three-step test is not intended to determine in each individual case whether preference should finally be given to the concerns of authors or users. In view of the complex framework in which copyright law is embedded, it would be counterproductive to dictate a specific balance of grants and reservations anyhow. Accordingly, the three-step test merely provides guidelines facilitating the task of striking a proper balance. Against this backdrop, it is consistent to assume that the last signpost should be the widely-accepted principle of proportionality. If a limitation fulfils the two requirements established by criteria 1 and 2, national legislation may decide either way. It may favour the authors or the users. The decision, however, must be proportionate.

It is thus right to conceive of the different abstract terms establishing the third criterion as elements of one final proportionality test. In the following subsections, attention will be devoted to each of its elements. In the following subsection 4.6.1, the preliminary question will be raised why the third criterion refers to interests instead of rights. Subsequently, relevant interests will be examined in more detail. Subsection 4.6.2 deals with economic interests. Subsection 4.6.3 concerns non-economic interests. The proportionality test to be carried out will be explained in subsection 4.6.4. Its two elements - the reduction of relevant interests of the authors to legitimate ones and the prohibition of unreasonable prejudices - will be discussed in detail. In the light of the proportionality test, a final comment will be made on the relationship between the three-step test and special provisions of the Berne Convention permitting limitations in subsection 4.6.5. The system of the three criteria of the three-step test will be revisited in subsection 4.6.6.

---

1025 Cf. the detailed description of the system of the three criteria given in section 4.3.
1026 In this vein, the European Court of Human Rights underscores the margin of appreciation left to the contracting states of the European Convention on Human Rights by article 10(2) thereof. However, it also points out that 'the domestic margin of appreciation [...] goes hand in hand with a European supervision'. See the Court's Sunday Times decision, ECHR Judgement of April 26, 1979, Series A No. 30, § 59. Cf. Hugenholz 2002, 246-247.
1028 Cf. chapter 2 and particularly subsection 2.3.
4.6.1 The Reference to Interests Instead of Rights

The term ‘interest’ encompasses a wide variety of ordinary meanings. In connection with intellectual property, it may be understood as ‘the relation of being objectively concerned in something, by having a right or title to, a claim upon, or a share in’, and thus as a reference to a ‘right or title to property, or to some of the uses or benefits pertaining to property’. However, the term also implies a much broader reference to ‘the relation of being concerned or affected in respect of advantage or detriment’. The recourse to ‘interests’ in the third criterion, thus, begs numerous questions. As one possibility of construing the word is to understand it as a reference to a ‘right or title to property, or to some of the uses or benefits pertaining to property’, it must be clarified first why the drafters of the three-step test preferred this term rather than directly forbidding an unreasonable prejudice to the rights of the author.

To answer this question, it must be borne in mind that the Berne Convention, pursuant to its preamble, is ‘animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works’. Against this background, the compromise character of article 9 BC, in which the first three-step test was enshrined, can hardly be overlooked. Indeed, the broad general right of reproduction is conferred on the authors in its first paragraph. The highly flexible three-step test of the second paragraph, however, expressly offers the possibility of drawing resources away from this exclusive right. The particularity of this solution can especially be gathered from a comparison with the treatment of public performing rights. In this respect, the members of the Union contended themselves with the ‘minor reservations doctrine’ which was expressly mentioned in the general report of the Brussels Conference. Although this limitation is merely an implied one that does not form part of the text of the Convention, Marcel Plaisant, the rapporteur général of the Brussels Conference, hastened to stress when it came to mentioning the ‘minor reservations doctrine’ that ‘these references are just lightly pencilled in [the general report], in order to avoid damaging the principle of the right’.

---

1030 See the Oxford English Dictionary.
1031 See the Oxford English Dictionary.
1032 See the Oxford English Dictionary.
1033 The alignment of the Convention with the authors’ interests can primarily be explained by the historical situation at the time of its adoption. Cf. Ricketson, 1999, 61: ‘The Berne Convention was the culmination of a long series of efforts to bring about a multilateral arrangement for the protection of authors’ rights that would replace the previous piecemeal and incomplete network of bilateral agreements.’
1034 The treatment of public performing rights, in particular, is suitable for comparison because the ‘minor reservations doctrine’ and the three-step test evolved from comparable situations arising at the 1948 and 1967 revision conferences. See subsections 3.1.1 and 3.1.2.
1035 See the general report of the Brussels Act, Documents 1948, 100. The translation has been taken from that prepared by WIPO. See WIPO 1986, 181.
Due to the strong public interest, the same reserve could not be exercised in the field of the right of reproduction. The Study Group preparing the programme for the 1967 Stockholm Conference noted that the incorporation of the reproduction right into the Convention would have to be accompanied by a satisfactory formula sheltering 'the inevitable exceptions to this right'. It maintained that 'it would be vain to suppose that countries would be ready at this stage to abolish [the exceptions in favour of various public or cultural interests] to any appreciable extent'. To understand these comments, it must be remembered that limitations on the right of reproduction did not form a homogeneous group in respect of a shared de minimis nature. Express mention of the possibility to exempt certain uses in the general report of the 1967 Stockholm Conference could not be deemed an adequate reaction to the claim of the members of the Berne Union for the maintenance of limitations. A cautious approach comparable to the fine line walked at the 1948 Brussels Conference when the 'minor reservations doctrine' was mentioned in the general report was out of reach.

On the basis of this finding, several conclusions can be drawn. In the words of the Berne Convention's preamble, it can be stated that the most effective and uniform manner of protecting the authors' reproduction right was merely a far-reaching compromise solution. The wide array of traditional limitations on the right of reproduction had to be sheltered in order to pave the way for its recognition jure conventionis. The picture of the author underlying article 9 BC is that of an author on the defensive. By contrast to the situation in the field of other exclusive rights of the Convention, like public performing rights, he could not be vested with an almost absolute exclusive right of reproduction, the permissible limitations to which are just 'lightly pencilled in the general report'. Instead, great latitude was allowed national legislators wishing to set limits to that right, even though the already-known, traditional limitations did not share a de minimis nature. Moreover, the pre-digital world of the 1967 Stockholm Conference placed practical difficulties of ensuring authors adequate reward for their expressive work. The fact that market failure was often considered a basis for limitations in the analogue world mirrors the degree of market imperfection. The moment reprography as well as sound and visual reproduction became widespread, the potential danger from private use privileges as a mass phenomenon beyond the authors' control revealed the insecurity of their position within the realm of the right of reproduction. Not surprisingly, it was feared that private copying could erode the reproduction right.

---

1037 See Records 1967, 112 (Doc. S/1).
1038 Cf. subsections 3.1.1, 3.1.2 and 3.1.3.
1039 Cf. the general report of the 1948 Brussels Act, Documents 1948, 100.
1041 Cf. subsection 2.2.2.
The Interpretation of the Three Criteria

The background to article 9 BC makes the particular accentuation of the authors’ interests understandable. As an absolute exclusive right of reproduction was out of reach, the drafters of the three-step test sought to at least safeguard the authors’ interest in the right of reproduction. From the beginning, they envisioned an author as being incapable of reigning supreme over the use and enjoyment of his work. Limits had to be set to the author’s faculties on account of the public interest. Furthermore, the problem of market imperfections appeared insoluble. A typical situation arising in the field of the reproduction right was therefore that the author cannot control the utilisation of a work. What the drafters of the three-step test, nevertheless, sought to safeguard in this situation, are the mere interests which the author might have besides the right to prohibit and control the use of a work. It can be assumed that, for this reason, it was made a condition that a limitation does not unreasonably prejudice the legitimate interests of the author.

If an author, due to strong competing public interests, is deprived of the control of a work’s use, allowance must consequently at least be made for the mere interest which the author might have in the exploitation of that work. In this vein, Collova elaborated that

‘the interest only represents an element, namely, the teleological element of the content of the subjective right. The interest may benefit from protection but always less specific than the protection accorded to the subjective right. [...] If the international legislator effectively envisaged that, in special cases to be determined, the author’s subjective right could be weakened, he nevertheless wanted to maintain the protection of the author’s interest — the economic basis of his right — in circumstances where that right finds itself confronted with other competing interests of the collective.’

An example of the application of this principle can be found in the jurisprudence of the German Federal Constitutional Court, the Bundesverfassungsgericht. In the decision ‘Kirchen- und Schulgebrauch’, the Court took the position that an author may be hindered from exerting his right to prohibit the utilisation of a work in order to enable the inclusion of this work, for instance, in a schoolbook. However, the Court also stated that, in this case, it is not justified to deprive the author of, besides the right to control the utilisation of a work, the economic interest which he may have in the exploitation of the right of reproduction. The Court asserted:

‘The public interest in having access to cultural works is given satisfaction by excluding the right to prohibit a work’s use to the discussed extent; this

1043 See Collova 1979, 129-131: ‘L’intérêt ne représente qu’un élément, à savoir, l’élément téléologique du contenu du droit subjectif. L’intérêt peut bénéficier d’une protection, mais toujours moins spécifique que celle qui est accordée au droit subjectif [...] Si le législateur international a effectivement envisagé que, dans des cas spéciaux à déterminer, le droit subjectif de l’auteur puisse être affaibli, il a voulu pourtant maintenir la protection de son intérêt, c’est-à-dire du fond économique de son droit, lorsque des circonstances où ce droit se trouve confronté à d’autres intérêts concurrents de la collectivité se vérifient.’
exclusion concretises the social commitment of copyright as regards the area that is relevant here. A claim that the author has to place his intellectual work at the public's disposal free of charge, however cannot be inferred from article 14(2) GG.1044

Hence, the reference to interests instead of rights confirms that the third criterion is located at the core of copyright's balance.1045 When the divergent interests of authors and users finally meet, it makes no sense to insist on the right to control the use of a work by allowing or prohibiting, for instance, its reproduction. Instead, room to manoeuvre for the reconciliation of the divergent interests must be created. Against this backdrop, it is consistent that the third criterion does not emphasise an author's subjective right but merely his interest. Criteria 2 and 3 have different reference points:1046 the second criterion, forbidding a conflict with a normal exploitation of the work, concerns the sphere of the authors' exclusive rights. If a limitation encroaches upon the economic core of copyright, an author may prohibit the corresponding way of using a work, thereby subjecting it to his control. The third criterion, which is closer to the heart of copyright's balance deals with the authors' interests. If the author must be prevented from prohibiting a certain use because of its fundamental importance for the satisfaction of social, cultural or economic needs, his remaining interest must be brought to bear.

4.6.2 ECONOMIC INTERESTS

From the given description of the situation surrounding the Stockholm Conference, in which the concept of legitimate interests appears as a bulwark against the erosion of the right of reproduction by traditional limitations, it can be concluded that, first and foremost, the authors' economic interests must be brought into focus in the context of the third criterion. The interest which remains if an exclusive right in its entirety, encompassing the faculty to prohibit a certain use, cannot be safeguarded on account of strong competing interests, is primarily of an economic nature. The pecuniary interest which the author can assert under the given circumstances must be secured. By the same token, Collova spoke of the protection of an author's interest in the sense of the economic foundation of the corresponding right, and the German Federal Constitutional Court stressed that the author is not obliged to acquiesce in the utilisation of a work in schoolbooks free of charge.1047

1044 See BVerfGE 31, 229 (244-245): 'Dem Interesse der Allgemeinheit, Zugang zu den Kulturgütern zu haben, ist mit dem Ausschluß des Verbotsrechts in dem erörterten Umfang Genüge getan; dieser Ausschluß konkretisiert die soziale Bindung des Urheberrechts für den hier maßgeblichen Bereich. Aus Art. 14 Abs. 2 GG kann dagegen nicht die Forderung hergeleitet werden, dass der Urheber in diesen Fällen seine geistige Leistung der Allgemeinheit unentgeltlich zur Verfügung stellen müßte.'

1045 Cf. Badura 1984, 556-558 and subsection 2.2.1.

1046 Cf. subsections 4.2.2 and 4.2.3.

1047 Cf. subsections 4.3.2 and 4.3.3.

1047 Cf. Collova 1979, 129 and BVerfGE 31, 229 (244-245).
When tracing the conceptual contours of the authors' economic interests, the specific relationship between the third and the second criterion must be considered. The prohibition of an unreasonable prejudice to the legitimate interests of the author complements the prohibition of a conflict with a normal exploitation. It has been stated above that a conflict with a normal exploitation arises only if a limitation deprives authors of a way of exploiting a work which, typically, carries weight within the overall commercialisation of works of a relevant category.\textsuperscript{1048} After reducing the ambit of operation of the second criterion to the economic core of copyright in this way, sufficient weight must now be given to all ramifications of the author's exploitation right in the context of the prohibition of an unreasonable prejudice. Those exploitation forms which were not previously considered form the substance of the authors' economic interests in the context of the third criterion. Moreover, market segments for which allowance has already been made in connection with the second criterion reappear in the context of the third criterion if the limitation under examination was not found to be in conflict with a normal exploitation so that it could pass the second step.

In accordance with the normative concept which has been developed for determining a conflict with a work's normal exploitation,\textsuperscript{1049} the interest in actual and potential future markets, regardless of their economic or practical importance, must be considered when seeking to prevent an unreasonable prejudice to the legitimate interests of the author.\textsuperscript{1050} On its merit, the term 'interest' accordingly encompasses each and every possibility of deriving economic value from a work which is granted to an author by the recognition of exclusive rights.\textsuperscript{1051} If the author is inhibited from exerting control over the utilisation of a work on the grounds that allowance is made for competing user interests instead, he can assert the pecuniary interest in the exploitation of a work which he has under the given circumstances.

It is noteworthy that in the field of economic interests, the reference to the author's interests need not necessarily be construed so as to comprise solely the group of the creators of literary or artistic works. On the contrary, the interests of licensees, such as publishers, record companies or film distributors, enter the picture as well. This is clearly reflected in article 13 TRIPs where preference was given to the expression 'legitimate interests of the right holder'. This neutral formulation indicates that the circle of beneficiaries is not confined to the authors but also encompasses other right holders, like the aforementioned licensees. In the context of the Berne Convention and the WIPO Copyright Treaty, where the expression 'legitimate interests of the author' is used, article 2(6) BC solely forges a

\textsuperscript{1048} Cf. subsections 4.5.3.3 and 4.5.3.4.
\textsuperscript{1049} Cf. subsection 4.5.3.
\textsuperscript{1050} In respect of the inclusion of potential markets, see subsection 4.4.2.1 above.
\textsuperscript{1051} In this connection, it is thus appropriate to enunciate that 'a copyright owner is entitled to exploit each of the rights for which a treaty [...] provides'. This statement was made by the WTO Panel – Copyright 2000, § 6.175. The view of the Panel, however, could not be endorsed in the context of the second criterion. Cf. subsection 4.5.3.4.
link to ‘successors in title’. The interests of licensees, thus, are not to be factored into the equation in this context. As article 13 TRIPs, however, is a horizontal provision applicable to all kinds of limitations on the rights granted under the Berne Convention and the TRIPs Agreement alike – including limitations based on article 9(2) BC –, the only area not covered by the reference to right holders in article 13 TRIPs is formed by the exclusive rights newly granted in the WIPO Copyright Treaty, like the right of making a work available online reflected in article 8 WCT.

Particularly in the framework of the three-step test, it makes sense to consider the interests of a broader group of right holders including publishers and so forth. The second criterion prohibits a conflict with a work’s normal exploitation. In the majority of cases, this exploitation will not be organised and carried out by the authors themselves but by publishers, record companies, film distributors, etc. This group of licensees, moreover, will be affected by copyright limitations just like the author. When photocopying became a mass phenomenon soon after the 1967 Stockholm Conference, the enhanced attractiveness of personal use privileges undoubtedly concerned not only authors but also the calculations of publishers who had obtained a licence at a time when this development was not foreseeable. Similarly, digital ‘MP3’ technology has caused a massive drop in CD sales impacting on record companies.

In the context of the third criterion, the finding that not only the legitimate interests of the author but also those of licensees must be factored into the equation has important practical consequences. The three-step test has always been understood to allow compulsory licensing in the framework of the third criterion. National legislation can avoid an unreasonable prejudice to legitimate interests by providing for the payment of equitable remuneration. The harm flowing from a limitation can be reduced to a reasonable level by ensuring adequate monetary reward. In this connection, the outlines of the group of beneficiaries becomes crucial. If the three-step test were to operate solely for the benefit of the authors, the detriment to other right holders, such as publishers and record companies, would not have to be considered. Accordingly, it would be sufficient for national legislation to secure that the prejudice to the legitimate interests of the authors themselves does not reach an unreasonable level. Licensees, however, would end up with nothing, even though the harm flowing from a limitation affects them just like the authors.

---

1052 Article 2(6) BC is included in the WCT by the reference to provisions of the Berne Convention made in article 1(4) WCT. Pursuant to article 3 WCT, contracting parties, moreover, ‘shall apply mutatis mutandis the provisions of Articles 2 to 6 of the Berne Convention in respect of the protection provided for in this Treaty’.
1053 See section 3.2.
1055 Cf. subsections 3.1.2, 3.1.3.1 and 3.1.3.5.
1056 Cf. subsections 3.3.1, 4.3.2 and 4.3.3.
THE INTERPRETATION OF THE THREE CRITERIA

If the three-step test, however, is understood to operate for the benefit of a broader circle of right holders, as pointed out in article 13 TRIPs, national legislation must ensure that the prejudice to each different group of right holders, including the authors themselves, is reduced to a reasonable level. It would thus, for instance, be insufficient to vest only authors with some extra income accruing from a national levy system. This would mean that only the unreasonable prejudice to the authors is avoided. The unreasonable prejudice to other right holders, such as publishers would remain. On balance, the national system would thus fail the three-step test because the unreasonable prejudice to economic interests is not redressed completely.

For the reasons given above, it must be concluded that this latter scenario is appropriate. It is not only the economic interests of the author that enter the picture, but also those of other right holders, such as publishers. The third criterion of the three-step test thus calls upon the national legislator to ensure that, insofar as these interests are legitimate under the given circumstances, neither the economic interests of the author nor the economic interests of other right holders are unreasonably prejudiced. This task becomes crucial when equitable remuneration is paid to prevent the prejudice caused by a limitation from reaching an unreasonable level. In this case, national legislation must distribute the monetary reward appropriately among the different groups of affected right holders. Otherwise, the unreasonable prejudice is not remedied completely and the established national remuneration system fails the three-step test.

4.6.3 NON-ECONOMIC INTERESTS

The question of moral rights protection divorces copyright's legal traditions. The notion of authors' moral rights is strong in the civil law tradition resting on natural law theory. The notion that a work of art represents a materialisation of the unique personality of the creator entails the espousal of personal intellectual interests. France is often regarded as the 'mother country' of droit moral. Provisions on moral rights are widespread throughout continental Europe. Common law copyright systems, by contrast, are traditionally impervious to the claim for moral rights protection. The economic orientation of common law systems opposes the elaboration of a work of art as the materialisation of the author's personality. Nevertheless, a minimalist approach to the protection of non-economic interests was countenanced internationally. Article 6bis BC grants the right 'to claim authorship of the work and to object to any distortion, mutilation or other

---

modification of, or other derogatory action in relation to, the said work, which would be prejudicial to [the author’s] honour or reputation. The right of attribution and the integrity right, therefore, are recognised at the international level. However, the background to the introduction of moral rights in the Berne Convention at the 1928 Rome Conference and renewed discussions of the issue at later revision conferences, as well as the way how common law countries deal with these non-economic interests, reveal that they are far from enthusiastically approving the inclusion of moral rights protection into copyright law.

Common law countries, in particular, sought to ensure that the protection granted by torts, such as passing off, injurious falsehood and defamation – although not part of copyright law – could be asserted to demonstrate the fulfilment of the Convention’s obligations. In 1988, the Australian Copyright Law Review Committee, in this vein, concluded that Australia’s existing laws were sufficient to comply with article 6bis. A similar position was taken by the US in connection with their adherence to the Berne Convention. The Berne Convention Implementation Act 1988 bypassed the moral rights problem on the grounds that US law at that time met the requirements of article 6bis. This conviction did not hinder the US from considering it necessary to explicitly bestow moral rights protection upon the authors of a restrictively defined group of works in the Visual Artists Right Act 1990. Legislation on the matter, and even a detailed and complex moral rights code, can be found in the UK. In the Copyright, Designs and Patents Act 1988, authors are accorded moral rights in principle. This response to article 6bis, however, is interspersed with compromise solutions, like the requirement of formalities, to such an extent that the provisions appear cynical, or at least half-hearted. Ginsburg elaborates that this ‘may be because their drafters seem to have lacked real conviction in the desirability of moral rights’.
Owing to the missing agreement on strong moral rights’ protection throughout copyright’s legal traditions, the authors’ position in the field of non-economic interests is weakened at the international level. Nonetheless, Ricketson argues in favour of moral rights protection in connection with the expression ‘legitimate interests’: ‘In light of the obligation to protect moral rights under Article 6bis, it follows that the expression “legitimate interests” must extend to both the pecuniary and non-pecuniary interests of authors.’ In the following, it will accordingly be examined whether non-economic interests are encompassed by the third criterion. In subsection 4.6.3.1, attention will be devoted to the three-step tests in the Berne Convention and the WIPO Copyright Treaty. Subsection 4.6.3.2 deals with TRIPs.

4.6.3.1 **ARTICLE 9(2) BC AND ARTICLE 10 WCT**

From the formal recognition of the right of attribution and the integrity right in article 6bis BC, it need not necessarily be inferred that allowance must be made for moral rights protection when interpreting the expression ‘legitimate interests’. Instead, it is arguable that sufficient weight is lent to the authors’ non-economic interests in article 6bis itself. Exceptions to the right of attribution or the integrity right reflected in article 6bis are not allowed under the Berne Convention anyway. Therefore, why should they additionally be taken into account in the context of the three-step test? The latter is an instrument for setting limits to limitations on exploitation rights. Correspondingly, it could be asserted that solely the economic interests of the authors should enter the picture.

As to the latter argument, it is to be pointed out, however, that the strict boundary line often drawn between economic and non-economic rights of the author is an artificial construct anyway. In practice, the distinction is blurred. If the integrity right is invoked to prevent colours from being added to a film originally in black and white, this claim for the protection of moral interests, undoubtedly, has economic ramifications. The same is true when the integrity right is brought to the fore to hinder broadcasting companies from interrupting the showing of a film on TV by commercials. Monistic copyright theory, as espoused, for instance, in Germany, explicitly recognises that the economic and moral concerns of authors are limbs of one uniform body of interests protected by copyright.

To explain the monistic concept of copyright, Ulmer used the picture of a tree. Copyright constitutes the tree’s unitary trunk. The economic interests of the author on the one hand and his moral interests on the other are the two roots. The different faculties of authors are the tree’s branches and twigs extracting their force

---

1072 See Ricketson 1999, 70.
1073 See for a description of this almost ‘classical’ case in which moral rights are brought to the fore for instance de Souza/Waelde 2002, 278.
sometimes solely from one root, sometimes from both.\textsuperscript{1076} The situation may change from case to case. It is not deemed inconsistent if moral rights are invoked to assert monetary interests. The exercise of pecuniary rights, on the contrary, may serve personal and intellectual interests.\textsuperscript{1077} As Dietz concludes,

‘what are commonly called moral rights, on the one hand, and pecuniary rights, on the other hand, are not so unequivocally moral or economic as it would generally appear. Rather, these designations are based on terminological convenience; taken together, all of these faculties cover the whole spectrum of interests protected by copyright as a whole.’\textsuperscript{1078}

To cover the whole spectrum of potential legitimate interests in the framework of the three-step test, it appears accordingly appropriate not to exclude moral interests of the author. This is even the more advisable as the absolute right rhetoric often to be heard in the context of droit moral,\textsuperscript{1079} when scrutinised more thoroughly, turns out not to portray reality correctly. As Quaedvlieg has shown, the allegedly absolute moral rights of the author are frequently subjected to a weighing process, in the course of which competing interests may be favoured.\textsuperscript{1080} In particular, employment contracts or the need for functionality which, for instance, is strong in the case of buildings, are capable of forcing the author’s moral rights onto the sidelines.\textsuperscript{1081} Even in France, the ‘mother country’ of droit moral, authors – and particularly employed authors – must endure exposure to certain restrictions imposed on their moral rights.\textsuperscript{1082} Against this backdrop, Quaedvlieg’s view can be endorsed that moral rights are not absolute. In practice, the conceptual contours of the right of integrity, for instance, are not unlikely to be traced along the lines of principles like fairness and equity.\textsuperscript{1083}

Therefore, it makes sense to include the moral interests of the author in the proportionality test inhering in the third criterion of the three-step test. This offers the chance of factoring an author’s personal and intellectual interests into the equation – with all their economic ramifications. The balancing exercise may ultimately lead to more effective protection\textsuperscript{1084} than reiterating the mantra of the absoluteness of moral rights while tacitly compromising them. Besides the traditional example of parody, which deeply impacts on an author’s interest in the integrity of his work,\textsuperscript{1085} the threat posed to moral rights protection in the emerging

\textsuperscript{1076} See Ulmer 1980, 116.
\textsuperscript{1077} Cf. the examples given by Dietz 1995, 211-212.
\textsuperscript{1078} See Dietz 1995, 211.
\textsuperscript{1079} Cf. the examples given by Quaedvlieg 1992, 19.
\textsuperscript{1081} Cf. Quaedvlieg 1992, 26-31.
\textsuperscript{1083} See Quaedvlieg 1992, 42.
\textsuperscript{1084} Cf. the examples given by Quaedvlieg 1992, 45-53.
\textsuperscript{1085} Cf. Goldstein 2001, 292.
information society can be brought to the fore to fortify this line of argument. The
digital environment shows that both facets of article 6bis BC, the right of integrity
and the right of attribution, constitute a serious and substantial concern of the
authors which is of particular importance, for instance, with regard to
reproductions. The integrity right serves as a weapon against manipulations of the
work. Digital reproduction techniques encourage the encroachment upon the
interest in accuracy of reproduction. They afford users, profiting from limitations,
almost unrestricted possibilities of distorting, mutilating and modifying an author’s
expression. The work or parts thereof can easily be restructured, remodelled or
combined with other material. The easiness of manipulations might furthermore
lead to carelessness in respect of the author’s right of attribution. Therefore, the
need for proper acknowledgement of authorship can scarcely be underestimated in
the digital environment as well.

In the Berne Convention and the WIPO Copyright Treaty, an identical
framework is set out for the protection of non-economic interests in connection with
the three-step test. The WCT is closely linked with the Berne Convention. Article
1(1) of the WCT provides that it is a special agreement within the meaning of
article 20 BC. Therefore, contracting parties may not fall short of the level of
protection reached in the Berne Convention. Furthermore, article 1(4) WCT
ensures compliance with articles 1 to 21 of the Convention and its appendix. Article
6bis BC is encompassed by this reference. Moreover, the proximity to the Berne
Convention was emphasised in the basic proposal for the later article 10 WCT. It
was pointed out that the interpretation of the three-step test in the context of the
WCT should follow ‘the established interpretation of Article 9(2) of the Berne
Convention’. Therefore, the expression ‘legitimate interests’ can be given the
same meaning as in the Berne Convention. Besides the authors’ economic interest,
the third criterion of the three-step tests of article 9(2) BC and article 10 WCT,
therefore, refer to the non-economic interest in the acknowledgement of authorship
and a work’s integrity, as set out in article 6bis BC.

4.6.3.2 ARTICLE 13 TRIPs

The TRIPs Agreement sheds a somewhat different light on copyright than the Berne
Convention. The protection of literary and artistic works does not form an end in
itself. By contrast, the preamble of the Agreement expresses the members’ desire to

1086 Cf. Schricker 1997, 80. De Souza/Waelde 2002, 281, are of the opinion that an author might already
consider a work’s translation into digital form a violation of his moral right of integrity.
1091 See WIPO Doc. CRNR/DC/4, § 12.05.
'reduce distortions and impediments to international trade'. The trade orientation has left its mark in the third criterion of the three-step test of article 13 TRIPs. Instead of calling on the legislator, in line with article 9(2) BC, to make allowance for 'the legitimate interests of the author', article 13 devotes attention to 'the legitimate interests of the right holder'. The difference in wording is the more striking, as article 11 TRIPs refers to the 'authors and their successors in title'. This formulation corresponds to the use of the word 'author' in the Berne Convention. Article 2(6) BC enunciates that the protection granted in the Convention 'shall operate for the benefit of the author and his successors in title'. The documents of the GATT Uruguay Round leave the interpreter in the dark as regards the change of wording in article 13 TRIPs. Nevertheless, its meaning can be inferred from the general context in which the three-step test has been placed in TRIPs.

First of all, the term 'right holder' reflects the general orientation of the TRIPs Agreement. The protection of copyright is subjected to the primary objective to foster international trade. Accordingly, the Agreement is not concerned with the person of the author, as creator of literary and artistic works. First and foremost, it simply focuses on those instances allowing a work to enter the market and take part in international trade. Viewed from this perspective, the reference to the interests of the right holder in article 13 appears logical. Article 11 introduces rental rights in international copyright law. Hence, its drafters had to make clear who is initially vested with these new rights. The author could hardly be replaced with the right holder. Mention of the authors not only in article 11 but also in article 13, however, would have ensured consistency in wording throughout TRIPs' copyright section. The reason for sacrificing the consistency of wording can be seen in TRIPs' imperviousness to moral rights protection. Article 9(1) TRIPs unequivocally excludes article 6bis BC and the rights derived therefrom from the incorporation of provisions of the Berne Convention into the TRIPs Agreement.

However, the clarity of this exclusion is endangered by the reference to article 20 BC. This provision is encompassed by article 9(1) TRIPs and permits the members of the Berne Union to enter into special agreements among themselves only 'in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention'. As already elaborated above, there is substantial reason to assume that the TRIPs Agreement itself is to be qualified as a special agreement in the sense of article 20

---

1092 Cf. section 3.1.2 above.
1093 This need not be and, in most cases, will not be the creator of the work himself. Instead, it is more likely that an assignee or licensee places the work on the market. Common law copyright systems, furthermore, do not necessarily regard the physical creator of a work as the author. Pursuant to the 'work made for hire' doctrine, the author may also be the employer of the work's creator. Cf. Ginsburg 1991, 596.
1094 The US, as one of the driving forces behind the TRIPs Agreement, opposed the inclusion of moral rights protection. Cf. Gervais 1998, 72; Dietz 1993, 312.
The inclusion of article 20 BC in the TRIPs Agreement could therefore be understood to force the contracting parties of TRIPs to ensure that the Agreement is interpreted in a way that increases the protection of authors or at least in no way contravenes the Berne Convention.\textsuperscript{1095} In this line of reasoning, it is arguable that the interests underlying article 6bis BC must be observed irrespective of the explicit exclusion of the provision itself in article 9(1) TRIPs.\textsuperscript{1097} A reference to the 'legitimate interests of the author' in article 13 TRIPs, therefore, could easily have led to the understanding that the authors' non-economic interests, as solidified in article 6bis BC, must be taken into account.

The formulation, 'legitimate interests of the right holder', bars interpreters from following the described line of reasoning. The traditional, continental European concept of droit moral is inseparably linked with the author. A work is regarded as a materialisation of its creator's personality. Successors of the author clearly have to enforce the moral rights in nomine auctoris. They receive these rights to respect the work and the person of the author.\textsuperscript{1098} The author himself cannot assign or licence moral rights; only waiver is possible.\textsuperscript{1099} Therefore, the neutral mention of the right holder in article 13 TRIPs cannot be understood as a reference to the author insofar as moral rights are concerned. If this had really been intended by the drafters of the TRIPs Agreement, they would have referred directly to the author and his successors in title, like in article 11 TRIPs. Furthermore, they would not have excluded article 6bis BC.

The term 'right holder' underlines the repudiation of the concept of moral rights. It corroborates the imperviousness of the TRIPs Agreement to any form of moral rights protection. The moral rights of the Berne Convention are not only placed beyond its scope, but also prevented from indirectly influencing its framework. Article 13 TRIPs is rendered incapable of serving as a means of lending weight to non-economic interests.\textsuperscript{1100}

In sum, the circle of interests that must be taken into account in the context of the third criterion can be circumscribed as follows: the economic interest of the authors in the exploitation of the exclusive rights recognised in international copyright law always plays a decisive role. In the field of non-economic interests, however, a distinction must be made between article 9(2) BC and article 10 WCT on the one

\textsuperscript{1095} See subsection 3.2.2.
\textsuperscript{1096} Cf. Gervais 1998, 72, and subsection 3.2.2 above.
\textsuperscript{1097} Cf. Gervais 1998, 72, who is of the opinion that the task not to contravene the Berne Convention has to be extended to article 6bis. From his point of view, the inclusion of article 20 includes article 6bis. This assumption, however, does not rest on a firm basis. Doubt must be cast upon the result that the clear exclusion of article 6bis, as laid down in the second sentence of article 9(1) TRIPs, is compromised by the first sentence of this paragraph. It appears more convincing to assume that the inclusion of article 20 BC is also limited insofar as the moral rights of article 6bis are concerned.
\textsuperscript{1098} Cf. Dietz 1995, 217.
\textsuperscript{1099} Provisions on waiver of moral rights differ substantially throughout civil law countries. See the survey conducted by Dietz 1995, 219-225. Cf. also Schardt 1993, 320-321.
\textsuperscript{1100} Cf. Ricketson 1999, 81.
hand, and article 13 TRIPs on the other. Non-economic interests are prevented from influencing the framework of the latter provision. Article 9(2) BC and article 10 WCT, by contrast, afford authors moral rights protection. The author’s interest in the acknowledgement of authorship and a work’s integrity, as set out in article 6bis BC, can be taken into account in the framework of these provisions.

4.6.4 THE PROPORTIONALITY TEST

The proportionality test to be carried out in the framework of the third criterion comprises two elements. Firstly, the circle of relevant interests of the authors is confined to interests that can be qualified as legitimate. Secondly, a prejudice to these interests is forbidden if it reaches an unreasonable level. These two elements entered the picture successively. The potential harm to the authors’ legitimate interests was not factored into the equation until a committee of governmental experts, in 1965, discussed the initial, preliminary draft which had been presented by the study group undertaking the preparatory work for the 1967 Stockholm Conference. In the course of the committee’s deliberations, one delegation stated that the formula tabled by the study group ‘might prove dangerous to the authors’ legitimate interests’. In consequence, the committee gave its approval to a draft that permitted a work’s reproduction ‘in certain particular cases where the reproduction is not contrary to the legitimate interests of the author and does not conflict with a normal exploitation of the work’. On the eve of the 1967 Stockholm Conference, the third criterion of the three-step test, therefore, was still incomplete. The second element, the prohibition of an unreasonable prejudice, was missing. It owes its existence to the intervention of the UK delegation. The UK proposal referred to ‘certain special cases where the reproduction does not unreasonably prejudice the legitimate interests of the author and does not conflict with a normal exploitation’. The three-step test was based on this amendment. Ultimately, merely the order of the two conditions delimiting the basic rule that limitations must be certain special cases was reversed.

It can easily be seen that the two elements of the third criterion (the legitimacy of interests and the reasonableness of prejudices) point in the same direction: a balance between the author’s and the public’s concerns must be found. A prejudice to interests of the author is permitted. An unreasonable prejudice to legitimate interests, however, is prohibited. Nonetheless, it makes sense to reflect the necessity of finding a balanced proportion by setting forth two distinct elements. To explain why, the following picture can be drawn: copyright law is centred round the

---

1102 See Doc. S/1, Records 1967, 112.
1105 Cf. subsection 3.1.2.
THE INTERPRETATION OF THE THREE CRITERIA

delicate balance between grants and reservations. On one side of this balance, the economic and non-economic interests of authors of already existing works can be found. On the other side, the interests of users – a group encompassing authors wishing to build upon the work of their predecessors\footnote{Cf. section 2.3.} – are located. If a proper balance between the concerns of authors and users is to be struck, both sides must necessarily take a step towards the centre. The two elements of the third criterion mirror these two steps. The authors cannot assert each and every concern. Instead, only legitimate interests are relevant. As a countermove, the users recognise that copyright limitations in their favour must keep within reasonable limits. An unreasonable prejudice is unacceptable.

The third criterion paves the way for the establishment of a proper copyright balance by reflecting both steps to be taken. The corresponding proportionality test is consequently an internal two-step test. Its first step concerns the question which interests of the author are legitimate under the given circumstances. The second question is whether these relevant interests are unreasonably prejudiced. Subsequently, both elements will be examined in detail. In the following subsection 4.6.4.1, the identification of legitimate interests will be discussed. How to avoid an unreasonable prejudice will be explained in subsection 4.6.4.2.

\section*{4.6.4.1 IDENTIFYING LEGITIMATE INTERESTS}

An interest of the author can be qualified as legitimate if it is ‘conformable to law or rule; sanctioned or authorized by law or right’ – thus, if it is ‘lawful; proper’.\footnote{See the Oxford English Dictionary.} In the case of conformity to a recognised standard type, the term may furthermore simply mean ‘normal’ or ‘regular’.\footnote{See the Oxford English Dictionary.} Attempts to interpret the term ‘legitimate’ have particularly been made by WTO Panels. Two Panel reports touched upon the three-step test so far. The first concerned the patent protection of pharmaceutical products in Canada and dealt with the three-step test of the patent section of the TRIPs Agreement, laid down in article 30.\footnote{The report on Canada’s protection regime for pharmaceutical products was adopted on 7 April 2000. See WTO Panel – Patent 2000, §§ 7.60ff. for a discussion of the third criterion of article 30 TRIPs.} The second report concerned section 110(5) of the US Copyright Act. It dealt directly with the three-step test in international copyright law, as set out in article 13 TRIPs.\footnote{See for a detailed discussion of these two Panel reports Ficsor 2002b, 111-251.}

The WTO Copyright Panel reporting on section 110(5) of the US Copyright Act approached the question of legitimate interests from a legal positivist perspective. ‘In our view’, the Panel stated, ‘one – albeit incomplete and thus conservative – way of looking at legitimate interests is the economic value of the exclusive rights conferred by copyright on their holders’.\footnote{See WTO Panel – Copyright 2000, § 6.227.} It appears safe to assume that this

\footnotesize
\begin{itemize}
\item \footnote{Cf. section 2.3.}
\item \footnote{See the Oxford English Dictionary.}
\item \footnote{See the Oxford English Dictionary.}
\item \footnote{The report on Canada’s protection regime for pharmaceutical products was adopted on 7 April 2000. See WTO Panel – Patent 2000, §§ 7.60ff. for a discussion of the third criterion of article 30 TRIPs.}
\item \footnote{See for a detailed discussion of these two Panel reports Ficsor 2002b, 111-251.}
\item \footnote{See WTO Panel – Copyright 2000, § 6.227.}
\end{itemize}
statement indicates that the Panel was of the opinion that the term ‘legitimate’ primarily means conformity with and authorisation by the law. In consequence, the expression ‘legitimate interests’ is de facto equated with ‘legal interests’. Notwithstanding its own focus on the economic value of exclusive rights, however, the Copyright Panel observed that the term ‘legitimate’ also has ‘the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights’. This point was conceded with an eye to the earlier Panel report on patent protection of pharmaceutical products in Canada.

As already mentioned, the three-step test of the patent section of TRIPs, laid down in article 30 thereof, was interpreted in this report. The third criterion of article 30 TRIPs forbids an unreasonable prejudice to ‘the legitimate interests of the patent owner, taking account of the legitimate interests of third parties’. The Patent Panel reporting on Canada’s protection regime for pharmaceutical products rebutted an argument, advanced by the European Communities, that legitimate interests should be viewed through the prism of legal positivism and, thus, actually identified with legal interests. Besides other reasons, this conclusion was drawn on the grounds that ‘a definition equating “legitimate interests” with legal interests makes no sense at all when applied to the final phrase of Article 30 referring to the “legitimate interests” of third parties’. Hence, to a certain extent, the approach pursued by the Patent Panel evolves from the particular situation in the field of patent protection. Nonetheless, it is noteworthy that this Panel unequivocally rejected a legal positivist approach. It elaborated that

“to make sense of the term “legitimate interests” in this context, that term must be defined in the way it is often used in legal discourse – as a normative claim calling for the protection of interests that are “justifiable” in the sense that they are supported by relevant public policies or other social norms”.

To illustrate its line of reasoning, the Patent Panel brought an exception into focus under which use of the patented product for scientific experimentation, during the term of the patent and without consent, is not an infringement. It explained:

“It is often argued that this exception is based on the notion that a key public policy purpose underlying patent laws is to facilitate the dissemination and advancement of technical knowledge and that allowing the patent owner to prevent experimental use during the term of the patent would frustrate part of

1112 Cf. the definition given in the Oxford English Dictionary.
1113 Cf. the explanations given by Ficso 2002b, 141.
1114 See WTO Panel – Copyright 2000, § 6.224.
the purpose of the requirement that the nature of the invention be disclosed to the public. To the contrary, the argument concludes, under the policy of the patent laws, both society and the scientist have a "legitimate interest" in using the patent disclosure to support the advance of science and technology.\footnote{See WTO Panel – Patent 2000, § 7.69.}

The survey of WTO Panel reports shows that there are two different approaches to the problem of legitimacy. The Copyright Panel touched upon both. Its own legal positivist perspective focuses on 'the economic value of the exclusive rights conferred by copyright on their holders'.\footnote{See WTO Panel – Copyright 2000, § 6.227.} However, the Panel did not say that legitimate interests are limited to this economic value.\footnote{See WTO Panel – Copyright 2000, § 6.227.} By contrast, it referred to the report on patent protection of pharmaceutical products in Canada and, thus, to the second approach. The Patent Panel understood the expression "legitimate interests" as a 'normative claim calling for the protection of interests that are "justifiable" in the sense that they are supported by relevant public policies or other social norms'.\footnote{See WTO Panel – Patent 2000, § 7.69.} This approach can be called the normative perspective. The line of argument of the Patent Panel runs as follows: if one is ready to conceive of patent protection as a means to induce inventors to disclose their invention to the public in order to facilitate the dissemination and advancement of technical knowledge, it appears illegitimate to prevent experimental use during the term of the patent.\footnote{See the example given by the WTO Panel – Patent 2000, § 7.69.} As the Copyright Panel itself concedes that this normative perspective catches the claim for legitimacy more completely than its own legal positivist view, there seems to be no reason why preference should be given to the narrower legal positivist perspective equating 'legitimate interests' with 'legal interests'.

Nevertheless, Ficosr espouses the legal positivist perspective. He does not disapprove the normative view stating that the interests at stake must be justifiable in the light of relevant public policies or other social norms. He is merely of the opinion that the further prohibition of an unreasonable prejudice is capable of underlining this normative position as well. For this reason, he fears that the test procedure could become tautological and asserts that

'the "justification" test – in harmony with the [...] non-legal normative sense of "legitimacy" – concerning the limits of defensible interests of authors, would be just repeated within this third, interest-related condition of the three-step test'.\footnote{See Ficosr 2002b, 147. To support his argument, he refers to the evolution of the third criterion in the course of the preparatory work undertaken for the 1967 Stockholm Conference. Cf. Ficosr 2002b, 141-147. See the explanations given at the beginning of subsection 4.6.4.}
This fear is unfounded. Admittedly, the two elements of the proportionality test are closely connected with each other. They both point towards the necessity to strike a proper balance in copyright law. As already elaborated above, however, the two elements – the legitimacy of interests on the side of authors, and the reasonableness of prejudices on the side of users – represent the two steps towards the core of copyright's balance that must be taken to establish proportionality. Instead of being tautological, a complete proportionality test is only possible if the justifiability of the interests of both authors and users is examined. The legal positivist approach takes it for granted that the author's interests are justifiable. By equating the term 'legitimate interests' with 'legal interests', however, it causes the whole edifice erected by the third criterion to collapse. If the legitimate interests of the author are nothing but his legal interests, the reference to interests as such becomes questionable. If this meaning really was intended, it could easily have been given expression by simply forbidding an unreasonable prejudice to the author's rights instead of mysteriously referring to 'legitimate interests'. The legal positivist approach, thus, must be rejected. It is right to understand the expression 'legitimate interests' instead, like the WTO Patent Panel, as a 'normative claim calling for the protection of interests that are “justifiable” in the sense that they are supported by relevant public policies or other social norms'.

In the field of copyright, several public policy considerations can be considered in this connection. As elaborated in chapter 2, the principal objective of copyright protection is the promotion of cultural diversity. Under this heading, weight can be lent to several further arguments: the protection of works, the creation of which tends to be rooted in an idealistic motivation, like personal satisfaction, the desire for respect or esteem, or the urge for artistic expression, can primarily be supported by the natural law argument and the furtherance of freedom of expression. If the aim to succeed commercially is central to the creation of a work, its protection can foremost be explained by the utilitarian incentive rationale and corresponding industry policy. The crucial question that must be asked in the context of the third criterion, then, is whether the economic and non-economic interests which an author has in respect of a certain way of using his work are justifiable in the light of these rationales of copyright protection. If this question can be answered in the affirmative, the author's interest is legitimate. If not, it is illegitimate and therefore irrelevant to the proportionality test.

To point the right way for the outlined inquiry into the justifiability of an author's interests, a principle can be invoked that is commonly associated with the proportionality test. It is usually demanded that the measure in question is suitable for the realisation of the envisaged objective. An author's interest can

1126 See for an overview subsections 2.1.2 and 2.1.3.
1127 Guidance in respect of this 'principle of suitability' is especially provided by German law where the suitability test is explicitly recognised as a part of the concept of proportionality. Cf. Jowell/Lester 1988, 52; Emmerich-Fritsche 2000, 151. As the latter author shows, the principle of suitability is
Accordingly only be deemed justifiable if its assertion is suitable for promoting the attainment of one of the aforementioned objectives. It would be illegitimate to insist on an interest that is not conducive to the realisation of one of the rationales underlying copyright protection anyhow. Placing an ineffective, useless constraint on the public domain is disproportionate. This situation arises particularly when the authors are hindered from exploiting their works by market imperfections.

In the analogue world, it is for instance useless to erode personal and internal use privileges in order to afford authors the opportunity of exerting control over the use of their works. Market failure inhibits them from doing so. The abolition of this type of copyright limitations in the analogue environment, thus, does not contribute to the realisation of one of the objectives underlying copyright protection. A corresponding interest of the author is unjustifiable and illegitimate. What remains is the interest he may have in some sort of reward. Private copying has become a mass phenomenon. A gratification for the myriad copies made by private users will spur the productivity of an author who aims to succeed commercially. An author who is not induced to create intellectual works by the prospect of monetary profits is shown that his work is appreciated. The extra income, moreover, enhances an author’s independence of patrons, thereby encouraging free speech. Hence, the independence of intellectual creations and their production can be enhanced if some sort of monetary reward for private use is given to the authors. In consequence, cultural diversity is promoted. An author’s interest in being remunerated for private copying of his work is thus justifiable and legitimate.

An author’s economic interest in controlling the use of a work, however, again becomes unjustifiable and illegitimate insofar as objectionable uses are concerned. As explained above, it is unlikely that creators of intellectual works will in general develop or license others to develop markets for critical reviews or lampoons of their works. To subject these markets to the authors’ control, thus, is unsuitable for promoting the realisation of one of the objectives underlying copyright protection in.


The German Federal Constitutional Court, the Bundesverfassungsgericht, refrains from qualifying a means as unsuitable if the pursued objective cannot be fully attained. To answer the question of suitability in the affirmative, it is deemed sufficient that, with the help of the chosen means, the desired objective can be promoted. Cf. BVerfGE 30, 292 (316); 33, 171 (187); 39, 210 (230); 40, 196 (222). The reason for this reserve is the danger evolving from the replacement of the legislator’s discretion with the judgement of the courts. Cf. Emmerich-Fritsch 2000, 151. This restriction of the rigidity of the suitability test appears appropriate in the context of the three-step test as well. Cf. Jackson 2000, 154; Helfer 1998, 404.

Cf. subsection 2.2.2.

Cf. subsection 4.5.3.2. See Ficso 1981, 60-61.

protection. Authors would refrain from exploiting their works in this area anyway. In this case, the economic interests of authors are therefore unjustifiable. The moral interests, however, occupy centre stage. In particular, uses criticising or ridiculing a work may encroach upon non-economic interests, such as the interest in a work's integrity. This concern of the author is accordingly of particular relevance and must not be unreasonably prejudiced.\textsuperscript{1132}

A ramification of the suitability principle is the consideration that the author's interests must give way if a limitation is \textit{evidently} better suited to achieving the goals of copyright. If a work is used for the purpose of quotation, for instance, the economic interests of the quoted author come second. Very strong freedom of expression values underlie the right to quote. Like the grant of exclusive rights itself, it substantially contributes to intellectual debate.\textsuperscript{1133} Moreover, considerations of intergenerational equity urge the exemption of quotations.\textsuperscript{1134} Later authors ought to be free to use the work of their predecessors if they depend on that use to express themselves.\textsuperscript{1135} Admittedly, quoted authors could derive some extra income from licensing the making of quotations. In the field of commercial productions, authors could thus be vested with a further incentive to create. Authors following the maxim \textit{'l'art pour l'art'} would obtain a further individual source of income enhancing their independence of patrons.\textsuperscript{1136} However, these benefits are minimal and negligible in comparison to the detriment to other authors wishing to make quotations. It would have a corrosive effect on intellectual debate. The potential harm flowing from the exemption of quotations to the economic interests of a quoted author is thus evidently outweighed by the competing user interests at stake. On balance, the author's economic interests must be considered illegitimate and irrelevant. The moral interests of the quoted author, by contrast, must strictly be observed. The original work must already have been made lawfully available to the public and be reproduced accurately. The author's name is to be clearly indicated. Otherwise, legitimate moral interests are unreasonably prejudiced.\textsuperscript{1137}

A further example is the incidental inclusion of a work in a report on current events. The author could establish a market for this kind of incidental use and derive some profit. This extra income would give commercially oriented authors an additional incentive to create and authors following idealistic motives more

\textsuperscript{1132} The author's right of integrity set out in article 6bis BC can be asserted against reproductions for parody. Cf. Ricketson 1987, 468, elaborating that "any "rewriting" in the case of literary or dramatic work, for instance, for purposes of a parody" touches upon article 6bis.

\textsuperscript{1133} Cf. Ricketson 1987, 489.

\textsuperscript{1134} See section 2.3.

\textsuperscript{1135} Cf. the Germania 3-decision of the German Federal Constitutional Court, BVerfG, Zeitschrift für Urheber- und Medienrecht 2000, 869. See subsection 2.2.1.

\textsuperscript{1136} Cf. subsection 2.1.3.

\textsuperscript{1137} Cf. articles 10(1) and 10(3) BC. The inevitable encroachment upon the right of integrity arising from the fact that only passages of the original work are quoted instead of the entire work, however, is irrelevant. Cf. Quaedvlieg 1992, 22-23.
The Interpretation of the Three Criteria

independence from patronage. The freedom of the press, however, is a facet of freedom of expression that is of paramount importance. Press privileges, like the permission to include works seen or heard incidentally in the course of a current event, are therefore furnished with a strong underpinning. On balance, the potential benefit to the author whose work is included incidentally is thus far from being capable of outweighing the threatening detriment to the important competing interests at stake. It would evidently be disproportionate to uphold the economic interests of an author whose work is seen or heard incidentally in the course of a current event. Under the given circumstances, the economic interest of this author in exploiting a work's incidental inclusion is therefore illegitimate and, in consequence, irrelevant.

A clarification seems appropriate in this context. Positing that in some cases the author's economic interest must give way, should not be misunderstood as a general attack on minor sources of income. Instead, it is to be repeated that in the framework of the third criterion, each and every possibility of deriving economic profit from a work carries weight and may accordingly not so readily be put aside. The making of quotations and a work's incidental inclusion in a report on current events are exceptional cases. Under the given extraordinary circumstances, an evident imbalance between the benefit of authors and the detriment to users comes to the fore which clearly tips the scale in favour of the users. Section 110(5)(B) of the US Copyright Act, on which the aforementioned WTO Copyright Panel reported, is suitable for substantiating that minor sources of royalty revenue are not in danger of being neglected when it comes to identifying an author's legitimate interests. Under the so-called 'business exemption' set out in section 110(5)(B), commercial establishments such as bars, shops, and restaurants which do not exceed a certain size or which meet certain equipment requirements, may play radio and TV music without paying any royalty fees to collecting societies.

This exemption encroaches upon a typical ramification of a work's broadcast that is explicitly pointed out in article 11bis(1)(iii) BC. Authors clearly have the prospect of some royalty revenue accruing from this typical use of their work. The extra income spurs the productivity of authors seeking to succeed commercially and affords others more independence from patrons. Unlike the exemption of the making of quotations or the incidental inclusion of a work in a press report, however, the importance of section 110(5)(B) is far from towering above the one of other limitations. It neither substantially contributes to intellectual debate and the information of the public nor promotes intergenerational equity. It simply helps bars, shops and restaurants to engender the inevitable background music often

1138 Cf. subsection 2.1.3.
1139 Cf. subsection 2.2.1.
1140 See article 10bis(2) BC.
1141 Cf. subsection 4.6.2.
1142 Cf. subsection 2.1.3.
perceived as indispensable. This justification is incapable of outweighing the author’s loss of income. Consequently, there is no reason to assume that it would be illegitimate for authors to insist on their economic interest in deriving profit from the playing of radio and TV music in commercial establishments such as bars, shops and restaurants.

Finally, the following example of a deadlock can be given: if passages of a work or entire small works are included in a schoolbook, important social interests are at stake. A work’s use for teaching contributes substantially to the dissemination of knowledge. Moreover, considerations of intergenerational equity support the use of copyright material for teaching. On the side of the authors, however, vital interests are to be found as well. The included work will often stem from an author pursuing idealistic motives. If he is adequately rewarded, this will testify to the specific appreciation of his work. The pecuniary return will enhance his financial independence from patronage. It must moreover be borne in mind that the pecuniary reward is given to authors who made noteworthy cultural contributions – substantial enough to be considered for the inclusion in a schoolbook. Feelings of rightness and justice, thus, militate against leaving the author empty-handed. A poem, for instance, may be reproduced more often in a schoolbook than in the original publication. In the case of a commercial production, the pecuniary reward, in addition, has a stimulating effect. It serves as an incentive to create.

On balance, it can be said that the involved user interests are of particular importance but not as central to the promotion of society’s cultural life as the possibility of quoting. Furthermore, the author’s interests must be considered. They are not as marginal as in the case of a work’s incidental inclusion in a report on current events. That the user interest in including a work in a schoolbook outweighs the author’s competing economic interest evidently, thus, cannot be concluded. On the contrary, the author’s interest in receiving a pecuniary reward for a work’s reproduction in a schoolbook appears legitimate. It must consequently not be unreasonably prejudiced. To find an appropriate solution, it is therefore advisable to have recourse to the payment of equitable remuneration. The three-step test offers this possibility as a means to reduce the prejudice caused by a limitation to a reasonable level. It is a feature of the second part of the proportionality test that will be discussed in the next subsection.

---

1143 Cf. subsection 2.2.2 and section 2.3.
1144 Cf. subsections 2.1.2 and 2.1.3.
1145 Cf. subsections 2.1.2 and 2.1.3.
1146 Firstly, the making of quotations directly serves freedom of expression values instead of generally serving the dissemination of information. Cf. subsections 2.2.1 and 2.2.2. Moreover, considerations of intergenerational equity are stronger in the case of the making of quotations. Cf. section 2.3.
1147 Cf. the decision ‘Kirchen- und Schulgebrauch’ of the German Federal Constitutional Court, BVerfGE 31, 229 (244-245).
1148 Cf. subsections 3.1.2, 3.3.1, 4.3.2 and 4.3.3.
4.6.4.2 AVOIDING AN UNREASONABLE PREJUDICE

After delineating the authors' legitimate interests, the question of an unreasonable prejudice must be examined. The ordinary meaning of the term 'prejudice' connotes 'injury, damage, hurt, loss'. A prejudice can be regarded as 'unreasonable' if it is 'inequitable, unfair; unjustifiable', for instance, because of excessiveness in amount or degree. It may not go 'beyond what is reasonable or equitable', not be 'extravagant or excessive'. Hence, the prejudice to the authors' legitimate interest must be 'of such an amount, size, number, etc., as is judged to be appropriate or suitable to the circumstances or purpose'. It has to be proportionate.

This second element of the proportionality test carries on where the first criterion of the three-step test, the basic rule that limitations must be certain special cases, left off. That there is a mutual relationship between the first and the third criterion has already been emphasised above. To pass the first step of the three-step test, a limitation must be special in a qualitative sense. The outline of this qualitative requirement has been drawn as follows above: a careful weighing process must precede the adoption of a limitation at the national level. A cultural, social or economic concern must be invoked that serves as a rational justificatory basis for the limitation. In the light of the conflict of interests, the limitation's adoption must be plausible. The competing interest that consequently underlies each limitation reaching the final proportionality test, must now be brought into focus again. Its mere existence is already ensured by the basic rule that limitations must be certain special cases. In the framework of the proportionality test, the way in which it was reconciled with the author's legitimate interests must be scrutinised thoroughly. The content of the weighing process at the national level must be critically reviewed.

In principle, it can be posited in this context that, insofar as the objective underlying a limitation justifies the entailed prejudice to the author's legitimate interests, it can be approved. This can clearly be inferred from the French text of the Berne Convention. The translation of the expression 'unreasonable' into French posed some difficulties. At the 1967 Stockholm Conference, the terms inéquitable, injustifié, appréciable and sensible were under discussion. Finally, preference was given to the expression 'ne cause pas un préjudice injustifié'. This formulation emphasises that a limitation must be brought into a state of justification to meet the...
third criterion. Although the limitation might serve socially valuable ends, the prejudice to the legitimate interests of the author must not be a disproportionate. The detriment to the authors must be reasonably related to the benefit of the users. In other words: the room to manoeuvre created by national legislation for the user interest at stake must keep within reasonable limits.

To point the right way for examining a limitation in the light of these findings, the suitability principle that has already been embraced above to identify legitimate interests of the author can be re-invoked. At the beginning of the inquiry into an unreasonable prejudice, it must accordingly be ensured that a limitation is suitable for promoting the attainment of the objective pursued by its imposition on exclusive rights. The harm to the authors' legitimate interests which inevitably flows from any limitation cannot be justified if the relevant objective cannot be promoted with the help of the limitation under examination. To burden the authors with a useless limitation represents a clear instance of an unreasonable prejudice. Placing a constraint on authors' rights which does not correspond to the underpinning justifying its existence, undoubtedly causes an unreasonable prejudice.\footnote{1158}

Besides the suitability test, a second principle commonly associated with the proportionality test can be used to identify an unreasonable prejudice: the necessity test. A limitation must be the least harmful of more than one available means to obtain a particular objective. Consequently, it can be posited that those measures for achieving the objectives underlying a limitation must be pursued which cause the minimum injury to the legitimate interests of the author.\footnote{1159} It is to be noted in this context that the necessity test does not hinder the legislator from applying the best suited instrument. The different alternatives which are at the disposal of the legislator must have a comparable potential for realising the objective at stake. Less restrictive possibilities come into play only if they are capable of reaching the pursued objective as effectively as the current limitation.\footnote{1160} An unreasonable prejudice only arises if the least harmful means is not chosen even though there are equal alternatives.\footnote{1161}

\footnote{1158}{See the explanations given in the previous subsection. Cf. Emmerich-Fritsche 2000, 151 and 207-211; Jowell/Lester 1988, 52.}

\footnote{1159}{See the description of this principle by Jowell/Lester 1988, 53, Birnack 2003, 29. In the US, this requirement is known as the principle of the 'less restrictive alternative'. Cf. Jowell/Lester, ibid., 53. It also forms a part of the proportionality test that is applied by the European Court of Justice. See the decisions Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case 11/70 (1970) ECR 1125, §§ 8-12, and Bela-Mühle v. Grows-Farm, Case 114/76 (1977) ECR 1211, § 7. Cf. Jowell/Lester, ibid., 56-58; Emmerich-Fritsche 2000, 211-212. The German Federal Constitutional Court (Bundesverfassungsgericht) draws the outlines of the necessity test by enunciating that an instrument can be considered necessary to achieve a certain goal if the legislator 'nicht ein anderes, gleich wirksames, aber das Grundrecht weniger fühlbar einschränkendes Mittel hätte wählen können'. See BVerfGE 25, 1 (17); 30, 292 (316); 33, 171 (187).}

\footnote{1160}{Cf. Emmerich-Fritsche 2000, 151-152.}

\footnote{1161}{See the explanations given in the previous subsection. Cf. Jowell/Lester 1988, 53 and 56-58; Emmerich-Fritsche 2000, 211-212 and 151-152.}
That considerations of this nature can guide the process of devising a limitation has already been demonstrated above in the context of personal use privileges in the digital environment. In this respect, the establishment of a library-administered personal use system has been recommended instead of upholding general personal use privileges. The considerations governing this decision are in line with the principle that the least harmful means must be chosen. It is to be expected that a refined digital library system enabling a work's personal use would be capable of promoting the dissemination of information and intergenerational equity as effectively as the general exemption of personal use in the digital environment. As the latter alternative has a much deeper impact on the marketing of works in the digital world, a library-administered system must be preferred. To extend general personal use privileges to the digital environment would militate against the principle that the least harmful means must be chosen. Consequently, it would unreasonably prejudice the author's legitimate economic interests.

A prominent feature in evaluating the intensity of the prejudice caused by a limitation is the payment of equitable remuneration. The three-step test allows compulsory licensing in the framework of the third criterion. Before considering the practical consequences of this feature, it is to be noted that the payment of equitable remuneration must be separated from the principle that the least harmful means is to be chosen. Otherwise, a limitation could only be imposed on author's rights if it is accompanied by the payment of monetary reward. Obviously, the adoption of a limitation A without providing for equitable remuneration always does more harm than the adoption of exactly the same limitation A accompanied by the obligation to pay equitable remuneration. The introduction of a limitation without providing for equitable remuneration can hardly ever be qualified as a less restrictive alternative when compared with the introduction of the same limitation linked with the obligation to pay equitable remuneration.

The three-step test, however, has always been understood to offer the possibility of setting limits to exclusive rights without remunerating the authors. At the 1967 Stockholm Conference, the following statement was made in the general report:

'If [the photocopying] implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.'

---

1162 Cf. subsections 4.5.5.1 and 4.5.5.2.
1163 The library-administered system has the advantage that users can be individualised and personal uses can be restricted. Cf. subsection 4.5.5.2.
1164 Cf. subsections 3.1.2, 3.1.3.1, 3.3.1, 4.3.2 and 4.3.3.
In the framework of the prohibition of an unreasonable prejudice to the author's legitimate interests, two different outcomes are therefore possible. National legislation may be obliged to provide for the payment of equitable remuneration. However, certain uses can be permitted without payment. The principle that the least harmful means is to be chosen must therefore not be misused to divest national legislation of the latter possibility. The groundwork laid for the application of the three-step test at the Stockholm Conference precludes this result.

As to the payment of equitable remuneration in the context of the three-step test, two questions are pending. Firstly, it must be clarified what equitable remuneration means precisely. Secondly, it must be determined in which cases the payment of equitable remuneration is necessary and in which it is not. With regard to the first question, it must be pointed out that the field of equitable remuneration, at the international level, is more or less virgin territory. Commenting on article 13(1) BC, Ricketson takes the view that the expression 'equitable remuneration' must essentially mean that

'the author is to receive, for the compulsory use of his work, an equivalent remuneration to that which he would have received if he were free to authorise the use in the absence of a compulsory licensing provision'. 1166

He admits, however, that 'no guidance as to the meaning of the expression "equitable remuneration" is to be found in the Convention'.1167 Ricketson's somewhat idealistic position makes sense and appears desirable. However, it hardly portrays reality adequately – least of all within the realm of the three-step test. As can be seen from the passage quoted above, the payment of equitable remuneration was mentioned in the general report of the Stockholm Conference in connection with the internal use of copyrighted material in industrial undertakings. This example can be traced back to German legislation that entered into force on the eve of the 1967 Stockholm Conference.1168 The 1965 Copyright Act of the FRG obliged enterprises, making copies for internal use, to remunerate the authors adequately. The precursor of this solution was a prior agreement reached in the FRG ensuring that a lump sum for photomechanical reproductions made in industrial undertakings is paid.1169 The model underlying the example given in the general report of the Stockholm Conference, thus, bears scant resemblance to Ricketson's shining ideal.

Even worse, the fact must be faced that the 'equivalent remuneration to that which [an author] would have received if he were free to authorise the use in the absence of a compulsory licensing provision'1170 can hardly ever be ascertained in the field of personal and internal use of copyrighted material – at least in the

1166 See Ricketson 1987, 520.
1168 See subsection 3.1.3.1.
1170 See Ricketson 1987, 520.
The Interpretation of the Three Criteria

analogue environment. Market failure prevents authors from developing corresponding markets. The ordinary retail price of the copied work may serve as an indicator of what the author might have received. However, in the past, national legislation did not vest authors with a monetary reward for personal or internal copying that could be suspected of coming close to this (presumably high) sum. The income accruing from levy systems that had already been established at the time of the Stockholm Conference in the FRG and were maintained after the three-step test had been adopted, for instance, can hardly be qualified even as a pale reflection of the profit an author freely authorising the use of his work could derive. Against this backdrop, the view that equitable remuneration amounts to the price a free author would have agreed upon can hardly be endorsed in the context of the three-step test. The reference to equitable remuneration in the general report of the Stockholm Conference rather points towards the payment of a lump sum.

This result foreshadows the response to the second question. No clear boundary line can be drawn between those cases in which equitable remuneration must be paid and others where this is unnecessary. Instead, it is to be concluded that the concept of equitable remuneration underlying the three-step test is a fluid transition from a state where no remuneration has to be paid to cases necessitating the payment of the price a free author would have received. It must be borne in mind that the payment of equitable remuneration serves as a means for avoiding that the prejudice inevitably resulting from a copyright limitation reaches an unreasonable level. In general, it can therefore be enunciated that equitable remuneration must be paid insofar as the limitation in question does not keep within reasonable limits. If the threshold of a reasonable prejudice is merely overstepped slightly, a relatively low sum is sufficient. If not, a higher monetary reward is required that appears fair and just under the given circumstances. The following examples can be given:

In respect of objectionable uses like parody, it has been concluded in the previous subsection that an author's economic interest is illegitimate. What remains are the legitimate moral interests at stake. This concern must be taken seriously. Parody depends on the use of portions of the original work in a modified, or even disfigured way. Hence, it necessarily encroaches upon the moral integrity right. Nonetheless, it cannot so readily be considered as a case in which an unreasonable prejudice is caused. Strong freedom of expression values underlie the use of a copyrighted work for the purpose of parody. At the core of this way of using a

---

1171 However, cf. Schricker 2002, 739-743, criticising the rule that 10% of sales is to be regarded as an equitable remuneration.
1172 See subsection 3.1.3.1.
1173 Cf. the TBI-decision of the German Federal Court of Justice, Juristenzeitung 1999, 1005, that has been discussed in subsection 4.5.5.2. Cf. Kirchhof 1988, 51 and 54; Schack 1999, 1008.
1174 Cf. in particular subsections 3.1.2, 3.3.1, 4.3.2 and 4.3.3.
1175 See articles 9(1), 12 and 6bis(1) BC. Cf. in respect of the latter provision Ricketson 1987, 468.
1176 See subsection 2.2.1.
work lies a commentary having a critical bearing on the substance or style of the original. Objectionable uses of this kind play a decisive role in intellectual debate. They promote cultural diversity.\footnote{Cf. subsections 2.1.3 and 2.2.1.} Considerations of intergenerational equity further strengthen this line of argument. To express himself artistically, the parodist depends on the imitation of the characteristic features of the original in such a way as to make them appear ridiculous.\footnote{Cf. section 2.3. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), II C.} The appreciation of freedom of expression and the aim to ensure a controversial intellectual debate necessitate that users, parodying and thereby criticising a work, can work free from influence of the author. By and large, the harm to author’s moral interests is thus outweighed and no unreasonable prejudice arises. The following guidelines given in the US Supreme Court’s decision Campbell v. Acuff, however, must be observed:

‘If […] the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh’, Justice Souter who delivered the opinion of the Court explained, ‘the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish)’…\footnote{Cf. subsection 2.3.}

Examining the legitimacy of an author’s interests, the inclusion of passages of a work in a schoolbook has been discussed in the previous subsection as well. It was concluded that the author’s interest in exploiting this kind of use is legitimate, and that it appears advisable to provide for the payment of equitable remuneration. Further guidelines can be given in the present context. In general, the exemption of a work’s use for teaching is a reaction to the social and cultural concern for appropriate education. Particularly in developing countries, the importance of breathing space serving educational ends, also for increasing the general acceptance of copyright protection, can hardly be underestimated.\footnote{See Campbell v. Acuff, ibid., II A.} Furthermore, an aspect of intergenerational equity can be made visible in this context. Someone learning of already existing works in educational institutions may be induced to discover and develop his own creative potential.\footnote{See subsection 2.1.2 and the introductory remarks made in section 2.2.} As limitations for educational purposes, like the schoolbook privilege, thus serve social and cultural concerns of paramount importance and have a share in the promotion of intergenerational equity, the remuneration need not amount to the profit an author freely authorising the inclusion of a work could derive. By contrast, the payment of a moderate sum appears sufficient. Moreover, the author’s remaining moral interests must be taken into account.

\footnote{Cf. subsection 2.3.}
Finally, the library system for strictly personal use which has been envisaged above can be revisited.\textsuperscript{1182} From the perspective of intergenerational equity, it has been posited in this context that it is advisable to replace general personal use privileges in the digital environment with a refined library framework specifically aiming at permitting those uses that are not unlikely to contribute sooner or later to the creation of a new work. Libraries would then be permitted to make copyrighted material available online. A similar solution might be espoused with regard to other indispensable benefits evolving from strictly personal use privileges. Besides the promotion of intergenerational equity, they serve the dissemination of information and the enhancement of democracy.\textsuperscript{1183} A library-administered system for personal use, thus, rests on a firm justificatory underpinning.

In its TIB-Hannover-decision, which has already been discussed above,\textsuperscript{1184} the German Federal Court of Justice, on the other hand, unequivocally pointed towards the threat posed by digital library services. It emphasised that the library practice of dispatching copies which was challenged in the decision has a tendency to come close to a publisher's activity.\textsuperscript{1185} Against this backdrop, it was stressed above that the circle of beneficiaries profiting from the envisioned digital library service must be narrowly drawn and that, in addition, certain restrictions on the use, for instance as to the number of downloads, may be apposite. To avoid an unreasonable prejudice, it is to be added here that equitable remuneration must be paid.\textsuperscript{1186} The sum need not come up to the price an author freely authorising the use would agree upon. On account of the particular importance of the objectives underlying the envisioned library system, it may be lesser. Nonetheless, a fairly high remuneration seems appropriate to avoid an unreasonable prejudice.

4.6.5 The Impact on Internationally Recognised Limitations

A final comment on the relationship between the three-step test and special provisions of the Berne Convention permitting limitations is to be made here. Article 13 TRIPs, when applied to limitations already complying with special provisions of the Berne Convention, and article 10(2) WCT fulfil the function of additional safeguards.\textsuperscript{1187} However, it has already been emphasised that the three-step test is prevented from realising its full regulatory potential in this connection. At the 1996 WIPO Diplomatic Conference, it was understood that article 10(2) WCT 'neither reduces nor extends the scope of applicability of the limitations and

\textsuperscript{1182} Cf. subsection 4.5.5.2.

\textsuperscript{1183} Cf. subsections 2.2.2 and 2.2.4.

\textsuperscript{1184} See subsection 4.5.5.2.

\textsuperscript{1185} See BGH Juristenzeitung 1999, 1004; Krikke 2000, 163. Cf. subsection 4.5.5.2.

\textsuperscript{1186} This conclusion was also drawn by the Court. See subsection 4.5.5.2.

\textsuperscript{1187} Cf. subsection 4.2.2.
exceptions permitted by the Berne Convention.' It has been shown that this statement renders the additional safeguard function powerless in the context of criteria 1 and 2. As to the prohibition of an unreasonable prejudice to the author’s legitimate interests, the same conclusion need not be drawn. Certain provisions of the Berne Convention offer the possibility of consulting the three-step test in order to clarify their meaning. The wording of these provisions opens a loophole for lending weight to the third criterion of the three-step test. They may be concretised with an eye to the proportionality test described above. Three groups of provisions of the Berne Convention can be distinguished.

The first one is formed by limitations referring to compatibility with ‘fair practice’. Article 10(1) BC, for instance, permits the making of quotations from a work which has already been lawfully made available to the public, provided that the use is ‘compatible with fair practice, and their extent does not exceed that justified by the purpose…’ Similarly, article 10(2) BC allows ‘the utilisation, to the extent justified by the purpose, of literary or artistic works by way of illustrations in publications, broadcasts or sound or visual recordings for teaching, provided such utilisation is compatible with fair practice’. To determine whether or not a national limitation based on these provisions really is compatible with fair practice and justified by the underlying purpose, it is advisable to employ the described proportionality test. When the interests of the author that can be deemed legitimate under the given circumstances are not unreasonably prejudiced, the limitation in question complies with fair practice and is justified by the underlying purpose. Quotations and the inclusion of passages of a work in a schoolbook have been discussed by way of example in the previous subsection 4.6.4.

The second group is formed by provisions of the Berne Convention that permit the use of a work ‘to the extent justified by the informative purpose’. This formula can for instance be found in article 2bis(2) BC that allows national legislation to determine the conditions under which publicly delivered lectures, addresses and similar works may be reproduced by the press, broadcast or communicated to the public ‘when such use is justified by the informative purpose’. By the same token, article 10bis(2) BC permits the inclusion of copyrighted material in a report on current events ‘to the extent justified by the informative purpose’. The two steps of the proportionality test described above provide guidance for deciding whether or not the informative purpose underlying a corresponding limitation justifies the detriment to the author. If no unreasonable prejudice comes to the fore, the question can be answered in the affirmative.

The third group is formed by the implied limitations accepted by the members of the Berne Union. For instance, the task of delineating the so-called ‘minor

---

1188 See WIPO Doc. CRNR/DC/96, agreed statement concerning article 10 WCT. Cf. subsections 3.3.2, 4.2.2 and 4.4.3.
1189 Cf. subsections 4.4.3. and 4.5.4.
reservations doctrine * more precisely has been explicitly assigned to the three-step test. In the preparatory work for the 1996 WIPO Diplomatic Conference, it was stated:

'It bears mention that [the proposed three-step test] is not intended to prevent Contracting Parties from applying limitations and exceptions traditionally considered acceptable under the Berne Convention. It is, however, clear that not all limitations currently included in the various national legislations would correspond to the conditions now being proposed. In the digital environment, formally "minor reservations" may in reality undermine important aspects of protection. Even minor reservations must be considered using sense and reason." *

The proportionality test can serve in this context as a means to scrutinise traditional 'minor reservations' thoroughly. Insofar as digital technology deepens the impact of these limitations on the author's legitimate interests, the proportionality may bring to light that it is indispensable to provide for the payment of equitable remuneration to avoid an emerging unreasonable prejudice. A further implied exemption concerns the translation right recognised in article 8 BC. At the 1967 Stockholm Conference,

'it was generally agreed that Articles 2bis(2), 9(2), 10(1) and (2), and 10bis(1) and 2, virtually imply the possibility of using the work not only in the original form but also in translation, subject to the same conditions, in particular that the use is in conformity with fair practice..." *

The reference to 'fair practice' once again offers the possibility of having recourse to the proportionality test inhering in the three-step test to trace the conceptual contours of this implied limitation more precisely.

4.6.6 THE SYSTEM OF THE THREE CRITERIA REVISITED

A final overview of the regulatory framework embodied in the three-step test can be given when shedding light of the principle of proportionality not only on the prohibition of an unreasonable prejudice to the author's legitimate interests but also on the two preceding criteria. When viewed through the prism of proportionality, they appear as instruments for sorting out cases of evident disproportionality. In retrospect, it can therefore be confirmed that they pave the way for the final balancing of interests in the context of the third criterion:

---

1190 See subsection 3.1.1.
1191 See the basic proposal for substantive provisions of the later WCT, WIPO Doc. CRNR/DC/4, § 12.08.
Figure 1. Overview of the Regulatory Framework