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

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Chapter 6

Summary

The three-step test sets limits to limitations on authors' rights. The latter sequence – grant of exclusive rights, imposition of limits on these rights, application of the three-step test – has been inspected more closely in chapter 2.

Inquiring into the rationales underlying copyright protection first, it could be shown on the basis of historical findings that it is inappropriate to conceive of the two legal traditions of copyright law – the common law approach and the civil law approach – as two incompatible, separate systems in this context. Instead, the groundwork laid for copyright protection in the two traditions turns out to rest on a shared set of basic ideas derived from natural law and utilitarian notions alike.¹³⁷⁹ The natural law argument has subsequently been traced back to Locke's elaboration of a natural right to property in his *Second Treatise on Government*. It focuses attention on the individual merit of the author and the act of creation. Further ramifications of natural law theory, like the assumption that a bond unites the author to the object of his creation which is perceived as a materialisation of his personality, become understandable against this backdrop. Utilitarian arguments, by contrast, permit society's overall welfare to be factored into the equation. In this line of reasoning, the promise of monetary rewards is offered to authors as an incentive to encourage their intellectual productivity. Ultimately, this encouragement shall enhance the benefits for society. Economic, industrial and cultural considerations as well as freedom of expression values can be summoned up to support copyright protection in this framework. To establish a central basis for natural law and utilitarian arguments alike, it may be posited that copyright law is primarily to be understood as a means to provide an optimal framework for cultural diversity.¹³⁸⁰

As to the limits set to authors' rights – the second element of the aforementioned sequence – a survey of justifications for copyright limitations has been conducted after sifting through the rationales of copyright protection. Instead of seeking to determine a universe of potential justifications, stretching from the specific needs of disabled people to the regulation of industry practice, the discussion was confined to certain elements impacting deeply on the balance between grants and reservations of copyright law. Attention has been devoted to the fundamental guarantee of freedom of expression and information that may be invoked in favour of press privileges as well as the exemption of quotations and a work's use for the

¹³⁷⁹ See subsection 2.1.1.

¹³⁸⁰ See subsections 2.1.2 and 2.1.3.

purposes of criticism and parody.¹³⁸¹ In respect of the objective to disseminate information, it has been stressed that personal use privileges, functionally, constitute a powerful decentralised instrument for spreading information. This substantial contribution to the dissemination of information may be capable of justifying their maintenance in the emerging information society. The right to privacy has also been discussed in this context.¹³⁸² Finally, it was pointed out that limitations may also be imposed on authors' rights on the grounds that they fulfil a democracy-enhancing function.¹³⁸³

In order to point a clear route through the thicket of the wide variety of surveyed arguments, Locke's elaboration of a natural right to property was finally revisited. The three-step test would be hard to apply if no guidelines could be given as to where the line between grants and reservations of copyright, ultimately, should be drawn. It has therefore been emphasised that Locke's labourer acquires a property right only if he leaves 'enough and as good' in common for others. In the field of copyright, the principle of so-called 'intergenerational equity' can be derived from this proviso. It has accordingly been posited with regard to copyright limitations that an author acquires an intellectual property right in his creation only on the condition that he permits (potential) later authors to study and build upon his works – just like he himself may have done to discover and develop his creative talent. The specific balance with regard to those individuals who take part in the process of creation, thus, was brought into focus. Considerations of this kind support the exemption of transformative uses but also privileges for private study, educational purposes and library activities. The maxim of intergenerational equity does not only demand the exemption of uses which are directly related to the creation of a new work but also undergirds limitations serving uses which are of a consumptive nature at the moment they occur. This concept was used as a signpost for the later interpretation of the three-step test.¹³⁸⁴

In chapter 3, the different stages of development of the three-step test in international copyright law have been examined in detail. At the 1967 Stockholm Conference for the revision of the Berne Convention, the three-step test was introduced to pave the way for the formal recognition of the general right of reproduction *jure conventionis*. A provision had to be devised which accomplishes two opposite tasks. On the one hand, the envisioned general right of reproduction had to be sheltered from the potential corrosive effect of the numerous limitations to be found in domestic legislation.¹³⁸⁵ On the other hand, the margin of freedom which the countries of the Berne Union considered indispensable to satisfy social

¹³⁸¹ See subsection 2.2.1.

¹³⁸² See subsections 2.2.2 and 2.2.3.

¹³⁸³ See subsection 2.2.4.

¹³⁸⁴ See section 2.3.

¹³⁸⁵ The survey of national limitations known at the time of the Stockholm Conference, which has been conducted in this context, brought to light that there was a wide variety of limits set to the right of reproduction in domestic legislation indeed. See subsection 3.1.3.

and cultural needs had to be left untouched. Against this background, it is not surprising that the three-step test was adopted, the final wording of which can be traced back to a proposal tabled by the UK delegation. Due to the openness of its abstract criteria, the test is capable of encompassing a wide range of limitations. At the Conference, it constituted an appropriate basis for the reconciliation of the contrary opinions expressed by the participants. The first three-step test in international copyright law was thus enshrined in article 9(2) BC. Its ambit of operation was confined to limitations imposed on the general right of reproduction which could now be recognised internationally in article 9(1) BC.¹³⁸⁶

After its introduction at the 1967 Stockholm Conference, the three-step test reappeared in the TRIPs Agreement in 1994. It was thus embedded in a trade context. In the course of the negotiations, the abstract formula was apparently perceived as a kind of materialisation of the standard of protection reached in the Berne Convention. Accordingly, it was not only incorporated into TRIPs by referring to article 9(2) BC but also laid down separately in article 13 TRIPs as an instrument regulating generally 'limitations or exceptions to exclusive rights'. This latter insertion brings about a substantial broadening of the test's scope. It is no longer confined to the general right of reproduction. By contrast, the task was assigned to the three-step test to hinder limitations from encroaching upon whatever exclusive right was recognised internationally. As regards the rights newly granted under TRIPs, this means that the three-step test is the only standard of control to be met by national legislation. As to the rights conferred on authors in the Berne Convention, article 13 TRIPs turns out to be a Berne-plus element when taking into account article 2(2) TRIPs and article 20 BC which is incorporated into TRIPs by reference: domestic legislation wishing to impose a limitation on a right granted in the Berne Convention must not only ensure compliance with the specific norms of the Convention itself but also, in addition, observe the three-step test of article 13 TRIPs.¹³⁸⁷

The comprehensive applicability of the three-step test to all kinds of limitations was consolidated when it came to embodying the abstract formula also in article 10 WCT at the 1996 WIPO Diplomatic Conference. Pursuant to article 10(1) WCT, the test is to be applied to the limitations on the rights newly granted under the WIPO Copyright Treaty. Article 10(2) WCT makes plain that limitations on Berne rights must additionally be subjected to the three-step test. The confirmation of this latter aspect, already following from article 13 TRIPs, gave rise to the fear among the participants of the Conference that the freedom traditionally enjoyed by national legislation may be unduly curtailed. It was therefore understood that article 10(2) WCT neither reduces nor extends the scope of those provisions permitting limitations under the Berne Convention. Besides this tribute paid to the concern about sufficient room to manoeuvre for national legislation, the agreed statement

¹³⁸⁶ See subsection 3.1.2.

¹³⁸⁷ See section 3.2.

concerning article 10 WCT expressly embraces the three-step test as a guiding principle for the adjustment of traditional limitations to the digital environment and a basis for the development of new limitations to come.¹³⁸⁸

In chapter 4, the functioning and structure of the three-step test was analysed before embarking on the interpretation of each criterion. If restrictions are imposed on the reproduction right of article 9(1) BC, the three-step test of article 9(2) BC functions as a direct control mechanism. Similarly, article 13 TRIPs directly controls exemptions from the rental rights of article 11 and 14(4) TRIPs, and the three-step test of article 10(1) WCT directly governs limitations on the right of distribution of article 6 WCT, the rental right of article 7 WCT, and the right of communication to the public of article 8 WCT. Exertion of direct control means that the three-step test itself constitutes the standard of review that a national legislator wishing to adopt a limitation must meet. This situation differs from the application of the three-step test as an additional safeguard. If limits are set to exclusive rights granted in the Berne Convention, the three-step test always additionally comes into play. Here, national legislation, first of all, must observe the specific rules for limitations set out in the Convention itself. Furthermore, however, the three-step tests of article 13 TRIPs and 10(2) WCT must be fulfilled. In this context, the three-step test, thus, does not exert direct control but must additionally be observed after ensuring compliance with a specific norm of the Berne Convention. The additional control exerted by the test influences particularly those provisions of the Berne Convention which, like article 10(1) and (2) BC, refer to fair practice, and the implied limitations accepted in the framework of the Berne Convention.¹³⁸⁹

As to the structure of the three-step test, it could be shown that the system of its three criteria can be considered a means for approximating gradually the core of copyright's balance: the first step is the furthest from the core and correspondingly of a general nature. It sets forth the basic rule that limitations are only permitted in certain special cases. Copyright limitations which are incapable of fulfilling this criterion are inevitably doomed to fail. The second step delineates the basic rule of criterion 1 more precisely: a conflict with a normal exploitation is not permissible. This criterion is located halfway to the core. At this stage, no additional instruments for the reconciliation of the interests of authors and users, like the payment of equitable remuneration, are necessary. Limitations which fail to meet this condition cannot be countenanced at all. The third step, however, is the closest to the core. The wording of this condition contains elements that can be applied for the exact calibration of copyright's balance. The prejudice has to be 'unreasonable', the interests of the author 'legitimate'. In this situation, where the divergent interests of copyright law finally meet, the possibility to provide for equitable remuneration is indispensable. As the mere decision between permission and prohibition of limitations would be too imprecise, it serves as a means to establish a balanced

¹³⁸⁸ See section 3.3.

¹³⁸⁹ See section 4.2 and subsection 4.6.5.

proportion between the interests at stake. The realisation of the objective to strike a proper copyright balance, thus, finally depends on the last criterion. This last step, if any, is therefore to be regarded as the kingpin of the three-step test.¹³⁹⁰

Turning to the interpretative analysis after clarifying the function and system of the three-step test, the first step, 'certain special cases', was brought into focus. It has been pointed out here that its first element, the claim for 'certainty', must not be overestimated. In particular, it is not necessary that limitations are precisely and narrowly determined in the sense of the civil law approach to copyright. The espousal of a clear definition that might be inferred from the term 'certain' has its limits. It simply means that limitations must be delineated so as to become distinguishable from each other. They must be discernible as 'some special cases'. The task to draw the necessary dividing line between different limitations need not be fulfilled by national legislation but may also be left to the courts. In common law systems, established case law can accordingly be factored into the equation in the context of open-ended provisions.¹³⁹¹

As to the second element, the necessity of 'speciality', it could be shown that an approach leaning heavily on quantitative findings is manifestly unsuited to determining special cases. A corresponding concept of the WTO Panel reporting on section 110(5) of the US Copyright Act had to be rejected. From the ensuing inquiry into the qualitative connotation of the term 'special', it could be inferred that some clear reason of public policy must underlie the adoption of a copyright limitation.¹³⁹² The national legislator must enter into a careful weighing process. The legitimate interests of the author, to which the third criterion of the three-step test refers, must be weighed carefully against the competing interests at stake. The legislative decision to set limits to the author's exclusive rights on account of these competing user interests must be a reaction to an understandable need for the reconciliation of the user interests at stake with the author's legitimate interests. Hence, a limitation that rests on a rational justificatory basis making its adoption plausible constitutes a special case in the sense of the three-step test.¹³⁹³

Provisions of the Berne Convention which explicitly permit the adoption of a limitation at the national level always constitute a rational justificatory basis in the outlined sense. A national limitation which complies with the Berne Convention, therefore, automatically forms a special case.¹³⁹⁴ However, the use of copyrighted material in industrial undertakings is, for instance, not a special case – at least not insofar as such use can be controlled in the digital environment.¹³⁹⁵ As regards the

¹³⁹⁰ See section 4.3.

¹³⁹¹ See subsection 4.4.1.

¹³⁹² Cf. Ricketson 1987, 482.

¹³⁹³ See subsection 4.4.2.

¹³⁹⁴ See subsection 4.4.3.

¹³⁹⁵ See subsection 4.4.4.1.

US fair use doctrine, it could be concluded that it is not unreasonable to assume that the doctrine forms a 'certain special case' in the sense of the three-step test.¹³⁹⁶

In the field of the second step, 'no conflict with a normal exploitation', concepts to be found in literature proved to be inappropriate. The historical approach of Bornkamm and Ricketson's empirical approach alike had to be rejected.¹³⁹⁷ The development of a new normative concept, subsequently, was based on the guideline given at the 1967 Stockholm Conference that all actual and potential forms of exploitation which have considerable economic or practical importance must be reserved to the authors. With an eye to the digital environment, it was clarified at the outset that this formula must not be misunderstood to encompass each and every conceivable way of deriving economic profit from a work. Otherwise, the three-step test would virtually be reduced to a 'one-step test': copyright limitations would almost always come into conflict with a normal exploitation.¹³⁹⁸

Taking this insight as a starting point, it could be gathered from a comparative analysis with the fourth factor of the US fair use doctrine that only major sources of royalty revenue should be qualified as an exploitation form of considerable importance in the context of the second criterion. The prohibition of a conflict with a normal exploitation, thus, merely shelters the economic core of copyright from erosion.¹³⁹⁹ The international system of exclusive rights, on which the WTO Panel reporting on section 110(5) of the US Copyright focused, turned out to be unsuitable for determining this core area. Instead, the overall commercialisation of works of the different categories affected by a limitation must be considered.¹⁴⁰⁰ A limitation therefore conflicts with a normal exploitation if it divests authors of an actual or potential, typical major source of royalty revenue that carries weight within the overall commercialisation of works of the relevant category.¹⁴⁰¹

Pursuant to this standard of review, a conflict with a normal exploitation arises in particular if a limitation erodes the very market for a certain category of works.¹⁴⁰² Privileges for strictly personal use form a further problem area. It can hardly be overlooked that the broad private use privileges known from the pre-digital past have the potential for depriving authors of potential major sources of royalty revenue in the digital environment. To avoid a conflict with a normal exploitation, it is thus advisable not to uphold broad private use privileges. On the other hand, the fact must be faced that particularly limitations serving strictly personal use may be of crucial importance for the appropriate distribution of information resources in the information society, the enhancement of democracy and the promotion of intergenerational equity. Instead of thoughtlessly abolishing personal use privileges

¹³⁹⁶ See subsection 4.4.4.2.

¹³⁹⁷ See subsections 4.5.1 and 4.5.2.

¹³⁹⁸ See subsections 4.5.3.1 and 4.5.3.2.

¹³⁹⁹ See subsection 4.5.3.3.

¹⁴⁰⁰ See subsections 4.5.3.4.

¹⁴⁰¹ See subsection 4.5.3.5.

¹⁴⁰² See subsections 4.5.4.2 and 4.5.4.3 for examples.

altogether, they should accordingly be carefully restructured. Those areas are to be carved out and enshrined in new limitations which are indispensable for attaining the aforementioned ends. The inquiry into possible ways of accomplishing this task which has been undertaken in this context suggests that particularly digital library services may play a decisive role.¹⁴⁰³

The third step, 'no unreasonable prejudice to legitimate interests of the author', lies at the core of copyright's delicate balance and serves as final adjustment tool. The different abstract terms establishing this criterion can be understood as elements of one final proportionality test. The author's interests to be taken into account in the course of the final balancing exercise, first of all, are his economic interests. Every conceivable economic concern may enter the picture in this framework. Economic interests which do not belong to the economic core of copyright and, therefore, were not considered in the context of the previous second step are thus to be factored into the equation now. Article 9(2) BC and 10 WCT, furthermore, offer the possibility of making allowance for an author's moral interests. Article 13 TRIPs, on the contrary, is impervious to the protection of non-economic interests. It neutrally refers to the 'right holder' instead of the 'author'. This language seems to indicate, however, that the economic concerns of a broader group, including licensees like publishers, record companies and film distributors, are relevant in this context.¹⁴⁰⁴ The proportionality test itself is an internal two-step test. On both sides – the side of authors and the side of users – a step towards the centre of copyright's balance is to be taken. Interests of the author are accordingly only relevant insofar as they can be qualified as 'legitimate'. Prejudices to the circle of legitimate interests, however, are forbidden if they reach an 'unreasonable' level.

As to the first of these two internal steps, it could be clarified that the expression 'legitimate interests' can be perceived as a 'normative claim calling for the protection of interests that are "justifiable" in the sense that they are supported by relevant public policies or other social norms'.¹⁴⁰⁵ Hence, an author's interests must be scrutinised in the light of the rationales of copyright protection. They may turn out to be unjustified, for instance, when market failure bars authors from exploiting their works in a certain area. Subjecting this area to the author's control would neither entail an additional incentive to create, nor would it enhance the author's independence from patrons, thereby encouraging free speech. The same is true as regards a work's use for the purposes of criticism and parody. Authors are likely to refrain from developing markets for these uses. The beneficial effects of a potential extra income accruing from uses of this kind, thus, would not be realised anyway. The interests of authors must also give way if a limitation is evidently better suited for achieving a certain objective underlying copyright protection. Cultural diversity and intellectual debate, for instance, can evidently be promoted more effectively by

¹⁴⁰³ See subsections 4.5.5.1 and 4.5.5.2.

¹⁴⁰⁴ See subsections 4.6.2 and 4.6.3.

¹⁴⁰⁵ See WTO Panel – Patent 2000, § 7.69. Cf. subsection 4.6.4.1.

exempting the making of quotations instead of subjecting such use to the author's control to open an additional source of royalty revenue.¹⁴⁰⁶

Turning to the side of users, the issue of 'unreasonable prejudices' had to be raised. The justificatory groundwork laid for a limitation is of particular importance in this respect. If a limitation, for instance, is unsuited to promoting the attainment of the objective which is pursued by its imposition on exclusive rights, this is a clear instance of an unreasonable prejudice. A useless constraint would be placed on the rights of authors under these circumstances. A limitation, in addition, must be the least harmful of more than one available means to achieve a particular goal. It was pointed out here that less restrictive alternatives only come into play insofar as they have the potential for furthering the pursued objective as effectively as the current limitation.¹⁴⁰⁷

The feature of the three-step test which occupies centre stage in the context of the third criterion, however, is the possibility to provide for the payment of equitable remuneration. To prevent the harm flowing from a limitation from reaching an unreasonable level, national legislation can ensure that authors receive adequate monetary reward. It could be shown that the concept of equitable remuneration underlying the three-step test is a fluid transition from a state where no remuneration has to be paid to cases necessitating the payment of the price a free author bargaining for the use in question would have agreed upon. In general, equitable remuneration must be paid insofar as the relevant limitation does not keep within reasonable limits. Hence, the extent to which the limitation oversteps the borderline must be estimated. The justification on which the limitation rests must once again be brought into focus in this connection.¹⁴⁰⁸

Ultimately, it could be shown by shedding the light of the principle of proportionality on the overall regulatory framework established by the three-step test that the whole test procedure, virtually, can be perceived as a refined proportionality test. The necessity that limitations must be 'certain special cases', and the prohibition of a 'conflict with a normal exploitation', could be identified as instruments for sorting out cases of evident disproportionality. They establish a gateway to copyright's delicate balance which, finally, is to be adjusted with the help of the last criterion, forbidding an 'unreasonable prejudice to the legitimate interests of the author'.¹⁴⁰⁹

In chapter 5, the results of the interpretative analysis were used to clarify the role which the three-step test plays in the European Copyright Directive 2001/29/EC of 22 May 2001 (CD). The Directive's principal objective is to harmonise copyright law in the European Union. However, it also paves the way for the ratification of

¹⁴⁰⁶ See subsection 4.6.4.1.

¹⁴⁰⁷ See subsection 4.6.4.2.

¹⁴⁰⁸ See subsection 4.6.4.2.

¹⁴⁰⁹ See section 4.3 and subsection 4.6.6.

the WIPO 'Internet' Treaties.¹⁴¹⁰ Therefore, international obligations are taken into account. In this framework, the three-step test forms a window opened in article 5(5) CD to make the existing international obligations in the field of limitations visible. On its merits, it functions just like article 10(2) WCT as an additional safeguard. The limitations allowed under paragraphs 1 to 4 of article 5 CD are its field of application. When a member state wants to adopt one of these limitations, it must additionally ensure compliance with three-step test of article 5(5) CD.¹⁴¹¹

With regard to the requirement laid down in article 5(5) CD that the limitations listed in article 5 CD 'shall only be applied in certain special cases', it could be shown that national legislation is not obliged to form special cases of the enumerated cases. To fulfil the first criterion of article 5(5) CD, national legislation thus need not draw the conceptual contours of a limitation based on one of the cases listed in article 5 CD more narrowly than is done in the Directive itself. Instead, this passage of article 5(5) CD simply completes the reference to the international three-step test.¹⁴¹²

Attention has also been devoted to the fact that the Copyright Directive explicitly provides for the payment of fair compensation in three cases, namely in respect of unauthorised photographic reproductions falling under article 5(2)(a), reproductions by a natural person for private use privileged by article 5(2)(b), and reproductions of broadcasts by social institutions permitted by article 5(2)(e). As to the relationship between this guarantee of fair compensation and the obligation to provide for the payment of equitable remuneration potentially resulting from the three-step test, it could be clarified that the international obligation remains untouched and must be fulfilled separately. Arguably, it is an even stronger claim for an adequate pecuniary reward because it may amount to the sum an author freely bargaining for the use in question would have agreed upon. The guarantee of fair compensation does not exempt EU member states from the necessity to determine carefully in each single case whether or not equitable remuneration is to be paid. In the case of articles 5(2)(a), (b) and (e), it has a privileging effect if an international obligation to provide for the payment of equitable remuneration does not result from the three-step test.¹⁴¹³

Besides these functional clarifications, each permissible limitation enumerated in article 5 has been scrutinised in the light of the three-step test. This inquiry yielded the following results: it is insufficient that the exemption of photographic reproductions in article 5(2)(a) CD is merely accompanied by the obligation to provide for the payment of fair compensation. With regard to copies made in industrial undertakings, it follows from article 5(5) CD that the pecuniary reward should amount to the sum a right holder freely bargaining for the use in question

¹⁴¹⁰ See subsection 5.1.3.

¹⁴¹¹ See section 5.2.

¹⁴¹² See subsection 5.3.1.2.

¹⁴¹³ See subsection 5.3.3.

would have received. Hence, equitable remuneration must be paid. Article 5(2)(b) CD, privileging strictly personal use, must furthermore 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 in this case, appears appropriate.¹⁴¹⁴

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. 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. Furthermore, the use for administrative purposes must be cushioned by the payment of equitable remuneration. The first alternative of article 5(3)(g) CD, the use of works during religious celebrations, conflicts with a normal exploitation. 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 so-called 'minor reservations doctrine'.¹⁴¹⁵ Otherwise, it cannot be deemed a special case. 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. Article 5(3)(i) CD, concerning the incidental inclusion of a work in other material, is not a special case. 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. 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.¹⁴¹⁶

Finally, it has been recommended that the three-step test of article 5(5) CD be introduced into national copyright law. To realise the Directive's overarching objective to harmonise copyright law, it would have been more effective anyway to set forth an open-ended formula 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 in the EU. On the basis of the framework set out in article 5 CD, this solution is not completely

¹⁴¹⁴ See subsection 5.3.3.

¹⁴¹⁵ See subsection 3.1.1.

¹⁴¹⁶ See subsections 5.3.1.1, 5.3.2 and 5.3.3.

SUMMARY

beyond reach. The cases enumerated in article 5 CD are not delineated precisely but rather reflect certain types of limitations, the outlines of which have not been drawn restrictively. 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. 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 all those member states providing for the limitation in question. 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.¹⁴¹⁷

¹⁴¹⁷ See section 5.4.

