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Chapter 5

The Three-Step Test in the European Copyright Directive

In EC law, the three-step test has become widespread. In Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, substantial parts of the three-step test were already reflected in article 6(3). Seeking to bring the provisions on decompilation of computer programs into line with the Berne Convention, article 6(3) ensures that the given rules

‘may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the right holder’s legitimate interests or conflicts with a normal exploitation of the computer program’.

A corresponding formulation has been embodied in article 6(3) of the European Parliament and Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases.¹¹⁹³ In Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter: Copyright Directive or CD), the European Parliament and the Council continued to intersperse European legislation with the three-step test. Article 5(5) CD draws heavily from the formulation used in international law. Limitations

‘shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder’.

Article 11(1) CD, moreover, incorporates a nearly identical¹¹⁹⁴ formulation into Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. The latter Directive did not yet contain the three-step test. Therefore, EC legislation in the field of copyright law embraces the three-step test as a regulatory instrument. Its utilisation in the Copyright Directive is of particular interest. In this context, the task is assigned to the three-step test to control the optional adoption of 21 permissible exemptions by EU member states, for which the Directive provides in article 5.¹¹⁹⁵

¹¹⁹³ Cf. Walter, in: Walter 2001, 1063-1064, § 95.

¹¹⁹⁴ Instead of ‘a normal exploitation of the work or other subject-matter’, the amendment to Directive 92/100/EEC speaks of ‘a normal exploitation of the subject-matter’.

¹¹⁹⁵ Cf. Walter, in: Walter 2001, 1063.

In the following sections, the clarification of the functioning of the three-step test and the interpretation of its abstract criteria in the previous chapter 4 form the basis for assessing and explaining the application of the three-step test in the Copyright Directive. To lay groundwork for this analysis, the contextual background to article 5(5) CD will be explained in section 5.1. Afterwards, in section 5.2, the function assigned to the three-step test in this context will be analysed. The impact on the limitations permitted by the Directive will be examined in section 5.3. Finally, the question of who is addressed by article 5(5) CD – the national legislators or the courts – will be begged in section 5.4.

5.1 The Contextual Background

The following examination of the contextual background to article 5(5) CD seeks to yield a better understanding of the objectives underlying the inclusion of the three-step test in the Copyright Directive and the role it plays therein. To achieve these goals, the drafting history of article 5(5) CD will first be recapitulated in subsection 5.1.1. Subsequently, the framework set out for limitations in article 5 CD will be described in subsection 5.1.2. The final subsection 5.1.3 devotes attention to the objectives underlying the Directive. They are to be borne in mind when applying the three-step test.

5.1.1 THE DRAFTING HISTORY OF ARTICLE 5(5) CD

The incorporation of the three-step test into the Copyright Directive can be traced back to the Green Paper ‘Copyright and Related Rights in the Information Society’ of July 19, 1995.¹¹⁹⁶ On the basis of preparatory work undertaken since the mid-90s, the European Commission presented this document to pave the way for further debates on problem areas.¹¹⁹⁷ In the context of the right of reproduction, the Commission critically noted that the three-step test of article 9(2) BC ‘considerably limits the effectiveness of the reproduction right’.¹¹⁹⁸ It maintained that the test led to ‘very different arrangements in respect of reprography and private copying’.¹¹⁹⁹ Against this background, the need for harmonisation was underlined.

Based on the consultations resulting from the Green Paper, the Commission tabled a follow-up document on November 20, 1996.¹²⁰⁰ Irrespective of the critical comments on article 9(2) BC made in the preceding Green Paper, the three-step test is embraced in this context as a guiding principle. The Commission emphasises that ‘a number of parties suggest the general “economic prejudice” clause in Article 9§2

¹¹⁹⁶ Doc. COM(95) 382 final.

¹¹⁹⁷ Cf. v. Lewinski, in: Walter 2001, 1019-1021.

¹¹⁹⁸ See EU Commission 1995, Doc. COM(95) 382 final, 50.

¹¹⁹⁹ See EU Commission 1995, Doc. COM(95) 382 final, 51.

¹²⁰⁰ Doc. COM(96) 586 final.

of the Berne Convention as a point of reference'.¹²⁰¹ This statement heralds a right holder-centric view seeking to employ the test, understood as an 'economic prejudice' test, in favour of the right holders.¹²⁰²

The further development in the EU was overshadowed by the adoption of the two WIPO 'Internet' Treaties underscoring the particular importance of the three-step test.¹²⁰³ Due account had to be taken of this development in the EU which itself became one of the contracting parties.¹²⁰⁴ In its proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related in the information society of December 10, 1997,¹²⁰⁵ the European Commission sought to meet this requirement without losing sight of the aforementioned prior consultations and initiatives. The proposal itself is declared to be 'closely linked to, if not based upon, international developments'.¹²⁰⁶ In this framework, however, the potential threat to the functioning of the internal market posed by limitations is emphasised:

'Without adequate harmonization of these exceptions, as well as of the conditions of their application, Member States might continue to apply a large number of rather different limitations and exceptions to these rights and, consequently, apply these rights in different forms.'¹²⁰⁷

In this context, the three-step test is perceived as a guiding principle but not as an effective means for avoiding the fragmentation of the internal market. As regards articles 10 WCT and 16 WPPT, it is stated that,

'unless interpreted in the light of the *acquis communautaire*, these new international obligations might lead to divergent interpretations between Member States and the risk of obstacles to trade within the Community, notably in on-demand services containing protected material.'¹²⁰⁸

Hence, it was deemed necessary to shift the three-step test of international copyright law into line with the *acquis communautaire*, primarily formed by the Computer Programs Directive and the Database Directive,¹²⁰⁹ to pave the way for a smoothly functioning internal market. The regulatory framework resulting from this conception was given the following shape: in paragraphs 1, 2 and 3 of article 5 of

¹²⁰¹ See EU Commission 1996, Doc. COM(96) 586 final, 11-12.

¹²⁰² Cf. Heide 1999, 107.

¹²⁰³ Cf. subsection 3.3.2.

¹²⁰⁴ Cf. v. Lewinski, in: Walter 2001, 1027.

¹²⁰⁵ Doc. COM(97) 628 final – 97/0359 (COD).

¹²⁰⁶ See the Explanatory Memorandum, Doc. COM(97) 628 final – 97/0359 (COD), 3.

¹²⁰⁷ See the Explanatory Memorandum, Doc. COM(97) 628 final – 97/0359 (COD), 35.

¹²⁰⁸ See the Explanatory Memorandum, Doc. COM(97) 628 final – 97/0359 (COD), 35-36.

¹²⁰⁹ See Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs and the European Parliament and Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases.

the proposed Directive, an exhaustive list of permitted limitations was set out. The first of these limitations, concerning temporary acts of reproduction, is mandatory. The following limitations, however, are optional. Article 5(4), finally, clarifies that the permitted limitations

'shall only be applied to certain specific cases and shall not be interpreted in such a way as to allow their application to be used in a manner which unreasonably prejudices the rightholders' legitimate interests or conflicts with the normal exploitation of their works or other subject matter'.

The initial proposal for the later Copyright Directive, thus, referred to 'certain specific cases' instead of using the expression 'certain special cases' that would have corresponded to international copyright law. The order of the two following conditions, moreover, is reversed – a further departure from the international framework. Instead of prohibiting a conflict with *a* normal exploitation of the work, a conflict with *the* normal exploitation is forbidden. The reference point for the application of the two conditions delimiting the basic rule that limitations must be certain special/specific cases, in addition, is a limitation's interpretation. This latter feature is in line with article 6(3) of the Computer Programs Directive and article 6(3) of the Database Directive.¹²¹⁰ It corresponds to the *acquis communautaire*. Whether it would really have contributed to a more effective application of the three-step test, as intended pursuant to the explanatory memorandum,¹²¹¹ appears questionable.¹²¹²

Besides the inappropriate treatment of the three-step test, the conception of the proposal as such is also questionable. Obviously, the fundamental problem which arose in respect of limitations was the wide variety of limitations to be found in the EU member states.¹²¹³ Against this backdrop, the task of effective harmonisation can hardly ever be accomplished.¹²¹⁴ It is foreseeable that each member state will seek to safeguard its domestic system of limitations.¹²¹⁵ The drafters of the three-step test had to face a similar situation. To escape from the dilemma, recourse was had to an abstract formula, now constituting the three-step test.¹²¹⁶

¹²¹⁰ The text of these provisions has already been quoted. See the introduction above.

¹²¹¹ See the Explanatory Memorandum, Doc. COM(97) 628 final – 97/0359 (COD), 35-36.

¹²¹² Cf. Heide 1999, 107-109.

¹²¹³ The European Commission ascertained more than 130 limitations. Cf. Hoeren 2000, 517; Bayreuther 2001, 829. The final article 5 CD still mirrors the wide array of limitations by providing for 21 different limitations. However, even a list of this size seems to be incapable of covering all instances in which a limitation might be appropriate. Cf. Flechsig 2002, 13; Schippan 2001, 125.

¹²¹⁴ Not surprisingly, the solution which has been found and laid down in article 5 of the Copyright Directive is harshly criticised. Cf. Hart 1998, 169-170; Hugenholtz 2000c, 501; Visser 2001, 9; Schippan 2001, 128; Bayreuther 2001, 829. Reinbothe 2002, 46, by contrast, takes the view that article 5 of the Directive is capable of bringing about a remarkable degree of harmonisation.

¹²¹⁵ Cf. Bayreuther 2001, 829. Against this backdrop, Hoeren 2000, 516, referred to limitations as 'sakrosankte Orte nationaler Heiligtümer'.

¹²¹⁶ See Doc. S/1, Records 1967, 113. Cf. subsection 3.1.2 and Ricketson 1987, 479.

The experiences in the field of the three-step test suggest that the best way of solving the problem of harmonising limitations on the European level would have been to employ a flexible, abstract formula.¹²¹⁷ To limit the great latitude which an open formula may possibly allow national legislation, the latter could have been complemented by a small number of mandatory exemptions. Furthermore, as the three-step test, by virtue of the provisions set out in international copyright law, exerts control over all of these limitation anyway, a formula could have been devised which leans on the three-step test without merely repeating its wording. Instead of the expression 'certain special cases', socially valuable ends which EU member states may pursue could have been enumerated explicitly.¹²¹⁸ The prohibition of a conflict with a normal exploitation of the work could have been aligned with the goal of ensuring the functioning of the internal market. Finally, the proportionality test embodied in the last criterion of the three-step test could have been adapted to the principle of proportionality, as applied in EC law.¹²¹⁹

Apparently, it was felt in the course of the further development that a flexible formula might indeed be an appropriate solution. When the Commission's proposal for the later Copyright Directive was submitted to the European Parliament, the notion of an open-ended norm modelled on the US fair use doctrine influenced the deliberations.¹²²⁰ However, these proposals were incapable of making their way to the later Copyright Directive. The Commission's amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the information society of May 21, 1999¹²²¹ followed in the footsteps of the original proposal. The three-step test is maintained in article 5(4) with exactly the same language already used in the previous draft.

It was not until the negotiations in the Council Working Group began that the initial concept underwent substantial changes. The moment the member states influenced the drafting process, however, it proved to be inappropriate that the European Commission had developed an exhaustive list of permissible exemptions.¹²²² The member states insisted on the maintenance of the majority of limitations existing in their national laws. They de facto reduced the concept of an

¹²¹⁷ Cf. Hugenholtz 2000c, 501; Dreier 2002a, 28.

¹²¹⁸ Cf. subsection 4.4.2.3. An approach which points in this direction can be found in recital 34 of the Copyright Directive where educational and scientific purposes, the benefit of public institutions such as libraries and archives, news reporting, quotations, privileges for people with disabilities, public security and administrative and judicial purposes are mentioned as laudable objectives.

¹²¹⁹ Cf. Emmerich-Fritsche 2000, 198-224.

¹²²⁰ See Draft Opinion for the Committee on Legal Affairs and Citizen's Rights on the proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society of the Committee on Economic and Monetary Affairs and Industrial Policy (Draftsman: Brian Cassidy), dated 3 June 1998, 4-5, and of the Committee on the Environment, Public Health and Consumer Protection (Draftsman: Phillip Whitehead), dated 3 July 1998, 8-9.

¹²²¹ Doc. COM(1999) 250 final - 97/0359 (COD).

¹²²² Cf. Hugenholtz 2000c, 500.

exhaustive list of permissible limitations to absurdity. This shortcoming clearly comes to the fore when the light of the harmonisation objective is shed on the final outcome.¹²²³ The European Parliament and Council Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society of 22 May 2001 gives approval to no fewer than 21 permissible limitations, 20 of which are optional. That existing differences really will be levelled out on this basis is nothing but a vague hope.¹²²⁴

However, the negotiations of the Council Working Group had a beneficial effect on the incorporation of the three-step test. In the course of the deliberations of March 13 and 14, 2000, the UK proposed to bring article 5(4) into line with the international three-step test, as laid down in the WCT and TRIPs.¹²²⁵ The delegates of numerous other member states favoured this proposal. Accordingly, the initial plan to follow the *acquis communautaire* was abandoned. The three-step test of the final Copyright Directive – set out in article 5(5) – in consequence, does not deviate from the wording used in international provisions. It refers to ‘certain special cases’ instead of ‘certain specific cases’ as well as to a ‘conflict with a normal exploitation’ instead of a ‘conflict with the normal exploitation’. Moreover, the drafters of article 5(5) CD refrained from choosing the interpretation of a limitation as point of departure for the test’s application.

5.1.2 THE FRAMEWORK SET OUT FOR LIMITATIONS

Article 5 CD contains an exhaustive list of exceptions and limitations which, pursuant to recital 32, not only ‘takes due account of the different legal traditions in Member States’ but also, purportedly, aims to ‘ensure a functioning internal market’. That the extensive enumeration is not necessarily conducive to realising the latter objective can already be gathered from the further requirement that the member states are obliged to ‘arrive at a coherent application of these exceptions and limitations’.¹²²⁶

The system of the enumeration is oriented by the exclusive rights recognised in the Directive. Article 5(1) concerns the reproduction right provided for in article 2. It allows temporary acts of reproduction, which are of a transient or incidental nature and form an integral and essential part of a technological process. Only two purposes may be enabled by the reproduction: a transmission in a network between third parties by an intermediary, or a lawful use. Moreover, the reproduction must be deprived of any independent economic significance.¹²²⁷ This provision is of

¹²²³ Cf. Hugenholtz 2000c, 500-501.

¹²²⁴ Cf. Desurmont 2001, 13-15: ‘Au total, on ne peut exclure que la Directive du 22 mai 2001 ait un effet déstabilisateur sur le niveau de protection reconnu aux créateurs dans les États membres de la Communauté.’

¹²²⁵ Cf. sections 3.2 and 3.3.

¹²²⁶ See recital 32 of the Copyright Directive.

¹²²⁷ For a detailed discussion of this provision, see Hugenholtz 2000b, 482-493 and 2001, 5-7.

particular importance because it is the only mandatory limitation. In the field of temporary reproductions, such as browsing and caching, harmonisation, thus, really does take place.¹²²⁸

Besides this mandatory exemption, article 5(2) CD contains five optional limitations which also concern the right of reproduction. The first of these provisions brings the technical circumstances of the privileged reproduction into focus: a copy of a work may be made on paper or any similar medium using any kind of photographic technique or other processes having similar effects. Electronic means of reproduction are barred.¹²²⁹ Correspondingly, article 5(2)(a) is often characterised as 'reprography exemption'.¹²³⁰ Article 5(2)(b) privileges non-commercial private use.¹²³¹ From the third case enumerated in article 5(2), publicly accessible libraries, educational establishments or museums, as well as archives can profit. In this connection, the Directive does not delineate the particulars of the envisioned privileged use. Article 5(2)(c) simply refers to 'specific acts of reproduction [...], which are not for direct or indirect economic or commercial advantage'.¹²³² That on-line delivery should not be covered by the exemption, however, is clarified in recital 40. Furthermore, article 5(2)(d) contains a limitation concerning ephemeral recordings of works which is aligned with article 11*bis*(3) BC.¹²³³ Ultimately, reproductions of broadcasts made by social institutions, such as hospitals and prisons, are exempted from the right of reproduction by virtue of article 5(2)(e). An important feature of some of these limitations, namely of the reprography exemption, the private use privilege, and the limitation for social institutions, is that the right holders shall receive 'fair compensation'.

Article 5(3) CD imposes various limitations not only on the right of reproduction, as set out in article 2, but also on the right of communication to the public, recognised in article 3.¹²³⁴ The free utilisation of a work is allowed in article 5(3)(a) 'for the sole purpose of illustration for teaching or scientific research'. People with a disability are the beneficiaries of article 5(3)(b). It allows, to the extent required by the specific disability, uses which are directly related to the disability and of a non-commercial nature.¹²³⁵ The press privileges set out in article 10*bis* BC reappear in article 5(3)(c). The subsequent article 5(3)(d) is also rooted in

¹²²⁸ Cf. Dreier 2002a, 33. That article 5(1), in particular, aims at privileging browsing and caching can be inferred from recital 33 of the Copyright Directive.

¹²²⁹ Cf. Visser 2001, 9.

¹²³⁰ Cf. Reinbothe 2001, 738; Bayreuther 2001, 831; Hart 2002, 59.

¹²³¹ Cf. Hoeren 2000, 519.

¹²³² See article 5(2)(c) of the Copyright Directive. Visser 2001, 11, emphasises the broad potential field of application. Originally, it was planned to restrict this limitation to the purposes of archiving and preserving copyrighted material. Cf. Reinbothe 2001, 739.

¹²³³ Cf. Bayreuther 2001, 834; Reinbothe 2001, 739; Visser 2001, 11.

¹²³⁴ Cf. the overview given by Reinbothe 2001, 739-740; Visser 2001, 11-15; Bayreuther 2001, 835-837; Flechsig 2002, 10-13.

¹²³⁵ Cf. the examples discussed by Hart 2002, 61.

the Berne Convention. It exempts the making of quotations. By contrast to the broader article 10(1) BC, however, quotations are only allowed 'for purposes such as criticism or review'. In article 5(3)(e), allowance is made for public security concerns and the utilisation of works in connection with administrative, parliamentary or judicial proceedings. Article 5(3)(f), in line with article 2*bis*(1) and (2) BC, devotes attention to the free use of 'political speeches as well as extracts of public lectures or similar works'. Among the following eight exemptions, a privilege for religious celebrations or official celebrations organised by a public authority can be found,¹²³⁶ as well as the exemption of uses for the purpose of 'caricature, parody or pastiche'.¹²³⁷ Finally, article 5(3)(o) also permits 'use in certain other cases of minor importance where exceptions or limitations already exist under national law'. This rule can only be applied if the currently exempted use is analogue and, moreover, does not affect the free circulation of goods and services within the EU. Nonetheless, it further imperils the objective to harmonise effectively the copyright laws of the member states.¹²³⁸ Inevitably, it gives rise to the question of why an enumeration of a limited number of mandatory limitations, complemented by an abstract formula leaning on the three-step test, was not preferred to a list of this length, comprising moreover the outlined open provision of a general nature.

In article 5(4) CD, the sphere of influence of the limitations on the right of reproduction, set out in paragraphs 2 and 3 of article 5, is extended. The distribution right granted in article 4 is also subject to these exemptions:

'Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4.'

The right of distribution, however, shall only be exposed to the limitations on the reproduction right 'to the extent justified by the purpose of the authorised act of reproduction'.¹²³⁹ In this connection, Reinbothe noted that the distribution must be the intended and permitted consequence of the exempted reproduction.¹²⁴⁰ The last paragraph of article 5 embodies the three-step test:

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

¹²³⁶ See article 5(3)(g). The provision rests on the 'minor reservations doctrine'. Cf. subsection 3.1.1.

¹²³⁷ This limitation is laid down in article 5(3)(k) and leans on French copyright law. Cf. Visser 2001, 14; Bayreuther 2001, 836-837.

¹²³⁸ Cf. Hoeren 2000, 519; Bayreuther 2001, 837.

¹²³⁹ See article 5(4) of the Copyright Directive.

¹²⁴⁰ Cf. Reinbothe 2001, 740.

5.1.3 THE OBJECTIVES UNDERLYING THE DIRECTIVE

Many provisions of the Copyright Directive draw heavily on the WIPO 'Internet' Treaties.¹²⁴¹ In particular, this is true for the right of communication to the public set out in article 3,¹²⁴² and the protection of technological measures and rights-management information in articles 6 and 7.¹²⁴³ Moreover, recital 44 of the Directive underscores the importance of international obligations with regard to limitations: 'When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations.' The incorporation of the three-step test in article 5(5) CD, therefore, is also a tribute paid to the WIPO 'Internet' Treaties.¹²⁴⁴

One of the objectives pursued with the adoption of the Copyright Directive, thus, is to pave the way for the ratification of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty by the European Community itself and its member states.¹²⁴⁵ Compliance with new international obligations, however, does not occupy centre stage in the Copyright Directive. Only recital 15 refers to the WIPO 'Internet' Treaties and clarifies that 'this Directive also serves to implement a number of new international obligations'. The adaptation of EC copyright law to the standard reached on the international level is intertwined with the principal objective of the Directive to harmonise the laws of the member states on copyright and related rights.¹²⁴⁶

The various facets of the intended harmonisation are described in depth in recitals 1 to 14 of the Copyright Directive.¹²⁴⁷ First of all, it is stressed that copyright and related rights play a decisive role with regard to the promotion of the development of the information society in Europe.¹²⁴⁸ It is feared that legislative differences and uncertainties evolving from varying responses of the member states to the challenges of digital technology could thwart the establishment of a flourishing internal market for intellectual products.¹²⁴⁹ A harmonised legal

¹²⁴¹ Cf. Desurmont 2001, 5; Hoeren 2000, 516-517; Reinbothe 2001, 734; Schippan 2001, 118.

¹²⁴² In accordance with article 8 WCT, the right of communication to the public granted under article 3 CD includes the making available to the public of a work in such a way that members of the public may access the work from a place and at a time individually chosen by them. Cf. Flechsig 2002, 5; Heide 2001, 472; Bayreuther 2001, 828.

¹²⁴³ Compare these provisions with article 11 and 12 WCT as well as articles 18 and 19 WPPT. Cf. Koelman 2001, 16; Heide 2001, 474; Reinbothe 2001, 734.

¹²⁴⁴ Cf. Reinbothe 2001, 740; Bayreuther 2001, 839. The three-step test also plays a decisive role in these treaties. See article 10 WCT and article 16 WPPT. Cf. section 3.3 above.

¹²⁴⁵ Cf. Flechsig 1998, 140; v. Lewinski 1998a, 115; Reinbothe 2001, 734; Schippan 2001, 117; Desurmont 2001, 5. The urgency and advantages of the ratification of these treaties is emphasised by Hugenholz 2000c, 499.

¹²⁴⁶ See recital 1. Cf. Hugenholz 2000c, 499-500; Reinbothe 2001, 734; Flechsig 2002, 3.

¹²⁴⁷ See for an overview Hugenholz 2001, 4 and Flechsig 2002, 3.

¹²⁴⁸ See recital 2 of the Copyright Directive.

¹²⁴⁹ See recital 6 of the Copyright Directive.

framework, by contrast, is believed to foster substantial investment in creativity and innovation, thereby leading to growth and increased competitiveness of European industry.¹²⁵⁰ The Directive, therefore, is not brought into line with the maxims of the civil law tradition of copyright, focusing on the author and a work of art as materialisation of his personality. First and foremost, it rests on utilitarian objectives.¹²⁵¹ The harmonisation of the laws of the member states on copyright and related rights is pursued to establish an effective internal market.¹²⁵²

In respect of the conceptual contours of the Directive, it is clearly stated that 'any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation'.¹²⁵³ In this context, authors and performers are addressed directly. Following once again a utilitarian line of argument, the necessity of appropriate reward is emphasised, spurring them to continue their creative and artistic work. The Directive seeks to secure satisfactory returns on investment in creative works.¹²⁵⁴ In this connection, it is pointed out that 'the investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable'.¹²⁵⁵ The person of the individual author or performer, as creator of a work of art or its interpreter is forced to the sidelines. Instead, the Directive seems to be concerned primarily with the well-being of the information industry.¹²⁵⁶ Not surprisingly, the field of moral rights protection is bypassed by succinctly suggesting that moral rights should be exercised according to the legislation of the member states and the provisions set out in international copyright law.¹²⁵⁷ It is stated that 'moral rights remain outside the scope of this Directive'.¹²⁵⁸

In sum, two objectives consequently come to the fore. Firstly, the Copyright Directive is intended to serve as a means for harmonising copyright law in the EU. Secondly, copyright law shall be brought into line with international obligations, particularly those set forth in the WIPO 'Internet' Treaties. The latter objective is central to the application of article 5(5) CD. As regards the aim to harmonise copyright law, the three-step test has only a limited potential. It is incapable of altering the fact that 20 of the 21 permissible limitations were declared optional. However, it may encourage a coherent application of the enumerated limitations, as envisaged in recital 32.

¹²⁵⁰ See recital 4 of the Copyright Directive.

¹²⁵¹ Cf. in respect of copyright's traditions section 2.1 above.

¹²⁵² See recital 1 of the Copyright Directive. Cf. Dietz 1998, 440-441.

¹²⁵³ See recital 9 of the Copyright Directive. Cf. Schippan 2001, 117; Desurmont 2001, 7.

¹²⁵⁴ See recital 10 of the Copyright Directive.

¹²⁵⁵ See recital 10 of the Copyright Directive.

¹²⁵⁶ Cf. Hugenholtz 2000c, 501, who points out that 'the Directive fails to protect authors or performers against publishers and producers imposing standard-form "all rights" (buy-out) contracts'.

¹²⁵⁷ See recital 18 of the Copyright Directive.

¹²⁵⁸ See recital 18 of the Copyright Directive. See the critique by Dietz 1998, 440.

5.2 The Function of Article 5(5) CD

It has already been indicated in the preceding subsections, that article 5(5) CD draws heavily on the three-step test of international copyright law. This can easily be gathered from a comparison of article 5(5) CD with article 10(2) WCT:

Table 1. Article 10(2) WCT and Article 5(5) CD

Article 10(2) WCT:	Article 5(5) CD:
<p>‘Contracting Parties shall, when applying the <i>Berne Convention</i>, 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</p> <p>and do not unreasonably prejudice the legitimate interests of the author.’</p>	<p>‘The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.’</p>

Article 10(2) WCT controls the application of the *Berne Convention*. The limitations allowed under the *Convention* are its field of application. When national legislation adopts a limitation, it must first ensure compliance with the relevant provision of the *Berne Convention* permitting the limitation. Additionally, article 10(2) WCT comes into play. The three criteria of the three-step test must also be observed. The following sequence illustrates this *modus operandi*:

- (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 article 10(2) WCT.¹²⁵⁹

Similarly, article 5(5) CD controls the application of the permissible limitations listed in paragraphs 1, 2, 3 and 4 of article 5 CD. The limitations allowed under the *Copyright Directive*, thus, are its field of application. When national legislation adopts a limitation, it must first ensure compliance with the relevant case on the list of article 5 CD. Additionally, article 5(5) CD comes into play. The three criteria of the three-step test must also be observed. A sequence identical with the one arising in the context of article 10(2) WCT comes to the fore:

¹²⁵⁹ See subsection 4.2.2.

- (a) imposition of a national limitation on an exclusive right recognised in the Copyright Directive;
- (b) compliance with a case listed in paragraph 1, 2, 3 or 4 of article 5 CD;
- (c) additional application of article 5(5) CD.

The close relationship between article 10(2) WCT and article 5(5) CD, therefore, can clearly be brought to light. As the Copyright Directive seeks to pave the way for the ratification of the WIPO 'Internet' Treaties,¹²⁶⁰ this result is not surprising. Article 5(5) CD was obviously based on article 10(2) WCT. In consequence, it also fulfils an additional safeguard function.¹²⁶¹ In line with recital 44, it can furthermore be stated that article 5(5) CD is a direct reference to the three-step test in international copyright law. It makes the existing international obligations visible in the framework of the Copyright Directive. The interpretation of article 5(5) CD must accordingly follow the interpretation of the three-step test at the international level to prevent EU member states from falling short of international obligations and endangering the ratification of the WIPO 'Internet' Treaties.

The fact that article 5(5) CD functions as an additional control mechanism in the outlined way allows for its ambit of operation to be defined precisely. In line with the rules at the international level,¹²⁶² it is to be noted here that the question of whether or not article 5(5) is applicable to a certain national limitation must be answered on the basis of the framework set out in the Copyright Directive. The legislative technique which is used at the national level – a restrictively delineated exclusive right may be granted instead of conferring a broad exclusive right first and imposing certain limitations afterwards – is not decisive. Otherwise, the obligation to ensure compliance with article 5(5) CD could easily be bypassed. Thus, if a member state, for instance, defines in its domestic law the right of reproduction so as to exclude from protection temporary acts of reproduction covered by article 5(1) CD, the three-step test of article 5(5) CD applies to this exclusion even though it is not labelled 'limitation' at the national level. This follows from the framework set out in the Directive.¹²⁶³ Pursuant to article 2 CD, the reproduction right encompasses temporary acts. They are to be exempted, however, by virtue of article 5(1) CD. This mandatory exemption is subjected to the three-step test of article 5(5) CD. A member state cannot circumvent the three-step test by not granting the right of temporary reproductions from the outset. If it does so, and excludes this facet of the reproduction right from protection, the three-step test must be applied to a national exclusion from protection instead of a national limitation.

¹²⁶⁰ Cf. subsections 5.1.1 and 5.1.3.

¹²⁶¹ Cf. subsection 4.2.2.

¹²⁶² See subsection 4.1.3.

¹²⁶³ See Triaille 2002, 11, discussing the legislative technique used in the Copyright Directive.

5.3 The Impact on the List of Permissible Limitations

The insertion of the three-step test into the Copyright Directive is judged very differently. Whereas some commentators are of the opinion that its incorporation was unnecessary because sufficient weight had already been given to the three-step test while drafting the catalogue of permissible limitations laid down in article 5,¹²⁶⁴ the view is also taken that the three-step test might prove to substantially limit the room to manoeuvre which the member states enjoy when amending their national laws.¹²⁶⁵ Whether the three criteria are observed can, in any case, be controlled by the European Commission and the European Court of Justice.¹²⁶⁶ Insofar as the three-step test really has the potential for placing constraints on national legislation, this potential can thus easily be realised on the European level.

Hence, there is all the more reason for turning to each individual criterion of the three-step test in order to clarify its precise meaning and sphere of influence in the context of the Copyright Directive. In the following subsections, the impact of each step of the three-step test on the permissible limitations enumerated in article 5 CD will accordingly be examined. Subsection 5.3.1 concerns the prerequisite that the listed limitations shall only be applied in certain special cases. Subsection 5.3.2 conducts an inquiry into a potential conflict with a normal exploitation. Subsection 5.3.3 clarifies whether the legitimate interests of the right holders are in danger of being unreasonably prejudiced.

5.3.1 CERTAIN SPECIAL CASES

It is stated in article 5(5) CD that 'the exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases'. The crucial question arising in this context is therefore whether the enumerated limitations can be qualified as special cases in the sense of the international three-step test. To ensure their exercise in accordance with international obligations, as intended pursuant to recital 44, this hurdle must be surmounted by the cases listed in article 5 CD. A corresponding examination will be undertaken in the following subsection 5.3.1.1. The formulation 'shall only be applied in certain special cases' chosen in article 5(5) CD, furthermore, begs the question whether the EU member states are obliged to further concretise the cases enumerated in article 5 CD. The potential need for further specification will accordingly be discussed in subsection 5.3.1.2.

¹²⁶⁴ Cf. Bayreuther 2001, 839.

¹²⁶⁵ Cf. Reinbothe 2001, 740.

¹²⁶⁶ Cf. Reinbothe 2001, 740.

5.3.1.1 SPECIALITY

At the international level, the conceptual contours of the requirement that a copyright limitation must be a 'special case' can be drawn as follows: 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. A limitation that rests on a rational justificatory basis making its adoption plausible constitutes therefore a special case. If an exemption corresponds to an internationally recognised limitation permitted by the Berne Convention, it can be assumed automatically that this requirement is met.¹²⁶⁷

This standard of control must be met by the limitations declared permissible in paragraphs 1, 2, 3 and 4 of article 5 CD. Otherwise, they would be incompatible with international obligations and thwart the ratification of the WIPO 'Internet' Treaties. When the cases listed in article 5 are scrutinised in the light of the outlined standard of control, the following conclusions can be drawn:

Article 5(1) CD exempts temporary acts of reproduction, such as caching, for the purpose of enabling network transmissions and lawful uses. This limitation reconciles the legitimate interest of the author in controlling reproductions of this kind with the interest of the general public in the efficient functioning of the internet. As pointed out in subsection 4.4.2.3, it can be qualified as a special case.

Article 5(2)(a) CD allows reproductions on paper or any similar medium effected by the use of any kind of photographic technique or by some other process having similar effects. This 'reprography exemption' refers to the technical process employed to make a copy instead of giving evidence of the objective pursued with the reproduction. Its judgement in the light of the outlined standard of control, thus, is impossible. Whether or not a rational justificatory basis exists is difficult to ascertain. Nevertheless, it need not be called into doubt that it is a special case. The market imperfections of the pre-digital world form the background to the exemption. It refers solely to analogue reproduction techniques. At the 1967 Stockholm Conference, it was unequivocally stated that copies made with the help of photographic techniques pass the first step of the three-step test – even if they serve commercial purposes:

'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 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.'¹²⁶⁸

¹²⁶⁷ See subsections 4.4.2.4 and 4.4.3.

¹²⁶⁸ See report on the work of Main Committee I, Records 1967, 1145-1146.

Pursuant to this practical example, the problem of reprography is to be solved in the context of the second and particularly the third criterion of the three-step test. Hence, photographic reproductions were apparently regarded as a special case in the sense of the test's first criterion. Otherwise, the following criteria could never be met. Article 5(2)(a) CD reflects this decision. It can thus be qualified as a special case on account of the drafting history of article 9(2) BC.¹²⁶⁹

Article 5(2)(b) CD exempts analogue or digital copies made by a natural person for private non-profit use. That strictly personal use of this kind is a special case in the sense of the three-step test – also in the digital environment – has already been emphasised in subsection 4.4.4.1 above.

Article 5(2)(c) CD privileges publicly accessible libraries, educational establishments and museums as well as archives. These institutions may make unauthorised copies on the condition that any profit motive is absent. This limitation reconciles the legitimate interest of the author in the exploitation of these reproductions with the competing public interest in the archiving, preservation and dissemination of information. For this reason, it is a special case.¹²⁷⁰

Article 5(2)(d) CD exempts ephemeral recordings of works made by broadcasting organisations. It is in line with article 11*bis*(3) BC. For this reason, article 5(2)(d) CD automatically constitutes a special case.¹²⁷¹

Article 5(2)(e) serves social institutions pursuing non-commercial purposes, such as hospitals or prisons. They may make reproductions of broadcasts. It has already been stated in subsection 4.4.4.1 that limitations of this type are special cases.

Article 5(3)(a) CD allows the unauthorised use of copyrighted material for the sole purpose of illustration for teaching or scientific research to the extent justified by the non-commercial purpose to be achieved.¹²⁷² It has already been substantiated in subsection 4.4.2.3 that a limitation of this kind is a special case.¹²⁷³ As regards the teaching aspect of the provision, this can also be inferred from article 10(2) BC. Although article 10(2) BC, in contrast to article 5(3)(a) CD, does not affect the right of making available granted in article 8 WCT, it nevertheless clearly indicates that the use for the purpose of illustrating teaching is a case where the imposition of a copyright limitation was deemed appropriate at the international level.¹²⁷⁴

Article 5(3)(b) CD permits the non-profit use of a work for the benefit of people with a disability to the extent required by the specific disability. It has already been stated in subsection 4.4.2.3 that a limitation of this kind is a special case.¹²⁷⁵

¹²⁶⁹ Cf. subsections 3.1.2, 3.1.3.1, 3.1.3.2.

¹²⁷⁰ Cf. subsections 2.2.2, 4.4.2.3 and 4.4.4.1.

¹²⁷¹ See subsection 4.4.3.

¹²⁷² See for a detailed description Xalabarder 2003, 134-149.

¹²⁷³ Cf. in addition the detailed analysis conducted by Geiger 2002b, 31-32 and 36-38.

¹²⁷⁴ Cf. subsection 4.4.3. Cf. Reinbothe/von Lewinski 2002, 125.

¹²⁷⁵ However, see Ricketson 2003, 77, doubting that article 5(3)(b) CD complies with the three-step test.

Article 5(3)(c) CD sets forth press privileges that are closely related to article 10*bis*(1) and 10*bis*(2) BC. It therefore automatically constitutes a special case in the sense of the three-step test.¹²⁷⁶

Article 5(3)(d) CD exempts the making of quotations for purposes such as criticism or review. The provision draws heavily on article 10(1) BC. Thus, it can automatically be qualified as a special case.¹²⁷⁷

Article 5(3)(e) CD allows the unauthorised use of a work for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings. It accordingly has three different aspects, all of which are special cases. Firstly, it is a plausible legislative decision to reconcile the author's interest in controlling the use of a work with the public's vital interest in public security. Secondly, the state enjoys the freedom of lending weight to its own interest in the effective functioning of its legislative, executive and judiciary bodies.¹²⁷⁸ However, it is to be emphasised that it is not sufficient when the exemption of a work's use for administrative, parliamentary or judicial purposes is merely considered politically useful. A copyright limitation does not become a special case just because it is conducive to reducing the costs of administration, etc. By contrast, it is only a special case if an administrative, parliamentary or judicial body really depends on the use of copyrighted material so that it would be rendered incapable of accomplishing its tasks if the required use is denied.¹²⁷⁹ Article 5(3)(e) CD is in line with this requirement. It refrains from generally permitting the use of copyrighted material. Merely the use ensuring the *proper* performance of administrative, parliamentary or judicial proceedings is privileged. This definition can be construed so as to necessitate that the state body involved really must depend on a work's use in the outlined sense. As to the third aspect, the reporting of such proceedings, the freedom of the press, as facet of freedom of expression,¹²⁸⁰ must be considered. It undoubtedly forms a rational justificatory basis.

Article 5(3)(f) CD exempts the use of political speeches as well as extracts of public lectures or similar works insofar as justified by the informatory purpose. This provision corresponds to articles 2*bis*(1) and 2*bis*(2) BC. Hence, it is automatically a special case.¹²⁸¹

Article 5(3)(g) CD permits the unauthorised use of a work during religious celebrations or official celebrations organised by a public authority. A line can be drawn between this limitation and the so-called 'minor reservations doctrine'

¹²⁷⁶ Cf. subsections 2.2.1 and 4.4.3. See in respect of the right of making available that is not affected by the provisions of the Berne Convention the previous comment made on article 5(3)(a) CD.

¹²⁷⁷ Cf. subsections 2.2.1 and 4.4.3. See in respect of the right of making available that is not affected by article 10(1) BC the previous comment made on article 5(3)(a) CD.

¹²⁷⁸ See subsection 4.4.2.3.

¹²⁷⁹ Cf. subsection 4.4.4.1.

¹²⁸⁰ Cf. subsection 2.2.1.

¹²⁸¹ Cf. subsections 4.1.3 and 4.4.3. See in respect of the right of making available that is not affected by article 2*bis* BC the previous comment made on article 5(3)(a) CD.

constituting an implied limitation recognised by the members of the Berne Union.¹²⁸² The 1996 WIPO Diplomatic Conference, at which the WIPO 'Internet' Treaties were adopted, touched upon the 'minor reservations doctrine'.¹²⁸³ Australia in particular, favoured its maintenance.¹²⁸⁴ The clarification that article 10(2) WCT 'neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention' in the agreed statement concerning article 10 WCT indicates that the contracting parties decided to uphold the doctrine. It can consequently be regarded as one pillar on which article 5(3)(g) CD rests.¹²⁸⁵ Whether the link to this implied limitation suffices, however, is doubtful because the conceptual contours of article 5(3)(g) CD have not been drawn restrictively. A work's reproduction, communication to the public and making available is exempted in general. The fundamental principle underlying the 'minor reservations doctrine', by contrast, is the *de minimis* principle.¹²⁸⁶ The right of reproduction, furthermore, does not fall within its sphere of influence. Traditionally, only public performing rights are subjected to the 'minor reservations doctrine'.¹²⁸⁷ As regards the first alternative, use during religious celebrations, it is nevertheless irrelevant that the boundary lines of the 'minor reservations doctrine' are overstepped. Here, it is also arguable that national legislation reconciles the author's interest in controlling the use of a work with the interest in freedom of worship and unhindered religious practice. As to the second alternative, use during official celebrations, however, a similar justificatory basis is difficult to find. The broad exemption set out in article 5(3)(g) CD follows the dictate of political usefulness rather than evolving from the necessity to solve an understandable conflict of interests. In this case, the *de minimis* principle and the restriction to public performing rights, namely articles 11(1), 11*bis*(1), 11*ter*(1), 14(1) and 14*bis*(1) BC,¹²⁸⁸ must consequently be interpolated to bring article 5(3)(g) CD into line with international obligations. A work's reproduction and making available in the course of official celebrations is therefore not a special case. Its communication to the public constitutes a special case only insofar as solely the listed Berne rights are affected¹²⁸⁹ and the use made is of a *de minimis* nature.

Article 5(3)(h) CD allows the unauthorised use of works, such as works of architecture or sculpture, made to be located permanently in public places.

¹²⁸² See for a more detailed description subsection 3.1.1.

¹²⁸³ See WIPO Doc. CRNR/DC/4, §§ 6.01, 12.06 and 12.07.

¹²⁸⁴ Cf. WIPO Doc. CRNR/DC/102, §§ 93 and 510.

¹²⁸⁵ Cf. subsection 4.4.3.

¹²⁸⁶ Cf. subsection 3.1.1.

¹²⁸⁷ Cf. subsection 3.1.1. The analysis conducted by Ficsor 2002a, 291-294, suggests that articles 11(1), 11*bis*(1), 11*ter*(1), 14(1) and 14*bis*(1) BC are covered nowadays.

¹²⁸⁸ See the analysis conducted by Ficsor 2002a, 291-294.

¹²⁸⁹ These exclusive rights are encompassed by the general right of communication to the public granted in article 8 WCT. It appears safe to assume that article 3 CD also covers these rights.

Traditionally, this widespread¹²⁹⁰ limitation is defended on the grounds that works of this kind shape the appearance of public streets, squares, parks and so forth, thereby inevitably becoming some sort of common property.¹²⁹¹ Whether a user interest in all kinds of unauthorised uses, encompassing use for commercial purposes,¹²⁹² can be inferred from this explanation, appears questionable – but still, the fact remains that these works inevitably form the background to people’s life. A certain interest in unhindered use of objects closely related to day-to-day life and personal experiences, thus, cannot be denied. In respect of the media, an aspect of freedom of expression is also to be taken into account. In the course of a report or film, that does not concern current events,¹²⁹³ copyrighted works in public places may become visible. Article 5(3)(h) CD ensures in this situation that media activities are not restricted. The preparatory work undertaken for the 1967 Stockholm Conference, moreover, gives evidence that the use of works in public places was considered in the context of the later three-step test.¹²⁹⁴ On the whole, article 5(3)(h) CD can therefore be regarded as a special case.

Article 5(3)(i) CD permits the incidental inclusion of a work in other material.¹²⁹⁵ The principle on which this exemption rests seems to be the *de minimis* principle. It is arguable whether copyright must be hindered from becoming an obstacle to activities not specifically aiming to make use of a work but rather affecting a work ‘by accident’. However, it can hardly be assumed on this basis that there is an understandable need calling on the legislator to reconcile the outlined user interest with the author’s interests. The *de minimis* principle as such is, in any case, insufficient to lend a limitation the air of speciality – at least of speciality in the sense of the three-step test. The better solution would be not to extend the coverage of exclusive copyrights to *de minimis* uses such as a work’s incidental inclusion in other material. This exclusion from protection would not fall under the three-step test.¹²⁹⁶ Article 5(3)(i) CD is therefore not a special case. To fulfil international obligations, EU member states must refrain from moulding a national limitation on article 5(3)(i) CD.

Article 5(3)(j) CD exempts the use of a work for the purpose of advertising the public exhibition or sale of artistic works insofar as necessary to promote the event. The limitation accordingly reacts to specific needs that are closely related to the work. A museum, for instance, depends on the use of its exhibits if it wants to

¹²⁹⁰ Cf. the overview given in subsection 3.1.3.

¹²⁹¹ Cf. von Gierke 2002, 105.

¹²⁹² Cf. von Gierke 2002, 113 and Cohen Jehoram 2002, 1693, both discussing use for the production of postcards and guidebooks.

¹²⁹³ Cf. article 5(3)(c) CD.

¹²⁹⁴ See Doc. S/1, Records 1967, 112 (footnote 1).

¹²⁹⁵ This limitation can traditionally be found in the German and UK copyright acts. Cf. subsections 3.1.3.1 and 3.1.3.4.

¹²⁹⁶ See subsection 4.1.3. Cf. as to the way in which common law countries deal with this kind of *de minimis* use subsections 3.1.3.4 and 3.1.3.5.

attract attention by publicising current exhibitions. Similarly, the owner of an artistic work depends on the work's use if he wishes to publicise the object he wants to sell.¹²⁹⁷ The limitation thus affords national legislation the opportunity to react adequately to an understandable conflict of interests. It is a special case.

Article 5(3)(k) CD allows the unauthorised use of a work for the purpose of caricature, parody or pastiche.¹²⁹⁸ This kind of use can be regarded as a specific (polemic) way of making a quotation of a work.¹²⁹⁹ In this line of reasoning, it can directly be supported by article 10(1) BC and would thus have to be qualified as a special case automatically.¹³⁰⁰ Moreover, it can be asserted that uses of this nature play a decisive role for cultural diversity. The parodist depends on the use of the original work to express himself artistically. Freedom of expression and considerations of intergenerational equity alike urge the national legislator to reconcile the author's interest in controlling objectionable use of this kind with another author's interest in using a work for caricature, parody or pastiche. Article 5(3)(k) CD is therefore a special case.¹³⁰¹

Article 5(3)(l) CD concerns the use of a work in connection with the demonstration or repair of equipment. This case has been discussed in detail in subsection 4.4.2.3 above: it is a special case only insofar as incidental use of a work is exempted that can hardly be avoided in the normal course of events when running a business selling and repairing relevant equipment. The permanent playing or showing of copyrighted material in such businesses, however, is not a special case.

Article 5(3)(m) CD permits the use of an artistic work in the form of a building or a drawing or plan of a building for the purpose of reconstructing the building. It reconciles the architect's interest in profiting from every construction of his artistic building with the owner's competing interest in making unauthorised use of the work to reconstruct the building. Article 5(3)(m) CD, therefore, reacts to an understandable conflict of interests and can be qualified as a special case.

Article 5(3)(n) CD allows libraries, educational establishments, museums and archives on their premises the unauthorised public communication or making available of a work in their holdings to individual persons for research or private study. The limitation serves the dissemination of information. The user interest at stake is the interest in getting unrestrained access to works of the intellect. The limitation is also related to considerations of intergenerational equity.¹³⁰² The national legislator is thus free to solve the existing conflict of interests. Article 5(3)(n) CD is a special case.

¹²⁹⁷ Cf. subsection 4.4.2.3.

¹²⁹⁸ This limitation is traditionally imposed on copyright in France. Cf. subsection 3.1.3.3.

¹²⁹⁹ Cf. Quaedvlieg 1992, 23-24 (footnote 50), whose comment on quotations and parody points in this direction.

¹³⁰⁰ Cf. subsection 4.4.3. See in respect of the right of making available that is not affected by article 10(1) BC the previous comment made on article 5(3)(a) CD.

¹³⁰¹ Cf. subsections 2.2.1, 2.3, 4.4.2.3.

¹³⁰² Cf. subsections 2.2.2, 2.3, 4.4.2.3 and 4.4.4.1.

Article 5(3)(o) CD allows EU member states the maintenance of already existing limitations of minor importance on certain further conditions. The provision 'grandfathers' a wide variety of traditional limitations. It is thus impossible to make a general comment on whether or not article 5(3)(o) CD is a special case. All depends on the national limitation. Each national limitation falling under article 5(3)(o) CD has to be scrutinised thoroughly in the light of the rules governing the identification of special cases.¹³⁰³

5.3.1.2 NO NEED FOR FURTHER SPECIFICATION

The analysis conducted in the previous subsection shows that the first criterion of the three-step test impacts only modestly on the list of permissible limitations set out in article 5 CD. Against this backdrop, it is of particular interest to reread the text of article 5(5) CD attentively: 'The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall *only be applied in certain special cases...*' (emphasis added). Does this mean that the EU member states, when adopting a limitation from the list, must form a special case of the listed type of limitation?¹³⁰⁴

Sufficient room for further specification is created by the Copyright Directive. The cases listed are circumscribed in broad terms. The reprography exemption of article 5(2)(a) CD, for instance, simply refers to the technical process enabling the reproduction. National legislation, thus, is free to determine the purposes for which a corresponding national limitation may be invoked. The private use exemption of article 5(2)(b) CD merely requires that the beneficiary is a natural person and that any profit motive is absent. National legislation could additionally determine how many copies are permissible, and whether a work in its entirety or only extracts therefrom may be reproduced. Further conditions could similarly be imposed on the use for illustrating teaching or scientific research pursuant to article 5(3)(a) CD, the use for administrative, parliamentary or judicial proceedings pursuant to article 5(3)(e) CD, the use during religious celebrations pursuant to article 5(3)(g) CD and so forth. As to the use during official celebrations pursuant to article 5(3)(g) CD and the use for demonstrating or repairing equipment pursuant to article 5(3)(l) CD, more precision is necessitated by the international three-step test itself. The Copyright Directive, therefore, enumerates obviously types of limitations rather than precisely defined exceptions.¹³⁰⁵

Nonetheless, the passage 'shall only be applied in certain special cases' does not generally require the enumerated cases to be further concretised. Admittedly, there is a move afoot in international copyright law seeking to align the requirement of

¹³⁰³ These rules have been set out in section 4.4.2.

¹³⁰⁴ An affirmative answer is given by Walter, in: Walter 2001, 1064. Dreier 2002a, 35, and Bornkamm 2002, 43, by contrast, answer in the negative.

¹³⁰⁵ Cf. the comments made by Poll and Reinbothe in the course of the discussion summarised by Zecher 2002, 53. See Walter, in: Walter 2001, 1064; Senfleben 2003, 12.

certainty with the continental European dogma of restrictively delineated exceptions.¹³⁰⁶ However, as shown above, this point of view must be rejected for various reasons.¹³⁰⁷ International obligations do not give rise to the assumption that a more precise delineation of the enumerated cases is generally required. Article 5(3)(l) CD and the second alternative of article 5(3)(g) CD which must further be specified to pass the first step of the three-step test are exceptions to this rule.

In the context of the Copyright Directive, it would even appear schizophrenic to contend that the expression 'shall only be applied in certain special cases' calls for devising special cases of the listed limitations. If the Directive's drafters really were of the opinion that the enumerated cases are not 'certain special cases', what was there preventing them from laying down a more precise definition themselves? Setting out an extensive list of permissible limitations first, and afterwards preventing national legislation from adopting the listed cases, appears a bewildering manoeuvre. This is all the more true because the overarching objective of the Copyright Directive, pursuant to its numerous recitals, is the harmonisation of copyright law in the EU.¹³⁰⁸ The further specification of the enumerated limitations in each member state would encourage the fragmentation of copyright law rather than its harmonisation. The best way of arriving at a coherent application of permissible limitations, as envisaged in recital 32, is to implement the listed types of limitations in national law in exactly the same broad terms as used in the Directive itself. Their further, more precise delineation in the light of the three-step test, then, can confidently be left to the courts – including the European Court of Justice, which is capable of taking care of their coherent application.¹³⁰⁹

The assumption that the expression 'shall only be applied in certain special cases' means that special cases of the listed limitations must be formed, therefore, inevitably points to certain inconsistencies. It can be inferred from the final shape of article 5 CD itself, that this result was not intended. When the first proposal for the later Copyright Directive was tabled by the EU Commission, it was stated in the explanatory memorandum in respect of the precursor of the later article 5(2)(c) CD, privileging libraries, educational establishments, museums and archives, that the provision 'does not define those acts of reproduction which may be exempted by Member States'. It was clarified that, 'in line with the "three step test", Member States may not, however, exempt all acts of reproduction, but will have to identify certain special cases of reproduction, such as the copying of works which are no longer available on the market'.¹³¹⁰ As to article 5(2)(c) CD, the view was

¹³⁰⁶ See subsection 4.4.1. Cf. Reinbothe/von Lewinski 2002, 124; Ficsor 2002a, 516.

¹³⁰⁷ Cf. subsections 4.4.1 and 4.4.4.2.

¹³⁰⁸ Cf. subsection 5.1.3.

¹³⁰⁹ Cf. Buydens 2001, 442, who takes the view that the wording of article 5(5) CD indicates that judges must consider the three-step test in each single case anyway.

¹³¹⁰ See the Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society of 10 December 1997, COM(97) 628 final – 97/0359 (COD), Explanatory Memorandum, 39.

accordingly adopted that certain special cases of the enumerated case must be formed at the national level indeed. This additional requirement, however, was directly given expression in the text of the proposed Directive itself. Draft article 5(2)(c) of the Commission's proposal explicitly allows solely 'specific acts of reproduction'.¹³¹¹ To this day, article 5(2)(c) CD is the only case listed in article 5 CD where this language is used. If the drafters of the Copyright Directive would have been of the opinion that the necessity to form special cases of the enumerated limitations already results from article 5(5) CD, this clarification in article 5(2)(c) CD would have been superfluous. Its existence, thus, indicates that the formulation 'shall only be applied in certain special cases' chosen in article 5(5) CD was not understood to call on national legislators to further concretise the enumerated types of limitations.

This conclusion can further be supported by developments in the field of article 10(2) WCT – the international provision on which article 5(5) CD was based.¹³¹² The outlined problem arose in the context of article 10(2) WCT as well. Pursuant to this provision, the contracting parties of the WCT, 'when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases...' Article 10(2) WCT is not accompanied by a list of 21 permissible limitations like article 5(5) CD. However, the limitations allowed under the Berne Convention function as such a list in this connection.¹³¹³ The question is accordingly the same: are the contracting parties obliged to further concretise the limitations permitted by the Berne Convention in order to confine them to certain special cases?

Interestingly, this issue was expressly addressed in the context of the WIPO Copyright Treaty. The agreed statement concerning article 10(2) WCT clarifies that 'article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention'.¹³¹⁴ The contracting parties of the WIPO Copyright Treaty, thus, were apparently alert to the potential harm flowing from the formulation chosen in article 10(2) WCT. The agreed statement, consequently, seeks to leave interpreters in no doubt about its impact on the scope of Berne limitations – none. As elaborated above, national limitations complying with provisions of the Berne Convention fulfil the first criterion of article 10(2) WCT automatically.¹³¹⁵

However, to present a complete discussion of the problem, the specific merit of the incorporation of all three criteria of the three-step test into article 5(5) CD shall not be concealed. Only the reference to the whole three-step test fully reflects the existing international obligations. As the analysis conducted in the previous

¹³¹¹ See the text of the proposal, *ibid.*, 57.

¹³¹² Cf. section 5.2.

¹³¹³ Cf. the parallel between article 10(2) WCT and article 5(5) CD drawn in section 5.2.

¹³¹⁴ See WIPO Doc. CRNR/DC/96, agreed statement concerning article 10 WCT.

¹³¹⁵ See subsection 4.4.3.

subsection has shown, a modest adjustment of the enumerated cases evolves from a scrutiny in the light of the first criterion. One case of minor importance, article 5(3)(i) CD, must even be abolished. In the context of article 10(2) WCT, it has moreover been argued above that the expression 'certain special cases' can at least function as a reminder for national legislation. It calls upon national policy makers to use the provisions of the Berne Convention moderately with sense and reason.¹³¹⁶ By the same token, it can be posited here that, when adopting the cases listed in the Copyright Directive, national legislation must proceed moderately. Instead of thoughtlessly exhausting the room to manoeuvre offered in article 5 CD, a careful analysis of the social and cultural needs must precede the adoption of a limitation. National legislators are expected to weigh carefully the need for copyright protection against the justifications for limitations. The expression 'certain special cases', therefore, can potentially help to diminish the potential harm flowing from the extensive enumeration of permissible limitations in the Copyright Directive. If the claim for moderateness is taken seriously, no member state should succumb to the temptation of adopting all listed exemptions.

In the context of the Copyright Directive, using the offered room to manoeuvre with sense and reason, moreover, necessitates considering the European harmonisation project. Whereas in connection with article 13 TRIPs and article 10(2) WCT only provisions of international copyright law must be reconciled with the objectives of national legislation, the complex framework surrounding article 5(5) CD comes up with further challenges. Recital 32 of the Copyright Directive stresses that the member states should arrive at a 'coherent application' of the limitations allowed under the Directive. It has already been pointed out that this task, ultimately, is not unlikely to be accomplished first and foremost by the courts. National legislation, however, also can contribute to its realisation by taking developments in other member states into consideration and seeking to bring its own decisions into line with them.

In sum, the following conclusions can accordingly be drawn: the requirement that the limitations listed in article 5 CD, pursuant to paragraph 5 thereof, 'shall only be applied in certain special cases' does not mean that national legislation must form special cases of the enumerated limitations.¹³¹⁷ Instead, it simply completes the reference to the international three-step test. It gives full evidence of the existing international obligations which, pursuant to recital 44, shall be observed. In the light of the harmonisation objective underlying the Directive, the passage can furthermore, like the corresponding formulation chosen in article 10(2) WCT, be understood as a claim for moderateness. When bringing domestic copyright law into line with the Copyright Directive, national legislators must use sense and reason. Limitations should only be adopted or maintained if necessary for an appropriate national copyright balance.

¹³¹⁶ Cf. subsection 4.4.3.

¹³¹⁷ Cf. Dreier 2002a, 35; Bornkamm 2002, 43.

5.3.2 CONFLICT WITH A NORMAL EXPLOITATION

Article 5(5) CD also comprises the second criterion of the international three-step test: 'The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter...' The reference to 'other subject matter' besides the 'work' concerns the rights related to copyright which are protected by the Directive, such as the rights of performers, phonogram and film producers, and broadcasting organisations.¹³¹⁸ In international copyright law, a conflict with a normal exploitation arises if the authors are deprived of an actual or potential market of considerable economic or practical importance. Among the circle of these actual or potential markets rank solely those possibilities of marketing a work which typically constitute a major source of income and, consequently, belong to the economic core of copyright. For determining these major sources of income, the overall commercialisation of works of the relevant category must be considered instead of focusing on the international system of exclusive rights. On the basis of these findings, the following comments can be made:

Article 5(1) CD exempts solely temporary acts of reproduction having no independent economic significance. These acts, thus, do not constitute a potential major source of income. The provision consequently does not conflict with a work's normal exploitation.

Article 5(2)(a) CD concerns reproductions effectuated by the use of photographic or similar techniques. In this area, it is fruitless to speculate about a potential conflict with a normal exploitation. Due to market failure in the analogue world, right holders are rendered incapable of establishing functioning markets that could be profitable enough to belong to the economic core of copyright.

Article 5(2)(b) CD allows unauthorised analogue or digital reproductions for strictly personal use. It is advisable to assign the task of administering digital private use of this kind to libraries and other organisations capable of individualising users.¹³¹⁹ It is irrelevant in this context that, with an eye to article 5(2)(c) CD, recital 40 emphasises that uses made by libraries and similar institutions should not cover on-line delivery of protected works or other subject matter. The institutions involved in the envisioned digital private use infrastructure serve as intermediaries. They deliver protected material on behalf of private users. These beneficiaries are entitled to make digital reproductions under article 5(2)(b) CD. Insofar as the digital library service is confined to private users, it can thus be defended on the basis of article 5(2)(b) CD – irrespective of recital 40. Libraries and similar institutions involved in a digital private use infrastructure must enter into

¹³¹⁸ See articles 1(1), 2 and 3(2) of the Copyright Directive. Cf. also the scope of the WCT and WPPT on which the Directive leans.

¹³¹⁹ Cf. subsection 4.5.5.

contractual agreements with the right holders anyhow. To be authorised to run the envisioned private use network,¹³²⁰ they have to obtain a licence for making works available on-line – at least insofar as article 5(3)(n) CD does not allow such use. The framework set out in the Copyright Directive, thus, is not favourable for the establishment of an appropriate digital private use infrastructure. This is a serious flaw of the Directive.

Article 5(2)(c) CD, when read together with recital 40, does not conflict with a normal exploitation. Reproductions made by libraries, educational establishments, museums or archives for internal use, such as the preservation and archiving of copyrighted material, can hardly be regarded as a potential major source of royalty revenue. Insofar as copies are passed on to third persons, the circle of beneficiaries must be drawn sufficiently narrow so that the limitation does not encroach upon the economic core of the overall commercialisation of affected works.

Article 5(2)(d) CD exempts ephemeral recordings. The provision keeps within the limits of article 11*bis*(3) BC. A potential major source of royalty revenue, belonging to the economic core of copyright, need not be expected in this area.

Article 5(2)(e) CD allows social non-profit institutions, such as hospitals or prisons, the reproduction of broadcasts. One can hardly assume that this limitation encroaches upon the economic core of copyright by depriving right holders of broadcast works of a major source of income. Insofar as the reproduction serves time shifting purposes, this has already been discussed in more detail in subsection 4.5.5.1. Article 5(2)(e) CD does therefore not conflict with a normal exploitation.

Article 5(3)(a) CD permits the use for the purpose of illustrating teaching or scientific research to the extent that it is justified by the underlying non-commercial purpose. The limitation leans on article 10(2) BC. The guidelines given in subsection 4.5.4.2 above, where the case of limitations based on article 10(2) BC was discussed in detail, must be observed in this respect. Furthermore, it is to be taken into account that only non-commercial purposes are exempted by article 5(3)(a) CD. It cannot therefore readily be inferred that the right holders are deprived of a major source of royalty revenue. It accordingly appears safe to assume that article 5(3)(a) CD does not conflict with a normal exploitation. This is particularly true if the circle of beneficiaries is drawn narrowly at the national level so that the economic core of a work's overall commercialisation, for instance of an academic work, remains untouched.¹³²¹

Article 5(3)(b) CD privileges people with a disability. It does not affect a potential major source of income. Hence, there is no conflict with a normal exploitation.

Article 5(3)(c) CD exempts the use of articles on current topics and, insofar as justified by the informatory purpose, a work's use in connection with the reporting of current events. The provision rests on article 10*bis* BC. A potential major source

¹³²⁰ Cf. subsection 4.5.5.2.

¹³²¹ Cf. Xalabarder 2003, 165-167.

of royalty revenue need not be expected – neither when an article on current topics is used nor when a work is incidentally included in a report on current events. The use of articles on current topics can furthermore be reserved. There is accordingly no conflict with a normal exploitation.

Article 5(3)(d) CD allows quotations. A typical major source of royalty revenue can hardly be expected in this area. Even in the case of academic works, where it is not unlikely that a work will be quoted in other treatises, it cannot generally be assumed that a major source of income – comparable to the sale of copies – will accrue from quotations. In the case of certain works of paramount importance, a potential major source of income might be expected. Surveying the wide variety of academic works, however, this appears as an atypical case. Hence, it is not possible to derive the general rule that quotations typically constitute a potential source of income which belongs to the economic core of an academic work's overall commercialisation. Article 5(3)(d) CD thus does not conflict with a normal exploitation. Considerations of intergenerational equity strongly support this finding.¹³²²

Article 5(3)(e) CD permits the use for the purpose of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings. As to the first aspect – public security – it suffices to say that a typical major source of income cannot be expected. There is consequently no conflict with a normal exploitation. In respect of the second aspect, the proper performance of administrative, parliamentary or judicial proceedings, it must be considered that this alternative solely concerns situations in which an administrative, parliamentary or judicial body really depends on the use of copyrighted material so that it would be rendered incapable of accomplishing its tasks if the required use is denied. Any further exemption of the use of copyrighted material in this context evolves from considerations of political usefulness and is not a special case.¹³²³ Owing to this restricted ambit of operation, a potential major source of royalty revenue is not at stake. Hence, there is no conflict with a normal exploitation. On the same grounds, it can be inferred that the third aspect, the reporting of proceedings of parliamentary, administrative or judicial bodies, is in line with the second criterion.

Article 5(3)(f) CD exempts the use of political speeches as well as extracts of public lectures or similar works insofar as justified by the underlying informatory purpose. The limitation is in line with articles 2*bis*(1) and 2*bis*(2) BC. A typical potential major source of royalty revenue cannot be expected here. Not every political speech¹³²⁴ or lecture held in public attracts attention. In the majority of

¹³²² Cf. subsections 2.3 and 4.5.4.1.

¹³²³ Cf. subsection 5.3.1.1.

¹³²⁴ By virtue of article 2*bis*(1) BC, political speeches may be excluded from protection wholly or in part. This permissible exclusion is not subjected to the three-step test in international copyright law. See subsection 4.1.3. Article 5(5) CD, however, may be applied to this case because the internationally permitted exclusion reappears in the Copyright Directive in the shape of a limitation.

cases, a public speech will not be reproduced, communicated to the public and made available on-line. Article 5(3)(f) CD does therefore not conflict with a normal exploitation.

Article 5(3)(g) CD permits the use during religious or official celebrations. As to the first aspect, use in the course of religious celebrations, it has already been shown above that this exemption conflicts with a normal exploitation of works specifically created to be used during such celebrations.¹³²⁵ This facet of article 5(3)(g) CD, thus, is incompatible with the three-step test. In connection with the second aspect – official celebrations – it must be borne in mind that this alternative is a special case only insofar as it does not go beyond the conceptual contours of the ‘minor reservations doctrine’. Its sphere of influence must accordingly be restricted to public performing rights.¹³²⁶ Furthermore, it appears safe to assume that the works publicly performed during official celebrations, by and large, will be of a general nature instead of being created specifically for use in the course of such celebrations. The conflict with a normal exploitation arising in the field of religious celebrations, thus, does not come to the fore in this context as well. The second alternative of article 5(3)(g) CD, the use during official celebrations, is therefore not in conflict with a normal exploitation.

Article 5(3)(h) CD allows the unauthorised use of works, such as works of architecture or sculpture, made to be located permanently in public places. This limitation poses substantial difficulties. To approach the problem, it is advisable to clarify at the outset that the passage ‘made to be located permanently in public places’, and the fact that especially the example of ‘works of architecture or sculpture’ is given, clearly indicates that the reference to ‘public places’ must not be misconstrued so as to encompass ‘premises open to the public’.¹³²⁷ Works situated in museums and similar institutions, thus, do not fall under article 5(3)(h) CD. Otherwise, the limitation would inevitably conflict with a normal exploitation. It has always been understood to also exempt use for commercial purposes, such as the production of postcards and guidebooks.¹³²⁸ The sale of reproductions of an exhibited artistic work, however, constitutes a potential major source of royalty revenue for painters, sculptors, etc. besides the sale of the original itself. If the postcard industry were to enjoy the freedom of entering museums, making all kinds of reproductions of the exhibited artistic works, and selling postcards and digital copies afterwards, the authors would be deprived of a major source of income.

The crucial question, then, is whether the same conclusion must be drawn when a work is really ‘made to be located permanently in public places’, as demanded by

For the application of article 5(5) CD, the framework set out in the Directive itself is decisive. See section 5.2.

¹³²⁵ See subsection 4.5.4.3.

¹³²⁶ See subsection 5.3.1.1.

¹³²⁷ The latter extension, for instance, can be found in section 62 of the UK CDPA 1988. Cf. Garnett/James/Davies 1999, 553 and subsection 3.1.3.4.

¹³²⁸ Cf. von Gierke 2002, 113; Cohen Jehoram 2002, 1693; Garnett/James/Davies 1999, 553.

article 5(3)(h) CD. In this case, it can be argued that the architect or sculptor dedicates his work – erected in a public street, square, park, etc. – to the public.¹³²⁹ However, this dedication need not be misunderstood to imply that he also waives exploitation possibilities capable of yielding major profits. Therefore, a fine line has to be walked here. If a photograph is taken showing family members in front of a famous monument to be presented to relatives in a photo album, this is a strictly personal use that does not deserve a defence based on article 5(3)(h) CD anyway.¹³³⁰ The paintings of amateur painters inspired by the beauty of a public square are irrelevant in the present context either. A typical major source of royalty revenue will not accrue from this kind of use anyway.¹³³¹

If a public place serves as a background to a film, the unauthorised use of the works situated in that place is of a commercial nature. However, this is no typical source of income. It cannot be stated that works made to be located in public places, *generally*, will sooner or later be used for the making of a film. A typical major source of royalty revenue, thus, cannot be expected. This commercial use is therefore irrelevant.

If, however, a work situated in a public place is systematically reproduced on postcards, in guidebooks or made available on-line for commercial ends, the conclusion can hardly be ignored that a conflict with a normal exploitation arises. It may be argued that such use is not typical. Admittedly, a work will not automatically be printed on postcards just because it is located in a public place. There are myriad works out there in public streets, squares and parks, a postcard of which will never be produced. On the other hand, it is not atypical that a work located in a public place attracts attention and is exploited in this way. The sale of postcards and similar uses systematically exploiting the work, therefore, may indeed be regarded as a relevant potential major source of income – just like the sale of postcards of works exhibited in a museum. Insofar as article 5(3)(h) CD exempts the systematic reproduction, and communication or making available to the public of works permanently located in public places for commercial purposes it conflicts accordingly with a normal exploitation.

Article 5(3)(i) CD is not a special case.¹³³² It does not reach the second criterion.

Article 5(3)(j) CD exempts the use for the purpose of advertising the public exhibition or sale of artistic works. It does not affect a potential major source of royalty revenue. Hence, no conflict with a normal exploitation arises.

Article 5(3)(k) CD allows the unauthorised use of a work for the purpose of caricature, parody or pastiche. It has already been explained in subsection 4.5.4.1 that limitations of this kind do not conflict with a normal exploitation.

¹³²⁹ Cf. von Gierke 2002, 105. See also the decision ‘Verhüllter Reichstag’ of the German Federal Court of Justice, *Juristenzeitung* 2002, 1005-1007.

¹³³⁰ See articles 5(2)(a) and (b) CD.

¹³³¹ Cf. section 2.3.

¹³³² See subsection 5.3.1.1.

Article 5(3)(l) CD permits the use of a work in connection with the demonstration or repair of equipment. It is a special case only insofar as incidental use of a work is exempted that can scarcely be avoided in the normal course of events when running a business selling and repairing relevant equipment. This does not constitute a potential major source of royalty revenue. Article 5(3)(l), thus, does not conflict with a normal exploitation.

Article 5(3)(m) CD permits the use for the purpose of reconstructing a building. This is no typical potential source of income. It can hardly be assumed that copyrighted buildings, in general, will be destroyed and reconstructed afterwards. Article 5(3)(m) CD, therefore, does not conflict with a normal exploitation.

Article 5(3)(n) CD allows libraries, educational establishments, museums and archives on their premises the unauthorised public communication or making available of a work in their holdings to individual persons for research or private study. On account of this restricted field of application, it is unlikely that article 5(3)(n) encroaches upon a potential typical major source of income. It does not conflict with a normal exploitation.¹³³³

Article 5(3)(o) CD allows the member states to maintain already-existing limitations of minor importance on certain further conditions. It is thus impossible to make a general comment on whether or not article 5(3)(o) CD conflicts with a normal exploitation.

5.3.3 UNREASONABLE PREJUDICE TO LEGITIMATE INTERESTS

In line with the international three-step test, article 5(5) CD forbids an unreasonable prejudice to 'the legitimate interests of the right holder'. The reference to the right holder instead of the author is consistent with the Directive's scope. It does not only deal with copyright, but also with rights related to copyright, such as the rights of performers, phonogram and film producers, and broadcasting organisations.¹³³⁴ As the Directive does not protect moral rights, the term 'interests' comprises only a right holder's economic interests. Recital 19 posits unequivocally that 'moral rights remain outside the scope of this Directive'. Accordingly, the conceptual contours of the term 'interests' must be drawn like in article 13 TRIPs.¹³³⁵ Merely the economic interest of the right holders in the exploitation of the exclusive rights granted under the Copyright Directive – the right of reproduction (article 2), the right of communication to the public, including the right of making a work available (article 3), and the distribution right (article 4) – is included. This interest encompasses every conceivable possibility of deriving economic value.¹³³⁶

¹³³³ Cf. subsection 4.5.5.2.

¹³³⁴ See articles 1(1), 2 and 3(2) of the Copyright Directive. Cf. also the scope of the WCT and WPPT on which the Directive leans.

¹³³⁵ See subsection 4.6.3.2.

¹³³⁶ Cf. subsection 4.5.1.2.

The proportionality test which the prohibition of an unreasonable prejudice to the legitimate interests of the right holders entails¹³³⁷ is compatible with EC law. In the decision *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, the European Court of Justice stated that,

‘in determining the scope of any derogation from an individual right [...], the principle of proportionality, *one of the general principles of law underlying the Community legal order*, must be observed’.¹³³⁸

The Court maintained that the principle of proportionality ‘requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view’.¹³³⁹ The latter statement, with its reference to the appropriateness and necessity of the measure taken, shows that the different notions, which have been invoked above in the context of the international three-step test, are consistent with the application of the principle of proportionality in EC law.¹³⁴⁰ As the comparative analysis conducted by Emmerich-Fritsche shows, the principle of proportionality is known in all EU member states.¹³⁴¹ Therefore, the proportionality test constitutes a feature of the international three-step test which can also be reconciled with the different legal traditions of the member states.¹³⁴²

In connection with the final balancing process, a specific problem comes to the fore which concerns the payment of equitable remuneration. In the context of the international three-step test, national legislation is offered the possibility to provide for the payment of equitable remuneration to avoid an unreasonable prejudice.¹³⁴³ As to the amount of remuneration to be paid, it has been elaborated above that the concept of equitable remuneration underlying the three-step test is a fluid transition from a state where remuneration is unnecessary to cases requiring the payment of the sum an author freely bargaining for the use in question would have received.¹³⁴⁴ As the payment of equitable remuneration serves as a means for avoiding that an unreasonable prejudice is caused, it can be enunciated in general that equitable remuneration must be paid *insofar* as the limitation in question does not keep within reasonable limits.¹³⁴⁵

The Copyright Directive does not refer to the payment of equitable remuneration. Instead, the formulation ‘fair compensation’ is used. The reprography exemption of

¹³³⁷ Cf. subsection 4.6.4.

¹³³⁸ See Judgement of the European Court of Justice of 15 May 1986, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84 (1986) ECR 1651, § 38 (emphasis added).

¹³³⁹ See *Johnston v. Chief Constable*, *ibid.*, § 38.

¹³⁴⁰ Cf. the analysis by Emmerich-Fritsche 2000, 207-224. See subsections 4.6.4 and 4.6.4.2.

¹³⁴¹ See Emmerich-Fritsche 2000, 140-193.

¹³⁴² The drafters of the Copyright Directive sought not to encroach upon the different legal traditions in the member states. Cf. recital 32 of the Directive.

¹³⁴³ Cf. subsections 3.1.2, 3.1.3.1, 3.3.1, 4.3.2, 4.3.3 and 4.6.4.2.

¹³⁴⁴ See subsection 4.6.4.2.

¹³⁴⁵ See subsection 4.6.4.2.

article 5(2)(a) CD, the limitation for strictly private use of article 5(2)(b) CD, and the privilege for social institutions, such as hospitals and prisons, of article 5(2)(e) CD place the obligation on the member states to secure the payment of fair compensation. In this regard, it is stated in recital 35:

'In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question.'

Apparently, the expression 'fair compensation' thus refers to a concept that is quite similar to the system of the three-step test. It is not clear, however, whether or not 'fair compensation' will ever amount to a remuneration equivalent to that which the right holder would have received if he were free to authorise the use in the absence of a compulsory licence provision. Use of the term 'compensation' instead of 'remuneration' in connection with the adjective 'fair' instead of 'equitable' suggests that this cannot so readily be assumed. It is a compromise formula rather than an equivalent.¹³⁴⁶ The pecuniary reward accruing from the international obligation to pay equitable remuneration, by contrast, may reach this level.¹³⁴⁷ The obligation to provide for the payment of equitable remuneration is therefore stronger than the claim for fair compensation.¹³⁴⁸

As the Copyright Directive only provides for the payment of fair compensation in the three aforementioned cases, the relationship between this concept and the international system embodied in the three-step test must be examined. Recital 36 indicates in this respect that the member states 'may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation'. The payment of pecuniary reward is therefore obviously not restricted to those cases which explicitly contain the obligation to provide for fair compensation. Instead, it is a concept which may generally be applied to the limitations listed in article 5. Recital 44 must also be borne in mind in this context: 'When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations'. On the one hand, the Copyright Directive thus clarifies that the payment of pecuniary reward is not confined to those cases in which it is prescribed. On the other hand, it recalls international obligations arising from the three-step test. Against this backdrop, the obligation to fairly compensate the right holders laid down in articles 5(2)(a), (b) and (e) CD can be understood to have a

¹³⁴⁶ Cf. Reinbothe 2001, 738. See for a detailed discussion Hugenholtz/Guibault/van Geffen 2003.

¹³⁴⁷ See Ricketson 1987, 520; Ficsor 2002a, 275. Cf. subsection 4.6.4.2.

¹³⁴⁸ Cf. Reinbothe 2002, 49.

privileging effect. In these cases, the drafters of the Copyright Directive sought to ensure that the right holders would receive monetary reward anyway – irrespective of whether or not such an obligation results from the three-step test. To underline that an internal, ‘European’ obligation is imposed on the member states, the term ‘fair compensation’ was used instead of the expression ‘equitable remuneration’ that could have been mixed up with the international obligation. The divergent formulation also gives evidence that the international obligation remains untouched and must be fulfilled separately – notwithstanding the necessity to provide for fair compensation.¹³⁴⁹

The payment of equitable remuneration pursuant to the three-step test should therefore be independent of the rules governing the payment of fair compensation under the Copyright Directive. If a corresponding inquiry, in a case where the Directive itself does not provide for monetary reward, brings to light that the payment of equitable remuneration is necessary to fulfil international obligations, the right holders must be remunerated. If it shows that fair compensation is insufficient in a case where the Directive expressly provides for such compensation, a higher amount of monetary reward must be paid on account of the international obligation to pay equitable remuneration. If, by contrast, the inquiry supports the view that the payment of pecuniary reward is unnecessary in a case in which the Directive provides for fair compensation, this latter ‘European’ obligation has a privileging effect. Right holders receive fair compensation even though a corresponding international obligation does not exist.

It is to be reiterated in this context that the three-step test has always been understood to allow national legislation great latitude.¹³⁵⁰ The decision on whether and how much equitable remuneration ought to be paid is far from being a mathematical exercise. On the basis of the international rules, the following guidelines can nonetheless be given:

Article 5(1) CD concerns temporary acts of reproduction having no independent economic significance. It is therefore justified to refrain from providing for the payment of monetary reward.

Article 5(2)(a) CD sets out the ‘reprography exemption’, thereby prescribing the payment of fair compensation. In some cases, however, this will turn out to be insufficient. If, for instance, industrial undertakings take advantage of article 5(2)(a) CD, the right holders should receive the sum they would have agreed upon, if they had been free to bargain for the exempted use. The claim for a pecuniary reward reaching this level can be based on the international obligation to provide for the payment of equitable remuneration.

Article 5(2)(b) CD privileges strictly personal use. As elaborated above, it would unreasonably prejudice the legitimate interests of the right holders if digital uses of this kind would not be administered by libraries and similar institutions. The

¹³⁴⁹ Cf. Bornkamm 2002, 47-48.

¹³⁵⁰ Cf. Kerever 1975, 331; Collova 1979, 125-127; Heide 1999, 105. Cf. subsection 3.1.2.

establishment of a library-administered digital private use system is the least harmful means.¹³⁵¹ As to adequate pecuniary reward, the payment of fair compensation, as set out in the Directive itself, appears sufficient.¹³⁵²

In the case of article 5(2)(e) CD, the prescribed payment of fair compensation is sufficient to fulfil international obligations.

Article 5(3)(a) CD exempts the use for illustrating teaching or scientific research. As discussed above, the payment of equitable remuneration is appropriate in this case to fulfil international obligations.¹³⁵³ In this context, the three-step test of article 5(5) CD thus requires the payment of monetary reward.

Article 5(3)(e) CD, among other things, allows administrations the unauthorised use of copyrighted material insofar as the accomplishment of their tasks depends on such use.¹³⁵⁴ The limitation ensures the effective functioning of administrative bodies. However, it also helps to reduce the cost of proper administration. Arguably, it has overtones of a tax on right holders. The payment of equitable remuneration is consequently appropriate to ensure compliance with international obligations. It evolves from article 5(5) CD.

In the remaining cases, there is no obvious need for the payment of equitable remuneration.¹³⁵⁵

5.3.4 OVERVIEW OF INTERNATIONAL OBLIGATIONS

Conducting a survey of the obligations imposed on national legislation by the reference to the international three-step test made in article 5(5) CD, the following conclusions can be drawn: the 'reprography exemption' of article 5(2)(a) CD is merely accompanied by the obligation to provide for fair compensation. With regard to copies made by industrial undertakings, this pecuniary reward is insufficient. Pursuant to article 5(5) CD, it should amount in this case to the sum a right holder freely bargaining for the use in question would have received. Hence, equitable remuneration must be paid.¹³⁵⁶ Article 5(2)(b) CD, privileging strictly personal use, must be replaced in the digital environment with a library-administered private use system to fulfil the three-step test. Otherwise, it would unreasonably prejudice the legitimate interests of the right holders. The payment of fair compensation, as prescribed in the Directive, appears appropriate.¹³⁵⁷

¹³⁵¹ See subsections 4.6.4.2. and 4.5.5.

¹³⁵² Cf. subsection 4.6.4.2. See as to the relationship between levy schemes and the protection of DRM systems Hugenholz/Guibault/van Geffen 2003, 32-47, and Peukert 2003.

¹³⁵³ Cf. Xalabarder 2003, 167. See subsections 4.6.4.1 and 4.6.4.2.

¹³⁵⁴ Cf. subsection 5.3.1.1.

¹³⁵⁵ Ricketson 2003, 77, considers it advisable to provide for equitable remuneration in connection with article 5(3)(b) CD. Article 5(3)(i) CD is not a special case. The first alternative of article 5(3)(g) and article 5(3)(h) CD conflicts with a normal exploitation. See sections 5.3.1.1 and 5.3.2.

¹³⁵⁶ See subsection 5.3.3. Cf. subsection 4.6.4.2 and Ricketson 1987, 520; Ficsor 2002a, 275.

¹³⁵⁷ See subsection 4.6.4.2.

Article 5(3)(a) CD, exempting the use for illustrating teaching or scientific research, is incompatible with the three-step test insofar as no provision is made for the payment of equitable remuneration.¹³⁵⁸ In article 5(3)(e) CD, the exemption of the use for administrative, parliamentary or judicial proceedings must be restricted to those institutions which really depend on the use of copyrighted material to accomplish their tasks. Otherwise, this aspect of article 5(3)(e) CD cannot be considered a special case.¹³⁵⁹ Furthermore, the use for administrative purposes must be cushioned by the payment of equitable remuneration.¹³⁶⁰ The first alternative of article 5(3)(g) CD, the use of works during religious celebrations, conflicts with a normal exploitation.¹³⁶¹ It is therefore incompatible with the three-step test. The second alternative of article 5(3)(g) CD, the use of works during official celebrations, must be confined to the scope of the 'minor reservations doctrine'. Otherwise, it cannot be deemed a special case.¹³⁶² National legislation must furthermore refrain from adopting article 5(3)(h) CD, allowing the unauthorised use of works made to be located permanently in public places. Insofar as article 5(3)(h) CD exempts the systematic reproduction and communication or making available to the public of works situated in public places for commercial ends, it conflicts with a normal exploitation.¹³⁶³ Article 5(3)(i) CD concerning the incidental inclusion of a work in other material is not a special case.¹³⁶⁴ Its adoption, consequently, runs counter to international obligations. Article 5(3)(l) CD, permitting the use in connection with the demonstration or repair of equipment, is a special case only insofar as incidental use is made that can hardly be avoided in the normal course of events when running a business selling or repairing relevant equipment.¹³⁶⁵ When maintaining so-called 'cases of minor importance', as permitted by article 5(3)(o) CD, national legislation must moreover proceed carefully. Affected limitations must be scrutinised thoroughly in the light of the three-step test.

5.4 The Addressees of Article 5(5) CD

Finally, the question is to be raised, to whom should the task of bringing national copyright law into line with all the described modifications be assigned? Is it solely the task of national legislation? May it confidently be left to the courts? This question has interesting ramifications that shall not be concealed. Insofar as it touches upon the division of labour between courts and legislators, it also refers to

¹³⁵⁸ Cf. subsections 4.6.4 and 5.3.3.

¹³⁵⁹ See subsection 5.3.1.1.

¹³⁶⁰ See subsection 5.3.3.

¹³⁶¹ See subsection 5.3.2.

¹³⁶² See subsection 5.3.1.1.

¹³⁶³ See subsection 5.3.2.

¹³⁶⁴ See subsection 5.3.1.1.

¹³⁶⁵ See subsections 4.4.2.3 and 5.3.1.1.

the basic problem of whether copyright limitations should either be enshrined in restrictively delineated provisions or be circumscribed in elastic terms in the framework of an open-ended provision. The first alternative mirrors the continental European model, the second alternative reflects the Anglo-American approach.¹³⁶⁶ If the first alternative is chosen, the legislative decision about how to draw the conceptual contours of the restricted number of precisely delineated limitations forms the centre of gravity. If preference is given to the second alternative instead, the courts play a decisive role. They must bring to light the different facets of the given open-ended norm. As clarified in the context of the requirement that limitations have to be 'certain special cases', the three-step test leaves sufficient room for both alternatives.¹³⁶⁷ Hence, it is not prescribed in international copyright law which of the two outlined models is to be followed at the national level.

Furthermore, the question of how to fulfil international obligations has overtones of the general problem of the effect of international treaties in domestic law. It is beyond the scope of the present inquiry to dive into the theoretical profundities this question entails. Different answers are to be expected on the basis of the different national mechanisms regulating the effect of international treaties in domestic law.¹³⁶⁸ The observation of articles 9(2) BC, 13 TRIPs and 10 WCT depends on these specific mechanisms. In the framework of the Copyright Directive, however, this underlying complex problem¹³⁶⁹ has been solved by transforming the existing international obligations into EC law. Article 5(5) CD, accompanied by recital 44, repeats the international obligation to comply with the three-step test, thereby making it part of the obligation to implement the Copyright Directive correctly in national law.

In general, it might be doubted, however, whether the three-step test has the potential for impacting on national court decisions. It could be argued that it is too vague because of the openness of its wording. National legislation, it could then be argued, must concretise the three-step test first. Against this assumption, it is to be asserted that the test is an indispensable element of the international system. It sets limits to limitations on internationally recognised rights. If allowance is made only for the more precisely delineated limitations to be found in the Berne Convention but not for the three-step test, merely the walls of the building erected in international copyright law are considered but not the roof. A national court that is alert to international obligations will accordingly always seek to take into account the entire framework established in international copyright law instead of focusing merely on those elements, the outlines of which appear sufficiently specified. In fact, it cannot be said that courts were loath in the past to take the abstract criteria of

¹³⁶⁶ Cf. section 2.1.

¹³⁶⁷ Cf. subsections 4.4.1 and 4.4.2.

¹³⁶⁸ Cf. the overview given by numerous authors in: Jacobs/Roberts 1987. See as to the TRIPs Agreement Duggal 2001, 86-110; Drexl 1994, 777-788.

¹³⁶⁹ Cf. as to treaty-making by the EC Pescatore, in: Jacobs/Roberts 1987, 171-192.

the three-step test into account. Examples in Germany, the Netherlands and Austria show that the opposite is true.¹³⁷⁰

Against this background, it becomes obvious that the question of the addressees of the three-step test cannot be answered by drawing an entirely black or white picture. It does not portray reality adequately when it is assumed that the national legislator, by setting out precisely delineated limitations, is capable of barring courts from having recourse to the three-step test. National legislation cannot monopolise the application of the three-step test. As the test is now enshrined in article 5(5) CD, this is even more true in EC law. National courts have always and will always orient their decision by the abstract criteria of the three-step test when it comes to entering unknown territory. In particular, in times of upheavals within the copyright matrix, when new solutions have to be developed, the three-step test will be used as a signpost.¹³⁷¹ The crucial question, then, is the extent to which national legislation should pave the way for the application of the three-step test by the courts. With regard to the implementation of the Copyright Directive in the member states, this question has taken concrete shape. Should the three-step test itself be incorporated into national copyright law?¹³⁷²

The latter question can clearly be answered in the negative. The passage of article 5(5) CD stating that limitations 'shall only be applied in certain special cases' is a mere reference to international obligations.¹³⁷³ The three-step test must be borne in mind but not be incorporated. As there is no indication that national courts are reluctant to lend weight to the test, it is not necessary to impose the obligation on national legislation to include the three-step test in national law. However, it may be wise to introduce the three-step test in national copyright law – particularly in the context of the Copyright Directive. The realisation of the Directive's principal objective to harmonise copyright law is imperilled by the extensive list of optional limitations set out in article 5 CD. It would have been more effective to set forth an open-ended formula based on the three-step test instead of enumerating no fewer than 21 limitations. The courts, including the European Court of Justice, could then have accomplished the gradual harmonisation of copyright limitations.¹³⁷⁴

¹³⁷⁰ Cf. German Bundesgerichtshof (Federal Court of Justice), decisions I ZR 118/96 of February 25, 1999, in: *Juristenzeitung* 1999, 1000-1007, and I ZR 255/00 of July 11, 2002, in: *Gewerblicher Rechtsschutz und Urheberrecht* 2002, 963-967. Cf. Dutch Hoge Raad (Supreme Court), decision no. 13933 of June 22, 1990, 'Zienderogen Kunst', in: *Nederlandse Jurisprudentie* 1991, no. 268, and decision no. 14695 of June 26, 1992, in: *Nederlandse Jurisprudentie* 1993, no. 205. See also the decision of the Gerechtshof Amsterdam of January 30, 2003, in: *Tijdschrift voor Auteurs-, Media- en Informatierecht* 2003, 94-97. Cf. Austrian Oberster Gerichtshof (Supreme Court), decision 4 Ob 143/94 of January 31, 1995, in: *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* 1995, 729-731. Cf. the overview given by Bornkamm 2002, 35-38.

¹³⁷¹ Cf. section 2.3.

¹³⁷² Cf. Cohen Jehoram 2002, 1694.

¹³⁷³ Cf. subsection 5.3.1.2.

¹³⁷⁴ Cf. Dreier 2002a, 28 (footnote3).

However, this more effective solution of the harmonisation problem is not completely beyond reach. A last chance is offered by the circumscription of the 21 permissible limitations in the Directive. As the enumerated cases are not delineated precisely but rather reflect certain types of limitations, the outlines of which are not drawn restrictively,¹³⁷⁵ some breathing space is left. National legislation can use this room to manoeuvre by laying down literal copies of the enumerated cases in national law which are combined with the three-step test. The framework set out in article 5 CD, in other words, is to be copied as precisely as possible.¹³⁷⁶ By doing so, a further fragmentation of copyright law in the EU can be prevented. If all member states would literally reproduce the cases they wish to include in national law and subject these cases to the three-step test, a uniform framework would indeed be established. If the European Court of Justice, then, is called upon to decide on one of the limitations allowed under the Copyright Directive, its holding would equally affect the laws of those member states providing for the limitation in question.¹³⁷⁷ If, by contrast, each member state embarks on the further specification of the listed types of limitations, this will inevitably result in a further fragmentation of copyright law. Decisions of the European Court of Justice could not have the same harmonising effect. As they may concern only one specific variant chosen in one individual member state, it will become much more difficult for the Court to contribute to the intended harmonisation of copyright law.

It is therefore preferable to adopt the three-step test at the national level, and to combine it with literal copies of the types of limitations listed in article 5 CD. The outcome of this procedure would be a half-way house – somewhere between the much more open US fair use doctrine and the traditional continental European system of more restrictively delineated limitations. The question posed at the beginning of this subsection, then, could finally clearly be answered as follows: courts and legislators alike are the addressees of the three-step test.¹³⁷⁸ Otherwise, the project to harmonise copyright law in the EU will further be compromised.

¹³⁷⁵ Cf. subsection 5.3.1.2.

¹³⁷⁶ For a more detailed description of this proposal, see Senftleben 2003, 11-13.

¹³⁷⁷ Cf. Bornkamm 2002, 44, elaborating that the three-step test, within the framework set out in article 5 CD, 'offers the chance for dynamic harmonisation'.

¹³⁷⁸ Cf. Buydens 2001, 442, who believes that this conclusion follows directly from the wording of article 5(5) CD anyway.

