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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 7

Conclusion

On its merits, the three-step test is a relic of the pre-digital world, resting on the market imperfections which, in particular, threatened the right of reproduction.¹⁴¹⁸ It reflects the circumstances surrounding the operation of copyright law in the analogue world. Its very existence, as an instrument for setting limits to limitations on exclusive rights, implies the existence of copyright limitations. Its way of functioning inhibits user privileges from encroaching upon the authors' exclusive rights. The task of the three-step test is to safeguard a copyright balance of traditional shape: strong copyright protection is conferred on authors, while users may benefit from privileges which make inroads into the field of author's rights insofar as necessary for lending sufficient weight to the user interests at stake.¹⁴¹⁹ One might be induced to regret the maintenance of the status quo of the analogue world in view of the potential of the digital environment for spreading the world's knowledge, wisdom and wealth of aesthetic expression. It is to be borne in mind, however, that this decision affords the opportunity of taking full advantage of the wealth of experience which has been aggregated in the pre-digital past of copyright law.

Whether or not copyright law, furnished with the three-step test as a tool for adjusting its balance of grants and reservations, will finally prove to be capable of reacting adequately to the demands of the information society, is a question to be answered in the years to come. On the basis of the preceding close inspection of the three-step test, several guidelines can be given for the further development of the copyright system. The following section 7.1 concerns the copyright paradigm as such and refers primarily to the concept of intergenerational equity that has been embraced as a guiding principle in the course of the interpretation of the three-step test.¹⁴²⁰ Concrete proposals for the further improvement of the framework set out in international copyright law will be tabled in the final section 7.2. In this context, the role will be discussed which the incorporation of the three-step test into EC copyright law might play for future developments at the international level.

¹⁴¹⁸ Cf. subsections 3.1.2. This can particularly be seen in the field of the prohibition of a conflict with a normal exploitation. Cf. subsection 4.5.3.2.

¹⁴¹⁹ Cf. Dreier 2001, 70-72.

¹⁴²⁰ Cf. as to its theoretical foundation section 2.3.

7.1 Aligning Copyright Law with the Users among Authors

Over the last decades, much attention has been devoted to the economic analysis of copyright law. Imbued with the aim to shape the system of copyright protection so as to afford the most efficient allocation of intellectual resources, copyright scholars became engrossed in the world of economic thought and strove to bring to fruition the economic models they embraced.¹⁴²¹ The golden fleece they were searching for seems to have been the very formula yielding the one graph that clearly indicates how to properly calibrate the delicate balance between grants and reservations of copyright law – author's rights on the hand and exempted uses on the other. To this day, this goal could not be achieved. The complexity of the influences impacting on copyright's balance successfully resisted any attempts to lump them all together in a refined economic model.¹⁴²² The purism of neo-classicist economic property theory, for instance, was convincingly rebutted on the grounds that an economic model losing sight of hardly quantifiable but socially valuable 'externalities' of copyright limitations can scarcely be deemed appropriate for informing the adjustment of copyright's delicate balance.¹⁴²³

Nonetheless, the specific merit of the economic analysis of copyright law shall not be contested here. Undoubtedly, it yielded a better understanding of the basic problem that a proper balance between grants and reservations of copyright law is to be struck.¹⁴²⁴ This notion inheres in the common law approach to copyright. It

¹⁴²¹ The Chicago school of thought, with its emphasis on efficiency, as well as Public Choice theory, focusing on affected interest groups, have been invoked alike. The overview given by van den Bergh 1998, 17-20, also touches upon normative economic analyses of law. Groundwork for the debate was particularly laid by Landes/Posner 1989, 325.

¹⁴²² Cf. the extensive economic analysis conducted by Fisher 1988, 1698-1744, who, interestingly, offers a so-called 'utopian analysis', *ibid.*, 1744-1794, as well. Introducing his utopian model, Fisher, *ibid.*, 1744, explains: 'This Part considers how the fair use doctrine might be rebuilt if one's ambition were not merely to reduce inefficiency in the use of resources, but to advance a substantive conception of a just and attractive intellectual culture.' This statement points in the right direction. An economic approach may indeed be useful. However, it is to be regarded as an insufficient transitional stage paving the way for a more comprehensive and appropriate dealing with questions concerning copyright as law about creativity.

¹⁴²³ Cf. subsection 2.2.4. See Cohen 2000, 1819: 'Where complexity is central, however, and models overly reductionist, economic modeling may do more harm than good. It may cause harm, in particular, if it causes us to focus on and emphasize those aspects of the process that are least important – to overlook what is most vital in favor of what is easier to describe or model. The particular brand of economic analysis practiced within the legal academy compounds this error. Conventional law and economics has overwhelmingly focused on generating static pictures of the demand and distribution curves for isolated goods at a particular point in time. As applied to information goods, this approach is especially perverse. Like a medieval mapmaker skirting the boundaries of terra incognita, it concentrates on the familiar and visible – transactions! licensing revenues! – and evinces little curiosity about the rest and its relation to the dynamic, irreducible whole.'

¹⁴²⁴ Cf. Landes/Posner 1989, 333-336, van den Bergh 1998, 20-22.

occupies centre stage in the US.¹⁴²⁵ The economic analysis of copyright law, however, also succeeded in making continental European scholars and policy makers alike sensitive to this fundamental task. That the instruments of economic thought, in the end, are not unlikely to be incapable of solving the problem of copyright's delicate balance appropriately, may appear unfortunate to enthusiasts seeking to view all aspects of human activities through the prism of economic theory, thereby inexorably reducing human movements to economic actions. For all others, the time is ripe to put an end to the foray into the economic world of thought. It is advisable to begin digging the grave of the economic analysis of copyright in order to pave the way for passing this – in spite of the outlined merits – insufficient transitional stage. Genuine human creativity does not obey market dictates.¹⁴²⁶ It is therefore erroneous to seek to align laws intruding into the sphere of creative activity with the ostensible 'rationalism' of economic models.

Instead, the author and his specific needs must be brought into focus. This statement need not be misunderstood as a last-ditch effort to keep the out-dated prayer wheel of continental European author-centric copyright theory running.¹⁴²⁷ As the necessity to reconcile the interests of authors with those of users has clearly been brought to the fore in recent years – not least by the economic analysis of copyright law –¹⁴²⁸ this project would be doomed to failure anyhow. The reference to the specific needs of authors, thus, does not foremost address an author's interest in deriving profit from the works he has already created, but the same author's concern about unhindered use of existing intellectual productions as a stimulus if not prerequisite for his own future creativity. It seeks to tear down the artificial wall strictly dividing authors from users that is often erected in copyright law. In fact, the same individuals are to be found on both sides of the wall.¹⁴²⁹ The distinction between 'consumptive' and 'transformative' uses that is frequently made in the field of US copyright law,¹⁴³⁰ gives evidence of how inconsistent the dividing line drawn between authors and users is in reality. If a second author builds upon a predecessor's work to express himself artistically, he makes a 'transformative' use. The latter category circumscribing a certain way of using intellectual works, thus, bears witness to the fact that there are indeed users among authors.

To infer a comprehensive concept capable of assisting in the proper adjustment of copyright's balance from this basic insight, it must necessarily be placed in a broader context. It is indispensable to focus not only on instances in which an already existing work is used directly for creating a new one, but also on the beneficial effect which sufficient breathing space for the unauthorised use of

¹⁴²⁵ Cf. subsection 2.1.2.

¹⁴²⁶ Cf. subsection 2.1.3.

¹⁴²⁷ Cf. subsection 2.1.2.

¹⁴²⁸ Cf. Holzhauser 2000, 79-80.

¹⁴²⁹ See section 2.3. Cf. Landes/Posner 1989, 332-333.

¹⁴³⁰ Cf. Ginsburg 1997, 1-20, dealing specifically with this distinction.

copyrighted material, in general, has on future creativity. An efficient, decentralised, many-faceted and thus rich information infrastructure allows people to explore the cultural landscape of society free from interference by right holders. It grants access to diverse sources of perceptions and knowledge of the world, thereby substantially promoting the development of independent thinking and ideas.¹⁴³¹ It constitutes a propelling force for freedom of expression and future creativity by facilitating the discovery of the creative talent lying dormant in certain beneficiaries, as well as the further evolution of creative potential already unveiled. Besides situations where copyrighted material is directly used to create a new work, the delineated indirect beneficial effect on future creativity which copyright limitations have must accordingly be factored into the equation.¹⁴³²

This means that the sphere of so-called 'transformative' use is to be transcended. The mere finding that creative users of today are the authors of tomorrow is a platitude. At the core of 'transformative' use lies particularly the objective to embed already existing copyrighted material in a new work. If quotations are made in the course of writing an academic article, or a work is criticised in the guise of parody, the creation of a new work is already under way and its completion is foreseeable. The crucial ramification of the insight that there are authors using existing works as a basis for a new work, then, is the further statement that *also the consumptive users* of today are not unlikely to become authors tomorrow. Among pupils learning of intellectual creations in a schoolbook are future authors, potentially induced or further encouraged to develop their talent while studying the works presented in that book. Among teenagers addicted to rock, pop, rap or techno, making copies of recordings for personal use, are the creators of future musical trends. Among the users of libraries archiving and preserving information are future scientists writing articles. Among the members of the general public, adequately informed about current events by the press, are writers, painters and composers potentially prompted to creative activity by the presented information.

Hence, the conceptual contours of so-called 'transformative' use must substantially be widened. Not only the recourse to existing copyrighted material directly serving the creation of a new work is to be considered, but also beneficial long-term effects. The development and final realisation of creative talent is a gradual evolutionary process. Along the path ultimately leading to the creation of new literary and artistic works, copyright law may place obstacles by affording right holders pervasive control over the use of copyrighted material. However, it has also the potential for promoting and stimulating future creativity. Unhindered access to diverse sources of information and already existing intellectual creations is of paramount importance in this respect.¹⁴³³ The logical operation to be undertaken, thus, is to conceive of copyright limitations serving the delineated ends

¹⁴³¹ Cf. subsections 2.2.1 and 2.2.2.

¹⁴³² Cf. section 2.3.

¹⁴³³ Cf. subsection 2.2.2.

as an anticipated tribute paid to future creativity. Although not directly assisting in the creation of a new work, like the exemption of the making of quotations, a limitation may nevertheless have a share in the final realisation of creative talent. This notion concerns limitations for the purpose of teaching and private use as well as library and press privileges.¹⁴³⁴ It blurs the erroneous distinction between 'consumptive' and 'transformative' use. The only difference between these two imaginary poles lies in the time that passes until the creation of a work is enabled or at least facilitated by a copyright limitation, and in the likeliness that the creation really will take place. Like two sides of a coin, however, both categories – the exemption of 'consumptive' and 'transformative' use alike – substantially encourage and promote human creativity.

Interestingly, it is in particular Locke's elaboration of a natural right to property – the philosophical undercurrent of the continental European approach to copyright – that can be invoked to lay the theoretical groundwork for the exemption of uses either directly or indirectly contributing in the outlined way to the creation of new works. Locke's labourer acquires a natural right to property only 'where there is enough and as good left in common for others'.¹⁴³⁵ The notion of intergenerational equity among authors that can be inferred from this proviso has been described in detail above.¹⁴³⁶ At the core of considerations of this kind lies the basic assumption that authors ought to refrain from sawing off the very branch on which their own creativity rests. In the case of the making of quotations, this is obvious. It is hard to imagine that an academic author, rendered incapable of presenting adequately an intellectual debate in the absence of the right to quote, would support the abolition of this user privilege. Similarly, a parodist is unlikely to militate against the unauthorised use of parts of his own work for the purpose of creating a lampoon thereof. However, the same can be said of limitations indirectly promoting the creation of new works. An author who, on his way to the realisation of his talent, profited from the privilege to use existing works for the purpose of private study can hardly be expected to espouse the erosion of the privilege. A famous writer admitting that the foundations for his literary work were laid at school and university is unlikely to call the legitimacy of teaching and library privileges into doubt. The principle of intergenerational equity, demanding solidarity among authors is thus a powerful justification for a wide variety of 'user' privileges.

It could be demonstrated in the context of the three-step test that it can be put to good use when seeking to provide guidance for the adjustment of the delicate balance between grants and reservations of copyright law. A limitation which reacts to a conflict of interests between (potential) creators of works – authors who want to exploit the fruit of their labour, and others seeking to access intellectual works to discover and develop their talents or, at a later stage, to build their own creations

¹⁴³⁴ Cf. section 2.3.

¹⁴³⁵ See Locke 1698, *Second Treatise on Government*, chapter 5 § 27.

¹⁴³⁶ See section 2.3.

upon the work of predecessors – can be regarded as a special case in the sense of the three-step test.¹⁴³⁷ From the perspective of intergenerational equity, a conflict with a normal exploitation should not be assumed if a use is made that serves intergenerational equity. It is not normal that authors stifle breathing space for the unauthorised use of works that helped themselves to arrive at the creation of a work. To use an aforementioned image: an author ought to refrain from sawing off his own branch.¹⁴³⁸ Eventually, a prejudice to an author's legitimate interests, caused by a form of using a work that is supported by considerations of intergenerational equity, can hardly be qualified as unreasonable. In this case, the detriment to the author is likely to be outweighed by the benefit for another – already active or potential future – author.¹⁴³⁹

The alignment of copyright law with the needs of authors, thereby particularly focusing on those instances where already active or potential future authors depend on the unhindered use of copyrighted material, would have a beneficial effect on the international copyright system. It builds a further bridge between copyright's legal traditions. In this regard, it is to be borne in mind that Locke's elaboration of a natural right to property forms the theoretical underpinning of the proposed concept of intergenerational equity.¹⁴⁴⁰ The very foundation of the civil law approach to copyright, thus, underlies the presented considerations. The author-centric view traditionally endorsed in continental Europe can accordingly be opened to the conviction that an appropriate balance between grants and reservations of copyright law must be struck. Placing the person of the author in the centre of the copyright system, rightly understood, does not at all mean espousing the constant gradual expansion of copyright protection, but finding a balance between the interest of authors in exploiting their work and the interest of the same authors in sufficient breathing space for unauthorised uses. The necessity of a proper copyright balance between author's rights and user privileges need consequently no longer be perceived as a notion alien to continental European copyright theory.¹⁴⁴¹

The balance between grants and reservations has tended to occupy centre stage in the common law copyright tradition.¹⁴⁴² However, this fact does not shield Anglo-American thought patterns from a critical review in the light of the concept of intergenerational equity. The fundamental utilitarian notion that copyright law shall serve the enhancement of the benefits for society is unproblematic insofar as advocates of this thesis are not loath to agree that this benefit, primarily, lies in the

¹⁴³⁷ Cf. subsection 4.4.2.3.

¹⁴³⁸ Cf. subsection 4.5.4.1.

¹⁴³⁹ Cf. subsections 4.5.5 and 4.6.4.2.

¹⁴⁴⁰ Cf. section 2.3.

¹⁴⁴¹ Notwithstanding civil law copyright rhetoric, national policy makers always had to face the practical need to strike a balance between grants and reservations anyway. Cf. subsections 3.1.3.1, 3.1.3.2 and 3.1.3.3. The time is therefore overripe for a goodbye to the theoretical lopsided espousal of exploitation interests which neglects the user interests authors have.

¹⁴⁴² Cf. subsection 2.1.2.

promotion of cultural diversity.¹⁴⁴³ The unshakeable reliance on marketplace principles and the motivating power of economic incentives as appropriate means for promoting society's overall welfare, however, cannot escape more thorough scrutiny. The production of intellectual works – and particularly of genuine literary and artistic expression – does not necessarily depend on the promise of monetary reward.¹⁴⁴⁴ The firm belief that such a promise has the potential for encouraging intellectual productivity is mere delusion.

As a guideline for industry policy, it may be upheld. However, it is to be noted that the welfare of copyright industries is only one aspect entering the picture when seeking to promote a wide variety of cultural activities.¹⁴⁴⁵ Policy makers forcing the person of the author onto the sidelines on account of this single aspect emphasised by powerful interest groups are ill-advised.¹⁴⁴⁶ Ultimately, the task to create new works is to be accomplished by authors. A copyright regime nourishing copyright industries but ignoring the specific needs of authors is inevitably doomed to fail in long term. Copyright industries may be capable of entertaining the public for a certain period of time by flooding the market with products that react perfectly to consumer tastes. Fresh ideas, new trends and the incessant renewal of original expression which solely guarantee a robust cultural framework, however, still are the domain of independent individuals who are motivated to create a work of the intellect by their artistic or scientific nature and not by the prospect of monetary reward.¹⁴⁴⁷ The well-being of the copyright industry itself is hanging by the thread of new impulses from these individuals when consumers finally get bored by the fireworks of safe but shallow intellectual productions and ask for something fresh and new.

The enhancement of the benefits for society, thus, must not be confused or equated with the well-being of copyright industries.¹⁴⁴⁸ The adequate vehicle for realising the objective to promote the overall welfare of society, consequently, is not necessarily the promise of bigger profits. It is wrong to allege that the prospect of higher monetary reward will automatically spur authors into increased intellectual productivity, thereby enhancing the number of creations and the benefits for society.¹⁴⁴⁹ On the contrary, it is right to assume that a copyright framework which reacts appropriately to the specific needs of authors – as exploiters and users

¹⁴⁴³ Cf. subsection 2.1.3.

¹⁴⁴⁴ Cf. subsection 2.1.3.

¹⁴⁴⁵ Cf. subsection 2.1.3.

¹⁴⁴⁶ Cf. Samuelson 1999, 587, pointing out that particularly at the international level it is to be taken into account that the interests of copyright industries and the interests of authors, in fact, diverge in some significant respects.

¹⁴⁴⁷ Cf. subsection 2.1.3.

¹⁴⁴⁸ Sifting through the recitals of the European Copyright Directive 2001/29/EC, one is inevitably left to wonder whether this fault, interestingly, was not recently made in the EU instead of the US. Cf. subsection 5.1.3.

¹⁴⁴⁹ Cf. subsection 2.1.3.

of intellectual works alike – has the potential for contributing substantially to the enrichment of society's cultural life and really improves the overall welfare of society.¹⁴⁵⁰ A copyright system that is perfectly aligned with the specific needs of authors gives a much bigger incentive to create, and is much more efficient, than the traditional spiral progressively extending copyright protection.¹⁴⁵¹ The time has come to face the fact that this spiral entails the danger of overprotection¹⁴⁵² that would inexorably stifle the breathing space necessary for the discovery, development and realisation of creative talent. In the field of computer programs and databases, one is left to wonder whether this dangerous stage has not already been reached. Hence, the reliance placed in Anglo-American copyright systems on the motivating power of economic incentives is to be replaced with the reliance on the beneficial effect of a copyright system that is carefully adapted to the needs of authors as creators and users of intellectual works. If continental European copyright systems, as a countermove, give more weight to the necessity of striking a proper balance between author's rights and user privileges, the way for the unification of copyright's legal traditions could be paved on the basis of the proposed concept of intergenerational equity.

For another reason, it is even the more advisable to tread the path of the strict alignment of copyright law with the specific needs of authors. In the emerging information society, copyrighted material enshrining a wide diversity of information constitutes the raw material of economic activity and the origin of wealth. It is to be expected that the social fabric of the society to come will depend on whether certain segments of the population are capable or incapable of accessing diverse sources of information.¹⁴⁵³ The information society, thus, comes up with further challenges. Copyright law is confronted with tasks taking on hardly foreseeable proportions. The mistake of lumping the protection of genuine literary and artistic expression together with the protection of computer programs and even databases can be regarded as a harbinger of the heavy burdens to be carried in the future. The repercussions of this fault on pillars of the copyright system, like the notion of a work and the idea/expression dichotomy, herald the jeopardising of the current copyright paradigm. It is questionable whether the traditional instruments of copyright law will finally prove to have the potential for coping with the challenges lying ahead. In 1997, Litman already concluded that,

¹⁴⁵⁰ Cf. Goldstein 2001, 293.

¹⁴⁵¹ Admittedly, this spiral particularly inheres in the mechanism of periodic conferences revising international copyright law. These conferences aim to progressively improve copyright protection. However, it is to be feared that they lose sight of the necessity to furthermore offer sufficient breathing space for unauthorised use of copyrighted material. The preamble of the WIPO Copyright Treaty appears as a sheet anchor in this regard. Cf. subsection 3.3.2.

¹⁴⁵² Cf. Hugenholz 2002, 239-240. See Geiger/Sentleben 2003, 734-735, summarising observations made by the participants of the MPI Conference "A New Framework for Intellectual Property Rights" held in November 2002.

¹⁴⁵³ Cf. subsection 2.2.2.

'if we build the information law of the Internet, and its progeny, around the copyright paradigm, we may be able to stretch and scrunch and bend copyright law out of any recognizable shape to permit it to manage all of the interests it has hitherto viewed as unimportant. If we can't, I think it's clear that the information space it encourages will be one that few of us will like very much.'¹⁴⁵⁴

In this situation, it is of crucial importance not to lose sight of the basic concern to establish a framework favourable to creativity and intellectual productivity. As it is ultimately the author who creates a work of the intellect, his specific interest in exploiting and using copyrighted material towers above all conceivable competing concerns and should govern the metamorphosis of copyright law in the information society. The dualism between the authors' interest in deriving economic profit from a work on the one hand, and the same authors' concern about sufficient breathing space for unauthorised use on the other, clearly reveals the central task to be fulfilled in the future: an appropriate level of protection has to be found that leaves ample room to manoeuvre for the dissemination of information and freedom of expression.¹⁴⁵⁵ If the application of the three-step test is oriented by the specific needs of authors and brought into line with the principle of intergenerational equity, it may substantially contribute to the realisation of this objective.

The future tasks of academic work in the field of copyright law, thus, clearly come to the fore. Instead of continuing to muse and debate on the appropriateness or inappropriateness of economic models, the psychology of creative processes should be high on the agenda of interdisciplinary research. Copyright scholars have to get to know what exactly induces people to engage in the creation of an intellectual work, and how the framework that is best suited for encouraging and supporting intellectual productivity can be established.¹⁴⁵⁶ They must refrain from reiterating the out-dated mantra that the progressive improvement of copyright protection, in one way or another, will always promote the creation of new works.¹⁴⁵⁷ Instead, all excessive ramifications of the traditional espousal of stronger protection are to be pruned back and new growth of overprotection is to be nipped in the bud. The prerequisites for the discovery and development of creative talent are to be explored meticulously. Future decisions on whether or not the scope of exclusive rights or copyright limitations should be reduced or enhanced are to be based on profound empirical data demonstrating that the change corresponds to the actual needs of authors. The analytical instruments of social sciences must be

¹⁴⁵⁴ See Litman 1997, 619.

¹⁴⁵⁵ Cf. subsections 2.2.1 and 2.2.2.

¹⁴⁵⁶ See Cohen 2000, V: 'Before we can construct a reliable system of entitlements and public policy exceptions to promote the twin goals of progress and access, we must learn to understand and describe creative processes more accurately. We need to understand how people get ideas, and how ideas migrate and transform within society. And we must learn how to design open spaces - zones of unpredictability within and around the predictable contours of rights and rules.'

¹⁴⁵⁷ Cf. Samuelson 1999, 591.

employed to inform the decisions of policy makers. To further substantiate the results of psychological and empirical studies, attention should moreover be paid to the teachings of those scientific disciplines that analyse the final outcome of creative productivity. Why should copyright scholars be reluctant to consult literary studies and the teachings of musicology and art history if they really are interested in what they are talking about?

7.2 Restructuring International Copyright Law

When evaluating the influence of the three-step test on the establishment of a proper copyright balance in the digital environment, the danger of underestimating its regulatory potential is as big as the temptation to exaggerate its importance. Virtually, the three-step test is a fig leaf for the helplessness and dividedness of policy makers on the international level. Every time an explicit agreement on permissible limitations was out of reach, the abstract formula of three criteria was invoked. Due to its openness, it gains the capacity of serving as a compromise solution for the reconciliation of opposite opinions.¹⁴⁵⁸ Therefore, it would be an exaggeration to posit that the three-step test sets forth a balance of specific shape. Its three criteria can hardly be expected to draw the conceptual contours of permissible limitations exactly. Rather, it can be deemed a materialisation of the notion of an appropriate copyright balance which lends sufficient weight to the interests of authors and users alike. The three-step test merely outlines conceivable solutions by providing an abstract catalogue of criteria.

However, there is also a specific merit which is grounded in the conceptual openness of the three criteria. The high degree of flexibility enables the protection of copyright's balance even in times of upheavals within the copyright system. Accordingly, it was wise to embrace the three-step test to circumscribe the ambit of operation of permissible limitations in the digital environment at the 1996 WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions. By virtue of this decision, national legislation can orient its action by the abstract, and thus technology-independent criteria of the three-step test instead of blindly groping for solutions.¹⁴⁵⁹ Casting doubt upon the appropriateness of the three-step test would deprive national legislators of a helpful signpost for solving the problems raised by the digital environment. Thus, the three-step test prevents national policy makers from going astray by losing sight of essential questions which must necessarily be asked when seeking to shape future copyright limitations responsibly. Hence, the underestimation of the three-step test's regulatory potential has its own dangers.

¹⁴⁵⁸ Cf. subsection 3.1.2.

¹⁴⁵⁹ See the agreed statement concerning article 10 WCT, WIPO Doc. CRNR/DC/96.

This is even more true when considering the influence the three-step test may have on the further improvement of the international copyright system. At the beginning of its 'career'¹⁴⁶⁰ in international copyright law, it served foremost as a vehicle paving the way for the formal recognition of the right of reproduction *jure conventionis*.¹⁴⁶¹ Since its introduction at the 1967 Stockholm Conference, however, the abstract formula has made its way to the top of instruments regulating copyright's delicate balance.¹⁴⁶² Nowadays, all relevant international treaties contain the three-step test. Each and every limitation imposed on whatever exclusive right falls within its ambit of operation. Not only the task of controlling traditional limitations has expressly been assigned to the three-step test but also the provision of guidance in the digital environment.¹⁴⁶³

Hence, the three-step test has become a powerful counter-principle to the edifice of permissible limitations erected in the Berne Convention. The importance of this finding can be assessed by drawing a line between the international system and copyright's legal traditions. The framework established in the Berne Convention reflects the continental European approach to exemptions from author's rights. Permissible limitations are separately enumerated and more or less restrictively delineated, for instance, in articles *2bis*(2), 10(1) and (2), *10bis*(1) and (2), *11bis*(3) and *14bis*(2)(b) BC.¹⁴⁶⁴ Within this framework, the three-step test of article 9(2) BC seems to be completely out of place. It rests on three abstract factors, circumscribed in elastic and flexible terms. The conclusion is therefore inescapable that it is an element stemming from the Anglo-American sphere rather than from the continental European tradition. Not surprisingly, it was especially the UK delegation which supported the adoption of a provision constituted solely by abstract criteria at the 1967 Stockholm Conference.¹⁴⁶⁵ It is noteworthy that particularly this provision became a universal principle in the context of the TRIPs Agreement and the WIPO 'Internet' Treaties.¹⁴⁶⁶

The deep impact which this elevation of the three-step test might have on the much more detailed system of limitations set out in the Berne Convention was noticed by the participants of the 1996 WIPO Diplomatic Conference. They were alert to the fact that the three-step test has the potential for overruling the Berne system of permissible limitations altogether. Reluctantly, they nevertheless agreed on the subjection of Berne limitations to the three-step test of article 10(2) WCT.¹⁴⁶⁷ In the agreed statement concerning article 10 WCT, however, they hastened to stress that 'Article 10(2) neither reduces nor extends the scope of applicability of

¹⁴⁶⁰ See Bornkamm 2002, 29.

¹⁴⁶¹ Cf. subsection 3.1.2.

¹⁴⁶² Cf. the description of the several stages of development of the three-step test in chapter 3.

¹⁴⁶³ Cf. subsection 3.3.2.

¹⁴⁶⁴ Cf. the more detailed overview given in subsection 4.2.2.

¹⁴⁶⁵ Cf. subsection 3.1.2.

¹⁴⁶⁶ Cf. sections 3.2 and 3.3.

¹⁴⁶⁷ Cf. subsection 3.3.2.

the limitations and exceptions permitted by the Berne Convention'.¹⁴⁶⁸ This statement appears as a curiosity. After expressly extending the scope of the three-step test to the limitations for which the Berne Convention provides, the contracting parties of the WIPO Copyright Treaty finally straitjacketed the test of article 10(2) WCT by adopting the agreed statement. A closer inspection, however, reveals that the statement does indeed make sense. It prevents article 10(2) WCT from bringing inconsistencies within international copyright law to the fore.

It cannot so readily be assumed that the drafters of the WIPO Copyright Treaty were fully aware of the statement's harmonising effect. The records of the 1996 Diplomatic Conference merely give evidence of the delegates' fear that national legislation might be inhibited by the three-step test from upholding those limitations in their domestic laws which they deemed compatible with the Berne Convention.¹⁴⁶⁹ Be that as it may, the agreed statement nonetheless fulfils an important function: it inhibits the three-step test from eroding those limitations permitted by the Berne Convention that do not fulfil its criteria. Article 11*bis*(2) BC, for instance, would inevitably fall prey to article 10(2) WCT in the absence of the agreed statement.¹⁴⁷⁰ The so-called 'minor reservations doctrine' would have to be restricted.¹⁴⁷¹ These corrections of the international system of permissible limitations may be perceived as desirable. However, it is to be noted that if article 10(2) WCT is employed as a means for their realisation, the self-contradictory nature of the actual international framework could no longer be masked.

By virtue of article 1(4) WCT, articles 1 to 21 BC are incorporated into the WIPO Copyright Treaty by reference. Article 11*bis*(2) BC which clearly fails the three-step test, thus, is encompassed. Against this background, it would appear inconsistent if article 10(2) WCT were to erode article 11*bis*(2) BC. Why should the drafters of the WIPO Copyright Treaty include a certain provision by reference first, and seek to abolish it afterwards? This inconsistent result is avoided by the agreed statement concerning article 10 WCT. The same situation arises in the context of the TRIPs Agreement. Here, article 11*bis*(2) BC is incorporated pursuant to article 9(2) TRIPs. It is consequently not advisable to construe article 13 TRIPs so as to require the abolition of article 11*bis*(2) BC. Otherwise, the inconsistencies prescribed in actual international copyright law would come to the fore which the contracting parties of the WIPO Copyright Treaty circumvented by adopting the aforementioned agreed statement. There is thus reason to recommend that the agreed statement concerning article 10 WCT should also be taken into account when applying article 13 TRIPs.¹⁴⁷² This inclusion of the agreed statement is also in line with the drafting history of article 13. In the context of the TRIPs Agreement,

¹⁴⁶⁸ See WIPO Doc. CRNR/DC/96, agreed statement concerning article 10 WCT.

¹⁴⁶⁹ Cf. subsection 3.3.2.

¹⁴⁷⁰ Cf. subsection 4.5.4.4.

¹⁴⁷¹ Cf. subsection 4.5.4.3.

¹⁴⁷² Cf. Ficsor 2002a, 60-61 and subsection 4.1.2.2.

the three-step test was understood as a materialisation of the standard of protection reached in the Berne Convention but not as a control instrument eroding Berne limitations.¹⁴⁷³

When applying the three-step test, the outlined consideration for the contradictions inhering in international copyright law inevitably leads to unsatisfactory results. Although a certain national limitation is found to be incompatible with the three-step test, it cannot be abolished when it keeps within the limits set forth in provisions of the Berne Convention, such as article 11*bis*(2) BC. The three-step test, in consequence, is hindered from realising its full regulatory potential. The agreed statement concerning article 10 WCT shields the scope of applicability of Berne limitations from the additional control the three-step test exerts.¹⁴⁷⁴ At the core of this peculiar constraint placed on the three-step test lies the fact that a renewed revision of the Berne Convention was out of reach after the twin revisions in Stockholm 1967 and Paris 1971. Instead, the TRIPs Agreement and the WIPO Copyright Treaty were superimposed on the Convention.¹⁴⁷⁵ The agreed statement concerning article 10 WCT, on its merits, hides the inconsistencies in the field of copyright limitations evolving from the conglomerate of international treaties. This provisional solution interferes with the operation of the three-step test. The latter must carry the burden of the complicated mixture of relevant international provisions and bridge the fissures it entails. Not surprisingly, there is a move afoot in international copyright law seeking to degrade the three-step test to a mere tool of interpretation.¹⁴⁷⁶

As the inconsistencies of international copyright law become particularly visible in the context of the three-step test, its closer inspection is a useful starting point for tabling proposals of how to redress the shortcomings of the actual international framework set out for copyright limitations. Two divergent principles, mirroring copyright's two legal traditions, are important in this respect. On the one hand, the detailed provisions laid down in the Berne Convention enter the picture. This complex sub-system enshrined in the Convention points towards the civil law approach to copyright.¹⁴⁷⁷ On the other hand, the three-step test is to be factored into the equation. Theoretically, it is devised so as to control the numerous more detailed limitations permitted by the Berne Convention.¹⁴⁷⁸ In practice, however, it is often inhibited from exerting control over the application of Berne limitations by the agreed statement concerning article 10 WCT. The three-step test forms an open-ended, horizontal provision that points towards the common law approach to copyright.¹⁴⁷⁹ The two divergent principles – the system of specific limitations set

¹⁴⁷³ Cf. subsection 3.2.1.

¹⁴⁷⁴ Cf. subsection 4.2.2.

¹⁴⁷⁵ Cf. the overview of the development of international copyright law given in chapter 3.

¹⁴⁷⁶ Cf. Reinbothe 2000, 264; Ficsor 2002a, 519. Cf. subsection 4.2.2.

¹⁴⁷⁷ Cf. subsection 2.1.2. See the overview given in subsection 4.2.2.

¹⁴⁷⁸ Cf. subsection 4.2.2.

¹⁴⁷⁹ Cf. subsection 2.1.2.

out in the Berne Convention on the one side and the flexible three-step test on the other – can be reconciled by merging the catalogue of Berne limitations in the three-step test. This procedure further concretises the three-step test while not imperilling its open-ended nature. The resulting provision could take the following shape:

‘Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works in special cases, such as the use of a work for the purposes of

- (a) making quotations;¹⁴⁸⁰
- (b) parody, caricature or pastiche;
- (c) strictly personal use in privacy;
- (d) illustration for teaching;¹⁴⁸¹
- (e) disseminating, preserving and archiving information, as long as carried out by non-profit libraries and similar institutions;
- (f) reporting current events;¹⁴⁸² and
- (g) enabling the press to inform the public about political speeches, speeches delivered in the course of legal proceedings, as well as lectures, addresses and other works of the same nature which are delivered in public;¹⁴⁸³

provided that the limitation or exception does not conflict with a normal exploitation of the work and does neither unreasonably prejudice the legitimate interests of the author, including his moral interests,¹⁴⁸⁴ nor the legitimate interests of other right holders.¹⁴⁸⁵

In this way, the inconsistent framework established in international copyright law could be replaced with one general provision governing all national exemptions from exclusive rights. The expressly listed cases mirror the particular importance of limitations serving freedom of expression and the dissemination of information.

¹⁴⁸⁰ See article 10(1) BC.

¹⁴⁸¹ See article 10(2) BC.

¹⁴⁸² See article 10*bis*(2) BC.

¹⁴⁸³ See article 2*bis*(1) and (2) BC.

¹⁴⁸⁴ Cf. subsection 4.6.3.

¹⁴⁸⁵ Cf. subsection 4.6.2.

The clarification that they are examples of permissible special cases clearly indicates that a rational justificatory basis must underlie limitations.¹⁴⁸⁶ The enumeration is not closed ('special cases, *such as*'). At the national level, legislators are free to base more precise limitations on the concretised three-step test (civil law approach) or to bring open-ended norms into line therewith (common law approach, principle of fair use).

The merit of the proposed provision lies not only in the facilitation and clarification of international copyright law, but also in the realisation of more equality between authors and users. In international copyright law, a trend towards flexibly-devised author's rights, as traditionally granted in civil law copyright systems,¹⁴⁸⁷ can be observed. The general right of reproduction was laid down in broad terms in article 9(1) BC at the 1967 Stockholm Conference. The complementing general right of communication to the public was conferred on authors in article 8 WCT at the 1996 WIPO Diplomatic Conference. Broad exclusive rights, therefore, nowadays occupy centre stage at the international level. As a countermove, it is advisable to adopt a flexible provision regulating limitations on these rights. Otherwise, the task to strike a proper copyright balance could be made unnecessarily difficult or even become impossible. This is particularly true in times of upheavals within the copyright system. They require fast reactions to technical and contractual challenges so that precisely delineated provisions are in danger of becoming out-dated soon.

In particular, the international framework may be rendered incapable of keeping pace with the speed of future developments. To succeed in setting forth rules that, for instance, have the potential for standing the test of a 20-year period – the traditional interval of revisions of the Berne Convention –¹⁴⁸⁸ it is indispensable to have recourse to flexible norms instead of seeking to give precise guidelines on the basis of the status quo. This conclusion must not be misunderstood as an attack on the civil law dogma of restrictively-delineated exceptions to author's rights. As pointed out above, national legislation enjoys the freedom of developing more precise provisions. International policy makers, however, should confine themselves to outlining the conceptual contours of permissible limitations in order to create sufficient room to manoeuvre for establishing and safeguarding copyright's delicate balance between grants and reservations. The fact that the path of precisely-defined limitations has been left in the context of the TRIPs Agreement and the WIPO Copyright Treaty in favour of the abstract three-step test is accordingly a promising first step in the right direction. The next step must be the application of an amalgam of Berne limitations and the three-step test which concretises the three-step test without encroaching upon its flexible nature.

¹⁴⁸⁶ Cf. subsection 4.4.2.3.

¹⁴⁸⁷ Cf. the introduction given in section 2.1.

¹⁴⁸⁸ Cf. section 3.1.

The outcome of this further improvement of international copyright law – flexibility on the side of authors and users alike – is in line with the conclusions drawn in the previous section: copyright law must be aligned with the specific needs of authors. This task requires that weight be given not only to an author's interest in the exploitation of his work but also to the interest of already active or potential future authors in the unhindered use of copyrighted material. Limitations supporting this consideration of intergenerational equity are to be qualified as rights of authors just like the exclusive rights conferred by copyright law. In certain circumstances, and particularly in those cases which are explicitly listed in the concretised three-step test proposed above,¹⁴⁸⁹ authors and users, thus, meet on equal footing. It would therefore be wrong to set out flexibly-devised author's rights while straitjacketing limitations. The establishment of such a framework ignores the fact that authors are users of copyrighted material as well. This mistake may lead to overprotection stifling the breathing space necessary for the incessant renewal of individual expression, thereby impoverishing the cultural life of society, neglecting the principal objective underlying copyright law to promote cultural diversity and thus ultimately reducing the whole copyright system to absurdity.¹⁴⁹⁰

Unfortunately, the chance of anticipating the proposed solution of the problems raised by current international copyright law was missed by the drafters of the Copyright Directive 2001/29/EC. They were ready to embrace the three-step test as a regulatory instrument in the field of exemptions from the rights granted under the Directive. However, they apparently lacked the courage to rely on a flexible norm resting on the three-step test, and instead turned to the enumeration of no fewer than 21 limitations. As at the international level, the application of permissible limitations was finally subjected to the three-step test. Hence, the structure of the international framework – with all its inconsistencies – was copied.¹⁴⁹¹

This is all the more regrettable as the final result, laid down in article 5 CD, is not so far from the concretised three-step test espoused here. If the drafters of the Copyright Directive had confined themselves to the enumeration of a few indispensable limitations and combined these cases with the three-step test, a promising regulatory framework would have been established that could have served as a model for future international developments. The task to pave the way for the further improvement of international copyright law is now left to the EU member states. On the basis of article 5 CD, they may introduce a provision in their national laws which at least resembles the open-ended norm recommended above. To realise this objective, they merely have to reproduce literally the wording of the cases explicitly listed in article 5(1), (2) and (3) CD they wish to adopt, and to combine these precise copies with the abstract criteria of the three-step test in the

¹⁴⁸⁹ Cf. also the explications given in section 2.3.

¹⁴⁹⁰ Cf. the previous section and subsection 2.1.3.

¹⁴⁹¹ Cf. section 5.2 and subsection 5.3.1.2.

CONCLUSION

same way as indicated above.¹⁴⁹² It appears safe to assume that this form of implementation best serves the principal objective underlying the Copyright Directive: the harmonisation of copyright law throughout the EC.¹⁴⁹³

Naturally, the mere fact that the international three-step test has made its way to the Copyright Directive has its own merits. It is foreseeable that a robust body of case law will emerge, including decisions of the European Court of Justice. Right holders in EU member states are unlikely to hesitate to challenge limitations in national law on the grounds that they are incompatible with the international obligations the three-step test represents. The experience to be gained in the years to come in EC copyright law may be brought to fruition at the international level afterwards. Thus, time will tell whether the European approach to the three-step test, ultimately, is capable of contributing to the improvement of international copyright law in the described sense, or merely proves to be a dead end – just like the current framework established in international copyright law, the unsatisfactory structure of which was carefully copied in article 5 CD.

¹⁴⁹² See for a concrete example of the resulting norm Senftleben 2003, 12.

¹⁴⁹³ Cf. section 5.4.

