

A Szerzői Jogi Szakértő Testület szakvéleményei

A jogellenes forrásból történő másolás kérdése

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Megkereső, megbízó: Audiovizuális Művek Szerzői Jogait Védő Közcélú Alapítvány (ASVA)

I. Az ASVA által feltett kérdések

Az Audiovizuális Művek Szerzői Jogait Védő Közcélú Alapítvány (ASVA), mint megbízó, a szerzői jogról szóló 1999. évi LXXVI. törvény (a továbbiakban: az Szjt.) 33. §-a (2) és (3) bekezdésének és a 35. §-a (1) bekezdésének értelmezésével kapcsolatban a következő beadvánnyal fordult a Szerzői Jogi Szakértő Testülethez (a továbbiakban: a Testület):

“Az Szjt. szabad felhasználásra vonatkozó általános [Szjt. 33. § (2) és (3) bekezdése] és azon belül az úgynevezett magáncélú másolásra vonatkozó külön szabályai [Szjt. 35. § (1) bekezdése] a magyar jogalkotó nemzetközi kötelezettségvállalásain, vagyis a TRIPS Egyezmény 13. Cikkén, valamint a Berni Uniós Egyezmény (BUE) 9. Cikkének 2. bekezdésén alapulnak, amelyek kimondják, hogy egy felhasználás csak akkor megengedett külön szerzői felhasználási engedély és díjfizetés nélkül, ha megfelel az úgynevezett háromlépcsős teszt együttes feltételrendszerének, azaz:

- a szabad felhasználások egyes eseteit külön-külön, egyedi esetekként kell tekinteni,
- a szabad felhasználás nem lehet sérelmes a mű rendes felhasználására,
- és indokolatlanul nem károsíthatja a szerzői jogosult jogos érdekeit.

A magyar Szjt. a fenti feltételrendszert kiegészíti a tisztesség polgári jogi követelményére való hivatkozással, valamint feltételként szabja, hogy az nem irányulhat a szabad felhasználás rendeltetésével össze nem férő célra.

A magyar Szjt. 33. § (3) bekezdése értelmében továbbá a szabad felhasználásra vonatkozó rendelkezéseket nem lehet kiterjesztően értelmezni.

A fentiek alapján abban a kérdésben kérjük a Tisztelt Szerzői Jogi Szakértő Testület szakvéleményét, hogy a digitális – on-line – környezetben tömegessé váló másolási – többszörözési – cselekmények azon eseteinél, amelyekben a műpéldányról készített másolatok száma, vagy a felhasználás egyéb mennyiségi vagy minőségi kritériumai alapján nem állapítható meg egyértelműen a szabad felhasználás általános feltételeibe való ütközés, levezethető-e a fentiekben bemutatott nemzetközi feltételeken alapuló magyar szerzői jog alapján az, hogy a nem jogszerű forrásból származó, azaz jogellenesen előállított hordozóról vagy műpéldányról való másolat készítés – többszörözés – már nem felel meg a szabad felhasználás általános feltételrendszerének.

A fenti kérdésfelvetés szükségességét a szerzői jogi felhasználási cselekmények gyakorlati megnyilvánulása is bizonyítja:

A gyakorlatban azokban az esetekben ugyanis, amikor egy természetes személy egy meghatározott szerzői műről (jellemzően filmalkotásról vagy zeneműről) nagy számú másolatot készít, vagy nyilvánvalóan úgynevezett kalóz on-line forgalmazótól, zártláncú FTP szerveren keresztül különböző filmalkotásokat (és zeneműveket) tömegével, nagy mennyiségben, magas havi előfizetési díj ellenében rendszeresen tölt le (többszöröz) a számítógépe merevlemezére, egyértelműen megállapítható a szabad felhasználás általános feltételeibe való ütközés, ahogy ezt a következő magyar (büntető)bírósági gyakorlat is mutatja.

Azokban az egyedi esetekben azonban, amelyek egyenként ugyan nem sérelmesek a mű rendes felhasználására – például egy filmalkotás letöltése kalózdalról illetve fájlcsereőről (ez utóbbi esetben természetesen egyértelmű, hogy a letöltés feltételeként megvalósuló visszaosztás, illetve feltöltés szerzői jogsértés, a kérdésünk nem is erre vonatkozik), kérdéses azonban, hogy az egész társadalomra vetítve tömegében, számában és összességében a hatályos szerzői jogi szabályozás alapján nem nyilvánvalóan sérelmesek-e a mű rendes felhasználására.

A hatályos német szerzői jogi szabályozás [UrhG 53. § (1)] is ugyanazon a nemzetközi kötelezettségvállalásokon (TRIPS, BUE) alapul, mint a hatályos magyar Szjt. szabad felhasználásra vonatkozó szabályai, azonban a német szerzői jogi törvény a magáncélú másolás szabályaiba beépített egy speciális szabályt is, amely a műpéldány forrására utal: a német törvény ugyanis a szabad felhasználás körébe eső magáncélú másolás lehetőségét kizárja a nyilvánvalóan jogellenesen létrehozott műpéldányokról történő többszörözés esetében még akkor is, ha az ilyen többszörözés egyébként megfelel a szabad felhasználás egyéb, a háromlépcsős teszt szerinti általános, valamint a magáncélú másolásra vonatkozó különös feltételeknek.

A fentiekre tekintettel kérjük a Tisztelt Szerzői Jogi Szakértő Testületet az alábbi kérdéseink megválaszolására:

1. Levezethető-e az Szjt. 33. § (2) és (3) bekezdéseinek és az Szjt. 35. § (1) bekezdésének együttes szabályrendszeréből, hogy a nem jogszerűen többszörözött vagy nem jogszerűen nyilvánosságához közvetített (különös tekintettel az internetes típusú, az Szjt. 26. § (8) bekezdése szerinti lehívásra hozzáférhetővé tétellel, valamint a letöltéssel – többszörözéssel - megvalósuló felhasználásokra) műpéldányról vagy hordozóról történő, egyébként magáncélú másolat készítése (többszörözés) a szerzői jogi jogosult kizárólagos jogait sérti, avagy a fentiek általános rendezésére csak egy erre vonatkozó kifejezett jogszabály módosítás alapján kerülhet sor.

2. Amennyiben az előző kérdésre a Tisztelt Szerzői Jogi Szakértő Testület azt a választ adja, hogy a fentiek rendezésére külön erre vonatkozó jogszabály módosítás szükséges, akkor a további kérdésünk, hogy Tisztelt Szerzői Jogi Szakértő Testület álláspontja szerint szükséges-e / lehetséges-e, hogy a magyar jogalkotó külön rendelkezzen a – mintegy a kivétel alóli kivételként – arról, hogy csak a nyilvánvalóan jogsértő módon előállított példányról való másolatkészítés nem minősül szabad felhasználásnak, ily módon pedig utaljon-e a jogalkotó a másolatot készítő személy oldalán bármilyen nyilvánvalóságra, tudatállapotra, gondosságra vagy elvárhatóságra?

A 2. kérdéssel kapcsolatban megjegyezzük, hogy álláspontunk szerint a szabad felhasználás rendszertanilag nem a felhasználónak biztosított külön jog, hanem a szerzői jogosultak kizárólagos szerzői jogainak a korlátja.”

II. Az irányadó nemzetközi, közösségi és hazai szabályozás elemzése

Az Sztj. irányadó rendelkezései

1. A Testület eljáró tanácsa szükségesnek látja az Sztj. irányadó rendelkezéseinek a pontos idézését, mégpedig úgy, hogy a vizsgálatot a megbízó beadványában említett 33. és 35. § mellett a 20. §-t is bevonja a vizsgálat körébe (a 21. §-t azért nem, mert bár abban is szó van magáncélú másolásról, miután reprográfiai másolásra vonatkozik, kívül esik a megbízó által felvázolt kérdéskörön). Itt jegyzi meg az eljáró tanács, hogy a “másolás” szó pontosabban fejezi ki a nemzetközi és közösségi normák angol (és francia) szövegében szereplő “reproduction” szó fogalmát, mint a “többszörözés” szó. A “többszörözés” azt a téves képzetet keltheti, hogy csak a mű *több* példányban való engedély nélküli másolása (“reprodukálása”) sérti a szerzői jogot. Ez azonban nem így van; amennyiben nem áll fenn az adott esetre valamely kivétel vagy korlátozás, egyetlen példány engedély nélküli másolása is jogsértő.

2. (Magáncélú másolás mint szabad felhasználás.) A magáncélú másolás alapvető szabályait az Sztj. 35. §-ának az (1)-(3) bekezdésében foglalt rendelkezések tartalmazzák, amelyek így szólnak:

“35. § (1) Természetes személy magáncélra a műről másolatot készíthet, ha az jövedelemszerzés vagy jövedelemfokozás célját közvetve sem szolgálja. E rendelkezés nem vonatkozik az építészeti műre, a műszaki létesítményre, a szoftverre és a számítástechnikai eszközzel működtetett adatbázisra, valamint a mű nyilvános előadásának kép- vagy hanghordozóra való rögzítésére. Kotta reprográfiával [21. § (1) bek.] magáncélra és a (4) bekezdés b)-d) pontjában szabályozott esetekben sem többszörözhető.

(2) Teljes könyv, továbbá a folyóirat vagy a napilap egésze magáncélra is csak kézírással vagy írógéppel másolható.

(3) Nem minősül szabad felhasználásnak – függetlenül attól, hogy magáncélra történik-e –, ha a műről más személlyel készíttetnek másolatot számítógépen, illetve elektronikus adathordozóra.”

3. (A szabad felhasználás általános szabályai.) A fenti rendelkezésekre is vonatkoznak azonban a szabad felhasználásokra és a szerzői jog más korlátaira vonatkozó általános szabályok, amelyeket az Sztj. 33. §-a foglal magában. A megbízó által feltett kérdések szempontjából a § (1)-(3) bekezdésének van jelentősége [a (4) bekezdés az iskolai célú felhasználás fogalmával foglalkozik]:

“33. § (1) A szabad felhasználás körében a felhasználás díjtalan, és ahhoz a szerző engedélye nem szükséges. Csak a nyilvánosságra hozott művek használhatók fel szabadon e törvény rendelkezéseinek megfelelően.

(2) A felhasználás a szabad felhasználásra vonatkozó rendelkezések alapján is csak annyiban megengedett, illetve díjtalan, amennyiben nem sérelmes a mű rendes felhasználására és indokolatlanul nem károsítja a szerző jogos érdekeit, továbbá amennyiben megfelel a tisztesség követelményeinek és nem irányul a szabad felhasználás rendeltetésével össze nem férő célra.

(3) A szabad felhasználásra vonatkozó rendelkezéseket nem lehet kiterjesztően értelmezni.”

4. (A többszörözési jog díjigényre korlátozása a magáncélú másolás egyes eseteiben.)
Külön rendelkezések vonatkoznak a hang- és képrögzítés útján történő magáncélú másolásra. Ezeket az Szjt. 20. §-a foglalja magában. A § (1) és (2) bekezdése így rendelkezik:

“20. § (1) A rádió- és a televízió-szervezetek műsorában sugárzott, a saját műsort vezeték útján a nyilvánossághoz közvetítők műsorába belefoglalt, valamint a kép- vagy hanghordozón forgalomba hozott művek szerzőit, előadóművészi teljesítmények előadóművészeit, továbbá filmek és hangfelvételek előállítóit műveik, előadóművészi teljesítményeik, illetve filmjeik és hangfelvételeik magáncélú másolására tekintettel megfelelő díjazás illeti meg.

(2) Az (1) bekezdésben említett díjat az irodalmi és a zenei művekkel kapcsolatos szerzői jogok közös kezelését végző szervezet állapítja meg a többi jogosult közös jogkezelő szervezeteivel egyetértésben. A díj megállapításakor figyelembe kell venni, hogy az érintett művek, előadóművészi teljesítmények, valamint filmek és hangfelvételeik esetében alkalmaznak-e a szerzői jog, illetve az ahhoz kapcsolódó jogok védelmére szolgáló hatásos műszaki intézkedést (95. §). A díjat az üres kép- és hanghordozó gyártója, külföldi gyártás esetén pedig a jogszabály szerint vám fizetésére kötelezett személy, vagy - vámfizetési kötelezettség hiányában - egyetemlegesen a hordozót az országba behozó személy és az azt belföldön először forgalomba hozó személy köteles az irodalmi és a zenei művekkel kapcsolatos szerzői jogok közös kezelését végző szervezethez a vámkezelés befejezésétől, vámfizetési kötelezettség hiányában pedig a forgalomba hozattaltól, illetve a vámfizetés befejezésétől számított nyolc napon belül megfizetni. A jogdíj megfizetéséért az adott hordozó összes belföldi forgalmazója is egyetemlegesen felel.”

5. A § (3)-(6) bekezdése a díjazás alól kivett készülékekre, illetve kép- és hanghordozókra, valamint a befolyt díjak felosztására vonatkozik, míg a § (7) bekezdése díjigény érvényesítésének kötelező hatályú közös jogkezeléséről rendelkezik. Ezeknek a rendelkezéseknek nincs jelentőségük a megbízó által feltett kérdések szempontjából.

A “háromlépcsős teszt” nemzetközi, közösségi és hazai szabályozása; a teszt kötelező alkalmazása a többszörözési jogra vonatkozó kivételekre és korlátozásokra

6. (A Berni Egyezmény 9. Cikkének (2) bekezdése a szerzők többszörözési jogára vonatkozó kivételekről és korlátozásokról.) A “háromlépcsős teszt” először a Berni Egyezmény 1967-es stockholmi felülvizsgálatának az eredményeként került be a szellemi tulajdonvédelem nemzetközi szabályaiba. A Berni Egyezmény 9. Cikkének (2) bekezdése rendelkezett úgy (s ez a szabály változatlan maradt a ma hatályos 1971-es párizsi szövegben is), hogy a Berni Unió országainak a törvényei csak annyiban engedhetik meg az irodalmi és művészeti művek többszörözését, másolását, amennyiben az ilyen engedély (i) különleges

esetre vonatkozik; (ii) nem sérelmes a mű rendes felhasználására, és (iii) indokolatlanul nem károsítja a szerző jogos érdekeit.

7. A stockholmi diplomáciai értekezlet I. Főbizottságának a jegyzőkönyve nyilvánvalóvá teszi, hogy a többszörözés, másolás ilyen engedélyezése kétféle formában történhet: vagy szabad felhasználás formájában (ami azt jelenti, hogy a többszörözést, másolást végzőnek egyrészt nincs szüksége a szerző engedélyére, másrészt a felhasználásért díjat sem kell fizetnie), vagy kényszerengedély útján, vagyis a szerző kizárólagos engedélyezési jogának a pusztá díjigényre való korlátozásával (amely esetben ugyan nem kell engedélyt kérni, de fizetni kell a többszörözés, másolás lehetőségéért).¹ Az előbbi esetben a többszörözési jog alóli kivételről, az utóbbi esetben pedig e jog korlátozásáról van szó.

8. A stockholmi diplomáciai értekezlet irataiból egyértelműen kitűnik, hogy a Berni Egyezmény szerint a nyilvánosság egyes köreiből elterjedt és gyakran ismételt annak a folklór-szerű tételnek, amely szerint a magáncélú másolás általában szabad, és mindenkinek „joga” van rá, minden alapot nélkülöz. A magáncélú másolásra is vonatkozik az Egyezmény 9. Cikkének (1) bekezdése szerinti kizárólagos többszörözési jog, és csak arról lehet szó, hogy e jogra vonatkozóan kivételeket vagy korlátozásokat vezessenek be a Berni Unió országai, feltéve, hogy azok megfelelnek a 9. Cikk (2) bekezdésében foglalt, fent említett „háromlépcsős tesztnek.” Tehát, ha a kivétel vagy korlátozás (i) nem minden magáncélú másolásra, hanem csak azok különleges eseteire terjed ki; (ii) nem sérelmes a mű rendes felhasználására; és (iii) indokolatlanul nem károsítja a szerző jogos érdekeit.

9. A stockholmi diplomáciai értekezlet kifejezetten foglalkozott egy olyan javaslattal, hogy a magáncélú másolás legyen általában kivétel, minden további feltételtől függetlenül (amely elképzelés nyilván azért merülhetett fel, mert a 60-as években még nem voltak meg az ilyen másolást könnyűvé, tökéletessé és tömegessé tevő eszközök), de elutasította azt. Ez a következőképpen történt. A diplomáciai értekezlet előkészítésére a BIRPI (a WIPO elődje) igazgatója által 1965-ben összehívott kormányszakértői bizottság külön munkacsoportot hozott létre a többszörözési jogra és az azt érintő kivételekre és korlátozásokra vonatkozó rendelkezések kidolgozására. A bizottság elfogadta a munkacsoport javaslatát és az került be a diplomáciai értekezlet elé terjesztett tervezet szövegébe. A javaslat a következőkből állt: (i) a többszörözési jog kifejezett elismeréséből (az Egyezmény korábbi szövegeiben ugyanis ez az alapjog csak a rá vonatkozó egyes kivételekből következően, közvetetten – az *“a contrario”* elv alapján – szerepelt az Egyezményből folyó kötelezettségek között); és (ii) olyan rendelkezésekből, amelyek e jogra vonatkozó kivételek, illetve korlátozások bevezetését teszik lehetővé a Berni Unió országai számára: (a) magánhasználatra (*“private use”*); (b) igazságszolgáltatási és közigazgatási célokra; és (c) *“bizonyos különleges esetekre, amelyekben a többszörözés nincs ellentétben a szerző jogos érdekeivel és nem sérelmes a mű rendes felhasználására.”*²

¹ Az I. Főbizottság jegyzőkönyvének a hivatalos angol változata e tekintetben a következőket tartalmazza: *“If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license or to provide for use without payment”* [kiemelés a Testület eljáró tanácsától]. *“Records of the Intellectual Property Conference of Stockholm (1967),”* WIPO kiadvány, Genf, 1971, (a továbbiakban: a stockholmi értekezlet iratai) 1145-46. old. 85. bek.

² A stockholmi értekezlet iratai, 113. old.

10. A diplomáciai értekezlet I. Főbizottságához (amely a Berni Egyezmény felülvizsgálatával foglalkozott) egy sor módosító javaslatot terjesztettek elő a küldöttségek, s azok részben a kivételek szűkítésére, részben azok bővítésére irányultak.³ Végül azonban az Egyesült Királyság javaslatát fogadta el a Főbizottság, amely érdemben megfelelt a 9. Cikk jelenlegi (2) bekezdésének (csak még kisebb szövegezési változtatások történtek annak végső elfogadása előtt). A javaslat lényege az volt, hogy az alapszöveg (a) és (b) pontja (tehát a magáncélú másolásra és az igazgatási és közigazgatási célokra vonatkozó minden további feltételtől független kivétel) maradjon ki, és csak a (c) pont kerüljön be az Egyezmény szövegébe. Ez azt eredményezte, hogy, többek között, a magáncélú másolás is egyértelműen a “háromlépcsős teszt” ernyője alá került.

11. (A Római Egyezmény 15. Cikke 1. bekezdésének (a) pontja a szomszédos jogok tekintetében a magáncélú felhasználásra alkalmazható kivételről.) A szomszédos jogok (vagyis az előadóművészek, a hangfelvétel-előállítók, és a műsorsugárzó szervezetek) védelméről szóló Római Egyezmény 15. Cikke 1. bekezdésének (a) pontja szerint a szerződő államok minden további feltétel nélkül kivételeket vezethetnek be a magáncélú másolásokra – és általában a magáncélú felhasználásra – vonatkozóan. Megjegyzendő, hogy a Római Egyezményt a Berni Egyezmény fent említett 1967-es felülvizsgálata előtt hat évvel, 1961-ben fogadták el, amikor még kevésbé voltak előreláthatóak azok a műszaki fejlemények, amelyek lehetővé tették a szomszédos jogok által védett teljesítmények tömeges, jó minőségű másolását és annak az e jogok rendes felhasználására és a jogtulajdonosok jogos érdekeire gyakorolt negatív hatását.

12. (A TRIPS Megállapodás 13. Cikke a szerzők vagyoni jogaira vonatkozó kivételekről és korlátozásokról és 30. Cikke a szabadalmasok jogaira vonatkozó kivételekről.) TRIPS Megállapodás 13. Cikke kiterjesztette a “háromlépcsős teszt” alkalmazását a szerzői jogi jogosultak összes vagyoni jogaira. A TRIPS Megállapodásnak ez a rendelkezése ugyanazt a három feltételt tartalmazza, mint a Berni Egyezmény 9. Cikkének (2) bekezdése. A két szövegbeli eltérés nem jelent érdemi különbséget. Azzal, hogy nem a felhasználás engedélyezésének, hanem a kizárólagos jogokra vonatkozó korlátozások és kivételek alkalmazásának a feltételeire utal a Megállapodás 13. Cikke, valójában világosabbá vált a szöveg (mégpedig ugyanolyan értelemben, mint ahogyan a Berni Egyezmény 9. Cikkének (2) bekezdése is értelmezendő a főbizottsági jegyzőkönyvben foglalt, fent említett és a lábjegyzetben idézett megállapítások tükrében). A szerzői jogi tulajdonosokra való utalás a szerzők helyett is felfogható úgy, hogy az nem változtat a szöveg értelmén, hiszen a Berni Egyezménynek a szerzőkre vonatkozó rendelkezései – természetesen a személyhez fűződő jogokra vonatkozó rendelkezések kivételével – is úgy értendők, hogy azok éppen úgy vonatkoznak a vagyoni jogok más jogosultjaira is.

13. Megjegyzendő, hogy a TRIPS Megállapodás 13. Cikke csak a szerzői jogokra vonatkozik. Ez nemcsak abból következik, hogy a szerzői jogról szóló 9-12. Cikk után és a szomszédos (a TRIPS Megállapodás szóhasználatában: “kapcsolódó”) jogokról szóló 14. Cikk előtt áll, de abból is, hogy csupán a (szerzői) művekre utal. A 14. Cikk 6. bekezdése aztán teljesen egyértelművé teszi, hogy a szomszédos jogok esetében a Római Egyezménynek a kivételekre vonatkozó szabályai [tehát a 15. Cikk 1. bekezdésének a magáncélú használatra vonatkozó (a) pontja is] alkalmazandók.

³ Ugyanott, 690-92. old.

14. Arra a WTO vitarendezési esetre tekintettel is, amelyre röviden utalás történik az alábbiakban, indokolt megjegyezni, hogy a TRIPS Megállapodás nemcsak a szerzői jogra, de a szabadalmi jogra is kiterjesztette a “háromlépcsős tesztet,” igaz bizonyos eltérésekkel. A legfontosabb érdemi különbség azonban nem a három “lépcsőben” van, hanem abban, hogy az irányadó rendelkezés – a Megállapodás 30. Cikke – csupán a szabadalmi joggal szembeni *kivételekről* szól, s nem terjed ki a *korlátozásokra* (a 31. Cikk rendelkezik a kényszerengedélyek formájában történő korlátozásokról, mégpedig eltérő és jóval részletesebb feltételekkel). A szabadalmi teszt első “lépcsője” csak részben azonos a szerzői jogi teszt első “lépcsőjével,” hiszen csak a kivételek “korlátozott” (“limited”) voltát említi, s így nincs utalás az esetek “különleges” voltára. A második “lépcső” gyakorlatilag ugyanaz (természetesen “*mutatis mutandis*” módon), mint a 13. Cikk esetében. A harmadik “lépcső” némileg ugyancsak eltér. A szerzői jogi rendelkezésekhez hasonlóan ez is úgy szól, hogy a kivétel indokolatlanul nem károsíthatja a szabadalmas jogos érdekeit, de ehhez hozzáteszi a rendelkezés, hogy mindezt a harmadik személyek jogos érdekeinek a figyelembe vételével kell megítélni. (Megjegyzendő azonban, hogy ez utóbbi különbség aligha eredményezhet igazi érdemi különbséget a harmadik “lépcső” alkalmazásában, hiszen a szerzői jogi rendelkezések esetében is nyilvánvalóan figyelembe kell venni a harmadik személyek, s általában a közösség, jogos érdekeit annak eldöntéséhez, mely esetekben lehet szó arról, hogy, bár valamely kivétel károsítja a szerzők jogos érdekeit, az az adott körülmények között és adott feltételekkel mégis indokolt.)

15. (A WCT 10. Cikke és a WPPT 16. Cikke a szerzők, előadóművészek és hangfelvétel-előállítók vagyoni jogaira vonatkozó kivételekről és korlátozásokról.) A “háromlépcsős teszt” “karrierjét” a WIPO 1996-ban elfogadott két ú.n. “Internet Szerződése” – a WCT és a WPPT – teljesítette ki. A két szerződés a szerzők, az előadóművészek és a hangfelvétel-előállítók összes vagyoni jogaira vonatkozó korlátozásokra és kivételekre előírta e teszt alkalmazását. A WCT 10. Cikke és a WPPT 16. Cikke ugyanazt a három feltételt jelöli meg a teszt három “lépcsőjeként” mint a Berni Egyezmény 9. Cikkének (2) bekezdése és a TRIPS Megállapodás 13. Cikke. E rendelkezések a TRIPS Megállapodás 13. Cikkének stílusában a vagyoni jogokra bevezetendő korlátozások és kivételek feltételeire utalnak (a WCT azonban abban nem követi a TRIPS Megállapodás rendelkezését, hogy a szerzők érdekei helyett általában a szerzői jogi jogtulajdonosok érdekeiről szólna; ebben a tekintetben a Berni Egyezmény szerinti szöveget veszi át).

16. (Az InfoSoc irányelv 5. Cikke (2) bekezdésének (b) pontja a szerzők és a szomszédos jogi jogosultak többszöröségi jogának díjigényre korlátozásáról magáncélú másolás esetében és (5) bekezdése a vagyoni jogokra vonatkozó kivételek és korlátozások általános feltételeiről.) Mint ismeretes, az Európai Parlament és Tanács 2001. május 22-i 2001/29/EK irányelve a szerzői és szomszédos jogok egyes vonatkozásainak az információs társadalomban való összehangolásáról (a továbbiakban: az “InfoSoc irányelv”) 5. Cikkének (1)-(4) bekezdése kimerítő jelleggel rendelkezik azokról a kivételekről és korlátozásokról, amelyeket a tagországok szerzői jogi törvényei alkalmazhatnak a szerzők és a szomszédos jogok jogosultjai egyes jogainak, többek között a többszöröségi jogának tekintetében. A magáncélú másolásra vonatkozó korlátozás egyike ezeknek. Az 5. Cikk (2) bekezdésének (b) pontja rendelkezik úgy, hogy “[a] tagállamok a 2. Cikkben szabályozott többszöröségi jog alól kivételeket, illetve korlátozásokat állapíthatnak meg... bármely hordozóra természetes személy által magáncélra, kereskedelmi célt közvetlenül vagy közvetve sem szolgáló többszörösítés tekintetében, feltéve, hogy a jogosultak méltányos díjazásban részesülnek, amelynek meghatározásánál figyelembe kell venni, hogy az érintett művel vagy más védelem alatt álló teljesítménnyel kapcsolatban alkalmaztak-e a 6. cikkben meghatározott műszaki

intézkedést.” Így erre is alkalmazandó az 5. Cikk (5) bekezdése, amely szerint “[a]z (1), a (2), a (3) és a (4) bekezdésben foglalt kivételek és korlátozások kizárólag olyan különös esetekben alkalmazhatók, amelyek nem sérelmesek a mű vagy más, védelem alatt álló teljesítmény rendes felhasználására, és indokolatlanul nem károsítják a jogosult jogos érdekeit.” Vagyis az InfoSoc irányelv szerint a magáncélú másolásra vonatkozó kivételek és korlátozások csak annyiban megengedettek, amennyiben azok összhangban állnak a “háromlépcsős teszttel.”

17. (Az Szjt. 33. §-ának (2) bekezdése: a második és harmadik “lépcső” a hátról.) Ami az Szjt-ben szabályozott szabad felhasználásokat illeti, s így a magáncélú másolásra vonatkozóan az Szjt. 35. §-ában foglaltak szerint engedett szabad felhasználást is, azokra is kiterjed a “háromlépcsős tesztnek” legalább a második és harmadik “lépcsője.” Ezt írja elő a szabad felhasználás általános feltételeit tartalmazó 33. § (2) bekezdése. A rendelkezés tehát az első “lépcsőt” nem foglalja magában, viszont a második és harmadik “lépcső” szerinti feltételeken kívül továbbiakat is tartalmaz, hiszen így szól: “A felhasználás a szabad felhasználásra vonatkozó rendelkezések alapján is csak annyiban megengedett, illetve díjtalan, amennyiben nem sérelmes a mű rendes felhasználására és indokolatlanul nem károsítja a szerző jogos érdekeit, továbbá amennyiben megfelel a tisztesség követelményeinek és nem irányul a szabad felhasználás rendeltetésével össze nem férő célra.” Ezek a “többfeltételek” azonban valójában levezethetők a Berni Egyezmény egyes szabályaiból is. Például a tisztességes eljárás követelményét – amely amúgy nyilván nem erre ez egy esetre szorítkozik – külön is kimondja az Egyezmény 10. Cikkének az idézésekről szóló (1) bekezdése és az oktatási célú felhasználásokról szóló (2) bekezdése is (igaz, hogy az Egyezménynek az 1975. évi 4. törvényerejű rendelet által kihirdetett magyar szövege ebben a tekintetben is pontatlanságot tartalmaz, miután a “fair practice” kifejezés egyszerűen “bevett gyakorlatként” szerepel benne). Az pedig, hogy a szabad felhasználás csak a rendeltetésével összeférő célra történhet, egyrészt természetes, másrészt következik magából az első “lépcsőből,” harmadrészt például ez is szerepel az Egyezmény 10. Cikke (1) és (2) bekezdésében, mint feltétel.

18. (A három “lépcső” “címettjei;” az Szjt. 33. §-ának (2) bekezdése és annak alkalmazási köre.) Külön vita tárgya lehetne, hogy vajon a fent említett nemzetközi szabályokkal és az InfoSoc irányelv 5. Cikkének (5) bekezdésével való teljes összhang megteremtése érdekében indokolt lenne-e az Szjt. 33. §-a (2) bekezdését kiegészíteni a “háromlépcsős teszt” első “lépcsőjével” is. A válasz erre a kérdésre attól függ, hogy az első “lépcső” szerinti feltételt is úgy tekintjük-e, mint amelyet a jogalkalmazás során is figyelembe kell venni, vagy inkább olyannak, mint amelynek – a második és a harmadik “lépcső” szerinti feltételektől eltérően – egyedül a törvényhozó a címettje. Az Szjt. 33. §-ának (2) bekezdése az utóbbi álláspontot tükrözi, s ez – bár az ezzel ellenkező álláspont mellett is felhozhatók érvek – mindenképpen védhetőnek látszik (azt az álláspontot tükrözi, hogy azoknak a különleges eseteknek a bővülésével vagy szűkülésével, amelyekre vonatkozóan kivételek, illetve korlátozások irányadók, indokolt magának a törvényhozónak a beavatkozása; a “háromlépcsős teszt” másik két “lépcsőjének” az alkalmazását viszont – a vonatkozó feltételeknek az adott esetek konkrét és esetleg változó körülményeitől való függőségükre tekintettel – jobb a gyakorlatra és az igazságszolgáltatásra bízni).

19. Az eljáró tanács erre is tekintettel egyelőre elegendőnek tartja az arra való utalást, hogy az Szjt. nem minősíti a magáncélú másolást, mint olyan különleges esetnek, hiszen a 35. § (1)-(3) bekezdése az ilyen másolások egy széles körét kizárja mind a kivételek, mind a korlátozások köréből. A különleges esetek két körét határozza meg: egyrészt azokat, amelyekben a kizárólagos többszörözési jog díjigényre való korlátozásáról van szó (lásd a 20.

és 21. §-t), másrészt azokat, amelyek szabad felhasználás – vagyis a többszörözési jog alóli kivétel – alá esnek (lásd a 35. §-t az olyan esetek tekintetében, amelyek nincsenek kizárva a szabad felhasználás lehetőségéből).

20. Annál fontosabb kérdés az, hogy vajon az Szjt. 33. §-ának (2) bekezdése vonatkozik-e a többszörözési jognak a 20. § szerinti korlátozására is.

21. Az említett cikkek szövegének összevetése alapján első látásra tagadó válasz látszik indokoltnak erre a kérdésre. Ennek az az oka, hogy a 33. § (2) bekezdése csak *szabad felhasználásra* utal, amelyet a § (1) bekezdése akként határoz meg, hogy az “*díjtalan*, és ahhoz a szerző engedélye nem szükséges,” viszont a 20. §-ban említett magáncélú másolások esetében, bár a szerző engedélye nem szükséges, a felhasználás *nem díjtalan*. Ebből az következne, hogy a többszörözési jognak a 20. § szerinti korlátozására nem terjedne ki a “háromlépcsős teszt” második és harmadik “lépcsője” sem, vagyis akkor is elegendő lenne a jogdíjigény elismerése és az annak megfelelő díj megfizetése a magáncélú másoláshoz, ha az a konkrét körülmények között sérelmes lenne az érintett művek rendes felhasználására, illetve indokolatlanul károsítaná a szerzők (és más jogosultak) jogos érdekeit (továbbá, ha a 33. § további feltételeire is gondolunk, annak sem lenne jelentősége, hogy az említett korlátozás alapján megengedett magáncélú másolás egyes esetekben nem felelne meg a tisztesség követelményeinek, illetve a korlátozás céljának).

22. A csupán az Szjt. szövegére épülő ilyen értelmezés elfogadása esetén ellenmondások merülnének fel a törvényen belül. S ami legalább annyira fontos, a törvény a fent idézett nemzetközi normákkal és az Infosoc irányelv szabályaival is ellentétbe kerülne.

23. Az egyéb vonatkozásoknak – különösen a Berni Egyezmény, a TRIPS Megállapodás és a WCT irányadó rendelkezéseivel való összhang hiányának – az elemzését figyelmen kívül hagyva, az eljáró tanács elegendőnek tartja az arra való utalást, hogy az *acquis communautaire*-rel való összhang ilyen hiánya nem maradhat feloldatlanul valamely tagállam jogában. Ebben a tekintetben ugyanis az Európai Bíróság ítéletei egyértelmű eligazítást adnak. Az ítéletek egész sora szögezte le, hogy a tagállamok bíróságai kötelesek a nemzeti törvényeket az irányelvek céljainak megvalósítására alkalmas módon értelmezni. (Nem arról van szó, hogy a nemzeti bíróságok magát a közösségi jogot kell, hogy alkalmazzák, hanem arról, hogy a nemzeti jog megfelelő értelmezésével biztosítsák a közösségi jog közvetett érvényesülését.) Először az azóta híressé vált von Colson és a Harz esetekben⁴ mondta ki az Európai Bíróság, hogy a tagállami bíróságok kötelesek egy adott irányelvet annak céljára és rendelkezéseinek a szövegére figyelemmel úgy értelmezni, hogy az irányelv célja a nemzeti törvények alkalmazása során megvalósuljon. A von Colson doktrínát aztán több ítéletben fejlesztette tovább és bővítette az Európai Bíróság. A Marleasing ítélet⁵ kiterjesztette azt azokra a nemzeti jogszabályokra is, amelyek nem az adott irányelv végrehajtása céljából, és esetleg akár még annak elfogadása előtt, születtek. A Wagner Miret ügyben⁶ hozott ítélet szerint pedig egy adott irányelv végrehajtása céljából alkotott tagállami jogszabály esetében a nemzeti bíróságnak azt is vélelmeznie kell, hogy az érintett állam eleget kíván tenni közösségi jogi kötelezettségeinek, és amennyire lehetséges, a tagállami jogot úgy kell értelmeznie, hogy az irányelvben kitűzött célok megvalósuljanak.

⁴ Lásd 14/83, von Colson v. Land Nordrhein-Westfalen, (1984) ECR 1891; és 79/83, Harz v. Deutsche Tradax GmbH, (1984) ECR 1921.

⁵ Lásd C-106/89, Marleasing SA v. La Comercial Internacional de Alimentación SA, (1990) ECR I-4135.

⁶ C-334/92, Wagner Miret v. Fondo di Garantía Salarial, (1993) ECR I-6911.

24. Ez utóbbi elv tekintetében indokolt megjegyezni, hogy a 2003. évi CII. törvény – amely a 2004. május 1-én, vagyis azon a napon lépett hatályba, amelyen Magyarország az Európai Unió tagja lett – egyik elsődleges célja éppen az volt (s e felől nem hagyott kétséget a törvény miniszteri indokolása), hogy teljes egészében végrehajtsa az InfoSoc irányelvet. A törvény módosította az Sztj.-nek a magáncélú másolásra vonatkozó szabályait is, és az indokolás pontosan megjelölte az irányelvnek azokat a rendelkezéseit – így különösen az 5. Cikk (2) bekezdésének erre vonatkozó (b) pontját – amelyekre figyelemmel a módosítások szükségessé váltak.

25. Mindezekre figyelemmel nyilvánvalónak látszik, hogy a “háromlépcsős tesztet,” legalábbis annak a második és harmadik “lépcsője” szerinti feltételeit [úgy, ahogyan arról az Sztj. 33. §-ának (2) bekezdése szól] alkalmazni kell nemcsak a 35. §-ának a szabad magáncélú másolásra vonatkozó rendelkezéseire, de a többszörözési jognak a 20. § szerinti díjigényre való korlátozására is, függetlenül attól, hogy az utóbbi körre kifejezetten nem vonatkozik a két “lépcső,” vagy legalábbis az alkalmazásuk – ha a von Colson doktrínát nem vennék figyelembe – csak a 33. § (2) bekezdésének a kiterjesztő értelmezésével volna lehetséges.

26. Érdemes utalni ebben a tekintetben a francia Legfelsőbb Bíróság ez év február 28-án a “Mulholland” ügyben hozott és nagy figyelmet kiváltó ítéletére, amely éppen a magáncélú másolásra vonatkozó kivételekre, illetve korlátozásokra irányadó szabályok tekintetében alkalmazta a von Colson doktrínát. A Bíróság kimondta, hogy (i) bár Franciaország még nem ültette át nemzeti jogába az Infosoc irányelvet, a francia nemzeti törvényt annak megfelelően kell alkalmazni; (ii) következésképpen alkalmazni kell az InfoSoc irányelv 5. Cikke (5) bekezdését a magáncélú másolásokra a francia jogban meglévő kivételek és korlátozások esetében is; (iii) ennek megfelelően nem lehet a fogyasztóknak valamilyen “magáncélú másolási jogáról” beszélni; és (iv) az ilyen kivételek, illetve korlátozások nem alkalmazhatók ott, ahol nem felelnek meg a “háromlépcsős tesztnek;” így a per tárgyát képező esetben sem, ahol a francia fogyasztóvédelmi egyesület a DVD-k másolásvédelmi műszaki intézkedéseiről állította azt, hogy azok sértik a fogyasztók szabad másolási jogát. Az eljáró tanács *1. számú mellékletként* csatolja a Francia Legfelsőbb Bíróság említett ítéletet, *2. számú mellékletként* pedig a Testület eljáró tanácsa előadó tagjának a pernyertes jogtulajdonosi szervezetek kérésére az ügy legfelső bírósági szakaszában “*pro bono*” készült és az ügyben felhasznált tanulmányát, amely az ügy részleteiről és a felek által felhozott érvekről részletes leírást ad.⁷

III. A “háromlépcsős teszt” értelmezése és alkalmazása

27. (A “háromlépcsős teszt” értelmezése a WTO vitarendezési paneljei által.) A Kereskedelmi Világszervezet (WTO) vitarendezési eljárásainak keretében két jelentős döntés született 2000-ben, amely a “háromlépcsős teszt” értelmezésével foglalkozott. Az első az Európai Közösségek és Kanada közötti WT/DS/114/R számú ügyben 2000. április 30-án született döntés volt, amely a TRIPS Megállapodás 30. Cikkét értelmezte. Ez a Cikk, mint ahogyan a fentiekben említette az eljáró tanács, a “háromlépcsős tesztnek” a szabadalmakat érintő kivételekre irányadó változatát foglalja magában. Érdekes módon az említett rendelkezés értelmezése, jóllehet szabadalmi ügyről volt szó, jórészt az 1967-es stockholmi diplomáciai értekezlet dokumentumainak és jegyzőkönyveinek azokra a részeire támaszkodott, amelyek a Berni Egyezmény 9. Cikke (2) bekezdésének az előkészítő

⁷ A könnyebbnek tűnő nyelvi hozzáférés érdekében a két melléklet az ítélet angol fordítását és a tanulmány angol nyelvű változatát tartalmazza. Az eljáró tanács előadó tagja az eredeti francia nyelvű ítéletet, illetve a tanulmány francia nyelvű változatát, ha erre igény van, rendelkezésre bocsátja.

munkálataira és vitájára vonatkoztak. Ez volt a magyarázata annak, hogy az ügyben eljáró panel egyetlen szellemi tulajdonvédelemmel foglalkozó tagja valójában szerzői jogász volt (történetesen éppen a Testület jelen ügyben eljáró tanácsának az előadó tagja) egy amerikai nemzetközi kereskedelmi professzor és – miután gyógyszer szabadalmáról volt szó – egy mexikói közegészségügyi professzor mellett). A panel mindhárom “lépcsőt” elemezte. Mint ahogyan arra a fentiekben rámutat az eljáró tanács, a szabadalmi jogi és a szerzői jogi teszt első lépcsője eltér. Miután azonban a második és a harmadik “lépcső” tartalmilag, vagy teljesen, vagy legalább is a lényegét tekintve, azonos, a szabadalmi jogi panel megállapításainak jelentősége volt a szerzői jog szempontjából is.

28. Olyannyira hatása volt a szabadalmi jogi panel döntésének a szerzői jog területén is, hogy az Európai Közösségek és az Amerikai Egyesült Államok közötti WT/DS/160/R számú ügyben eljáró szerzői jogi panel (amelyben viszont érdekes módon nem volt szerzői jogi specialista) felhasználta a szabadalmi panel elemzését és megállapításait a később, 2000. június 15-én hozott döntéséhez. Ez azonban, az említett okoknál fogva csupán a második és harmadik “lépcsőre” áll. Az első “lépcső” esetében furcsa módon úgy tűnt, mintha a szerzői jogi panel a TRIPS Megállapodás 30. cikkében foglalt szabadalmi jogi teszt inkább terjedelmi megközelítését használta volna, és mintha elfeledkezett volna a “különleges eset” fogalmán belül a tartalmi, normatív “különlegesség” mozzanatáról; nevezetesen arról, hogy e fogalom nemcsak azt foglalja magában, hogy az esetnek terjedelmileg korlátozottnak kell lennie, hanem azt is, hogy sajátos és megalapozott társadalmi és jogpolitikai indokoknak kell alapul szolgálniuk az adott esetben bevezetendő kivételekhez, illetve korlátozásokhoz.

29. (A paneldöntések kritikája; WIPO útmutató a “háromlépcsős teszt” értelmezésére.) A szerzői jogi panel által alkalmazott fent említett megközelítés az adott ügyben nem vezetett téves eredményre, miután úgy tűnt, hogy a tartalmi, normatív megközelítés alapján is ugyanaz az eredmény született volna. A panel pusztán terjedelmi megközelítését azonban számosan bírálták (a döntés ellen nem fellebbeztek a felek, mint ahogyan a szabadalmi döntés ellen sem, így a WTO vitarendezési Fellebbezési Testület (Appellate Body) nem foglalkozott azokkal; ennek következtében valójában hiányzik az igazi precedens értékük). Az eljáró tanács a 3. számú mellékletben csatolja a Testület eljáró tanácsa előadó tagjának a két fent említett WTO esetet leíró és elemző, s az említett, csupán terjedelmi megközelítés hibás voltára rámutató tanulmányát, amely a *Revue internationale du droit d'auteur (R.I.D.A.)* 2002. áprilisi számában jelent meg. Megjegyzendő, hogy a “háromlépcsős teszt” első “lépcsőjét” illetően a WIPO is a terjedelmi és tartalmi, normatív feltételek együttes érvényesítését tartja szükségesnek. Ezt tükrözi a Berni Egyezményhez kiadott WIPO Útmutatónak (“Guide to the Berne Convention”) az a része is, amely az Egyezmény 9. cikkének (2) bekezdését elemzi és értelmezi.⁸ A könnyebb hozzáférhetőség végett a WIPO Útmutatónak ezt a részét is csatolja az eljáró tanács a szakértői vélemény 4. számú mellékletként.

30. (A “háromlépcsős teszt” értelmezésének összefoglalása.) Az 1967-es stockholmi diplomáciai értekezlet fent említett dokumentumaiban és jegyzőkönyveiben foglaltak és a WTO panelek, valamint a WIPO által végzett elemzés alapján a következőképpen foglalható össze a “háromlépcsős teszt” egyes “lépcsőinek” az értelmezése:

⁸ Lásd: “Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms,” WIPO, Genf, 2003, 56-60. old. Mint ahogyan az előszóból és a bevezetőből kiderül, a könyv szerzője az eljáró tanács előadó tagja. Lényeges azonban rámutatni, hogy a könyv a WIPO Titkárságának a felkérésére készült, de annak teljes egyetértésével jelent meg.

31. Első “lépcső:” a kivételek és korlátozások csak “különleges esetekre” vonatkozhatnak. Ez a feltétel részben terjedelmi, részben pedig tartalmi, normatív jellegű. Terjedelmi jellegű abban az értelemben, hogy a kivételek, illetve korlátozások nem lehetnek általános jellegűek; csak egy szűkebb, meghatározott körre vonatkozhatnak. Tartalmi, normatív jellegű abban az értelemben, hogy nyomós és magalapozott társadalmi, jogpolitikai indokokra van szükség a kivételeknek, illetve korlátozásoknak az érintett esetekben való alkalmazásához.

32. Második “lépcső:” a kivételek és korlátozások nem lehetnek sérelmesek a művek rendes felhasználásra. Jóllehet a magyarban a “felhasználás” szót használjuk, a “háromlépcsős tesztről” szóló fent említett nemzetközi és közösségi rendelkezésekben angolul mindenhol az “exploitation” szó szerepel, és a többi hivatalos nyelvi változatban is hasonló jelentésű szó áll. Ennek pedig inkább a “kiaknázás” szó felel meg, ami az adott összefüggésben a szerzői jog – a Berni Egyezmény 9. Cikke esetében, különösen a többszörözési jog – hasznosítását jelenti. Az 1967-es stockholmi diplomáciai értekezlet elé terjesztett tervezetnek a 9. Cikk (2) bekezdéshez fűzött magyarázata meglehetősen tisztán megjelöli, mit kell érteni a második “lépcsőben” foglalt feltételen: “a mű felhasználásának (‘kiaknázásának’) minden olyan formáját, amely számottevő gazdasági vagy gyakorlati fontossággal bír vagy bírhat, elvileg fenn kell tartani a szerző javára; az olyan kivételek, amelyek korlátozzák a szerző számára ebben a tekintetben nyitva álló lehetőségeket, elfogadhatatlanok lennének.”⁹ A magyarázat ehhez hozzáteszi: “Azonban az Unió országainak a törvényhozása számára lehetővé kell tenni, hogy... különleges célokból korlátozzák a [többszörözés jogának] az elismerését és gyakorlását azzal a feltétellel, hogy ezek a célok nem kerülhetnek gazdasági versenybe ezekkel a művekkel.”¹⁰

33. A harmadik “lépcső:” a kivételek és korlátozások indokolatlanul nem károsíthatják a szerzők jogos érdekeit. A WTO panelek és a kommentátorok egyaránt foglalkoztak a “jogos érdekek” pusztán jogi (a jog által biztosított) és az azon túlmutató értékrendi jellegével. Úgy tűnik, hogy ebben a fogalomban mindkét jelleg jelen van. Érdemes utalni a stockholmi diplomáciai értekezlet I. Főbizottsága elnökének a következő, a küldöttségek egyetértésével találkozó kijelentésére: “Miután a többszörözési jogra vonatkozó bármely kivétel elkerülhetetlenül károsítja a szerző érdekeit, a Munkacsoport megpróbálta szűkíteni a sérelmes esetek körét az “indokolatlan” kifejezés beiktatásával.”¹¹ A kijelentés első fele általános jogi (a jog által biztosított) érdekre utal, az érdeksérelemre vonatkozó “indokolatlanul” kifejezés alapján azonban nyilvánvalóvá válik, hogy a “jogos érdekek” kifejezésnek értékrendi jelentése is van. Az is világosnak látszik, hogy ebből a szempontból a szerző érdekeit nem lehet csak önmagában tekinteni, hiszen azt, hogy az ő érdekei szempontjából mi számít ilyen értelemben jogosnak, és hogy milyen mértékű érdeksérelem lehet indokolt, csak mások – és végső soron a társadalom egésze – érdekeinek az egyidejű mérlegelésével lehet megállapítani.

⁹ A stockholmi értekezlet iratai, 112. old. Az eredeti angol szöveg így szól: „all forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance must in principle be reserved to the authors; exceptions that might restrict the possibilities open to authors in these respects were unacceptable.”

¹⁰ Ugyanott. Az eredeti angol szöveg így szól: „However, it shall be a matter for legislation in the countries of the Union... to limit the recognition and the exercising of [the right of reproduction] for specific purposes and on the condition that these purposes should not enter into economic competition with these works.”

¹¹ Ugyanott 883. old. Az eredeti angol szöveg így szól: „Since any exception to the right of reproduction must inevitably prejudice the author’s interests, the Working Group had attempted to limit that prejudice by introducing the term „unreasonable.”

IV. A “háromlépcsős teszt” és a jogellenes forrásból történő magáncélú másolás

34. Az eljáró tanács megállapítja, hogy a megbízó által feltett kérdések az audiovizuális művek (és e mellett a zeneművek) jogellenes forrásból való magáncélú másolására vonatkoznak. Ezt azért szükséges megjegyezni, mert bár a megbízó elsősorban az Szjt. 33. §-a (2) és (3) bekezdésének és 35. §-a (1) bekezdésének az értelmezésére utal, elkerülhetetlen az Szjt. 20. §-ának (1) és (2) bekezdését is bevonni az értelmezés körébe, miután az audiovizuális művek (és a zeneművek) magáncélú másolására valójában különösen az utóbbi rendelkezések vonatkoznak. Az utóbbi rendelkezések esetében nem a többszörözési jogra fennálló kivételről, hanem annak pusztán díjigényre korlátozásáról van szó. Miután a díjigénynek nyilvánvalóan szerepe van annak megítélésében, hogy a szerzői jogi jogosultakat indokolatlanul károsítja-e a jogellenes forrásból történő magáncélú másolás, azt mindenképpen figyelembe kell venni a “háromlépcsős teszt” alkalmazásánál. Továbbá, arra is választ kell adni, milyen hatással van a díjigényre, ha megállapítjuk, hogy a jogellenes forrásból való magáncélú másolás még a díjigény fejében sem megengedett (ezt a lentiekben külön vizsgálja az eljáró tanács).

35. (Első “lépcső.”) A magáncélú másolás esetében különösen fontos az, hogy a “különleges esetek” fogalmának nemcsak terjedelmi, de tartalmi, jogpolitikai jellege is van. A magáncélú másolás önmagában nem “különleges eset.” A másolás jellege és célja teheti csak a magáncélú másolás bizonyos eseteit “különleges esetekké.” Akkor, amikor a magáncélú másolásra a kezdetekben kivételeket engedtek a nemzeti törvények, elsősorban manuális vagy kezdetleges gépi (például írógép útján) másolásról volt szó, amely a kivétel esetkörét nemcsak terjedelmileg, de tartalmilag is meghatározta. Az ilyen kivételek, majd a jogdíjigényre épülő korlátozások köre és jellege a magáncélú másolást hallatlanul megkönnyítő, tökéletessé és tömegessé tevő eszközök (készülékek és hordozók) megjelenésével bővült, illetve változott. Az, amire az Szjt. 20. §-a vonatkozik, a következő: a rádió- és a televízió-szervezetek műsorában sugárzott, a saját műsort vezeték útján a nyilvánossághoz közvetítő műsorába belefoglalt, valamint a kép- vagy hanghordozón forgalomba hozott audiovizuális művek (és zeneművek) magáncélú másolása. A kizárólagos többszörözési jognak az ebben az esetkörben való díjigényre korlátozása azt a felismerést tükrözi, hogy az ilyen módon sugárzott, nyilvánossághoz közvetített, illetve nyilvánosságra hozott művek esetében nem lehet ellenőrizni a magáncélú másolást, s bár az ilyen másolás tömegessé válása már indokolatlanul károsítja a jogosultak jogos érdekeit, az így okozott sérelem mértékét az indokolt mértékre lehet – és kell – korlátozni a díjigény bevezetésével és érvényesítésével. A digitális – és főleg az internetes, “on-line” – környezetben azonban megváltoztak a magáncélú másolás körülményei, feltételei és hatásai. Egyrészt, a megfelelő ellenőrzés nélküli ilyen másolás – annak könnyű, tökéletes, és a rohamosan növekvő Internet-populációra tekintettel, a korábbiaknál is jóval inkább tömegessé váló jellege folytán – jóval túlnőhet a “különleges eset” körén, s általánossá válhat. Másrészt a jogosultak számára a műszaki védelmi eszközök és az elektronikus jogkezelési adatrendszerek alkalmazásával, illetve azoknak a WCT, a WPPT és az InfoSoc irányelv által előírt megfelelő védelmével, lehetővé válik ennek megakadályozása, és annak elérése, hogy a szabad, illetve a jogdíjigény ellenében történő magáncélú másolás csak a különleges esetekre korlátozódjék.

36. A jogellenes forrásból történő magáncélú másolás megengedése ellentmondana a “különleges eset” feltételeinek. Egyrészt terjedelmileg is az általánosság irányába tolná ki a magáncélú másolásra vonatkozó kivétel, illetve jogdíjigényre korlátozás alapjául szolgáló “különleges eset” körét. Másrészt – és ez önmagában is elegendő lenne – nem felel meg annak a feltételnek sem, hogy a “különleges esetekben” megengedett kivételek, illetve

korlátozások alapjául megalapozott társadalmi, jogpolitikai indokok kell, hogy szolgáljanak. A megbízó által felvázolt esetkörben különösen két tipikus esete van a jogellenes forrásból való magáncélú másolásnak. Az egyik az, amikor valamely művet a jogtulajdonosok engedélye nélkül hoznak nyilvánosságra, terjesztenek, illetve közvetítenek a nyilvánossághoz digitális formában, s így különösen az Internet útján (mint ahogyan ez például az Üvegtrigris 2 című magyar film esetében történt a közelmúltban), a másik pedig az, hogy a jogtulajdonosok által alkalmazott műszaki védelmi eszközöket feltörik, így terjesztik, közvetítik a nyilvánossághoz az Internet útján az érintett műveket, és ennek alapján történik a magáncélú másolás. Ennek kivételként, vagy akár a díjigény fejében történő korlátozás formájában való megengedése nemcsak a “különleges eset” terjedelmi és tartalmi, jogpolitikai feltételeinek nem felelne meg, de a szerzői jog értelmével, céljaival és alapvető jellegével is gyökeresen ellentétben állna. Az üzenet kivédhetetlenül romboló hatású lenne: ne törődj vele, hogy jogsértő forrásról van szó, ne törődj azzal, hogy a szerző engedélye nélkül történik, a szerzői jog elavult, az Interneten minden szabad; nyugodtan másold és használd fel a művet! Egyébként a jogellenes források gyakran kifejezetten ezzel a “forradalmi” ideológiával “hirdetik” magukat.

37. (A második “lépcső.”) A “háromlépcsős teszt” jellegéből következik, hogy ha egy kivétel vagy korlátozás lehetősége már az első “lépcsőnél” megbukik, elvileg nincs szükség a teszt következő két “lépcsőjét” vizsgálni. Az eljáró tanács azonban az elemzés teljessége érdekében ezt mégis megteszi. A megállapítás azonban az első “lépcsőre” vonatkozó fenti elemzés alapján a második “lépcső” tekintetében is kézenfekvőnek látszik. A digitális, “online” környezetben a művek magáncélú másolás céljára, műszaki eszközökkel ellenőrzött és ellenérték fejében való hozzáférhetővé tétele a művek rendes felhasználásának az egyik formájává vált. Annak elfogadása és meghirdetése, hogy ennek ellenére, az adott művek esetében akár az ilyen jogszerű forrásból, akár jogellenes forrásból való magáncélú másolás egyaránt megengedett, nyilvánvalóan sértene a műveknek az említett módon való rendes felhasználását (“kiaknázását”).

38. (A harmadik “lépcső.”) Mint arra az eljáró tanács a fentiekben rámutatott, a harmadik lépcső esetében a “jogosság” és az “indokolatlanság” fogalmának értékrendi jellege is van, és a jogosultak érdekeit ért sérelem indokoltságának, illetve indokolatlanságának a megítélésénél azt is figyelembe kell venni, hogy a harmadik személyek, és általában a társadalom részéről milyen jogos érdekek indokolhatják a kivételek, illetve korlátozások bevezetését. Az eljáró tanács nem tartja szükségesnek különösebben bizonygatni, hogy ennek fényében mennyire tarthatatlan lenne azt állítani, hogy a jogszerű forrásokból való magáncélú másolás mellett a jogellenes forrásokból való ilyen másolás megengedése is kellő indokoltságú, és hogy az ez által okozott sérelem a jogtulajdonosok jogos érdekeivel összevetve sem lenne indokolatlan. A jogdíjigény egymagában nem lehet alkalmas az így okozott indokolatlan sérelemnek az indokolttá tételére.

39. (A tisztesség követelménye és a kivétel, illetve korlátozás rendeltetésével összhangban álló cél.) Az eljáró tanácsnak tehát az a véleménye, hogy a jogellenes forrásból való magáncélú másolás megengedése nincs összhangban a “háromlépcsős tesztel.” Ez az Szjt. esetében a különösen a 33. § (2) bekezdésével való összhang hiányát jelenti. Mint ahogyan arra a fentiekben utalás történt, az Szjt.-nek ez a rendelkezése azt is kimondja, hogy a kivétel (szabad felhasználás), de a törvény összefüggésében nyilván a jogdíjigényre való korlátozás alapján történő felhasználás is meg kell, hogy feleljen a tisztesség követelményeinek, és nem irányulhat a szabad felhasználás rendeltetésével össze nem férő célra. Ez, mint ahogy az eljáró tanács arra a fentiekben rámutatott, a “háromlépcsős tesztben” és a Berni Egyezmény más

szabályaiban rejlő egyes elemek külön kiemelését jelenti. A tisztesség és a rendeltetéshez kötöttség követelménye egyaránt következik az első “lépcső” tartalmi oldalából és a harmadik “lépcső” értékorientált, jellegéből. Ezeknek a ismérveknek az alkalmazása esetén aligha juthatunk más következtetésre, mint hogy a jogellenes forrásból történő magáncélú másolás azért sem engedhető meg, mert sem a tisztesség követelményével, sem az ilyen másolások esetén engedett kivételek, illetve (jogdíjigényre) korlátozások rendeltetésével nem fér össze.

40. (A másolók tudatállapotának a kérdése.) A jogellenes forrásból történő magáncélú másolás következményeinek vizsgálatánál néha érvként merül fel az, hogy az ilyen másolást azért kell mégis megengedni, mert a magánszemélyek nem lehetnek tisztában, mely forrás jogellenes, mely forrás jogszerű. Az eljáró tanács ezt az érvet nem látja megalapozottnak. Nyilván nem kerülhet sor sem a polgári, sem esetleg a büntetőjogi következmények alkalmazásáról olyankor, amikor jóhiszemű eljárásról van szó, és az érintett jogágak szankciórendszerében figyelembe veendő tudattartalmak és egyéb feltételek (mint a szándékosság, gondatlanság vagy az adott helyzetben való általános elvárhatóság) nem állapíthatók meg. Amikor viszont megállapíthatók, és esély, lehetőség van a szankciók alkalmazására – ennek a gyakorlati nehézségei közismertek, de nem korlátlanok – nincs ok azok kizárására. Az eljáró tanács megjegyzi, hogy ezt az elvet a magyar fogyasztók is elfogadják és magukévá teszik. Ezt tükrözi az Artisjus Magyar Szerzői Jogvédő Iroda Egyesület és az Országos Fogyasztóvédelmi Egyesület 2006. február 20-án kötött megállapodásának a 2.3 pontja is, amely a következőket tartalmazza: “A fogyasztót abban a helyzetben is védeni kell, ha *jóhiszeműen* jogsértő forrásból másol magának zenét” [kiemelés az eljáró tanácstól]. Ebből következik, hogy rosszhiszeműség esetén senki nem érdemel “védelmet.”

V. A jogellenes forrásból történő magáncélú másolás és a jogdíjigény viszonya

41. (A “jogdíjigény nem legalizálhatja a kalózkodást” – tétel és az irányadó rendelkezések.) A magáncélú másolás és a jogdíjigény viszonylatában viszonylag gyakran hangoztatott álláspont az, hogy “a jogdíjigény nem legalizálhatja a kalózkodást.” Vagyis: azokban az esetekben, ahol a magáncélú másolás valamilyen okból tilos, és ezért törvénysértő, csak a törvénysértés következményei érvényesíthetők. A jogosultak az ilyen esetben nem élhetnének a díjigényükkel, amiből az következne, hogy a jogellenes forrásból történő magáncélú másolások arányában csökkenteni kellene a jogdíjigény mértékét (és *ad absurdum* víve az érvelést, ha általánossá válna a jogellenes magáncélú másolás, azt el is kellene törölni).

42. Az eljáró tanács nem osztja ezt az álláspontot.

43. Mindenekelőtt az InfoSoc irányelv irányadó rendelkezéseit – az 5. Cikk (2) bekezdésének (b) pontját és 5. Cikkének (5) bekezdését – indokolt értelmezni ebből a szempontból. Az előbbi rendelkezés, mint ahogyan azt a fentiekben már idézte az eljáró tanács, így szól: “[a] tagállamok a 2. cikkben szabályozott többszörözési jog alól kivételeket, illetve korlátozásokat állapíthatnak meg... bármely hordozóra természetes személy által magáncélra, kereskedelmi célt közvetlenül vagy közvetve sem szolgáló többszörözés tekintetében, feltéve, hogy a jogosultak méltányos díjazásban részesülnek, amelynek meghatározásánál figyelembe kell venni, hogy az érintett művel vagy más védelem alatt álló teljesítménnyel kapcsolatban alkalmaztak-e a 6. Cikkben meghatározott műszaki intézkedést.” A Cikk (5) bekezdése szerint azonban nem alkalmazható ez a kivétel sem, ha az a “háromlépcsős tesztbe” ütközik.

44. Mint ahogy az a fentiekből kiderül, az eljáró tanácsnak az a véleménye, hogy a jogellenes forrásból való magáncélú másolás megengedése – akár kivétel (szabad felhasználás), akár (jogdíjigényre való) korlátozás formájában – ellentétben állna a “háromlépcsős teszt” mindhárom “lépcsőjével.” Ebből a fentiekben említett álláspont szerint az következne, hogy a jogdíjigény nem terjedhetne ki a jogellenes forrásból történő magáncélú másolásra.

45. Az első látásra is megállapítható, hogy ez – legalább is közvetlenül – nem következik az InfoSoc irányelv fent említett rendelkezéseinek a szövegéből, sem pedig az irányelv ide vonatkozó preambulumbekzdéseiből [különösen a (38) és (39) számúból]. Ezekben sem közvetlen, sem közvetett utalás nincs a jogellenes forrásból történő magáncélú másolásra. Így, míg az nyilvánvalóan következik az 5. Cikk (2) bekezdésének (b) pontjából, hogy a díjigény megállapításánál és mértékénél figyelembe kell venni a műszaki védelmi eszközök alkalmazását vagy nem alkalmazását, nincs szó arról, hogy hasonló módon figyelembe kellene venni a magáncélú másolás jogszerű vagy jogellenes forrásból történő voltát (jóllehet ennek kimondására ugyanúgy mód lett volna az irányelv megalkotásakor és elfogadásakor).

46. Így a jogdíjigény csökkentése vagy kizárása a tilossá nyilvánított magáncélú másolás esetében csupán az irányelvnek a nyelvtanin túlmenő értelmezésén alapulhatna.

47. Gyakorlatilag ugyanez mondható el az Szjt.-nek az irányelv említett rendelkezéseivel összhangban álló 20. §-áról, illetve 33. §-ának (2) bekezdéséről. Ezekben a rendelkezésekben sem található olyan szövegszerű szabály, amely alapul szolgálhatna a jogdíjigény csökkentésére vagy kizárására azon az alapon, hogy az üres kép- és hanghordozókat jogellenes forrásból történő magáncélú másolásra (is) használják.

48. (A kérdés kontextuális és joglogikai vizsgálata; kétes megoldási lehetőségek.) Az említett közösségi és hazai rendelkezések kontextuális és joglogikai értelmezéséhez elengedhetetlennek látszik a jogdíjigény céljának és jogi természetének az alaposabb elemzése.

49. Az eljáró tanács álláspontjából – amely szerint a jogellenes forrásból történő magáncélú másolás tilos – az is következik, hogy a kép- és hanghordozók árába beépített jogdíjigény kifizetése csak a jogszerű forrásból történő másolásra jogosítja fel a fogyasztót. Van olyan vélemény – és akik azt vallják, hogy “a jogdíjigény nem legalizálhatja a kalózkodást,” mindenképpen ezen a véleményen vannak – hogy ennek elfogadása esetén csak egy megoldás van; nevezetesen a jogdíjigény csökkentése, illetve kizárása.

50. Az eljáró tanács véleménye szerint ez a következtetés megalapozatlan.

51. Három lehetőség merülhet fel a jogdíjigénynek a jogellenes forrásból történő magáncélú másolás arányának megfelelő csökkentésére vagy kizárására.

52. Az első lehetőség az lenne, hogy a vásárló követelhetné a kép- és hanghordozónak a jogdíjigénynek megfelelő összeggel csökkentett áron való értékesítését azzal az indokkal, hogy azt jogellenes célból történő magáncélú másolásra kívánja felhasználni. Az árkülönbséget aztán a forgalmazó követelhetné vissza a jogdíjigényt érvényesítő közös jogkezelő szervezettől. Az ebből adódó számviteli és elszámolási bonyodalmakat esetleg el is lehetne kerülni úgy, hogy már eleve kétfajta kép- és hanghordozó kerülne forgalomba: egy a

jogdíjigénnyel terhelt változat azok részére, akik jogszerű forrásból kívánnak másolni, egy másik, olcsóbb változat pedig azok számára, akik jogellenes forrásból készülnek másolni. Ez a lehetőség természetesen annyira abszurd, hogy nem érdemes szót vesztegetni annak indokolására, miért lenne elfogadhatatlan.

53. A második lehetőség az lenne, hogy a jogellenes forrásból másolást végzők visszakövetelhetnék a jogdíjigénynek megfelelő összeget a kép- és hanghordozók árából a jogdíjigényt érvényesítő közös jogkezelő szervezettől. Erre a lehetőségre is azt lehet mondani, mint az elsőre. Nemcsak hogy súrolná a neveltségesség határát, de túl is menne azon. Emellett az előző “megoldáshoz” hasonlóan, s ha lehet még annál is inkább nyilvánvaló módon, egyértelműen ellentétben állna az ősrégi jogi alapelvvel, amelyet a Polgári Törvénykönyvünk 4. §-a (4) bekezdésének második mondata rögzít: “Saját felróható magatartására előnyök szerzése végett senki sem hivatkozhat.”

54. A harmadik lehetőség a díjigénynek nem ilyen esetenkénti kizárása lenne, hanem egy olyan fajta megoldás, amelyet a műszaki védelmi eszközök alkalmazása vagy nem alkalmazása tekintetében az InfoSoc irányelv 5. Cikke (2) bekezdésének (b) pontja, illetve az Sztj. 20. §-ának (1) bekezdése követ. Nevezetesen az, hogy a díjigényt általános jelleggel csökkenteni kellene (vagy ki kellene zárni) a jogellenes magáncélú másolás valamilyen felmérés alapján megállapított arányának megfelelően. Ami pedig a jogellenes forrásból történő magáncélú másolást illeti, azt a jogsértő voltának megfelelő módon kellene kezelni: alkalmazni kellene vele szemben a jogsértés következményeit. Ez a “megoldás” már jóval inkább ésszerűnek tűnhet, és a “jogdíjigény nem legalizálhatja a kalózkodást” jelszót követők lényegében ezt javasolják.

55. E megoldás mellett azt is fel lehetne hozni – s időnként ezt fel is hozzák – hogy jogpolitikailag is ez a kívánatos, hiszen ha megállapítjuk, hogy jogsértésről van szó, a rendelkezésre álló szankciók felhasználása a helyes út. S nemcsak a szükséges visszatartó hatás eléréséhez és a jogkövető magatartás kikényszerítéséhez van szükség erre, de így a jogosultakat ért érdeksérelem is megfelelőbb és arányosabb módon orvosolható.

56. Az utóbbi megállapítással valószínűleg a jogosultak is teljes egészében egyetérthetnének, és ők is ezt a megoldást tarthatnák a legmegfelelőbbnek – ha az a kívánatos mértékben megvalósítható lenne. Erről azonban aligha van szó. A jelenlegi feltételek között nincs reális lehetőség az összes ilyen jogsértés azonosítására (sőt a többségére, sőt a töredékére sem) és a jogellenes forrásból másolók tudatállapotának minden esetben való olyan egyértelmű tisztására, amire szükség van a szankciók alkalmazásához.

57. Ennek következtében a jogdíjigénynek a jogellenes magáncélú másolás arányának megfelelő csökkentése vagy kizárása azzal az eredménnyel járna, hogy az esetek egy jelentős – és nagyon nagy valószínűséggel a túlnyomó – részében a jogosultak sem a jogdíjigény, sem a jogsértés miatti kárigény érvényesítése alapján nem jutnának semmilyen jövedelemhez. Ugyanakkor, a jogosultak indokolatlan károsodásának megfelelő arányban előnyhöz jutnának a jogellenes utat választók. Az eljáró tanács megállapítja, hogy így “makro-méretben” ugyanaz a helyzet állna elő, mint a fentiekben elemzett – és elfogadhatatlannak talált – első két “lehetőség” esetében: a Ptk. 4. §-a (4) bekezdésének második mondatában rögzített alapvető jogi elvvel ellentétben álló eredmény születne. Egy ilyen eredmény előidézése pedig aligha állhat a jogalkotók és jogalkalmazók szándékában.

58. (A helyesnek látszó megoldás.) Az eljáró tanács szerint más úton, más irányban kell keresni és lehet megtalálni a törvény helyes értelmezésének és alkalmazásának megfelelő megoldást.

59. Fel kell tenni a kérdést, mi történne akkor, ha a jogdíjigényt nem csökkentenénk arra való tekintettel, hogy vannak olyanok – és esetleg sokan vannak – akik a jogdíjigénnyel terhelt kép- és hanghordozókat jogellenes forrásból való másolásra használják fel.

60. A következő történne: Az ilyen módon jogsértő másolást végzőket terhelné a jogdíjigény és ezért nem élveznének előnyt a fentiekben leírt és a Ptk.-ban is rögzített alapvető jogi elvvel ellentétben álló módon: nem kerülnének kedvezőbb helyzetbe, mint a jogszerűen eljárók. Elvileg felmerülhetne az az aggály, hogy az általuk elkövetett szerzői jogi jogsértésért járó kárigény érvényesítése esetén visszamenőleg indokolatlanná válna a jogdíjigény. Ennek a “problémának” a megoldása azonban könnyű és jogdogmatikailag, jogtechnikailag egyaránt kézenfekvő lenne: akkor, amikor a jogtulajdonosnak tényleg sikerül érvényesíteni a kártérítési igényét, figyelembe kellene venni azt a díjigényt, ami az ilyen másolást végzőket (is) terhelte.

61. Az eljáró tanács úgy látja, hogy míg az előző három lehetőség vagy egyszerűen abszurd, vagy joglogikai, jogpolitikai szempontból elfogadhatatlan, az utóbbi változat minden szempontból megfelel a nemzetközi, közösségi és hazai jogi szabályozásnak, az irányadó rendelkezések betűjének és szellemének, valamint az alapul szolgáló általános jogi elveknek.

VI. A szakértői vélemény összefoglalása; a megbízó által feltett kérdések megválaszolása

62. Mint ahogyan ezt a fentiekben idézi az eljáró tanács, a megbízó a megvizsgálandó szempontok felvázolása után a következő kérdések megválaszolását kéri a Testülettől:

“1. Levezethető-e az Szjt. 33. § (2) és (3) bekezdéseinek és az Szjt. 35. § (1) bekezdésének együttes szabályrendszeréből, hogy a nem jogszerűen többszörözött vagy nem jogszerűen nyilvánosságához közvetített (különös tekintettel az internetes típusú, az Szjt. 26. § (8) bekezdése szerinti lehívásra hozzáférhetővé tétellel, valamint a letöltéssel – többszörözéssel - megvalósuló felhasználásokra) műpéldányról vagy hordozóról történő, egyébként magáncélú másolat készítése (többszörözés) a szerzői jogi jogosult kizárólagos jogait sérti, avagy a fentiek általános rendezésére csak egy erre vonatkozó kifejezett jogszabály módosítás alapján kerülhet sor.

2. Amennyiben az előző kérdésre a Tisztelt Szerzői Jogi Szakértő Testület azt a választ adja, hogy a fentiek rendezésére külön erre vonatkozó jogszabály módosítás szükséges, akkor a további kérdésünk, hogy Tisztelt Szerzői Jogi Szakértő Testület álláspontja szerint szükséges-e / lehetséges-e, hogy a magyar jogalkotó külön rendelkezzen a – mintegy a kivétel alóli kivételként – arról, hogy csak a nyilvánvalóan jogsértő módon előállított példányról való másolatkészítés nem minősül szabad felhasználásnak, ily módon pedig utaljon-e a jogalkotó a másolatot készítő személy oldalán bármilyen nyilvánvalóságra, tudatállapotra, gondosságra vagy elvárhatóságra?

A 2. kérdéssel kapcsolatban megjegyezzük, hogy álláspontunk szerint a szabad felhasználás rendszertanilag nem a felhasználónak biztosított külön jog, hanem a szerzői jogosultak kizárólagos szerzői jogainak a korlátja.”

63. Az eljáró tanács véleménye szerint az vezethető le az előzőekben elemzett nemzetközi, közösségi és hazai szerzői jogi szabályozásból, hogy a jogellenes magáncélú másolás nem megengedett, sem szabad felhasználásként, sem pedig a jogdíjigényre való korlátozás alapján.

64. Az eljáró tanács megjegyzi továbbá, hogy

- (i) a jogellenes forrásból történő magáncélú másolásra tekintettel nem indokolt az Szjt. 20. §-a szerint a felhasznált kép- és hanghordozókra kivetett jogdíjigény csökkentése (s főleg nem annak kizárása);**
- (ii) a jogellenes forrásból való másolással megvalósított jogsértés miatti kártérítési igény érvényesítése esetén figyelembe kell venni, hogy a felhasznált kép- és hanghordozókat milyen díjigény terhelte.**

65. Ami a megbízónak a fent idézett utolsó megjegyzését illeti – amely szerint “a szabad felhasználás rendszertanilag nem a felhasználónak biztosított külön jog, hanem a szerzői jogosultak kizárólagos szerzői jogainak a korlátja” – mint ahogyan a nemzetközi, közösségi és hazai szabályozás fenti elemzéséből kitűnik, azzal az eljáró tanács teljes egészében egyetért.

Budapest, 2006. május 11.

Dr. Bogsch Attila
a tanács elnöke

id. Dr. Ficsor Mihály
a tanács előadó tagja

Dr. Gyenge Anikó
a tanács szavazó tagja

Dr. Horváth Zoltán
a tanács szavazó tagja

Dr. Mlinarics József
a tanács szavazó tagja

**1. számú melléklet a Szerzői Jogi Szakértő Testület 17/06/1. számú szakértői
véleményéhez**

CIV. 1

C.B.

SUPREME COURT

Public session of **February 28, 2006**

Cassation Mr. ANCEL, President
Judgment No. 549 FS-P+B+R+I

Appeals Numbers D 05-15.824 JOINDER
 X 05-16.002

THE REPUBLIC OF FRANCE

IN THE NAME OF THE FRENCH PEOPLE

THE SUPREME COURT, FIRST CIVIL DIVISION,
has rendered the following judgment:

I - On appeal No D 05-15.824 lodged by the company Studio Canal, a corporation having its registered office at 1 place du Spectacle, 92863 Issy-les-Moulineaux Cedex 9,

II - And on appeal No X 05-16.002 lodged by:

1) the company Universal Pictures Video France, a simplified joint-stock company having its registered office at 20 rue Hamelin, 75116 Paris,

2) the Video Publishing Union, having its registered office at 24 rue Marboeuf, 75008 Paris,

in cassation of the judgment issued on April 22, 2005 by the Court of Appeal of Paris (4th division, section B), in favour of:

1) Mr. Stéphane Perquin, residing at 63, avenue de Mozart, 75116 Paris,

2) the association Federal Union of Consumers (UFC) Que choisir, having its registered office at 11 rue Guenot, 75011 Paris,

appellees;

In the presence of: the company Films Alain Sarde, having its registered office at 17 rue Dumont d'Urville, 75116 Paris;

The appellant No D 05-15.824 is citing, in support of its appeal, four grounds of cassation attached to the present judgment;

The appellants No X 05-16.002 are citing, in support of their appeal, a single ground of cassation also attached to the present judgment;

In the light of the communication made to the Attorney General;

THE COURT, composed in accordance with Article L. 131-6-1 of the Code of Judicial Organisation, at the public hearing of February 14, 2006, attended by: Mr. Ancel, President, Mrs. Marais, Advising Judge, Mr. Bague, Mr. Gridel, Mr. Charruault, Mr. Roller, Advisers, Mrs. Cassuto-Teytaud, Mrs. Duval-Arnould, Mrs. Gelbard-Le Dolphin, Mr. Creton, Mrs. Richard, Mr. Jessel, Public Auditors, Mr. Sarcelet, Prosecuting Attorney, Mrs. Collet, Clerk of the Division;

Based on the report of Mrs. Marais, adviser, the observations and pleadings of SCP Piwnica et Molinié, counsel for the company Studio Canal, of SCP Lesourd, counsel for Mr. Perquin and the association UFC Que choisir, of SCP Roger et Sevaux, counsel for company Universal Pictures Video France and the Video Publishing Union, and the brief of Mr. Sarcelet, Prosecuting Attorney, after which the President of the Court asked counsel if they wished to present supplementary observations, and after having deliberated in accordance with the law;

Joinder of the appeals No D 05-15.824 and No X 05-16.002 which are related;

Whereas, [the appellees] complained of not being able to make a copy of the DVD “Mulholland Drive”, produced by Films Alain Sarde, published by the company Studio Canal and distributed by the company Universal Pictures Video France, rendered materially impossible due to technological protection measures inserted in the carrier [or medium], and claiming that such measures were in conflict with the right of private copying granted to the user by Articles L. 122-5 and L. 211-3 of the Intellectual Property Code, Mr. Perquin and the Federal Union of Consumers UFC Que choisir filed an action against the [appellants] seeking a prohibition on their use of such measures and their marketing of the DVDs so protected, applying also for them to be ordered to pay, firstly, the amount of 150€ in compensation for [the appellee’s] loss, secondly, 30.000€ for the prejudice to the collective consumer interest; that the Video Publishing Union intervened in the proceedings on behalf of the defendants;

On the first ground, taken from the first section, and the second ground taken from the second and third sections of the appeal of the company Studio Canal, and on the first, third and eighth sections of the single ground of the appeal of the company Universal Pictures Video France and the Video Publishing Union, which are combined:

Whereas Articles L. 122-5 and L. 211-3 of the Intellectual Property Code, interpreted in the light of the provisions of Directive 2001/29/EC of May 22, 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, together with Article 9.2 of the Berne Convention;

Whereas, according to Article 9.2 of the Berne Convention, the reproduction of literary and artistic works protected by copyright can be permitted, in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work nor cause an unreasonable prejudice to the legitimate interests of the author; that the private copy exception provided for in Articles L. 122-5 and L. 211-3 of the Intellectual Property Code, which must be interpreted in the light of the European Directive cited above, cannot form an obstacle to the insertion in the carriers onto which a protected work is reproduced, of technical protection measures intended to prevent the copying of [that work], when it would result in a conflict with the normal exploitation of the work, which must be assessed by taking into account the economic impact that such a copying can have in the context of the digital environment;

Whereas, in order to prohibit the companies Alain Sarde, Studio Canal and Universal Pictures Video France from using a technical protection measure preventing the copying of the DVD “Mullholland Drive”, the judgment, after having found that private copying constituted only a legal exception to copyright and not an absolute right granted to the user, ruled that this exception could not be limited since French legislation does not comprise any provision to that effect; that in the absence of reprehensible conduct, of which no proof has been shown in the present case, a copy for private use is not likely to conflict with the normal exploitation of the work in the form of a DVD, which generates the revenues necessary for the recovery of the production costs;

That in ruling as it did, whereas the conflict with the normal exploitation of the work, which should lead to the setting aside of the private copying exception, must be assessed in light of the risks inherent in the new digital environment as regards the safeguarding of copyright and of the economic importance that the exploitation of the work, in the form of DVD, represents for the recovery of the costs of cinematographic production, the Court of Appeal violated the legislative texts cited above;

ON THESE GROUNDS, and without it being necessary to rule on the other grounds for complaint on appeal:

QUASHES AND ANNULS, all provisions in the judgment delivered on April 22, 2005, between the parties, by the Court of Appeal of Paris; restores, as a consequence, the action and the parties to the state in which they found themselves before the said judgment and, to obtain a ruling [or to be made right], remands the case to the Court of Appeal of Paris, in a different composition [i.e., a different panel of judges];

Orders Mr. Perquin and association UFC Que Choisir to meet the costs;

According to Article 700 of the New Code of Civil Procedure, rejects the applications;

Rules that through the efforts of the Attorney General before the Supreme Court, this judgment will be sent for transcription in the margin or following the quashed judgment;

Thus issued and judged by the Supreme Court, First Civil Division, and handed down by the President in public audience of February twenty-eight two thousand six.

**2. számú melléklet a Szerzői Jogi Szakértő Testület 17/06/1. számú
szakvéleményéhez**

Opinion
on the 30 April 2004 decision of the Tribunal de Grande Instance re
Perquin/UFC Que Choisir v. Films Alain Sarde, Universal Pictures Video
France & Studio Canal Image/Studio Canal, Paris,
and on the appeal submitted against it

by Dr. Mihály Ficsor¹²,
former Assistant Director General of WIPO

I. Introduction

1. The present opinion has been prepared – *pro bono* – at the request of *Le Syndicat de l'édition vidéo* as a member of the *International Video Federation*, an *intervenant volontaire* in the above-mentioned law suit. The opinion concerns the above-mentioned court decision and the appeal against it, and it analyses them mainly from the viewpoint of the international norms and the *acquis communautaires* on copyright (also taking into account the relevant norms under the French copyright law).
2. The key issues of the court decision and the appeal seem to be (i) the copyright status of private copying; (ii) the application of the “three-step test” for exceptions and limitations; and (iii) the “interface” of exceptions and limitations with technological protection measures. Thus the opinion also mainly addresses these issues.
3. The opinion, apart from short general remarks, does not cover the issue of labelling copy-protected DVDs, since it goes beyond the field of copyright, and it rather concern possible liability and consumer-protection aspects.

II. The court decision and the appeal

The decision

4. *L'Union fédérale des consommateurs – Que choisir* (hereinafter: *Que choisir*), a major French consumer protection organisation, alleged that it had received complaints from consumers regarding the use of copy-protection technologies on DVDs. One such case concerned *M. Perquin*, who had bought the DVD “Mulholland Drive” and was unable to make a copy of it. Moreover, the label on the DVD did not provide any information in this regard. Taking the view that these points amounted to violations of the “right to private copy” under the Intellectual Property Code and the obligation to advise consumers of “essential characteristics” of a good or service under the Consumer Code, *Que choisir* and *M. Perquin* brought an action against the defendant producers/distributors – *Films Alain Sarde, Universal Pictures Video France and Studio Canal Image/Studio Canal, Paris* – in May 2003 seeking a prohibition on the use of technological measures which are incompatible with “right to private copy” as well as various costs and damages.

¹² A short *curriculum vitae* is attached.

5. The *Tribunal de Grande Instance de Paris* rendered its judgment on 30 April 2004 in which it rejected the claims of *Que choisir*.
6. **The Court found that the validity of *Que choisir*'s claims required examination of the nature and scope of the private copy exception (articles L. 122-5 and L. 211-3 of French Intellectual Property Code) with regard to the Berne Convention before looking at the Copyright Directive, which has not yet been implemented in France.**
7. On the basis of its analysis, the court described the exception to be “precisely circumscribed” and “strictly reserved for an exceptional use.” It found that the legislator had not intended to create any “generalised” right to make copies of every work but only to establish the conditions under which a copy escaped the author’s exclusive right to authorise or prohibit the reproduction of his works.
8. The Court pointed out that the provisions on the exception were adopted in 1957 and 1985. This means that it was impossible for the legislator to take into account the recent proliferation of media on which works can be copied and the use of technological measures to prevent copying, and, thus, in the absence of specific references to methods of reproduction in French law, there is no support for *Que choisir*'s claims.
9. In its finding, the Court then referred to the Berne Convention to assess the scope of this exception stressing that this assessment had been done in the French law since, when the 1985 Act introduced a private copy levy on all blank media (with some exceptions), it was supposed to do so in compliance with the 1971 Paris Act of the Berne Convention. In particular, reference was made to article 9(2) of the Convention under which exceptions to the reproduction right are only permitted where three conditions are met (special cases, no conflict with normal exploitation, and no unreasonable prejudice to the author’s legitimate interests). This “three-step test” was then also included in article 13 TRIPS Agreement and in article 10 of the WCT in a way extended to all economic rights of copyright owners.
10. Furthermore, the Court found that, in spite of the fact that the Copyright Directive had not yet been transposed in France, the French law must already be interpreted in its light. This was of importance because Article 5.5 of the Directive incorporates the three-step test prescribing that it must be taken into account in determining the exceptions in Article 5, including the private copying exception in Article 5.2(b).
11. The Court also pointed out that Article 5.2(b) is optional and that Article 6.4 provides that Member States *may* take measures necessary to ensure effective implementation of this exception. According to the finding of the Court, it follows from this that the Directive neither recognises nor introduces a “general private copying right” since it stipulates that the exception is subject to the three-step test in the light of the basis of which also the plaintiffs’ claims must be assessed.
12. When the Court applied the three-step test to the concrete case, it found that the DVD market is of vital economic importance and essential to audiovisual production – “irrefutably a normal method of exploitation” of audiovisual works – and thus, the

copying of film in *digital* format is “prejudicial to the normal exploitation of the work.” (The finding does not address the issue of analogue copying.) Furthermore, the Court states that this prejudice is “serious - within the meaning of the Berne Convention criteria - because it will affect an essential method of exploitation of the work, which is vital to recouping its production costs”. Thus, use of a technological measure “is not *prima facie* an infringement” of the private copy exception. It is irrelevant whether a private copy levy was paid because “the basis of that remuneration does not determine the scope of the private copying exception”.

13. As regards the issue of labelling DVDs, the Court recognized that the Consumer Code requires that the consumer must be made aware of the essential characteristics of goods or services. However, it found that, while the DVD cover could advise consumers as to the inability to make a private copy, the possibility to do so “does not constitute an essential characteristic of such a product, especially as [the consumer] cannot avail himself of the private copying exception”. As indicated above, the opinion does not cover this issue.

The appeal

14. On 19 July 2004, *Que choisir* deposited an appeal. In the appeal, the position was expressed that “[t]he incorporation of such a protection measure is a flagrant restriction on the right of private copying as provided for in article L.122-5 of the Intellectual Property Code.” (Furthermore, it was pointed out that the fact that no prior notice was given of this restriction on use is a breach of the provisions of article L.111-1 of the Consumer Code.)
15. The appeal develops the legal arguments concerning the issue of private copying under the title “unlawful interference with private copying right.”
16. Reference is made to articles L.122-5.2 and L.211-3.2 of the Intellectual Property Code. Under article L.122-5.2, “once a work has been disclosed, the author may not prohibit ... copies or reproductions reserved strictly for the private use of the copier and not intended for collective use ...”. Article L.211-3.2 of the Intellectual Property Code, moreover, provides that producers of videograms “may not prohibit reproductions reserved strictly for private use by the person who has made them and not intended for any collective use”).
17. Then article L.311-1-1 of the Intellectual Property Code is quoted which provides that: “The authors and performers of works fixed on phonograms or videograms and the producers of such phonograms or videograms shall be entitled to remuneration for the reproduction of those works made in accordance with subparagraph 2 of article L122-5 and subparagraph 2 of article L. 211-3”. Finally, it is recalled that Act No. 2001-624 of 17 July 2001 added a second subparagraph to this article, providing that: “The authors and publishers of works fixed on any other medium are also entitled to remuneration for the reproduction of those works made in accordance with subparagraph 2 of Article L122-5 and subparagraph 2 of Article L211-3, on a digital recording medium”.
18. The appeal points out that, thus, the legislature did take account of technological and industrial developments in 2001, and that “[f]ar from excluding private copying of

and/or on a work fixed on a digital medium as it could have done, it actually enshrined it in law.” It is indicated as a supporting argument that article L.311-4 of the Intellectual Property Code, which lists the persons liable to pay remuneration for private copying (given that, in the final analysis, that remuneration will be passed onto the price paid by the consumer), is couched in sufficiently broad terms, referring as long ago as 1985 to “recording media that may be used for reproduction of works for private use”, which can obviously include digital media.

19. The appeal expresses the belief that the country’s highest administrative court takes the same view as *M. Perquin* and *Que choisir*, since in its ruling of 25 November 2002, the *Conseil d’Etat* held that digital recording media enable the reproduction for private use of works fixed on phonograms and videograms, and dismissed the information technologies industry association’s submission that technological developments would make it impossible to assess how much private copying was being done using these media, considering that technological protection measures may prevent copying being carried out.
20. In its appeal, *Que choisir* opines that the Copyright Directive also supports its position. To prove this, the first part of Article 5.2(b) allowing Member States to provide for exceptions to the reproduction right “in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation”. It also refers to the draft legislation intended to implement this Directive in France exercises this “right”, “reaffirming the national legislature’s commitment to private copying,” and states that “Nowhere is it within the French legislature’s intention to endorse copy protection systems, which would negate the private copying exception provided for in article L.122-5 of the Intellectual Property Code.” Reference is made to the draft provisions, in particular section 9 of the bill according to which “A mediation board is established to settle disputes between rightholders and users who consider that a technological protection measure prevents them from availing themselves of the private copying exception.”
21. The appeal suggests that article 6.4 of the Copyright Directive should be read to mean that “protection measures must not interfere with the exercise of the right to make private copies, and the Member States must if needs be take action against the protection measures applied by rightholders, including the producers of phonograms and videograms (audio and video recordings), to enable the private reproduction right to be exercised.”
22. Then, regarding the French legislation, the appeal outlines the following arguments:

“The fact is that first the Act of 3 July 1985, then that of 17 July 2001 which took into account technological developments and changing consumer habits, did not make the private reproduction of works unlawful, but introduced a balanced solution for the different interests involved by setting up a system of remuneration for rightholders.

That balance is achieved in internal law by levying a fair remuneration on blank recording media, including digital recording media like DVD-R- and RW-Video, which is paid by consumers because it is passed on into the purchase price of blank recording

media.

The use of technological protection measures which prevent the private copying right from being exercised upsets that balance...

The consumer is... compelled to pay royalties not only for the use of the work when he purchases the original medium (which is obviously perfectly reasonable), but also for the reproduction of that work in making a private copy, which becomes unreasonable when such reproduction is prevented by the use of technological protection measures.”

23. In a kind of summary, the appeal states as follows:

“The possibility of copying a DVD onto an identical, magnetic medium or any other medium permitted by technological development, has a basis in both law and fact:

The exception laid down in article 5.2(b) of the Directive expressly provides that where Member States provide for exceptions to the private copying right, the reproduction must be able to be made on “*any medium*”, as in French internal law, which does not exclude any medium.

The exception therefore covers all reproductions of works, including those fixed on a digital medium provided that it is made by a natural person, it is made for private use, and it is made for ends that are neither directly nor indirectly commercial.

Copying from a digital medium source allows the consumer to replace the product with an identical one if the original suffers deterioration.

Copying onto any medium also enables the individual to view the work elsewhere than at home and, in particular, in any place -- on a laptop computer, in a car fitted with a DVD player -- and, more generally, in any private place (holiday spot, family home, ...).

24. After this the appeal also addresses the issue of compliance with the three-step test.

25. It expresses the view that there can be no question that French law has addressed the first requirement (special case) by spelling out in detail what constitutes private copying.

26. In the interpretation of *Que choisir*, the second requirement of the three-step step, “the ‘normal exploitation of the work’ must be construed in accordance with the Directive as being carried out in a way which respects not only the rights of authors, but also those of users.” It believes that “the incorporation of a technological measure which would limit the number of copies that could be made of the work fixed on the digital medium might have satisfied this requirement, since it would have ensured protection for rightholders while at the same time still allowing users to exercise their private copying right.”

27. Regarding the third requirement of the test, the appeal remarks as follows: “As to unreasonable prejudice, there is none in this case because domestic law provides not for compensation but for a fair remuneration owed to the rightholder in consideration

of the obligation placed on him to permit this special use of the reproduction right attaching to the work.”

28. The following comments are added to this analysis: “in the appealed judgement, the Paris Regional Court fails to explain why, in the case before it, the production costs of the film “Mulholland Drive” would not have been recouped by its exploitation through being shown in cinemas.... Now, while it is true that DVD sales may help to balance a production budget, it cannot be said conclusively that such balance can be achieved *only* by DVD sales, thereby authorizing the fitting of a mechanism that prevents both analogue and digital private copying in breach of substantive law... The Court’s assertion is all the more questionable in that the market abounds with DVD films that are available to consumers, and are not sold with technological measures that prevent private copying....The Court was therefore wrong to conclude - especially as the defendants had failed to produce any... figures in support of their claims - that “the copying of a filmed work published on a digital medium therefore cannot but conflict with the normal exploitation of the work”.

Prof. Caron’ opinion supporting the appeal

29. On 20 October 2004, Professor Christophe Caron¹³ prepared an opinion at the request of *Que choisir* supporting the appeal against the judgement of the Court. The position expressed and the arguments presented in the opinion are partly the same as those in the appeal. Nevertheless, Prof. Caron’s views differ from those reflected in the appeal in certain aspects, and he also presents certain further arguments. Here mainly the differences and the additional arguments are outlined.
30. In *point 3* of the opinion, *la question de l’applicabilité du droit communautaire* is discussed. It is pointed out that « *Il est de jurisprudence constante que le droit national doit être interprété selon la finalité et à la lumière des directions non encore transposées, mais qui auraient du l’être (v. par exemple, CJCE, 14 juillet 1994, aff Paola Faccini Dori : Rec. 1994, I-3325 ; CJCE, 13 novembre 1990, aff. Marleasing : JCPG 1991, II, 21658, note P. Level).* » On this basis, the opinion finds, in agreement with the Court, that, since the Copyright Directive *aurait du, comme le précise son article 13, être transposée en droit français avant le 22 décembre 2002, il convient de l’appliquer au présent litige.*
31. However, having stated this, the opinion adds the following remarks, and, in these respects, it differs from the judgement of the Court:

« Mais il n’en demeure pas moins qu’il est délicat d’interpréter le droit national en fonction de disposition de la directive qui seraient facultatives. En effet, dans cette dernière hypothèse, les Etats membres n’ont pas l’obligation de les transposer...

L’article 5.2.b) de la directive prévoit l’exception pour copie privée. Mais sa transposition est facultative. Il ne serait donc servir de guide à la résolution du présent litige, sauf pour éclairer, sans réelle normativité. »

¹³ Agrégé des Facultés de droit, Professeur à la Faculté de droit de l’Université Paris XII, Directeur du DESS de droit de la propriété intellectuelle appliqué.

32. In *point 4*, the opinion analyses the *notion de l'usage privé*. It is stated correctly that the members of the family of the *copist* are still covered by the concept of private use. It goes, however, further than that, since it states as follows: « *La mise en oeuvre du droit de reproduction exige qu'un public soit concerné. En effet, article L. 122-3 du Code de la propriété intellectuelle dispose que 'la reproduction consiste dans la fonction matérielle de l'oeuvre par tous procédés qui permettent de la communiquer au public d'une manière indirecte. Il faudrait donc, en l'espèce, que la copie réalisée par Monsieur Perquin soit destinée à un public pour que le droit de reproduction soit concerné.* »
33. The analysis of the concept of private use is summed up in the following way:
34. « *Il résulte de ce qui procède que la copie destinée à être communiquée à quelques proches du copiste ne constitue pas un acte de contrefaçon et doit être analysée comme étant une copie privée: d'une part, la reproduction ne vise pas une communication au public (art. L. 122-3, c. propr. intell.); d'une part, la copie ainsi réalisée peut être représentée librement dans le cadre du cercle de famille. La copie privée apparaît donc comme étant plus une limite au droit d'auteur qu'une exception : elle existe parce que la copie n'est pas destinée à un public qui, seul, met en œuvre le monopole. Avec la copie privée, on se situe donc en dehors du monopole, lequel implique un public.* »
35. In *point 7*, la *notion de rémunération pour copie privée* is discussed. The opinion points out that « *le montant de la rémunération pour copie privée est généralement supporté par le consommateur final, qui fait l'acquisition du support, et qui apparaît comme étant le véritable débiteur de cette rémunération.* » Then it continues as follows : « *Il en résulte qu'en faisant l'acquisition du support vierge analogique sur lequel il souhaitait reproduire le film fixé sur le DVD, Monsieur Perquin acquitte cette rémunération pour copie privée... Cet élément factuel prouve, d'une part, la parfaite licéité du comportement de Monsieur Perquin et, d'autre part, sa conformité avec l'article 5.2.b) de la directive du 22 mai 2001. En effet, cette dernière disposition subordonne la licéité de l'exception pour copie privée à l'existence d'une 'compensation équitable', ce qui est le cas en l'espèce.* »
36. In *point 8*, la *force et la nature juridique de l'exception pour copie privée* is analysed. First, it is stated as follows : « *D'emblée, il convient d'écarter la qualification de 'tolérance' (v. dans ce sens, Y. Gaubiac et J. Ginsburg, 'L'avenir de la copie privée numérique en Europe' : Comm. com. électr. 2000, chron. n° 1). En effet, la tolérance émane d'une personne, et non pas de la loi, et ne fonde aucun droit en vertu de l'article 2232 du Code civil. Cela signifie que cette qualification ne sied pas à l'exception pour copie privée dont l'origine est légale.* »
37. Then it is stressed that « *De même, il est inutile de rechercher, dans la copie privée, un 'droit à la copie'. Il n'est, en effet, pas certain que le législateur ait fait entrer, dans le patrimoine de tous les consommateurs, un véritable droit à la copie privée.* » On the basis of this, it seems that the opinion does not share the view of *Que choisir* that there is a “right” of consumers to make copies for private purposes, and that it rather agrees with the finding of the Court. What is more, the opinion even states the agreement of its author with the following statement in the Court judgement: “*le législateur n'a pas ainsi entendu investir quiconque d'un droit de réaliser une copie*

privée de toute oeuvre mais a organisé les conditions dans lesquelles la copie d'une oeuvre échappe... au monopole détenu par les auteur, consistant dans le droit exclusif d'autoriser ou d'interdire la reproduction de leurs oeuvre. »

38. However, it would be misleading to believe that this apparent agreement with the Court's finding expresses the essence of the position of Prof. Caron. When one continues reading the text, he can see that what is suggested is not what the Court has found, namely that the absence of a "right to private copy" means that private reproduction should be subject to the "three-step test" and, when it does not pass that test, the owners of rights should be able to apply technological measures in order to exercise their exclusive right of reproduction. What is suggested is just the contrary. What is suggested is that there is a legal basis guaranteeing free private copying for consumers that is even stronger than a mere "right to private copying;" namely that the existence of this possibility or freedom or right, or in any other way it is referred to, is a matter of *public order*.
39. The argumentation for this theory is as follows: *« Afin de résoudre la question, il import tout simplement de se référer au texte même de l'article L. 122-5 du Code de la propriété intellectuelle. Et cette disposition utilise l'expression 'l'auteur ne peut interdire'. Il en résulte qu'il n'appartient pas à l'auteur – ou à l'ayant droit – d'interdire la copie privée. En d'autres termes, une telle interdiction échappe au pouvoir de sa volonté individuelle. Cette exception – comme les autres d'ailleurs – est d'ordre public et seul le législateur peut en aménager l'exercice. Il est donc inutile de rechercher une nature juridique incertaine de cette exception ; il suffit de constater qu'il est impossible de la neutraliser. »*
40. Point 9 of the opinion deals with the question of whether or not the provisions of the Copyright Directive on technological measures are applicable in the given case, and it states that *« dès lors, [l']absence de consécration légale, dans le droit positif, des mesures techniques de protection devrait conduire à les ignorer dans le présent litige... Par conséquent, il faudrait s'en tenir à la règle ci-dessus exposée : le titulaire des droits ne peut interdire des copies privées, y compris par des procédés anti-copies qui ne sont pas consacrés en droit positif. »* The opinion refers to the provisions of Article 6.4 of the Directive concerning the possible intervention mechanisms in order to guarantee that the beneficiaries may enjoy certain exceptions, but it finds that those provisions are not applicable either in the French law in stating that *« l'application directe, indépendamment de toute transposition, de ce texte postulerait que l'article 5.2.b), consacré à la copie privée, soit obligatoire. Or, il n'en est rien puisque cette dernière exception est facultative. »*
41. In spite of this, the opinion deals with the question of the possible application of Article 6.4 of the Directive in the given case. It points out that *« l'article 6.4 de la directive souhaite que la 'reproduction à usage privé ait été rendu possible par les titulaire de droit' » ; mais « cependant, cette possibilité doit être limitée, comme le précise l'article 6.4. à la 'mesure nécessaire pour bénéficier de l'exception'. »* The opinion refers to two possible forms of such limitations: regarding the quality and the number of copies. It adds that in the given case lower quality copies are involved: *« C'est bien la caractéristique de la copie qu'entend réaliser Monsieur Perquin puisqu'il souhaite effectuer une reproduction sans le mode analogique, lequel entraîne une altération inévitable de la qualité. »* In summary, it is stated that *« le verrouillage*

du DVD, par un procédé qui interdit toute copie, jure avec les termes de l'article 6.4, de la directive. »

42. It is in *point 11* that the opinion, for the first time, also refers to article 5.2.b) of the Copyright Directive which requires that, concerning the application of an exception for private copying « *l'application ou la non-application des mesures techniques visées à l'article 6 aux oeuvres ou objets protégés* » must be taken into account. According to the opinion, this only means that « *le montant de la compensation équitable doit être déterminé... en fonction de l'existence des procédés anti-copie.* » This analysis is concluded as follows : « *Sans avoir de réelle incidence sur la résolution du présent litige, cette constatation permet de se convaincre que Monsieur Perquin aurait du acquitter une rémunération pour copie privée moins élevée, du fait de l'existence de mesures techniques de protection.* »
43. Part III. of the opinion bears the following title « *L'existence de l'exception pour copie privée ne méconnaît pas, en l'espèce, le test des trois étapes.* »
44. In *point 13*, it is first stated as follows: « *L'article 5.5 [de la directive européenne] étant une disposition obligatoire pour les Etats membres, son effet direct ne fait pas de doute dans notre droit national puisque le délai de transposition de la directive est expiré.* » However, the opinion, in *point 14* emphasises what it characterises as « *incertitudes sur l'utilisation de test des trois étapes.* » It finds that there are « *incertitudes* » concerning the answer to the question of to whom the three-step test is addressed. Three possibilities are reviewed: first, it is addressed to the Member States; second, it is addressed to the « *juges communautaires* »; third, it is addressed to the « *juge judiciaire national.* » It is in connection with the third possibility that the opinion reminds that « *c'est cette approche qui est retenue dans le projet de loi français de transposition de la directive et certainement la plus conforme aux objectifs du texte.* » In spite of this, this point of the opinion concludes that « *il n'est pas absolument certain que le test puisse être ainsi utilisé par le juge judiciaire dans le cadre d'un tel litige.* »
45. Nevertheless, the opinion, in its last four points – *points 15 to 18* – analyses how the three- step test might be applied in the given case. The analysis is made on the basis of presuming that *M. Perquin* wants to make an analogue copy.
46. The opinion expresses the view that « *la première condition (cas spécial) et la troisième condition (absence de] préjudice aux intérêts légitimes) n'ont pas un grand intérêt en l'espèce* » and, therefore, it is sufficient to deal with them only briefly, and rather « *de "s'attarder davantage sur la seconde condition de l'exploitation normale qui a retenue toute l'attention du tribunal.* »
47. Concerning the first condition, the opinion contains two different statements. The first one is this: « *Il est vrai que la décision du Panel de l'OMC considère qu'est un 'cas spécial' l'exception qui est 'clairement définie', ce qui signifie, selon un commentateur, que 'l'utilisation visée doit avoir une finalité précise' (M. Ficsor,¹⁴ op. cit., p. 129). L'exception pour copie privée, dont la mise en œuvre est subordonnée à plusieurs critères spécifiques (identité de personne entre le copiste et le bénéficiaire*

¹⁴ Le commentateur est l'auteur de cet avis. Le nom a été corrigé dans cette citation ; dans la version originale il contient une erreur typographique (« Ficzor »).

de la copie, exigence d'usage privé, etc.) a donc une finalité précise : permettre la réalisation de copies privées selon des critères définis. »

48. The second statement is this : *« La décision du panel de l'OMC apprécie la condition du 'cas spécial' à l'aune de l'importance quantitative de l'exception en pratique... En l'espèce, force est de constater que l'exception est utilisée pour réaliser une copie analogique, en format VHS. Il s'agit donc véritablement d'un cas spécial, quantitativement rare étant donné le déclin des reproductions analogique. »*
49. As regards the third condition – namely that the exception must not unreasonably prejudice the legitimate interests of the owners of rights – the opinion considers that *« les vidéocassettes étant soumises à la rémunération pour copie privée, il est possible de soutenir que les titulaires de droit ne subissent pas de préjudice injustifié puisqu'ils perçoivent cette redevance. »* Then, it adds : *« En outre, les copies privées analogiques étant devenues rares de nos jours, il est difficile de considérer que leur réalisation cause un préjudice aux titulaires des droits, ce qui amener d'ailleurs à s'interroger sur la condition de l'exploitation normale. »*
50. As indicated above, the opinion mainly concentrates on the analysis of the second step; on the condition that an exception must not conflict with the normal exploitation of the works concerned. It states that *« il est vrai que, comme le précise le tribunal, l'exploitation du film sous forme de DVD relève de son exploitation normale, »* but then stresses that it is possible to have doubts that the exception for private copying that *M. Perquin* wants to benefit from truly constitutes a conflict with a normal exploitation.
51. In explaining the doubts, the opinion first points out that *« il est évident que la copie privée, de surcroît analogique, réalisée par un seul consommateur... ne saurait mettre en péril l'exploitation normale de l'œuvres. »* It adds : *« En effet, il n'est pas prouvé que la réalisation de la copie se traduit par l'absence d'un achat du film sur support DVD. Ainsi, l'existence des mesures technique ne conduit pas forcément le consommateur à acheter un deuxième DVD du même film, faute d'avoir pu le copier. »*
52. The opinion recognizes, however, the possibility of taking into account the impact of the behaviour of the ensemble of consumers. First, it expresses doubts of whether it was justified that the Court undertook such an analysis in a case where the act of reproduction of only one single person is to be considered. Then, in merit, it insists again that only an analogue copy is involved and concludes as follows: *« Or, l'organe de règlement des différends de l'Organisation mondiale de commerce précise que l'atteinte à l'exploitation normale de l'oeuvre ne pourrait résulter que de 'formes d'exploitation qui, avec un certain degré de probabilité et de plausibilité, pourraient revêtir une importance économique ou pratique considérable' (§ 6.180 de la décision), ainsi que concerner une 'pratique d'une ampleur notable' (§ 6.218). Il est évident que les copies privées analogiques ne pourront pas revêtir une telle importance ! Le même décision retient que l'atteinte à l'exploitation normale doit priver les détenteurs de droit 'de gains commerciaux significatifs et tangible' (6.183). La copie privé analogique étant de plus en plus rare, il est certain que sa réalisation ne privera pas les titulaires de droits de tels gains, d'autant plus qu'il ne faut pas considérer qu'une copie équivaut forcément à un DVD qui n'est pas acheté. »*

III. The international norms: there is no “right to private copy;” any exception for private copying is subject to the “three-step test”

The three-step test under Article 9(2) of the Berne Convention

53. It was article 9(2) of the Berne Convention adopted at the 1967 Stockholm revision conference which prescribed, for the first time at the international level, the application of the so-called “three-step test.”
54. The nature of article 9(2) differs from that of the other provisions of the Berne Convention on exceptions and limitations. It does not provide for any specific limitation or exception; it rather fixes the rules for the application of limitations and/or exceptions at the national level.
- 55. The origin of the expression “three-step test” may be found in the way Main Committee I of the 1967 Stockholm revision conference described how to apply paragraph (2). The relevant part of the report reads as follows:**

“If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interest of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment. A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.”¹⁵

56. It is to be noted that, since 1967, the technological nature and the impact of reprographic reproduction – which was chosen for the examples in the report – have changed fundamentally; therefore, these examples, may not be necessarily relevant under the present circumstances. The description in the report of the way paragraph (2) should be applied continues to be valid, however, in respect of the indication of the *structure* of the test; that is, in respect of its being a “*three-step test*.” In this context, it should be stressed that, although the condition that the exception may be allowed only in special cases is mentioned at the end of this description, in fact, it is the first condition to be checked. Not only because it is the first one mentioned in the text of the paragraph, but also because it is obvious that, if it is found that the coverage of a proposed exception is broader than just a special case, it is needless to consider the other two conditions; in such a case, the exception is not allowed under the Convention.

¹⁵ “Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967” (hereinafter: *Stockholm records*), Geneva, 1971, pp 1145-46.

57. *First step: the meaning of “special cases”.* Although neither the text of the Convention nor the report of Main Committee I of the 1967 Stockholm revision conference contains a precise definition of the cases that may be regarded “special,” the proposals and debates about limitations of, and exceptions to, the right of reproduction, as reflected in the records of the conference, as well as the context of the Convention offer sufficient orientation in this respect.
58. On the basis of these sources of interpretation, it may be stated that the concept of “special cases” includes two aspects: first, any exception or limitation must be limited in its coverage; no broad exception or limitation with a general impact is permitted; and, second, it must be also special in the sense that there must be a specific and sound legal-political justification for its introduction. The first aspect is easily understandable and it may hardly be reasonably questioned. It is rather the second aspect which requires some explanation.
59. The text of the existing provisions of the Berne Convention on specific exceptions to the right of reproduction and other rights clearly shows that the revision conferences have always introduced exceptions on the basis of some clearly identifiable public policy reasons.
60. Furthermore, the text and the negotiating history of the Convention indicate that certain specific public and cultural policy purposes not only have served as the basis for the adoption of provisions on exceptions, but also that, under the Convention, they must be kept in mind constantly in the application thereof. This is clearly reflected in the repeatedly used condition in the text of those provisions: “to the extent justified by the purpose”.
61. The sound public policy foundation of the purposes serving as a basis for exceptions and limitations under the Convention seems to require more justification than that policy makers wish to achieve *any kind* of political objective. There is a need for a clear and well-founded political justification, such as freedom of expression, public information, public education and the like; it is not allowed to curtail authors’ rights in an arbitrary way.
62. *Second step: the meaning of “[conflict with] normal exploitation”.* The meaning of the word “exploitation” seems to be quite clear: it is the activity by which the owner of copyright employs his exclusive right to authorize reproduction of his work in order to extract the value of this right. What requires interpretation in this context is rather the adjective “normal.” It may be understood in two different ways: either as an empirical conclusion about what is common in a given context, or as an indication of some normative standards. The records of the Stockholm revision conference, in the form of the following statement, clearly indicate that the latter meaning was taken into account: “all forms of exploiting a work, which have, or *likely to acquire, considerable economic or practical importance*, must be reserved to the authors”[emphasis added].¹⁶
63. It becomes even clearer that the adjective “normal” simply cannot be of a mere descriptive, empirical nature, and that it is rather of a normative one, if the

¹⁶ Ibid, p. 112.

technological developments are taken into account. New means and forms of reproduction keep emerging, and when, at the beginning, they are applied for the first time, certainly it would be difficult to speak about a form of exploitation that might be described – in the empirical sense of the word – as “usual,” “typical” or “ordinary.” At the same time, these new forms of reproduction may be very important for the owners of copyright to extract market value from the right of reproduction, the more so because they usually replace some other, more traditional forms.

64. *Third step: the meaning of “unreasonable prejudice to the legitimate interests of authors”.* The diplomatic conference had taken into account the term “legitimate interests” in its “legal interests” sense (in the sense as it is expressed by Masouyé in his Guide: “all copying is damaging [prejudicial] in some degree”¹⁷) and it was the adverb “not unreasonably” that had been included to offer an appropriate basis for determining the permissible scope of exceptions. This is also reflected by the unchallenged statement of the Chairman of Main Committee I of the Stockholm conference: “Since any exception to the right of reproduction must inevitably prejudice the author’s interests, the Working Group had attempted to limit that prejudice by introducing the term... ‘unreasonable.’”¹⁸
65. *Private reproduction is covered by article 9(1) and (2).* Article 9(1) of the Berne Convention provides for an exclusive right to authorize reproduction “in any manner or form.” Any kind of reproduction is covered by this right. Thus, also private reproduction is covered. Exceptions to the right of reproduction are only permitted if they fulfill the conditions of the “three-step test,” and this also applies for private reproduction.
66. This is confirmed by the negotiating history of article 9. There was a proposal at the Stockholm revision conference to allow new exceptions to the right of reproduction directly in certain cases without subjecting them to the “three-step test,” and private reproduction would have been one of those cases. The conference, however, rejected this proposal. Thus, it is clear that, under the Berne Convention, no general exception for private reproduction is permitted. Any exception to the right of reproduction for such reproduction is only allowed if it corresponds to the “three-step test;” that is, if it may be regarded a special case; if it does not conflict with the normal exploitation of works; and if it does not unreasonably prejudice the legitimate interests of authors and other owners of copyright.
67. All this mean that, under the Berne Convention, there is no such “*right*” of consumers as might be characterized as a “right to private copy.” Consumers may benefit from an *exception* to the right of reproduction for private copying in cases that fulfils the requirement of the “three-step text.”

Article 13 of the TRIPS Agreement on limitations and exceptions

68. The basic provision of the TRIPS Agreement on limitations of, and exceptions to, copyright is contained in its article 13 on “Limitations and Exceptions” which reads as follows:

¹⁷ C. Masouyé: “Guide to the Berne Convention”, WIPO publication No. 615(E), p. 56.

¹⁸ *Stockholm records*, p. 883.

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

69. This is not, however, the only relevant provision of the TRIPS Agreement. Article 9.1 of the Agreement provides that the Members of WTO must comply with articles 1 through 21 of the Berne Convention (except for the provisions on moral rights – article 6*bis* – “and the rights derived therefrom”). This means that all the provisions of the Berne Convention on exceptions and limitations are also applicable under the TRIPS Agreement.

70. In substance, the three conditions provided for in article 13 are identical with the three conditions under Article 9(2) of the Berne Convention. The following slight wording differences do not change this fact:

- Article 9(2) of the Berne Convention does not use the expressions “limitations and exceptions”, but, nevertheless, as discussed above, what it does is that it allows the application of exceptions (free use) and limitations (non-voluntary licenses);
- Article 13 of the TRIPS Agreement provides that Members of WTO must *confine* limitations or exceptions to the cases mentioned in it, if the conditions provided in it are fulfilled; this is completely equal to what Article 9(2) of the Berne Convention does in respect of the exclusive right of reproduction: it authorizes countries party to the Convention to permit – as the analysis above indicates, in the form of exceptions or limitations – reproduction (but only) in the cases mentioned there (and only) if the conditions provided in it are fulfilled;
- Article 9(2) of the Berne Convention speaks about the legitimate interests of the author, while Article 13 of the TRIPS Agreement about the legitimate interests of the right holder; this, however, does not produce any substantive difference, since it is obvious that the Berne Convention applies not only to the rights of authors but also to the rights of other owners of rights.

71. The really substantive difference – and this is quite an important one – is that article 9(2) of the Berne Convention only covers the right of reproduction, while article 13 of the TRIPS Agreement provides for possible limitations and exceptions “to exclusive rights” in general; that is, to all economic rights under articles 1 to 21 of the Berne Convention, and also to the right specifically provided for in the Agreement; namely the right of rental (concerning computer programs and cinematographic works). This difference, however, is without real importance in the present case since the scope and conditions of an exception for private copying are involved.

72. Nevertheless, it may be worthwhile discussing the impact of article 13 of the TRIPS Agreement on the provisions of the Berne Convention on specific exceptions and limitations (incorporated by reference into the TRIPS Agreement). In fact, this seems to be very much worthwhile, since, in article 5 of the Copyright Directive (discussed below), the exception, under article 5.2(b) for private copying also takes the form of a

kind of specific exception, and, thus, the question emerges in the same way: what impact does the three-step test have on this exception.

73. The relationship between specific exceptions and the three-step test was analyzed in the WIPO study published in 1996, on the “Implications of the TRIPS Agreement on Treaties Administered by WIPO.” The study pointed out that Article 13 of the TRIPS Agreement, in connection with the provisions of the Berne Convention on exceptions and limitations, is an interpretation tool. It does not change the applicability of those provisions; at the same time, it guarantees an appropriate interpretation thereof excluding any possibility for a conflict with a normal exploitation of works and for an unreasonable prejudice to the legitimate interests of owners of copyright.
74. This finding of the WIPO study was confirmed by the 1996 diplomatic conference that adopted the WCT and the WPPT. It reached practically the same conclusion in respect of the relationship between the existing provisions of the Berne Convention on exceptions and limitations (included by reference into the WCT) and Article 10(2) of the WCT which, using practically the same language as in Article 13 of the TRIPS Agreement, extended the applicability of the ‘three-step test’ to all economic rights. The conference adopted an agreed statement which contained, *inter alia*, the following sentence: “It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.” This should be seen in the light of the finding of the above-mentioned WIPO study.

***The WCT and the WPPT on exceptions and limitation
in the digital, networked environment;***

75. *The Preamble of the WCT.* The fifth paragraph of the Preamble of the WCT reads as follows: “*Recognizing* the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention...”
76. This reflects the recognition that, in the Berne Convention, there is “a balance between the rights of authors and the larger public interest,” and that there is a need for maintaining this balance “as reflected in the Berne Convention.”
77. In this paragraph, reference is made to “the *rights* of authors and the larger public *interests*” (emphasis added). Certain interests are supposed to be balanced with certain other interests. Therefore, the “balance” about which this paragraph speaks, in fact, is to be achieved between the interests of authors – along with the underlining larger public interest in granting “protection of the rights of authors in their literary and artistic works in a manner as effective[...] as possible” providing by this “an incentive for literary and artistic creation” (as indicated in the preceding paragraphs of the Preamble) – on the one hand, and, on the other hand, the “larger public interests,” that is, all the *other* relevant public interests.
78. This paragraph makes it clear that what is needed is only *maintaining* such a balance since it does exist already in the Berne Convention. Therefore, the balancing requirement must not be regarded as a new principle; it has rather been simply “decompiled” from the present balance of interests as manifested in the existing norms of the Berne Convention. In this context, it is also important to note that the balancing

of interests in the Convention is supposed to be under the control of the basic objective of the Convention; namely, the protection of copyright “in a manner as effective[...] as possible.” The same principle of “balancing” must also prevail in the WCT.

79. Certain aspects of public interests – namely, “education, research and access to information” – are also referred to in the fifth paragraph. It is exactly with respect to these interests that the Berne Convention provides for certain specific limitations and exceptions. The text of the paragraph itself underlines this in clarifying that what is meant is a balance “as reflected in the Berne Convention.” Therefore, it is quite obvious that the diplomatic conference did not intend to introduce any new element into the existing principles of the Berne Convention. (It is to be noted that, as mentioned below, an agreed statement concerning Article 10(2) of the WCT confirms again the principle of “unchanged balance,” since it reads as follows: “It is understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.”)

80. *Article 10 of the WCT and the agreed statement related to it.* Article 10 of the WCT on “Limitations and Exceptions” reads as follows:

“(1) Contracting Parties may, in their national legislation, provide for limitations and exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

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

81. The Diplomatic Conference has adopted the following agreed statement concerning this Article:

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

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

82. The coverage of the entire article 10 of the WCT is similar to that of article 13 of the TRIPS Agreement, in the sense that it also extends to all rights under copyright. However, while the latter consists of one single provision which is applicable for both those rights which have been incorporated from the Berne Convention and the new right – the right of rental – provided for in it, article 10 of the WCT is composed of two paragraphs. The result is, however, the same: the “three-step test” is applicable for exceptions to, and limitations of, all economic rights protected under the WCT, irrespective of whether they are covered by the

provisions of the Berne Convention incorporated by reference or specifically provided by the WCT.

83. *The impact of Article 10(2) of the WCT on the application of the provisions of the Berne Convention concerning exceptions and limitations as incorporated, by reference, into the WCT.* . It is mentioned above that the cumulative effect of the two paragraphs of article 10 of the WCT is similar to the effect of the single provision of TRIPS article 13. From this, it follows that their impact, and, in particular, that of paragraph (2) which addresses exactly this issue, on the application of the provisions of the Berne Convention concerning exceptions and limitations as incorporated into the WCT by article 1(4) thereof, is supposed to be similar. That is, article 10, and, in particular its paragraph (2), is to be regarded as a mere interpretation tool.
84. In the case of article 13 of the TRIPS Agreement, the finding that, for the exceptions and limitations provided for in Berne Convention and incorporated by reference, it does not have either an extending or a restricting effect, and that it is not more than an interpretation tool, is based on the interpretation of that provision of the Agreement. As regards the WCT, the 1996 diplomatic conference itself clarified, through the adoption of an agreed statement concerning article 10(2) of the Treaty, that this interpretation is the adequate one. As quoted above: “It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.”
85. It is important to stress that the agreed statement should be interpreted in the light of the obligation of applying the “three-step test” provided for in article 10. Existing exceptions and limitations may be carried forward to the new environment, but when this happens, it should be guaranteed that they still correspond to the conditions of the “three-step test” also under the new circumstances. This is indispensable due to the fact that digital technology and the global information network dramatically change both the ways works may be normally exploited and the consequences of the application of certain possible exceptions from the viewpoint of the legitimate interests of copyright holders. The result of a new control of the existing exceptions and limitations on the basis of the “three-step test” before carrying them forward may be that they turn out to be inapplicable in the new environment or that, although they may be carried forward, the extent and conditions of their application should be adapted to the new environment. At the same time, certain exceptions may be carried forward without any significant change, and as the agreed statement also clarifies this, the introduction of certain new exceptions or limitations may also be justified specifically in view of the digital environment.

IV. Articles 5.2.b), 5.5 and 6.4 of the Copyright Directive
and their impact on the given case

The impact of the Copyright Directive in France

86. It seems that neither of the parties in the law suite questions the correctness of the following statement in the Court decision concerning the applicability of: « *bien que cette directive ne soit pas encore transposée, il demeure que les dispositions internes doivent être interprétées à sa lumière.* »
87. As quoted in paragraph 32, above, Prof. Caron explicitly states his agreement with this principle, underlining that « *il est de jurisprudence constante que le droit national doit être interprété selon la finalité et à la lumière des directions non encore transposées, mais qui auraient du l'être* », and he refers to the relevant court cases.
88. Thus, since the deadline for the transposition of the Copyright Directive expired two years ago – on 20 December 2002 --- it is unnecessary to further elaborate on this principle. The French copyright law should be interpreted in the light of the provisions of the Directive. It is another matter how this principle is interpreted in the case of the provisions on private copying, in particular concerning the issues of which provisions may be applied at all directly, and which provisions may be regarded to be addressed to national legislators rather than to national courts. These issues are discussed below.
89. There are three provisions of the Copyright Directive which relate to private copying directly. Their analysis may take place step by step and in focusing on each of them separately, but, as it may be seen below, for their appropriate interpretation, it is inevitable to consider them together in their complex interaction.

Article 5.2.b) and Article 5.5

90. Article 5.2.b) as part of the exclusive list of exceptions and limitations to copyright (and related rights) provides as follows:

« [2. Les États membres ont la faculté de prévoir des exceptions ou limitations au droit de reproduction prévu à l'article 2 dans les cas suivants:]

b) lorsqu'il s'agit de reproductions effectuées sur tout support par une personne physique pour un usage privé et à des fins non directement ou indirectement commerciales, à condition que les titulaires de droits reçoivent une compensation équitable qui prend en compte l'application ou la non application des mesures techniques visées à l'article 6 aux œuvres ou objets concernés ; »

91. This provision should be read together with the relevant recitals – recitals (38) and (39) – of the Directive:

« (38) Les États membres doivent être autorisés à prévoir une exception ou une limitation au droit de reproduction pour certains types de reproduction de produits sonores, visuels et audiovisuels à usage privé, avec une compensation équitable. Une telle exception pourrait comporter l'introduction ou le maintien de systèmes de rémunération à dédommager les titulaires de droits du préjudice subi. Même si les disparités existant entre ces systèmes de rémunération gênent le fonctionnement du marché intérieur, elles ne devraient pas, en ce qui concerne la reproduction privée sur support analogique, voir une incidence significative sur le développement de la société de l'information. La confection de copies privées sur support numérique est susceptible d'être plus répandue et d'avoir une incidence économique plus grande. Il y a donc lieu

de tenir dûment compte des différences existant entre copies privées numériques et de analogiques et de faire une distinction entre elles a certains égards.

(39) Lorsqu'il s'agit d'appliquer l'exception ou la limitation pour copie privée, les États membres doivent tenir dûment compte de l'évolution technologique et économique, en particulier pour ce qui concerne la copie privée numérique et les systèmes de rémunération y afférents, lorsque des mesures techniques de protection efficaces sont disponibles. De telles exceptions ou limitations ne doivent faire obstacle ni à l'utilisation de mesures techniques ni à la répression de tout acte de contournement. »

92. Furthermore, recital (35) should also be taken into account since it deals with the concept of “fair compensation” and the impact of the application or non application of technological protection measures thereon:

« (35) Dans le cas de certaines exceptions ou limitations, les titulaires de droits doivent recevoir une compensation équitable afin de les indemniser de manière adéquate pour l'utilisation faite de leurs oeuvres ou autres objets protégés. Lors de la détermination de la forme, des modalités et du niveau éventuel d'une telle compensation équitable, il convient de tenir compte des circonstances propres à chaque cas. Pour évaluer ces circonstances, un critère utile serait le préjudice potentiel subi par les titulaires de droits en raison de l'acte en question. Dans le cas où des titulaires de droits auraient déjà reçu un paiement sous une autre forme, par exemple en tant que partie d'une redevance de licence, un paiement spécifique ou séparé pourrait ne pas être dû. Le niveau de la compensation équitable doit prendre en compte le degré d'utilisation des mesures techniques de protection prévues à la présente directive. Certains cas où le préjudice au titulaire du droit serait minime pourraient ne pas donner naissance à une obligation de paiement. »

93. The interpretation of the above-quoted provisions and recitals in themselves raise complex questions. However, they cannot be interpreted alone, since for their application, also article 5.5 of the Directive must be taken into account. It provides as follows:

« 5. Les exceptions et limitations prévues aux paragraphes 1, 2, 3 et 4 ne sont applicable que dans certains cas spéciaux qui ne portent pas atteinte à l'exploitation normale de l'œuvre ou autre objet protégé ni causent un préjudice injustifié aux intérêts légitimes du titulaire du droit. »

94. It is worthwhile also quoting the recital that relates to this paragraph:

« (44) Lorsque les exceptions et les limitations prévues par la présente directive sont appliquées, ce doit être dans le respect des obligations internationales. Ces exceptions et limitations ne sauraient être appliquées d'une manière qui cause un préjudice aux intérêts légitimes du titulaire de droits ou qui porte atteinte à l'exploitation normale de son oeuvre ou autre objet. Lorsque les États membres prévoient de telles exceptions ou limitations, il y a lieu, en particulier, de tenir dûment compte de l'incidence économique accrue que celles-ci sont susceptibles d'avoir dans le cadre du nouvel environnement électronique. En conséquence, il pourrait être nécessaire de restreindre davantage encore la portée de certaines exceptions ou limitations en ce qui concerne certaines

utilisations nouvelles d'oeuvres protégées par le droit d'auteur ou d'autres objets protégés. »

The applicability of article 5.2.b) in France

95. As mentioned above, there is agreement, in principle, that the French law on copyright should be interpreted in the light of – that is, as much as possible, in accordance with – the provisions of the Copyright Directive.
96. As mentioned in paragraph 33, above, Prof. Caron, in respect of article 5.2.b), expresses the view that, since it is not obligatory under the Directive, it cannot be taken into account by the French courts. According to him, this will only be possible when the implementation of the Directive takes place and this optional provision is transposed into the French copyright law.
97. Prof. Caron is, of course, right when he refers to the optional nature of article 5.2.b) of the Directive. It should, however, be taken into account that an exception for private copying already does exist in the French copyright law. The only question is how to apply this exception taking into account the principle that the copyright law must be interpreted already in accordance with the objectives, and in the light of the provisions, of the Directive.
98. The interpretation of the existing provisions of the French copyright law on the exception for private copying in the light of the Directive requires that (i) as provided in the second part of article 5.2.b), the application or non application of technological measures should be taken into account; and that (ii) the exception should be subject to the criteria of the “three-step test”.
99. As regards, the first aspect – “the application or non-application of technological protection measures” – it is one of the most important objectives of the directive that it should guarantee the protection, exercise and enforcement of copyright (and related rights) in the digital environment. It has become obvious by now that this is only possible if technological protection measures (and electronic rights management information) are applied, and if such measures enjoy effective protection against the acts of circumvention (with an appropriate legal defence line built up already against the acts “preparatory” and “contributory” acts) as this is duly reflected in the provisions of article 6.1 to 3 of the Copyright Directive.
100. It is obvious that, wherever it is possible, the French copyright law must already be interpreted in a way that the application of the existing national norms should be as much in accordance with the above-mentioned objective of the directive and with its provisions serving that objective.
101. It is in the light of this consideration that certain arguments in the appeal and in Prof. Caron’s opinion should be judged. As referred to in paragraph 36, above, the argument is presented that, since an equitable remuneration exists for the time being under the French law for private copying, owners of rights must not apply technological measures that would exclude the possibility of private copying. Under this interpretation, the existence of a right to equitable remuneration (which is the

most reasonable form of “fair compensation”) would mean that the owners of rights would not be allowed to apply technological measures in respect of the acts of private copying covered by the right to equitable remuneration.

102. Article 5.2.b), however, provides for a diametrically opposite solution for avoiding the situation where a right to remuneration were paid but private reproduction would not be allowed, or would only be allowed against the payment of a fee, due to the application of technological protection measures. Under the directive, in such a case, subject to the possible application of article 6.4 (see below), there is no obstacle to apply technological measure, and it is rather the level or the very existence of a right to remuneration that is made dependent on the application or non-application of such measures.
103. That is, even before the implementation of the directive, in France, the existence of a right to remuneration for private copying cannot, and must not, deprive the owners of rights from the possibility of applying technological measure, such as copy-protection systems, excluding the possibility of making copies, including for private purposes. The system of right to remuneration should be adapted to the application of such measures. To the extent that these measures limit the possibility of private copying, the level and/or the scope of application of the remuneration should take this into consideration.

The applicability of article 5.5 by national – and in particular French – courts

104. As regards article 5.5, as discussed in paragraph 45, above, Prof. Caron considers it a reasonable interpretation that it is to be applied by national courts, but, nevertheless, he expresses some doubts whether this is the only adequate interpretation, and he refers to two other possible alternatives; namely that article 5.5 is only addressed to national legislators; or it is addressed to national legislators and to the *juges communautaires*.
105. It seems, however, that Prof. Caron’s doubts are unfounded. Article 5.5 is addressed not only to national legislators, and, where appropriate, to the *juges communautaires*, but also to national courts. This is true *as a minimum* in respect of the second and third steps of the three-step test provided for in article 5.5, for the following reasons.
106. It seems to be obvious that national courts can apply, at least, the second and the third criteria of the three-step test the same way as they are supposed to, and do, apply several similar criteria clearly addressed to national courts. It is sufficient to refer to such criteria provided for in the various provisions of article 5.1 to 3 of the directive that are supposed to be included in national laws and applied by national courts (and applied even before the transposition of the directive where direct applicability of these provisions are possible – and in the case of the majority of them, it is):

- article 5.1: l’absence de « signification économique indépendante » ;
- article 5.3.a) : « justifiés par le but non commercial poursuivi » ;
- article 5.3.c) et f): « dans la mesure justifiée par le but d’information » ;

- article 5.3.d): « conformément aux bons usages et dans la mesure justifiée par le but poursuivi » ; etc.

107. The second and third criteria of the “three-step test” do not differ in nature from the above quoted ones that are to be applied without any doubts whatsoever by national courts:

- « ne portent pas atteinte à l’exploitation normale » ;
- « ni ne causent un préjudice injustifié aux intérêts légitimes du titulaire du droit ».

108. These are also those kinds of criteria that may only be judged on the basis of the circumstances of the concrete cases by national courts. There could hardly be any doubt that the courts are able to judge them in the same way as in the case of the other similar general criteria quoted above (which has been proved in an obvious manner by the court in the present case).

109. Therefore, the question may emerge: if the national court may find, and in some cases, certainly will find, that there is such conflict with a normal exploitation and/or an unreasonable prejudice to the legitimate interests of owners of rights (i) is there any obstacle to apply the consequences of such findings in its decision; (ii) would not it be in conflict with the above-mentioned principle – according to which national legislation should be interpreted in the light of the applicable *acquis communautaires* – if such findings would be disregarded in the court’s decision?. It seems that the answer to question (i) should be “no, none”, and to question (ii), yes, it would be.

110. The recognition of the need for the application of, at least, the second and third criteria of the three-step test by national courts is reflected in the national laws of a number of member states of the European Union which have included these two criteria into their national laws (made by this clear that the courts should apply them in judging concrete cases), such as: Belgium,¹⁹ Czech Republic,²⁰ Estonia,²¹ Hungary,²² Italy,²³ Latvia,²⁴ Lithuania,²⁵ Luxemburg,²⁶ Poland,²⁷ Portugal,²⁸ Slovakia,²⁹ Slovenia,³⁰ Spain.³¹ As indicated above,³² the French draft law for the transposition of the Copyright Directive also contains such a provision. The same kinds of provisions may be found in the laws of certain candidate countries, such those of Bulgaria,³³ Croatia³⁴ or Romania.³⁵

¹⁹ Article 22 of Law on Copyright and Neighboring Rights of June 30, 1994, as amended by Law of August 31, 1998.

²⁰ Article 29 of Law No. 121/2000 on Copyright and Related Rights.

²¹ Article 17 of the Copyright Act of 1992 as amended up to 2000.

²² Article 33 of Act LXXVI of 1999 as amended up to 2003.

²³ Articles 71^{sexies} and 71^{nonies} of the Copyright Law of 1941 as amended up to 2003.

²⁴ Article 18 of the Copyright Law of 2000.

²⁵ Article 19. of the Copyright Law as amended up to 2003.

²⁶ Article 46 of the Copyright Law of 2001 as amended up to 2004.

²⁷ Article 35. of the Act of 1994 on Copyright and Neighboring Rights as amended up to 2004.

²⁸ Article 75 of the Code on Copyright and Related Right of 1998 as amended up to 2004.

²⁹ Article 38 of the Act of 2003 on Copyright and Related Rights.

³⁰ Article 46 of the Copyright and Related Rights Act of 1995 as amended up to 2004.

³¹ Article 40^{bis} of the Consolidated Text of the Law of Intellectual Property

³² See paragraph 45, above.

³³ Article 23 of Law on Copyright and Neighboring Rights of 1993 amended several times up to 2002.

³⁴ Article 80 of the Copyright and Related Rights Act of 1 October, 2003.

³⁵ Article 33 of the Law on copyright and Related Rights of 1996 as amended up to 2004.

111. It is less clear whether the first criterion of the “three-step test” – that an exception or limitation may only cover a “special case” – is only addressed to national legislators and to the *juges communautaires*, or also to national courts. The fact that, in the national laws of the above-mentioned countries, only the second and third criteria are prescribed in the above-mentioned general provisions covering all exceptions and limitations, may be interpreted as a reflection of the intention of the legislators of identifying the special cases. In fact, the provisions containing the second and third criteria, in general, refer to the provisions on the specific cases provided for the respective laws, and state that exceptions and limitations may only applied in those cases, provided, however, that they also correspond to the said two criteria.
112. This does not exclude the possibility for a court to find that, for example, as a result of certain developments having taken place since the adoption of a provision on a given exception, its coverage has become so broad that it may not be regarded a special case anymore. This may happen also in the case of the exception for private copying. However, for the reason discussed below – namely that, in the present case, the application of the second criterion of the three-step test seems to be decisive – the question of whether national courts may also apply the first criterion is not discussed further.
113. It is to be noted, however, that, at least two member states of the European Union – Greece and Malta – reproduces all the three criteria of the three-step test in their national laws confirming in this way the applicability also of the first criterion by the courts. The text of Article 9(3) of the Copyright Act of Malta³⁶ makes it clear that the three-step test is supposed to control the application of the exceptions specifically provided for in the law: “The exceptions and limitations provided for in this Article shall only be applied [first step:] in such particular cases which [second step:] do not conflict with a normal exploitation of the work or other subject matter and [third step:] do not unreasonably prejudice the legitimate interests of the rightholder.” Article 28C of Law No. 2121/1993 of Greece as amended up to 2002 contains a similar provision.”
114. Finally, in Germany, Austria, and the Netherlands, there are concrete examples of national courts applying the three-step test.³⁷

The second paragraph of article 6.4 concerning the “interface” of technological protection measures with exceptions and limitations for private copying

115. With the advent of technological measures for the control of access to and use of works and objects of related right, the question emerged whether these measures

³⁶ Act XIII of 2000 as amended up to 2003.

³⁷ Bundesgerichtshof (German Federal Court of Justice) - Judgment I ZR 118/96 of 25 February 1999 (GRUR 1999, 707); Bundesgerichtshof (German Federal Court of Justice)- Judgment I ZR 255/00 of 11 July 2002 (GRUR 2002, 963); Oberster Gerichtshof (Austrian Supreme Court) 4 Ob 143/94 of January 31, 1995 in *Gerwerblicher Rechtsschutz und Urheberrecht International Teil* 1995, 729-731; Hoge Raad (Dutch Supreme Court), decision no. 13933 of June 22, 1990, “Ziendrogen 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 *Gerechthof Amsterdam* of January 30, 2003, in: *Tijdschrift voor Auteurs-, Media- en Informatierecht* 2003, 94-97.

should allow the continued application of exceptions and limitations recognized by international treaties and national laws.

116. The relevant provisions in the Copyright Directive read as follows:

“Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.

The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.”

117. It is to be noted that, under the first paragraph, if the conditions identified in it are present, it is an obligation for member states to take the measures indicated in the paragraph, while in the case of the exception for private copying this is just an option, not an obligation.

118. The interpretation of the provisions concerning private copying may be assisted by recital (52) which reads as follows:

“When implementing an exception or limitation for private copying in accordance with Article 5(2)(b), Member States should... promote the use of voluntary measures to accommodate achieving the objectives of such exception or limitation. If, within a reasonable period of time, no such voluntary measures to make reproduction for private use possible have been taken, Member States may take measures to enable beneficiaries of the exception or limitation concerned to benefit from it. Voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, as well as measures taken by Member States, do not prevent rightholders from using technological measures which are consistent with the

exceptions or limitations on private copying in national law in accordance with Article 5(2)(b), taking account of the condition of fair compensation under that provision and the possible differentiation between various conditions of use in accordance with Article 5(5), such as controlling the number of reproductions. In order to prevent abuse of such measures, any technological measures applied in their implementation should enjoy legal protection.”

119. If one considers the complex issues of balance of interests concerning the “interface” between technological protection measures and exceptions, it should not be forgotten what rationales, what kinds of public policy considerations serve as a basis for allowing certain exceptions to and limitations on the exclusive rights of owners of copyright. In legal literature, it is quite generally recognized that the categorization worked out by Bernt Hugenholtz³⁸ is quite helpful. As one of the commentators, Anna Lapage, notes: “His views shed a more modern light on copyright and the reasons for limitations thereto. By classifying exceptions according to type, he helps to define them more clearly in order to determine which ones are relevant or obsolete in the digital environment. He holds that these exceptions do not all have the same force, and that in the world of networks, some are no longer justified, while others remain fully valid.”³⁹
120. The by now well-known categorization by Hugenholtz includes three types of exceptions and limitations: first, those justified by the respect for fundamental human rights and freedoms, such as the right to get access to information indispensable for participating in social, political life, or the freedom of expression; second, exceptions in recognition of certain specific public interests, such as the availability of works protected by copyright for educational, research and other similar purposes; third, exceptions introduced as a response to handle the problems of market dysfunctions; that is situations where, for some reasons, the owners of rights are unable to control the use of their works and exercise their rights in a normal way.
121. The provisions of the first paragraph of article 6.4 cover certain exceptions that fall into the first two categories in the categorization proposed by Hugenholtz. The exceptions and limitations for private copying fall into the third category because the owners of rights are unable to control the use of their works and exercise their rights in a normal way.

The question of applicability of the second paragraph of article 6.4 in the French law

122. As mentioned in paragraph 41, above, Prof. Caron is of the view that, in the absence of their transposition, for time being, the provisions of article 6.4, and in particular its second paragraph concerning the “interface” between technological measures and the exception for private copying, is not applicable in French law. According to him this is so since the paragraph relates to article 5.2.b) which is optional and, due to its optional nature, is not applicable in the French law without the transposition of the directive.

³⁸ B. Hugenholtz (ed.): “The Future of Copyright in a Digital Environment”, Kluwer, 1996, pp. 94 et seq.

³⁹ A. Lapage: “Overview of Exceptions and Limitations to Copyright in the Digital Environment”, in *Copyright Bulletin*, UNESCO publication, March 2003, p. 3.

123. It seems that the second paragraph of article 6.4 truly is not applicable yet in the French law before the transposition of the Directive, but it appears that for different reasons.
124. As discussed above, although article 5.2.b) is optional under the Directive, its optional nature is irrelevant from the viewpoint of the French law which does provide for exceptions and limitation for private copying (and since they are applied, they should be applied in accordance with the objectives, and in the light of the provisions, of the Directive). Thus, the optional nature of article 5.2.b) is independent of the equally optional second paragraph of Article 6.4.
125. There is, however, another reason for which these provisions are not applicable yet. The reason is that the second paragraph itself is optional. It is not an obligation to apply it in order to guarantee the enjoyment of an exception for private purposes. Even where national legislators wish to apply such an exception, they cannot do so without adopting specific norms concerning the “appropriate measures” of intervention. In France, these kinds of optional measures are under consideration, but they have not been adopted yet. Thus, it is impossible to apply the second paragraph of article 6.4. However, for the reasons discussed below, this hardly create any possible conflict with the objectives of the directive in a case as the one to be judged in the present law suit.

***The application of articles 5.2.b) and 5.5 and – conditionally –
the second paragraph of article 6.4 of the directive***

126. After the analysis of the relevant provisions of the Copyright Directive it is time now to review how, and with what results, they may be applied in the present law suite. Although Prof. Caron is of the view that article 6.4 is not applicable yet in the French law, he still outlines, in paragraph 46, above, what kind of impact it might have if it were, nevertheless, applied (which, as indicated above, may become the case as soon as the transposition of the directive is completed). Such extension of the analysis seems to be justified. This opinion, in principle, also follows this approach (however only in a conditional manner since, as discussed below, it reaches the conclusion that, in the given case, the three-step test does not allow the application of exception for private copying).
127. It seems that the three questions should be answered one after the other, in the following order:
- is it true that the exception for private copying is a matter of public order under the French law which thus would not allow the restriction of its enjoyment by technological measures?
 - if this is not the case, would the three-step test allow the extension of the exception for private copying to such copying of audiovisual works embodied in DVD, in spite of the application of technological measures (copy protection) by the owners of rights?
 - if the exception could be extended in this way, how may its exercise be guaranteed in view of the application of technological measures?

128. In addressing the first question, it is to be recalled that the reason for which Prof. Caron is of the view that the exception of private copying is a matter of public order not allowing any exclusion or restriction of its applicability by technological (copy-protection) measures may be found in the wording of the provision on this exception. As mentioned in paragraph 40, above, Prof. Caron points out that articles L.122-5.2 and L.211-3.2 of the Intellectual Property Code uses the expression “l’auteur ne peut interdire”. He interprets this as an absolute prohibition of the authors to prohibit private copying which may only be changed through direct legislative intervention.
129. It seems, however, that there is no reason for such a far-reaching interpretation of the wording of the above-mentioned provisions. This is only just of the possible ways of providing exceptions to exclusive rights of authorization or prohibition. An exception to such a right, in fact, means that in the given case the author exceptionally cannot exercise its right of prohibition. Articles L.122-5.2 and L.211-3.2 simply provides for exceptions without transferring them, at the same time, to the specific dimension of public order. There is, therefore, no obstacle to the interpretation of those provisions in accordance with the objectives, and in the light of the provisions of, the Copyright Directive – which, as discussed above, on the basis of the application of article 5.2.b) and article 5.5 – raises the possibility of reducing the scope of applicability of such exceptions.
130. Thus, it is fully justified to ask and try to answer the second question mentioned above. For the possible answer, it is worthwhile reverting to the finding indicated above, that, under the categorization proposed by Prof. Hugenholtz, it is the third category – exceptions in view of market dysfunction – that the exceptions for private copying may fit.
131. This is so since the reason for which such exceptions were allowed was a typical “market failure” situation where it was impossible to monitor, authorize or prohibit acts of reproduction in the private sphere. As long as such acts were performed in certain traditional ways (such as copying by handwriting or by typewriters), they did not create any conflicts with any normal exploitation of works and did not unreasonably prejudice the legitimate interests of owners of rights (in fact, they were suitable to be justified even by the mere *de minimis* principle). The advent of perfect, rapid and relatively cheap copying machines changed the situation; their use led to so much widespread copying that it became indispensable to reduce the growing prejudice to the legitimate interests of owners of rights at least to a reasonable level through the recognition of a right to remuneration in the form of levies on recording machines and material (which, from the viewpoint of the exclusive right of reproduction, is to be regarded, instead of an exception, just a limitation, covered by the obligation of granting national treatment no matter how it is referred to – as a right to remuneration, as a limitation to the exclusive right, as a “fair compensation” or in any other way). This kind of right to remuneration was – and still is – based on the recognition of a market failure consisting in the impossibility of monitoring and controlling, through authorization or prohibition, the acts of private reproduction.
132. Digital technology has changed the situation in two aspects. On the one hand, with the constant improvement of the quality of copies, with the growing ease of reproduction, and then with the possibility of making copies also through the Internet, the level of prejudice continued growing in an accelerated way and began

reaching even the level of a conflict both with certain traditional forms of exploitation of works (such as sale and rental of tangible copies) as well as with some newly emerging ones (such as the authorized making available of works through the Internet). All this seemed to take already the form of a complete market collapse rather than just some isolated market failures. The phonographic industry was the first victim of the spectacularly spreading Internet piracy through what had been baptized euphemistically as “file sharing”. However, with the constant broadening of storage, compression technologies and transmission capacities, the plague is spreading quickly to audiovisual works.

133. On the other hand, the same technology that has created trends towards the drying out of the sources of creativity and production, has also made available the means of fighting against this trend in the form of technological protection measures (along with digital rights management information). In fact, through such measures – provided that they enjoy effective protection the way it is prescribed in article 11 of the WCT and, in more detailed manner, in article 6(1) to (3) of the Copyright Directive – not only the looming market collapse may be prevented but also the traditional market failure situations may be eliminated or at least mitigated.
134. It is in this context that it is necessary to analyze what possible rationale may exist for a private copying exception other than the recognition of a market failure. It is to be noted that free availability of copies of works to private persons may be justified in specific cases falling in the first two categories of exceptions mentioned above (for example, for educational, research and similar other purposes, or for use by handicapped people). They are taken care of those exceptions – both traditional ones and new ones introduced in response to the changing conditions in the digital, networked environment.
135. In the situation which is considered in the present lawsuit, however, no such specific cases may be identified. None of the parties in the dispute has challenged the fact that the purpose of preparing copies of films embodied in DVDs is private entertainment within the usual circle that may still be regarded as “private.” It may hardly be denied that in the disputed case the purpose of reproduction would be merely greater convenience. Prof. Caron’s opinion refers to the purpose of private copies made by *M. Perquin* that he want to give them to his parents who do not have a DVD player, but only an analogue machine. That is, by making such a copy, the convenience of his parents is increased; if they wish to watch the film, they do not have to visit their son; they can watch it at home, although in a somewhat lower quality.
136. If the question is making digital private copies on the basis of the DVD, even the increase of convenience is marginal, and certainly may have only an even more limited weight when it comes to balancing various interests. This is so, since it means – if the example referred to in the appeal and in Prof. Caron’s opinion is taken as a basis – nothing more than that the members of the plaintiff’s family may see the film more or less at the same time at different places, without coming together for this purpose. Without “private copies”, they either would have to come together or to wait for the time when the DVD is lent to them.

137. These are at worst the interests of consumers that may be “endangered” by a copy-protection system. The interests of owners of rights who wish to protect films in DVD format through technological measures are more complex.
138. At first sight, it may seem that the conflict with the normal exploitation of audiovisual works in DVD format is more evident or stronger if digital private copies are made than when analogue ones is made.
139. From this viewpoint, not only the number of private copies should be taken into account – which alone may have a significant impact on the market of DVDs – but all the possible consequences of the availability of digital copies the use of which cannot be controlled any more by the owners of rights. The loss of control by copy-protection measures, under the present circumstances and in the present stage of development of technologies, may undermine the market for works in DVD format very quickly. Such copies, by definition would be in possession of a great number of persons, inevitably including pirates who, due to the availability of cheap, easy and perfect reproduction equipment would be able to inundate the market with illicit products. And this would only be one of the ways of destroying the market of lawful copies. The availability of copies for illegal distribution through the Internet would have at least as much devastating effect. This is reality that cannot and must not be disregarded when a court applies – since, for the reasons discussed above, it should apply – the three-step test, and in particular its second criterion: the absence of any conflict with any normal exploitation. Here it is clear that, by opening the system for digital private copying of DVDs, would lead to multiple conflicts with important ways of exploiting works in such format.
140. Thus the court was totally right when it (i) applied the three-step test to the question of the application of the exception for private copying of DVDs; and (ii) it found that it would conflict with the normal exploitation of audiovisual works in this format, and thus (iii) the exception is not applicable in this case.
141. It is to be noted that the situation would not be qualitatively different if, through efficient technological measures, it could be achieved that only one analogue copy could be made on the basis of a digital private copy. This is so, since, in the current stage of development, there is no adequate solution to the problem of “analogue hole”. It means that, as soon as on the basis of a digital copy, an analogue copy is obtained the technical measures blocking the possibility of further copying and other uses of the work is neutralized, and, when the work is digitized again on the basis of the analogue copy (which is also quite easy, and now these switches of formats do not necessarily go along with significant decrease of quality) it becomes available for illegal uses without any further technological protection.
142. Having discussed this, it seems unnecessary to elaborate on the fact that there would be no real difference if private reproduction of DVDs would be allowed in analogue format. There would be no real difference since if, in the case of digital private copies with built-in measures blocking further digital copying, the danger of conflict with normal exploitation emerges again due to the “digital hole”, the same danger would obviously exist where analogue private copies were allowed, since such copies with a single switch may resurface again as digital copies with the same possible detrimental consequences.

143. Since, as the court has found, there is a conflict with a normal exploitation – or even with different possible ways of normal exploitation – of the works in DVD format, there is no need to proceed to the third criterion of the “three-step test”. However, it seems obvious that free private copying of DVDs would fail to fulfil that criterion either; it would not be possible to find that it does not unreasonably prejudice the legitimate interests of owners of rights. This is so since it is an important legitimate interest of owners of rights that free private copying should not open the floodgate to uncontrollable mass use of their works. What may be compared with this as the interests of the buyers of DVDs is nothing more than better convenience of using the work (which they and their private circle can use in any way). It could hardly be acceptable to say that such vital legitimate interests of owners of rights should be disregarded for mere convenience of owners of copies. It would lead quite obviously to unreasonable prejudice. (Not mentioning that, as a “collateral damage,” it would also lead to disadvantages of consumers, since as a result, the distribution of popular new films in DVD format would be delayed quite importantly by the owners of right.)
144. Since it does not seem justified to extend the application of the exceptions for private copying to copy-protected DVDs, the applicability of an optional intervention mechanism under the second paragraph of article 6.4 of the Directive, for the time being, is excluded. For the time being, since with the development of technology, solutions may be found to the problems outlined above – perhaps also to the so far thorny problem of the “analogue hole”. If and when it happens, there will be a new situation where the “three-step test” may produce other results, and where, as a consequence, even the application of the second paragraph of article 6.4 might be justified. So far, however, we are no such situation.

V. Conclusions

- (a) There is no such thing as a “right to private copy” either under the international norms, or under the *acquis communautaire*. Exceptions for private copying may only be applied where, and to the extent that, they fulfil the criteria of the three-step test provided for in article 9(2) of the Berne Convention, article 13 of the TRIPS Agreement, Article 10 of the WCT and article 5.5 of the Copyright Directive.
- (b) The deadline for the transposition of the Copyright Directive expired on 20 December 2002. Therefore, even if it has not been transposed yet into the French copyright law, the law should already be interpreted and applied in accordance with the objectives, and in the light of the provisions, of the Directive.
- (c) The provisions of the French copyright law on private copying provide for an exception, subject, at least in certain cases, to the payment of an equitable remuneration. These provisions should *not* be regarded as part of “public order” in the sense that their scope of application must not change, even where the need for changes follows from their interpretation of the law in accordance with the objectives, and in the light of the provisions, of the Directive. The principle referred to in point (b), above, should be fully applied also to those provisions of the law.

- (d) Although exceptions for private copying under article 5.2.b) of the Directive is optional, its optional nature is irrelevant from the viewpoint of the French law, since there are such exceptions in the law. Since this is the case, the provisions of the law on such exceptions should be interpreted in harmony with the principle mentioned in point (b) above.
- (e) Article 5.2.b) of the Directive provides that, in the application of exceptions for private copying along with a “fair compensation”, the application or non application of technological protection measures must be taken into account. This means that it must not be an obstacle to the application of copy-protection measures on DVDs that exclude the possibility of private copying. Nobody can claim that, since he has paid a levy on the recording equipment or material, he is authorized to make a private copy and to demand that the copy-protection measure render this possible. Under the Directive, the “fair compensation” – of which “the right to remuneration” under the French law is a form – should be adapted to the application of technological protection measures.
- (f) The three-step test under article 5.5 of the Directive – or at least the second and third criteria of the test – is to be applied not only by national legislators and by the *juges communautaires*, but also by national courts, thus, in the present case, also by the French court.
- (g) The opening of the copy-protection systems applied on DVDs, *inter alia* due to the so far unsolved problem of “analogue hole”, would lead to a serious conflict with at least two forms of normal exploitation of films that under the present circumstances are indispensable for the recouping the creative and financial investments: (i) reproduction and distribution of copies (in particular in DVD format) and (ii) authorized making available of copies through the Internet. These are fundamental interests of the owners of rights (interests which are in due harmony with the public interest of guaranteeing appropriate conditions for the creation, production and distribution to the public of such works), while the interest of the lawful owners of copies is only better convenience for using the films embodied in the DVDs.
- (h) Since free private copying of copy-protected DVDs would conflict with normal exploitations of the films embodied in them (and, as a matter of fact, would also seriously and unreasonably prejudice the legitimate interests of owners of rights), the exception for private copying should not be applied for such copying. This is the case irrespective of the number of possible private copies and irrespective of whether the copies are in digital or in analogue format (due to the availability of a great number of copies which then – after being transferred through the “analogue hole” with the simultaneous elimination of control by the owners of rights – would serve as a basis for mass unauthorized use also in digital format).
- (i) The second paragraph of article 6.4 on possible intervention mechanisms is not applicable yet under the French law since it requires implementing legislation which has not been adopted yet. However, even if there were an intervention mechanism in place, it could not cover private copying of DVDs (at least for the time being) since, for the reasons mentioned above, the exception for private copying should not extend to such copying.

- (j) With further technological developments (as a result of which the problem of “analogue hole” might also be solved), a new situation may emerge where certain forms of private copying of DVDs might be allowed, along with the possible application of the second sentence of article 6.4 of the Directive. So far, however, there no such situation yet.
- (k) The Court has duly interpreted the French copyright law in accordance with the objectives, and in the light of the provisions, of the Directive, and its judgement is in full harmony not only with the French law, but also with the Directive and with the relevant international norms (in particular with article 9(2) of the Berne Convention, article 13 of the TRIPS Agreement and article 10 of the WCT).

Budapest, 20 December 2004.

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**3. számú melléklet a Szerzői Jogi Szakértő Testület 17/06/1. számú szakértői
véleményéhez**

(a melléklet a R.I.D.A.-ban megjelent tanulmány elektronikus változatban meglevő kéziratát tartalmazza; a szövegbe beszúrva, nagyobb méretű betűkkel az van feltüntetve – az

idézhetőség érdekében –, hogy a tanulmány mely részei a folyóirat említett számának melyik oldalán található (annak, hogy csak páratlan oldalak szerepelnek az az oka, hogy a R.I.D.A. cikkei párhuzamosan három nyelven jelennek meg))

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Page 111 HOW MUCH OF WHAT ? **THE “THREE-STEP TEST” AND ITS APPLICATION** *IN TWO RECENT WTO DISPUTE SETTLEMENT CASES*

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The Captain to the engine-room: How much?
The engine-room to the Captain: Thirty.
The Captain to the engine-room: Thirty of what?
The engine-room to the Captain: How much of what?

(Central European joke on the way
economists manage national economy)

I. INTRODUCTION

The “three-step test” “invented” in 1967 at the Stockholm revision conference and provided for in Article 9(2) of the Berne Convention **Page 113** to determine the conditions of exceptions to, and limitations of, authors’ exclusive *right of reproduction* has made a spectacular “carrier” recently.

In 1994, the TRIPS Agreement, through its Article 13, extended the application of the “three-step test” to *all economic rights under copyright* (although not to related rights). Furthermore, Article 30 of the Agreement on exceptions to *rights conferred by a patent* may be regarded as an adapted version of this test, and even in Article 17 of the Agreement on exceptions to *rights conferred by a trademark*, there are certain elements – although less than in the case of Article 30 -- that seem to have been inspired by Article 9(2) of the Berne Convention. {1}

In 1996, The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) made a further step in extending the scope of application of the “three-step test”. Under Article 10 of the WCT and Article 16 of the WPPT, it is applicable not only to all economic rights of authors but also to all economic rights of performers and producers of phonograms.

Recently, two WTO panel have interpreted the three conditions – “steps” – included in the “three-step test”. Interestingly enough, this took place first in a patent case; namely in case *No WT/DS114* dealing with a complaint of the European Communities against Canada. Then an analysis was made in the **Page 115** original field of application of this test, in a copyright case – so far the most significant one in this field in the history of WTO dispute settlement cases – namely in case *No WT/DS160* on a complaint of the European Communities against the United States.

This article, describes briefly the way the “three-step test” is regulated in Article 9(2) of the Berne Convention (II); it discusses the impact of its scope of extension by the TRIPS Agreement (III) and by the WCT and the WPPT (IV); then it analyses the findings in the above-mentioned patent case (V) and copyright case (VI); and, finally, it offers some conclusions (VII).

II. THE “THREE-STEP TEST” UNDER THE BERNE CONVENTION

1. Suggestions of the Study Group to prepare the Stockholm revision conference. The Study Group set up jointly by the Swedish government and BIRPI to prepare the 1967 Stockholm revision conference, in its 1964 report, first, proposed the inclusion of a general provision on the right of reproduction into the Berne Convention and, then, it immediately indicated that “if a provision on the subject was to be incorporated in the text of the Convention, a **Page 117** satisfactory formula would have to be found for the inevitable exceptions to this right.”{2}

The following principles were proposed by the Study Group for trying to find such a formula: “[T]he Study Group observed that, on the one hand, it was obvious that all forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance must in principle be reserved to the authors; exceptions that might restrict the possibilities open to authors in these respects were unacceptable. On the other hand, it should not be forgotten that domestic laws already contained a series of exceptions in favour of various public and cultural interests and that it would be vain to suppose that countries would be ready at this stage to abolish these exceptions to any appreciable extent.”{3}

It was suggested by the Study Group that countries of the Berne Union be allowed to “limit the recognition and the exercising of that right, for specified purposes and on the condition that these purposes should not enter into economic competition with these works”.{4} As regards the notion of “specified purposes”, it further underlined that “[e]xceptions should only be made for clearly specified purposes, e.g., private use, the composer's need for texts, the interests of the blind. Exceptions for no specified purpose, on the other hand, are not permitted.”{5} The Study Group also indicated what it meant under the condition that the limitations on the recognition and exercise **Page 119** of the right of reproduction “should not enter into economic competition with these works”. It pointed out that “all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors.”{6}

The Study Group considered the option of proposing an exhaustive list of possible exceptions. This idea was, however, abandoned. The Study Group found that such a list might have to be

very long and still not necessarily complete. It was, however, an even more important argument against the idea of trying to work out and adopt an exhaustive list that, while so far each country only applied some of the exceptions in different variants, the exhaustive list might encourage all countries of the Union to apply all of them, and the Study Group found that this may “abolish the right of reproduction”.{7}

Nevertheless, for the interpretation of the “three-step test”, it seems worthwhile noting what kinds of cases had been considered for inclusion into a possible exhaustive list, before the idea of such a list was abandoned. The basic proposal, when it referred, to the just mentioned considerations in the Study Group, listed the existing exceptions in a footnote as follows: “The exceptions most frequently recognized in domestic laws seem to relate to the following works or methods of use: (1) public speeches; (2) quotations; (3) school books and chrestomathies; (4) newspaper articles; (5) reporting **Page 121** current events; (6) ephemeral recordings; (7) private use; (8) reproduction by photocopying in libraries; (9) reproduction in special characters for the use of the blind; (10) sound recordings of literary works for the use of the blind; (11) texts of songs; (12) sculptures on permanent display in public places, etc.; (13) artistic works used as a background in films and television programmes; (14) reproduction in the interests of public safety.(4).”{8}

2. Proposals of the Committee of Governmental Experts. The Committee of Governmental Experts, convened by the Director of BIRPI in 1965, pointed out the crucial role of an appropriate regulation of exceptions in case the revision conference wanted to explicitly recognize a reproduction right. It stated as follows: “While admitting that it was illogical that the Convention should not mention the recognition of the right of reproduction, the Committee was of the opinion that the main difficulty was to find a formula which would allow of exceptions, bearing in mind the exceptions already existing in many domestic laws.”{9}

The Committee of Governmental Experts established a Working Group to solve this problem, and then accepted the suggestion of that Group to propose draft provisions that would explicitly recognize the reproduction right, and would allow limitations or exceptions for “(a) private use; (b) for judicial or administrative purposes;” and “(c) in certain particular cases where the reproduction is not contrary to the legitimate interests of the author and does **Page 123** not conflict with a normal exploitation of the work”.{10} This proposal reflected that the Committee had accepted the position of the Study Group that a supposedly lengthy exhaustive list of exceptions would not be appropriate, but also that the Committee, nevertheless, wanted to identify what it believed to be the most important specific exceptions.

This proposal of the Committee had been included into the programme of the conference.

3. Debate in Main Committee I and the adoption of Article 9(2). During the debate in Main Committee I of the Stockholm conference, a number of amendments to the above-mentioned draft text were submitted. Some of them were aimed at narrowing the permissible exceptions (such as the amendments proposed by the French and German delegations),{11} while others sought to extend the scope of such exceptions (such as the proposals submitted by the Indian and Romanian delegations).{12}

It was finally the proposal of the United Kingdom that rendered it possible for Main Committee I to handle the complex situation having emerged as a result of the numerous and frequently conflicting amendments. It consisted of covering all permissible exceptions in a single provision leaving out (a) and (b) of the draft included in the programme (concerning private copying and reproduction for judicial or administrative purposes). According to the **Page 125** proposal, it would have been allowed to provide for limitations and exceptions “in certain special cases where the reproduction does not unreasonably prejudice the legitimate interests of the author and does not conflict with a normal exploitation of the work”.{13}

This proposal was agreed upon in substance by Main Committee I, and then the Committee approved the final text of Article 9(2) prepared by a Working Group on the basis of this agreement: “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works [that is, literary and artistic works] in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

Main Committee I offered the following frequently quoted guidance in its report concerning the order of, and relationship between, the conditions fixed in Article 9(2):

“The Committee also adopted a proposal by the Drafting Committee that the second condition should be placed before the first, as this would afford a more logical order for the interpretation of the rule. If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a **Page 127** compulsory license, or to provide for use without payment. A practical example may be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.”{14}

This statement in the report seems to be still valid concerning the *structure* of the conditions fixed in Article 9(2). It indicates the three subsequent steps that must be applied for any proposed exception or limitation in order to find out whether or not it is in harmony with the Convention; and, it was due to this explanation of the Committee that the test included in Article 9(2) was baptised the “three-step test”. It should be noted, however, that the concrete examples about different cases of photocopying, due to important new developments in the field of reprographic reproduction, may not be considered necessarily suitable any more.

4. Interpretation of Article 9(2): the meaning of “special cases”. Although neither the text of the Convention nor the report of Main Committee I contains a precise definition on what cases may be regarded “special”, the proposals and debates about limitations of, and exceptions to, **Page 129** the right of reproduction, as reflected in the records of the Stockholm conference, as well as the context of the Convention (in particular, the specific

provisions on exceptions to the right of reproduction) offer sufficient orientation in this respect.

All these factors indicate that commentators, like Ricketson, are right to state that the concept of “special cases” includes two aspects: “First, the use in question must be for a quite specific purpose: a broad kind of exemption would not be justified. Secondly, there must be something ‘special’ about this purpose, ‘special’ here meaning that it is justified by some clear reason of public policy or some other exceptional circumstance.”{15} The first aspect is easily understandable and it may hardly be reasonably questioned. As the arguments put forward in the above-mentioned WTO copyright case – and discussed below – reflect this, it is rather the second aspect which requires explanation.

If one looks at the text of the provisions of the Berne Convention on special cases of exceptions to the right of reproduction and other rights, one may find that the revision conferences have always introduced exceptions on the basis of, as Ricketson has put it, some clearly identified reasons of “public policy”; as the basic proposal submitted to the Stockholm conference, in referring to the suggestions of the Study Group, underlined it, in consideration of “various public and cultural interests” {16} The text and the negotiating **Page 131** history of the Convention show that specific public and cultural policy purposes not only have served for the adoption of these provisions, but also that they must be kept in mind constantly in the application thereof.

Some examples for this:

Article 10(1) provides, *inter alia*, that free quotations are only possible if “*their extent does not exceed that justified by the purpose*”[emphasis added]. As Claude Masouyé authoritative Guide to the Berne Convention underlies it, this purpose is: ‘either to illustrate a theme or defend some proposition or to describe or criticize the work quoted from..;’ {17} that is, a clear public policy purpose of guaranteeing free speech.

Article 10(2) allows the “utilization...of literary and artistic works by way of illustration in publications, broadcast or sound or visual recordings for teaching, provided such utilization is compatible with fair practice” “*to the extent justified by the purpose*”[emphasis added]. Here illustration for teaching purposes -- and in broader terms, promoting education by some reasonable exceptions – is the public policy purpose.

Public information is the clear purpose in the case of Article 2(4) on the possibility of excluding official texts of a legislative, administrative and legal nature, and official translations thereof and Article 10bis(1) and (2) on exceptions for the reproduction by the press, the broadcasting or the **Page 133** communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character under certain conditions, on the one hand, and, on the other hand, for reproduction and making available to the public of works seen or heard in the course of events for reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire. In the case of Article 10bis(2), it is explicitly stated that this is only allowed “*to the extent justified by the informatory purpose*” [emphasis added].

It would not be possible to continue analyzing in this article all the special cases covered by exceptions provided for by the Berne Convention in detail. However, it seems that in all

those cases it is possible to identify certain specific public and cultural policy purposes serving as a basis for their adoption (and the same may be said about the exceptions mentioned in the footnote to the basic proposal submitted to the Stockholm revision conference as quoted above).

The public policy foundation of the purposes serving as a basis for special cases covered by exceptions under the Convention seems to require more justification than that policy makers wish to achieve any kind of political objective. There is a need for a clear and sound political justification, such as freedom of expression, public information, public education; it is not allowed to curtail authors' rights in an arbitrary way.

Page 135 **5. Interpretation of Article 9(2): the meaning of “[conflict with] normal exploitation”.** The meaning of the word “exploitation” seems to be quite clear: it means the activity by which the owner of copyright employs his exclusive right to authorize reproduction of his work in order to extract the value of this right. What requires interpretation in this context is rather the adjective “normal”. It may be understood in two different ways: either as a reference to an empirical conclusion about what is common in a given context or in a given community, or an indication of some normative standards.

The records of the Stockholm revision conference grant appropriate assistance for finding out which of these two possible meanings were taken into account during the preparatory work and at the conference.

It seems to be particularly relevant what is included in the 1964 report of the Study Group set up for the preparation of the revision of the Berne Convention, as referred to in the annotated basic proposal submitted to the revision conference (document S/1). The Committee of Governmental Experts which adopted, in 1965, the draft text of Article 9, as included in the basic proposal (already containing the condition ‘does not conflict with a normal exploitation of the work’), based its discussions on the above-mentioned report of the Study Group.

Page 137 According to the annotations to the basic proposal, “the Study Group observed that... it was obvious that *all forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance* must in principle be reserved to the authors; exceptions that might restrict the possibilities open to authors in these respects were unacceptable” [emphasis added].{18} The annotations to the basic proposal quoted the text proposed by the Study Group in which the embryonic form of Article 9(2) appears as follows: "However, it shall be a matter for legislation in the countries of the Union, having regard to the provisions of this Convention, to limit the recognition and the exercising of (the right of reproduction) for specified purposes and on the condition that these purposes *should not enter into economic competition with these works*” [emphasis added].{19}

The context of the basic proposal indicates that the exploitation-oriented condition included in it (“does not conflict with a normal exploitation of the work”), which then became part of the final text of Article 9(2) of the Convention, has its roots in, and has practically the same objective as that of, the above-quoted exploitation-oriented condition in the proposal of the Study Group. There is no indication to the contrary in the records of the revision conference.

It follows from this that, in Article 9(2), the term “normal exploitation” does not refer to some mere empirical findings on how owners of rights usually exploit their works (and, of course, their rights in the works); it is rather a normative condition: an exception “conflict(s) with a normal exploitation of **Page 139** the work” if it covers any form of exploitation which has, or is likely to acquire, so considerable importance that those who make use of it may enter into economic competition with the exercise of the author’s right in the work (in other words, which may undermine the exploitation of the work by the author – or his successor-in-title -- in the market).

There is one more reason for which it is quite clear that the adjective “normal” is not of a mere descriptive, empirical nature here, but rather of a normative one. The reason is that, with technological developments, new manners and forms of reproduction keep emerging (which are all covered by the general provision of Article 9(2)), and when, at the beginning, they are applied for the first time, certainly it would be difficult to speak about a form of exploitation that might be described – in the empirical sense of the word – as “usual”, “typical” or “ordinary”. At the same time, these new forms of reproduction may be very much important for the owners of copyright to extract market value from the right of reproduction in their works, the more so because they may replace some other, more traditional forms. The fact that such new emerging forms of reproduction are also covered by the requirement of not creating any conflict with any normal exploitation of works is also underlined by the above-quoted principle referred to in the annotated basic proposal: “all forms of exploiting a work, which have, or *likely to acquire, considerable economic or practical importance*, must be reserved to the authors.”[emphasis added]{20}

Page 141 6. Interpretation of Article 9(2): the meaning of “unreasonable prejudice to the legitimate interests of authors”. No direct and explicit guidance may be found in the text of the Convention or in the records of the Stockholm revision conference concerning this concept.

If we take – for the reasons discussed below, somewhat reluctantly -- the dictionary definitions, we can see that “legitimate” (which seems to be the key adjective in this expression) is commonly defined as follows: (a) conformable to, sanctioned or authorized by, law or principle; lawful, justifiable; proper; (b) normal; regular; conformable to a recognized type. {21}

Here, the first definition in point (a) seems to be relevant. That definition, however, may also be understood in two different ways. If the “conformable to, sanctioned or authorized, by law...; lawful...” variant is taken as a basis, it suggests, in the context of this condition of Article 9(2), a “legal interest”; in other words, the interest of the owner of copyright to enjoy and exercise the right of reproduction provided for in paragraph (1) of the same Article as fully as possible. If this meaning is taken into account, the only possible basis for exceptions and limitations is that, although the owner of right has such a legitimate interest, it may still be neglected in cases where the prejudice does not reach an unreasonable level. If, however, the “conformable to, sanctioned... by... principle;... justifiable; proper” variant is accepted, the term “legitimate interests” may be understood to mean only those interests that are **Page 143** “justifiable” in the sense that they are supported by social norms and relevant public policies. (This is the sense of the adjective “legitimate” that frequently appears in statements such as “X does not have any legitimate interest to do this”.)

The condition included in the basic proposal submitted by the Committee of Governmental Experts in 1965, according to which an act of reproduction (covered by an exception or limitation) “[must not be] contrary to the legitimate interests of the author”{22} corresponded rather to the above-indicated second, non-legal, normative meaning of “legitimacy”. However, the delegation of the United Kingdom seemed to take the first meaning – mere “legal interests” -- as a basis, and this seemed to be the reason for which it proposed the addition of the adverb “not unreasonably”. {23} It is submitted that, with the addition of this adverb, the meaning of the term “legitimate interests” was switched; as combined with this adverb, it could not be understood any more in any other way than that it really only meant “legal interests”. Furthermore, it is submitted that the meaning of this condition, as a result of this switch of meaning combined with the restricting adverb “not unreasonably”, did not change substantially.

The reasons for these submissions are as follow. It is impossible that, in the basic proposal, the condition that “the reproduction is not contrary to the legitimate interests of the author” was meant to mean mere “legal interests” of the author to enjoy and exercise his right as fully as possible, since, in this case, exceptions and limitations would hardly be possible. The **Page 145** text in the basic proposal was only meaningful if it was meant according to the above-indicated first, non-legal meaning of “legitimate interests”; that is, if this term was meant as a balancing tool between the legal interests of the author and some other reasonable, justified interests to be taken into account. The argumentation of the United Kingdom delegation, in turn, seemed to reflect the fear that “legitimate interests” still might be interpreted as mere legal interests, and this seemed to be the reason for which it sought guarantees against this possibility by introducing a balancing concept according to which authors must accept that their “legitimate” interests be prejudiced in cases where such prejudice does not reach an unreasonable level. As regards the desirable result of this kind of balancing, it is indicated in the basic proposal, which referred – in agreement – to the principle established by the Study Group in 1964: “all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors”.{24}

The fact that the requirement that no prejudice must be unreasonable means that it must be duly justified (by appropriate public policy considerations) is reflected in the French version of the provision. The report of Main Committee I refers to this in the following way: “The Working Group decided to adopt the amendment proposed by the United Kingdom, with some slight alterations in the English version.... It proved very difficult to find an adequate French translation for the expression 'does not unreasonably prejudice'. In the Committee, it was finally decided to use the expression '*ne Page 147 cause pas un préjudice injustifié*’”. That is, “unjustified” was accepted as a synonym of “unreasonable”.{25}

This means that, with the introduction of the adverb “not unreasonably” before the verb “[to] prejudice”, the “justification” test – in harmony with the above-mentioned second, non-legal normative sense of “legitimacy” – concerning the limits of defensible interests of authors, would be just repeated within this third, interest-related condition of the “three-step test”. This obviously could not have been the intention of the Stockholm conference. This is the reason for which it is believed that, by the addition of this adverb, the concept of “legitimate interests” was automatically switched back to the first, legal-normative sense of “legitimacy” which, with this change, seems to have become the only appropriate reading in the context of the provision, and this is the reason for which it is

also believed that the meaning of the provision did not, in fact, change with the new wording.

It seems that the fact that the conference took into account the term “legitimate interests” in its “legal interests” sense – and that it is the adverb “not unreasonably” which takes care of offering an appropriate basis for determining the permissible scope of exceptions – is also reflected by the unchallenged statement of the Chairman of Main Committee I: “Since any exception to the right of reproduction must inevitably prejudice the author’s interests, the Working Group had attempted to limit that prejudice by introducing the term... ‘unreasonable’”.{26}

Page 149 III. THE “THREE-STEP TEST” UNDER THE TRIPS AGREEMENT

1. Article 13 of the Agreement and other provisions on exceptions and limitations included by reference. The basic provision of the TRIPS Agreement on limitations of, and exceptions to, copyright is contained in its Article 13 (entitled ‘Limitations and Exceptions’) which reads as follows: “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the works and do not unreasonably prejudice the legitimate interests of the right holder.”

However, this is not the only relevant provision of the TRIPS Agreement concerning exceptions and limitations. Article 9.1. of the Agreement provides that the Members of WTO must comply with Articles 1 through 21 of the Berne Convention (except for the provisions on moral rights – Article *6bis* – “and the rights derived therefrom”). This means that all provisions of the Berne Convention on exceptions and limitations are also applicable under the TRIPS Agreement.

2. Coverage of Article 13: only copyright. On the basis of an isolated reading of the text of Article 13, this cannot be seen immediately, but, if it is considered in the context in which it appears, this seems to be clear: it only covers copyright and does not extend to related rights. This seems to be the case since Article 13 follows those provisions **Page 151** -- Articles 9 to 12 – which only deal with copyright, and since it is placed before Article 14 whose title is “Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations”. In respect of limitations of, and exceptions to, related rights only Article 18.6 seems applicable. {27}

3. Coverage of Article 13: the scope of the “three-step test” extended. In substance, the three conditions provided for in Article 13 are identical to the three conditions under Article 9(2) of the Berne Convention. The slight wording differences do not change this fact:

-- Article 9(2) of the Berne Convention does not use the expressions “limitations and exceptions”, but, it obviously also allows the application of exceptions (free use) and limitations (non-voluntary licenses);

-- Article 13 of the TRIPS Agreement provides that Members of WTO must confine limitations or exceptions to the cases mentioned in it if the conditions provided in it are fulfilled; in substance, this is equal to what Article 9(2) of the Berne Convention does in respect of the exclusive right of reproduction: it authorizes countries party to the Convention

to permit reproduction (but only) in the cases mentioned there (and only) if the conditions provided by it are fulfilled;

-- Article 9(2) of the Berne Convention speaks about the legitimate interests of the author, while Article 13 of the TRIPS Agreement about the **Page 153** legitimate interests of the right holder; this, however, does not produce any substantive difference, since it is obvious that the Berne Convention applies not only to the rights of authors but also to the rights the original owners of which are not necessarily the author but also to any other owner of copyright.

The real substantive difference – and this is quite an important one – is that Article 9(2) of the Berne Convention only covers the right of reproduction, while Article 13 of the TRIPS Agreement provides for possible limitations and exceptions “to exclusive rights” in general; that is, to all exclusive economic rights under Articles 1 to 21 of the Berne Convention, and – in principle -- also to the right specifically provided for in the Agreement; namely the right of rental concerning computer programs, cinematographic works and – depending on the interpretation of Article 18.4 of the Agreement – works embodied in phonograms.

4. Impact of Article 13 of the TRIPS Agreement on the provisions of the Berne Convention on exceptions and limitations (as incorporated by reference into the TRIPS Agreement). This relationship was analyzed in the study prepared, at the request of the General Assembly of WIPO, by the International Bureau of WIPO, and published in 1996, on the “Implications of the TRIPS Agreement on Treaties Administered by WIPO”, as follows:

Page 155 “51. The Berne Convention contains a similar provision concerning the exclusive right of reproduction (Article 9(2)) and a number of exceptions or limitations to the same and other exclusive rights...and, it permits the replacement of the exclusive right of broadcasting, and the exclusive right of recording of musical works, by non-voluntary licenses.

“52. None of the limitations and exceptions permitted by the Berne Convention should, if correctly applied, conflict with the normal exploitation of the work and none of them should, if correctly applied, prejudice unreasonably the legitimate interests of the right holder.

“53. Thus, generally and normally, there is no conflict between the Berne Convention and the TRIPS Agreement as far as exceptions and limitations to the exclusive rights are concerned.”{28}

Under this interpretation, Article 13 of the TRIPS Agreement, in respect of the provisions of the Berne Convention on exceptions and limitations is a kind of interpretation tool. It does not extend the applicability of those provisions; at the same time, it guarantees an appropriate interpretation thereof excluding any possibility for a conflict with a normal exploitation of works and for an unreasonable prejudice to the legitimate interests of owners of copyright.

Daniel Gervais, in his book on the TRIPS Agreement, seems to agree with this. He states as follows: “When these exceptions [the exceptions under the Berne Convention] are invoked, they may from now on be submitted to the **Page 157** general test of Article 13, which should be interpreted on the basis of Article 9(2) of the Berne Convention.”{29}

5. The application of Article 13 to rights not recognized under the Berne Convention, but provided for in the TRIPS Agreement. In this respect, the following analysis of Gervais seems to us correct. He mentions the rental right as such an *extra* TRIPS right and then states as follows: “Here, the Berne constraints no longer apply and, hence, the only limit imposed on national legislators is Article 13. Since the text of Article 13, as contained in Article 9(2) of the Berne Convention, has been interpreted as allowing for compulsory licences, one might argue that it does here, in respect of rights granted only in TRIPS. While the theoretical possibility does exist, its application in practice is unlikely. The rental of computer programs has been shown to lead to systematic copying (see under Article 11) and a compulsory licence or other similar limitation would probably both conflict with normal exploitation and unreasonably prejudice the interests of the right holder. The same may be said of audiovisual products, for the reasons explained in respect of Article 11. That said, the fact remains that the only limit to possible exceptions to Article 11 is Article 13. The same cannot be said of Article 10, since the effect of that provision is to bring computer programs and databases under the umbrella of the Berne Convention.”{30}

Page 159 Article 30 of the TRIPS Agreement. In this article, the application of the “three-step test” is discussed from the viewpoint of copyright. Since, however, as mentioned above, the first WTO panel case in which the “three-step test” – or at least some of its main elements -- have been interpreted in the context of Article 30 on exceptions to the rights conferred by a patent, this case is also referred to briefly below. Article 30 is quoted and analyzed there.

IV. THE “THREE-STEP TEST” UNDER THE WCT AND THE WPPT

1. Article 10 of the WCT. Article 10 of the WCT has two paragraphs which provide as follows:

“(1) Contracting Parties may, in their national legislation, provide for limitations and exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

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

Page 161 The 1996 Diplomatic Conference also adopted an agreed statement related to this Article. The first part of the statement concerns the application of exceptions and limitations in the digital environment. Since, however, the impact of digital technology on copyright and related rights is not an issue specifically covered in this article, this is not discussed here. The second part of the statement, however, is relevant in the context of this article. It reads as follows: “It is... understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.”

2. Similarities and differences in comparison with the TRIPS Agreement. The coverage of Article 10 of the WCT is similar to that of TRIPS Article 13 in the sense that it also extends to all economic rights under copyright. However, while the latter consists of one single provision which is applicable for both those rights which have been incorporated from the Berne Convention and the new rights provided for only in the TRIPS Agreement, Article 10 contains two paragraphs with different coverage in respect of the scope of rights provided for by the WCT.

If one reads the text of paragraph (1), one may believe – for fully valid reasons -- that it covers all “the rights granted to authors of literary and artistic works under this Treaty”; that is, both those which are based on the provisions of the Berne Convention incorporated into the Treaty and those which are **Page 163** new in relation to the former rights. This is so since the rights under the Convention are also granted under the WCT, although not through the same drafting technique as the newly recognized rights, in the same way as in the case of the TRIPS Agreement.

After this, paragraph (2) of the Article comes as a surprise, since it restates the “three-step test” now exclusively in respect of the rights based on the provisions of the Berne Convention incorporated into the Treaty. The language chosen for this does not seem to be fully accurate, since it speaks about the application of *the Berne Convention*, while it is obvious that Contracting Parties, in this context, do not, in fact, apply the Berne Convention, but only *the WCT from which it follows the obligation to comply with Article 1 to 21 of the Convention*. It seems to be obvious that this kind of “short-hand” reference to the application of the Convention was intended to mean – and does mean – this. It is, however, a more substantive consequence of a comparison of the two paragraphs that – when read together – they seem to suggest that the rights incorporated from the Berne Convention are not granted under the WCT, which is not the case.

Nevertheless, one thing is sure: the result of the joint application of the two provisions of Article 10 is similar as in the case of the TRIPS Agreement: the “three-step test” – with the same conditions as under Article 9(2) – is extended to all economic rights under copyright.

Page 165 The language of the two paragraphs differs in one aspect where this difference does not seem to be necessary – and, in fact, it does not seem to be fortunate either. Under paragraph (1), “Contracting Parties may... provide for” limitations and exceptions in certain special cases, etc, while, under paragraph (2), they “shall confine” limitations and exceptions to certain special cases, etc.

Does the different wording mean any difference in substance? It seems that the answer to this question should be in the negative, and that we are only faced with a drafting inconsistency here. As it can be seen, paragraph (2) of Article 10 in the WCT has taken over the “confine to” language from Article 13 of the TRIPS Agreement which itself differs from the language of Article 9(2) of the Berne Convention, since the latter allows countries of the Berne Union “to permit... reproduction in certain special cases”, etc. Nevertheless, as discussed above, in substance, the conditions of the test are the same under the two provisions.

It seems that the same should be said about the third variant introduced by paragraph (1) of Article 10 in the WCT: ‘may provide for...’. It does not change the substance of the provision.

This interpretation is confirmed by the notes added to the draft of Article 10 (in the original numbering, Article 12) in the basic proposal concerning what became the WCT. (It is to be noted that the draft text was the same as the adopted one with the only exception that originally, in paragraph (1), the word “only” appeared before the words “in certain special cases”, which was then deleted as unnecessary, since it is clear also on the **Page 167** basis of the rest of the text that limitations and exceptions may *only* be granted in certain special cases and *only* if the two other criteria of the “three-step test” are also met.)

Concerning paragraph (1), the notes stated that the conditions in it “are identical to those of Article 9(2) of the Berne Convention”, and, when it referred to the three conditions, it underlined, *inter alia*, that “[a]ny limitations must be *confined to* certain special cases” [emphasis added to draw attention to the similarity with the language of paragraph (2) and of TRIPS Article 13]. Then, in respect of paragraph (2), the notes stressed that the same conditions were applied also in it. {31}

3. The impact of Article 10(2) of the WCT on the provisions of the Berne Convention concerning exceptions and limitations (as incorporated into the Treaty). It has been stated above that the cumulative effect of the two paragraphs of Article 10 of the WCT is similar to the effect of the single provision in Article 13 of the TRIPS Agreement. From this, it follows that their impact – and, in particular, that of paragraph (2) which addresses exactly this issue – on the application of the provisions of the Berne Convention concerning exceptions and limitations as incorporated into the WCT by Article 1(4) thereof, is supposed to be also similar. That is, Article 10 – and, in particular, its paragraph (2) – is a mere interpretation tool.

Page 169 While this effect may be deduced from the text and context of the TRIPS Agreement as a possible interpretation, in the case of the WCT, the Diplomatic Conference has offered such an interpretation through the adoption of the agreed statement quoted above: “It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.”

4. Article 16 of the WPPT extending the “three-step test” to the rights of performers and producers of phonograms. Article 16 of the WPPT has extended the scope of application of the “three-step test” also to exceptions and limitations to the rights of performers and producers of phonograms. It provides as follows:

“(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

“(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and **Page 171** do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.”

Since, in this article, copyright exceptions are in the focus of attention, this provision is not discussed in detail.

V. APPLICATION OF AN ADAPTED VERSION OF THE “THREE-STEP TEST” CONCERNING EXCEPTIONS TO PATENT RIGHTS BY A WTO PANEL

1. Article 30 of the TRIPS Agreement and the WTO panel case No. WT/DS114. Article 30 of the TRIPS Agreement provides as follows: “Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.”

This provision was interpreted in WTO panel case No. WT/DS114. Since the author of this article was a member of the panel dealing with this case, it would not be appropriate to express his own separate views on the issues involved and/or on the findings of the panel. Therefore, this part of the article tries to be as descriptive as possible. In fact, in order to strictly apply this principle, the summary included in the WTO web site is used to offer a short description of the case:

Page 173 “This request, dated 19 December 1997, is in respect of the alleged lack of protection of inventions by Canada in the area of pharmaceuticals under the relevant provisions of the Canadian implementing legislation, in particular the Patent Act. The EC contends that Canada's legislation is not compatible with its obligations under the TRIPS Agreement, because it does not provide for the full protection of patented pharmaceutical inventions for the entire duration of the term of protection envisaged by Articles 27.1, 28 and 33 of the TRIPS Agreement. On 11 November 1998, the EC requested the establishment of a panel. At its meeting on 1 February 1999, the DSB established a panel. Australia, Brazil, Colombia, Cuba, India, Israel, Japan, Poland, Switzerland, and the United States reserved their third-party rights. The report of the panel was circulated to Members on 17 March 2000. The panel found that the so-called regulatory review exception provided for in Canada's Patent Act (Section 55.2(1)) -- the first aspect of the Patent Act challenged by the EC - was not inconsistent with Article 27.1 of the TRIPS Agreement and was covered by the exception in Article 30 of the TRIPS Agreement and therefore not inconsistent with Article 28.1 of the TRIPS Agreement. Under the regulatory review exception, potential competitors of a patent owner are permitted to use the patented invention, without the authorization of the patent owner during the term of the patent, for the purposes of obtaining government marketing approval, so that they will have regulatory permission to sell in competition with the patent owner by the date on which the patent expires. As regards the second aspect of the **Page 175** Patent Act challenged by the EC, the so-called stockpiling exception (Section 55.2(2)), the panel found a violation of Article 28.1 of the TRIPS Agreement that was not covered by the exception in Article 30 of the TRIPS Agreement. Under the stockpiling exception, competitors are allowed to manufacture and stockpile patented goods during a certain period before the patent expires, but the goods cannot be sold until after the patent expires. The panel considered that, unlike the regulatory review exception, the stockpiling exception constituted a substantial curtailment of the exclusionary rights required to be granted to patent owners under Article 28.1 to such an extent that it could not be considered to be a limited exception within the meaning of Article 30 of the TRIPS Agreement. The DSB adopted the panel report at its meeting on 7 April 2000.”{32}

2. The role of the negotiating history of WIPO conventions in the interpretation of certain provisions of the TRIPS Agreement. As discussed below, Article 30 of the TRIPS

Agreement differs in several aspects from Article 13 of the Agreement (and Article 9(2) of the Berne Convention), even if it contains what may be regarded as an adapted version of the “three-step test”. Therefore, not all the results of the analysis of Article 30 may have a relevance if we try to transpose them to the copyright field and apply them in respect of Article 13 of the Agreement. However, the report of the panel in this patent case had an outstanding importance **Page 177** also for the copyright-related provisions of the TRIPS Agreement, since it clarified for the first time what role, if any, the negotiating history of WIPO conventions may have in those cases where the provisions of those conventions have been incorporated by reference into the TRIPS Agreement, or even where some of those provisions have been “reproduced” either directly or – as in the case of Article 30 the Agreement – in a more or less adapted version of the TRIPS Agreement rather than being incorporated simply by reference.

The report referred to the relevant provisions of the Vienna Convention on the Law of Treaties (hereinafter: “Vienna Convention”) – which are quoted in part VI below – in particular to its Article 32 concerning supplementary means of interpretation (including the preparatory work of a treaty and the circumstances of its conclusion) and then stated as follows: “The Panel notes that in the framework of the TRIPS Agreement, which incorporates provisions of the major pre-existing international instruments on intellectual property, the context to which the Panel may have recourse for purposes of interpretation of specific TRIPS provisions... is not restricted to the text, preamble and annexes of the TRIPS Agreement itself, but also includes the provisions of the international instruments on intellectual property incorporated into the TRIPS Agreement... Thus..., Article 9(2) of the Berne Convention... is an important contextual element for the interpretation of Article 30 of the **Page 179** TRIPS Agreement... As a consequence of the extended context that has to be taken into account, when interpreting provisions of the TRIPS Agreement, the Panel, in considering the negotiating history of the TRIPS Agreement, concluded that interpretation may go beyond the negotiating history of the TRIPS Agreement proper and also inquire into that of the incorporated international instruments on intellectual property.”{33}

3. The “three steps” in Article 30 of the TRIPS Agreement. The Panel followed the above-quoted principle and also took into account the negotiating history of Article 9(2) of the Berne Convention when interpreting the three conditions under Article 30 of the TRIPS Agreement. It is to be noted, however, that it is only the second condition which more or less fully corresponds to the corresponding condition in Article 9(2) of the Berne Convention (and Article 13 of the TRIPS Agreement).

The first condition is that exceptions must be “limited exceptions”; this is obviously different than that exceptions may only cover “special cases”; the requirement of specialty is missing from it. As regards the third condition, although its first element is that exceptions should not “unreasonably prejudice the legitimate interests of the patent owner”, and thus it seems to be a *mutatis mutandis* version of the third condition under Article 9(2) of the Berne Convention and Article 13 of the TRIPS Agreement, it also includes a second element, a kind of proviso – “taking account of the legitimate interests of third **Page 181** parties” – which had a modifying effect on the interpretation of this condition. Therefore, in this article, it is not described and analyzed how the panel interpreted these two conditions.

The second condition, however, in substance does not differ in the three provisions concerned, that is in Article 9(2) of the Berne Convention and Articles 13 and 30 of the

TRIPS Agreement. Under Article 30 of the Agreement, it is a condition that the exceptions “do not unreasonably conflict with a normal exploitation of the patent”. “Patent” refers to the rights granted in respect of an invention rather than to the invention itself (which is the subject matter of the rights granted). This seems to show a difference in comparison with the second condition under Article 9(2) of the Berne Convention and Article 13 of the TRIPS Agreement both of which speak about conflicts with the exploitation of works, rather than with the rights in works. This difference, however, is far from being substantive, since it is obvious that, when a patent is exploited, it means, in practice, the exploitation of the invention for which the patent has been granted, and the exploitation of a work is also may only take place through the exploitation of the economic rights in it. Thus, the interpretation by this patent panel of the second condition – the second “step” – of the “three-step test” under Article 30 of the TRIPS Agreement had relevance also from the viewpoint of the interpretation of Article 13 of the Agreement.

The patent panel adopted the following interpretation: “The Panel considered that “exploitation” refers to the commercial activity by which patent **Page 183** owners employ their exclusive patent rights to extract economic value from their patent. The term “normal” defines the kind of commercial activity Article 30 seeks to protect. The ordinary meaning of the word “normal” is found in the dictionary definition: “regular, usual, typical, ordinary, conventional”... As so defined, the term can be understood to refer either to an empirical conclusion about what is common within a relevant community, or to a normative standard of entitlement. The Panel concluded that the word “normal” was being used in Article 30 in a sense that combined the two meanings... The normal practice of exploitation by patent owners, as with owners of any other intellectual property right, is to exclude all forms of competition that could detract significantly from the economic returns anticipated from a patent's grant of market exclusivity.”{34}

It can be seen that, in substance, this interpretation corresponds to the one outlined in point II.5, above, on the basis of the negotiating history of Article 9(2) of the Berne Convention. There is only one apparent difference, namely that, in the interpretation in point II.5 above, only the normative aspect of the test is mentioned, while the panel report refers to the combination of the elements of empirical conclusion and normative standard. It is submitted, however, that this is not a substantive difference, and that, also under the report adopted in this patent case, the normative aspect is the decisive one. The normative aspect is supported by empirical conclusions on the way owners of rights exploit their rights in practice; however, empirical information on “normal exploitation” is not a *conditio sine qua non*. This is obvious in the **Page 185** case of emerging new ways and means of exploitation where, at the beginning, simply there cannot be yet any *empirical* conclusion that it is an established form of exploitation, but this does not mean that, therefore, there is necessarily a place for exceptions. The panel report, in a way, also refers to this when it states as follows: “The specific forms of patent exploitation are not static, of course, for to be effective exploitation must adapt to changing forms of competition due to technological development and the evolution of marketing practices. Protection of all normal exploitation practices is a key element of the policy reflected in all patent laws.”{35}

VI. APPLICATION OF THE “THREE-STEP TEST” IN THE *FIMLA* CASE

1. U.S. legislation heavily restricting authors’ rights: *Fairness* (!) in Music Licensing Act. WTO dispute settlement procedure No. WT/DS160 had been initiated by the European

Communities which alleged that the exemptions provided in subparagraphs (A) and (B) of Section 110(5) of the US Copyright Act are in violation of the United States' obligations under the TRIPS Agreement, and requested the Panel to find that the United States had violated its obligations under Article 9.1 of the TRIPS Agreement together with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) and to recommend that the United States bring its domestic legislation into conformity with its obligations under the TRIPS Agreement.

Page 187 Subparagraph (A) of Section 110(5) provides for so-called “homestyle” exception. It reads as follows:

“(A) except as provided in subparagraph (B), communication of a transmission or retransmission embodying a performance or display of a by the public reception of the transmission on a single receiving apparatus of a kind commonly used in p homes, unless
(i) a direct charge is made to see or hear the transmission: or
(ii) the transmission thus received is further transmitted to the public;”

Subparagraph (B) of Section 110(5) contains what is referred to in the report of the panel as the “business exception”. It is quite long and complex, but it seems necessary to quote it fully in order to reflect the extent of the restriction of authors’ rights by this provision:

“(B) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated by a radio or television broadcast station...or, if an audiovisual transmission, by a cable system or satellite carrier, if

(i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication **Page 189** occurs has less than 2,000 gross square feet of space..., or the establishment in which communication occurs has 2,000 or more gross square feet of space... and --

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 speakers are located in any 1 room or adjoining outdoor space;

(ii) in the case of a food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750 square feet of space..., or the establishment in which the communication occurs has 3,750 gross square feet of space or more... and [if the conditions mentioned under item (I) or (II) of point (i) above are fulfilled];

(iii) no direct charge is made to see or hear the transmission or retransmission;

Page 191 (iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and

(v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed;”

These provisions have been introduced into the US Copyright Act by the Fairness in Music Licensing Act of 1998 (FIMLA). The adoption of the FIMLA was the end of a long war between commercial establishments, on the one hand, and performing rights societies, on the other hand. The detailed description of this long fight, with ups and downs from the viewpoints of both sides, would hardly be possible in the framework of this article. What follows herewith is a sketchy summary of this complex story of 101 years:

- (1) 1897: recognition of a right of public performance.
- (2) 1914: the establishment of the American Society of Composers, Authors and Composers (ASCAP) to manage this right.
- (3) Extension of licensing to radio programs through a series of court cases. Further extension to live performances in commercial establishments (where the performance of musical works were regarded as being of a secondary nature; the Supreme Court decided in *Herbert v. Shanley* (242. U.S. 591 (1917)) that “for profit” use extends to cases where performance of music provided only indirect financial benefit, without charging a separate fee for listening to it). **Page 193**
- (4) Attempts at still further extending the exercise of performing rights to the use of broadcast music in commercial establishments. Strong resistance of users, law suites, enforcement problems. 1931: ASCAP’s relative victory: the Supreme Court in *Buck v. Jewell-La Salle Realty Co.* (U.S. 191(1931)) applied the so-called “multiple performance” doctrine (meaning that there is a need for separate licensing for broadcasting and for communication to the public of broadcast music in commercial establishments).
- (5) The resistance (a kind of “public disobedience”) of commercial establishments continued; they started a legislative campaign with the objective of heavily restricting public performance rights; the bills initiated by them were so far unsuccessful.
- (6) A side-effect of the enforcement difficulties: ASCAP voluntarily gave up licensing efforts in smaller “Mom and Pop” establishments using a simple radio receiver with one single built-in speaker.
- (7) 1975: ASCAP’s temporary defeat; the Supreme Court in *Twentieth Century Music Corp. v. Aiken* (422 U.S. 151 (1975)) repudiated the “multiple performance” doctrine.
- (8) The 1976 Copyright Act restored the “status quo”. It was based on the “multiple performance” approach, but included in its Article 110(5) an exception for communication to the public of broadcast music in commercial **Page 195** establishments through “a single receiving apparatus of a kind commercially used in private homes” (the so-called “homestyle exception”).
- (9) There was no peace between the performing rights societies (in addition to ASCAP, the other two U.S. societies being the BMI and SESAC) and commercial establishments. The latter continued applying their resistance tactics in the hope for legislative interventions in their favour.
- (10) In 1989, the United States acceded to the Berne Convention which provides for clear obligations to grant “performing rights” (in respect of music, see, in particular, Article 11 and 11*bis*), with only possible “minor reservations” (minor exceptions”).
- (11) In 1994, as part of the WTO package, the TRIPS Agreement was adopted which, with its entry into force in 1995, became binding also for the United States as a Member of the WTO.
- (12) The resistance of commercial establishments against the application of public performance rights for broadcast music continued despite the clear international obligations of the United States under the Berne Convention and the TRIPS Agreement.

They were confident that, with their influence and lobbying efforts, they would be able to persuade the Congress that it adopt legislation in their favour. The commercial establishments had three main arguments:

Page 197-- the obligation to pay royalties for broadcast music means that authors and composers receive two payments for the same use (broadcasting): one from the broadcasters and one from those who “receive” the broadcast program (wrong argument, since what is involved is not mere reception but a new exploitation; this is clear under Article 11*bis*(2)(iii) of the Berne Convention which provides that “[a]uthors of literary and artistic works shall enjoy the exclusive right of authorizing: ... the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work”);

-- the collective management organizations abuse their monopoly power (this is a factual question; if this was true, measures would have had to be taken against abuses rather than restricting or eliminating the rights abused);

-- the collective management organizations apply aggressive licensing and enforcement tactics (this argument did not seem to be justified either; it is sufficient to refer to the fact that the collective management organizations introduced in their licensing practice the “home style exception” before the adoption of statutory exception about it; the argument seemed to boil down to complaints that the collective management organizations took the exercise and enforcement of performing rights seriously).

Page 199

- (13) A victory of the commercial establishments: the Fairness in Music Licensing Act 1998 drastically limited the right of public performance in case of broadcast non-dramatic musical works.

If someone wishes to know more about the details and background of all these developments, one of the best sources for this is Laurence R. Helfer’s study published in February 2000 about the FIMLA and its implications from the viewpoint of the Berne Convention and the TRIPS Agreement (from which a great amount of information has been taken for the description above of the events leading to the FIMLA). {36}

2. The WTO panel decision regarded as a victory for copyright protection. The report of the WTO panel on the FIMLA case was adopted by the WTO Dispute Settlement Body (DSB) on July 17, 2000. The panel concluded that

“(a) Subparagraph (A) of Section 110(5) of the US Copyright Act meets the requirements of Article 13 of the TRIPS Agreement and is thus consistent with Articles 11*bis*(i)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement.

“(b) Subparagraph (B) of Section 110(5) of the US Copyright Act does not meet the requirements of Article 13 of the TRIPS Agreement and is **Page 201** thus inconsistent with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement.” {37}

The panel recommended that “the Dispute Settlement Body request the United States to bring subparagraph (B) of Section 110(5) into conformity with its obligations under the TRIPS Agreement.” {38}

Taking into account that copyright was – and, unfortunately, still is – In quite a defensive “public relations” position in this period and that there had been fears that authors’ interests may be neglected in the context of trade issues, the international copyright community received this panel decision with relief. For example GESAC (*Groupment européen des sociétés d’auteurs et compositeurs*), after the publication of the first version report of the panel, on April 26, 2000, published a press release under the title “Victory For European songwriters and composers in the World Trade Organization” which stated, *inter alia*, as follows: “GESAC welcomes this decision which will be officially confirmed in some weeks. Indeed it is a considerable victory as for Europe only more than 28 millions Euro are lost every year by authors and composers due to the American exemption which concerns nearly 70% of American bars and restaurants. This decision confirms the economic importance of copyright and the role of guardians of TRIPS agreement played by WTO.”

Page 203 GESAC was right. This panel decision truly could not have been characterized more appropriately than such a victory. If in this article also some shades of criticism may be found below, it only concerns certain legal arguments that, fortunately, have not resulted in a negative outcome in this concrete case, but which, nevertheless, bare the possibility of such an outcome in possible future cases, provided they are not duly reconsidered.

3. Methodology of interpretation. The panel interpreted the relevant provisions of the TRIPS Agreement in applying Articles 31 and 32 of the Vienna Convention on the interpretation of treaties which read as follows:

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

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was between all the parties in connexion with the conclusion of the treaty;

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

Page 205 3. There shall be taken into account together with the context:

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

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

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

4. A special meeting shall be given to a term if it is established that the parties so intended.

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

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.”

It seems to be a general WTO practice that the panels first are supposed to identify “ordinary meaning to be given to the terms of the treaty” on the basis of the definitions of the terms concerned in a dictionary, in the case **Page 207** of English terms, the Oxford Dictionary. It appears that sometimes quite a decisive importance is given to the grammatical interpretation based on this approach.

It should, however, be taken into account that during the negotiation and drafting of treaties, it is very rare that such a dictionary is used and that an explicit reference is made to it. Furthermore, dictionary definitions contain a number of synonyms or even alternatives. It may be a kind of lottery – or, who knows, even a “Russian roulette” – to select just one of these synonyms or alternatives. Thus, it seems, in general, advisable to pay great attention to the elements of the “context” mentioned in paragraph 2 of Article 31, and to the other factors to be taken into account “together with the context” listed in paragraph 3 thereof. Also it seems desirable to take into consideration the so-called “supplementary means of interpretation” mentioned in Article 32; that is, the preparatory work and the circumstances of the conclusion of the treaty.

The panel, in general, followed such a methodology in the FIMLA case. It also had accepted the principle adopted by the panel in the above-mentioned patent case and, thus, took also into consideration the negotiating history of the Berne Convention. In those aspects where, as discussed below, the legal basis of the findings, nevertheless, may raise some questions, the reasons for this may be seen in what seems to be an absence of complete consistency in the application of this methodology.

Page 209 4. The issue of “minor exceptions”. It seems that the panel was right when it stated that (i) the acts in respect of which the disputed provisions of the US Copyright Act provide for exceptions are covered by Article 11*bis*(1)(iii) and 11(1)(ii){39} of the Berne Convention; (ii) the statements adopted by the Brussels and Stockholm revision conferences concerning “minor exceptions” (or as they were not fully precisely referred to: “minor reservations”) should be recognized as agreements to be taken into account under Article 31.2(a) of the Vienna Convention; {40} (iii) Article 13 of the TRIPS Agreement is applicable also for determining whether such exceptions are permitted; {41} (iv) the examples included in the statements about “minor exceptions” in the records of the above-mentioned revision conferences cannot be regarded to be of an exhaustive nature. {42}

The panel also rightly stated that “the scope of permissible limitations and exceptions under the minor exceptions doctrine... is primarily concerned with *de minimis* use.” {43} It seems, however, that the panel has not reached an appropriate conclusion in respect of the question of whether or not “minor exception” should be reduced to non-commercial uses.

The panel stated as follows: “We note that some of the above-mentioned examples (e.g., religious ceremonies, military bands) typically involve minimal uses which are not carried out for profit. With respect to **Page 211** other examples (e.g., adult and child education and popularization), however, an exclusively non-commercial nature of potentially exempted uses is *less clear* [emphasis added]. On the basis of the information provided to us, *we are not in a position to determine* that the minor exceptions doctrine justifies only exclusively non-commercial use of works and that it may under no circumstances justify exceptions to uses with a more than negligible economic impact on copyright holders...[emphasis added]. At

any rate, in our view, a non-commercial character of the use in question is not determinative provided that the exception contained in national law is indeed minor.”{44}

In the above-quoted text, emphasis has been added to certain words that reflect that the panel had found the meaning of the statements in the records of the Brussels and Stockholm revision conferences on “minor exceptions” not sufficiently clear. In such a case, it would have followed from the correct methodology adopted by the panel – as outlined above -- to have recourse to supplementary means of interpretation mentioned in Article 32 of the Vienna Convention, and, in particular, to the “preparatory work” related to these statements as reflected in the same records of the same revision conferences.

The records of the general commission of the Brussels revision conference stated the understanding of the conference in this respect: “the Conference noted, however, that these exceptions should be of a limited nature and, in **Page 213** particular, that, *it was not sufficient that the performance or recitation was ‘not for profit’* in order that it to be excepted from the exclusive right of the author...” [emphasis added]{45} Thus, the understanding of the conference when adopting the agreed statement was that acts carried out for profit-making, commercial purposes certainly must not be covered by any “minor reservation”, and that even that condition was not sufficient, since, also within the not-for-profit activities, only those might be exempted in this context which are of a truly minor importance, in accordance with the *de minimis* principle. The panel probably has not found this decisive source in the “preparatory work” which certainly could have eliminated the absence of clarity perceived by it as reflected in the above-quoted statement in the panel report.

In the given case, this does not seem to have created a great problem. The panel, as quoted above, found that the “business exception” under Section 110(5)(B) is in conflict with the TRIPS Agreement (and the Berne Convention). As regards real “homestyle” reception/public communication to the public of broadcast music – the way it was originally conceived (that is, through a simple receiving apparatus with a single built-in speaker) -- may be accepted as an exception under the *de minimis* principle, and it may also be regarded as not being fully commercial. References to two acts -- mere “reception” (irrelevant from the viewpoint of copyright protection) and “public communication” (an act covered by Article 11*bis*(1)(iii) and Article 11(1)(ii), respectively, of the Berne Convention) -- are combined with a slash in the preceding sentence above in order to emphasize the borderline **Page 215** nature of the situation. In the small eating or drinking establishments and shops covered by Section 110(5)(A), the way the owner or employee uses such an apparatus seems to be at the borderline of these two acts, and the commercial significance of this form of “use” may be regarded as missing or at least negligible.

If, however, the interpretation that “minor exceptions” may extend to commercial activities were applied in the future in other cases, it might result in an undesirable curtailment of the exclusive economic rights concerned.

5. Interpretation of the “three-step test”: “certain special cases”. It is the interpretation of this expression in respect of which the most significant doubts may arise. Therefore, it is justified to quote how the panel had developed its interpretation about this first condition:

“6.108. The ordinary meaning of ‘certain’ is ‘known and particularised, but not explicitly identified’, ‘determined, fixed, not variable; definitive, precise, exact’... In other words, this term means that, under the first condition, an exception or limitation in national legislation must be clearly defined. However, there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal certainty.

Page 217 “6.109. We also have to give full effect to the ordinary meaning of the second word of the first condition. The term ‘special’ connotes ‘having an individual or limited application or purpose’, ‘containing details; precise, specific’, ‘exceptional in quality or degree; unusual; out of the ordinary’ or ‘distinctive in some way’... This term means that more is needed than a clear definition in order to meet the standard of the first condition. In addition, an exception or limitation must be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow in quantitative as well as a qualitative sense. This suggests a narrow scope as well as an exceptional or distinctive objective. To put this aspect of the first condition into the context of the second condition (‘no conflict with a normal exploitation’), an exception or limitation should be the opposite of a non-special, i.e., a normal case.

“6.110. The ordinary meaning of the term ‘case’ refers to an ‘occurrence’, ‘circumstance’ or ‘event’ or ‘fact’... For example, in the context of the dispute at hand, the ‘case’ could be described in terms of beneficiaries of the exceptions, equipment used, types of works or by other factors.

“6.111. As regards the parties' arguments on whether the public policy purpose of an exception is relevant, we believe that the term ‘certain special cases’ should not lightly be equated with ‘special purpose’... It is difficult to reconcile the wording of Article 13 with the proposition that an exception or limitation must be justified in terms of a legitimate public policy purpose in order to fulfill the first condition of the Article. We also **Page 219** recall in this respect that in interpreting other WTO rules, such as the national treatment clauses of the GATT and the GATS, the Appellate Body has rejected interpretative tests which were based on the subjective aim or objective pursued by national legislation.

“6.112. In our view, the first condition of Article 13 requires that a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach. On the other hand, a limitation or exception may be compatible with the first condition if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned. The wording of Article 13's first condition does not imply passing a judgment on the legitimacy of the exceptions in dispute...”

Although the key issue in the interpretation of the term “certain special cases” seems to be how the adjective “special” is interpreted, it has seemed to be worthwhile quoting all these paragraphs of the panel report, since this also shows the role that dictionary definitions play in the interpretation of treaty provisions under WTO standards (all the definitions in the above-quoted paragraphs have been taken from the New Shorter Oxford English Dictionary (Oxford, 1993)).

It seems to be quite sure that, at the Stockholm revision conference, no participant took these dictionary definitions into account. This is quite an important circumstance from the viewpoint of the most basic principle of **Page 221** interpretation under Article 31.1 of the Vienna Convention, namely that "[a] treaty shall be interpreted in good faith...". Although such definitions drawn up *completely outside the context* of a treaty, *with no attention whatsoever to the possible specific object and purpose thereof* may serve as a starting point, it may hardly be appropriate to base the interpretation of a treaty provision – in particular, in such a specialized field as copyright – immediately on such general-purpose dictionaries. This is the more so since, as the above-quoted definitions also show, there are certain variants or shades of meanings which hardly fit into the given context, or even two different alternative meanings which expressly oppose each other (for example, in the above-quoted definitions of "certain", the meaning of "not explicitly identified", on the one hand, and "determined, fixed,... precise exact" (the panel seems to have chosen the second meaning, which seems to be a doubtful choice, since in the given context, it seems that "certain" is a kind of synonym of "some", and in reality it does not even seem to have a true independent meaning)). Therefore, there may be an element of arbitrariness in selecting a certain variant and not the other, or even in presuming that although certain alternative meanings offered in the dictionary are clearly inappropriate in the given context, another one is surely suitable to take a definitive position on the interpretation of a treaty term. For these reasons, immediately stopping at any kind of dictionary definition may result in misleading interpretation; in our specialized field, for a correct interpretation, the use of all available interpretative tools as identified by Articles 31 and 32 seems indispensable.

Page 223 In the case of the key adjective "special", the panel also has selected one of the several meanings offered by the dictionary definition. There are no arguments given in the report about the reasons for which the element of "narrowness" and "exceptional objective" have only been accepted from the plethora of different meanings, and for which the element of "having an individual purpose" seemed to have been neglected. (It seems that there is an absence of consistency here even in the application of what appears to be an overly dictionary-centric interpretation methodology.) This is a very much relevant aspect, since, if the two elements are placed together, that kind of interpretation may emerge which is suggested by Sam Ricketson as quoted in point 4 of part II, above; under which a "special case" means that it both must be specific and limited in its scope and must have a special purpose. In that point, it is also discussed for what reasons Ricketson seemed to be right when he clarified that "special" here means "that it is justified by some clear reason of public policy or some other exceptional circumstance".{46}

In fact, the panel refers to the this position of Ricketson, although not in the body of the report but in a footnote. The footnote reads as follows: "We note that the term 'special purpose' has been referred to in interpreting the largely similarly worded Article 9(2) of the Berne Convention (1971). See Ricketson, *The Berne Convention*, op. cit., p.482. We are ready to take into account 'teachings of the most highly qualified publicists of the various nations' as a 'subsidiary source for the determination of law. We refer to this phrase in the sense of Article 38(d) of the Statute of the International Court of Justice which refers to such 'teachings' (or, in French '*la doctrine*') as 'subsidiary **Page 225** means for the determination of law.' But we are cautious to use the interpretation of a term developed in the context of an exception for the reproduction right for interpreting the same terms in the context of a largely similarly worded exception for other exclusive rights conferred by copyrights."{47}

The last sentence of this footnote is not persuasive and, in fact, it is quite surprising. The panel report, rightly enough, takes into account the negotiating history of Article 9(2) of the Berne Convention for the interpretation of Article 13 -- which contains practically the same conditions for the application of exceptions and limitations, with the only difference that the former only applies for the right of reproduction, while the latter for all economic rights under copyright -- and nowhere else it refers to any doubt that the meaning of the three conditions may have been modified with the extension of coverage. No reason is given for this kind of exceptional doubt in this respect. It is submitted that there is no reason for such a doubt. In the case of exclusive rights other than the right of reproduction, "special cases" are supposed to be different for the very reason that other rights, other acts and consequently other kinds of policy justifications may be involved, but this does not concern in any way whatsoever the concept of "certain special cases".

The panel was right, of course, when it considered that a principle applied in a certain aspect of copyright protection, is not necessarily applicable for **Page 227** another aspect. Exceptions and limitations represent one compact aspect, and the same conditions, drafted practically in the same way are applicable to them both in the case of the right of reproduction under Article 9(2) (incorporated by reference into the TRIPS Agreement) and in the case of other economic rights (under Article 13 of the Agreement). The issue of national treatment is a completely different aspect -- or it should rather be said: a different dimension -- of copyright protection. The text of the TRIPS Agreement (and the Berne Convention) on national treatment does not contain any expression that would have even far away similarity with the term "special cases". Therefore, it is not clear for what reason the panel has deduced the conclusion that, since the Appellate Body, in respect of national treatment has rejected interpretative tests which were based on the subjective aim or objective pursued by national legislation, {48} it may be justified to do the same in respect of exceptions and limitations.

The views expressed by Ricketson are not based on some abstract theories. As discussed in part II.4, above, the context -- the other provisions on exceptions -- of the Berne Convention, as well as the "negotiating history" as reflected in the records of the Stockholm revision conference, underlie that, for a case to be acceptable as "special", it is not sufficient that it is limited in its scope; it is also a condition that there be specific, sound and valid public policy justifications for providing exception or limitation in the given case. This is an important element of the complex balance of interests established by the international copyright norms.

If it were allowed to introduce exceptions and **Page 229** limitations without such justification in any case whatsoever -- for example, for fully commercial activities as those covered by Section 110(5)(B) of the US Copyright Law -- with the only condition that it should be somehow limited, this might result in an uncontrollable proliferation of exceptions and limitations, and the undermining of the value of economic rights, which would be in clear conflict both with the letter and the spirit of the TRIPS Agreement (and of the Berne Convention, and then also of the WCT and the WPPT which apply the same test).

The panel has applied the "statistical approach" adopted by it, for both the "business exception" and the "homestyle exception". It basically stated that, the former, since it covers a high percentage of the commercial establishments, {49} is not a special case, while the latter, since it only extends to a lower percentage of such establishment, {50} is a "special case".

In this panel decision, the danger of the application of such a purely statistical method has not been manifested, because, first, the absence of narrowness of the case alone has "disqualified" the "business exception" as a "special case", and, second, as regards the "homestyle

exception”, it was justified to accept it as a “special case” not only for the reason stated by the panel (due to the smaller percentage of the establishment covered) -- which alone would not be sufficient – but also for the reason that it seems **Page 231** to equally fulfil the other criterion of a “special case”, namely that, as discussed above, there is a valid and sound specific public policy justification for it.

It is submitted that the “business exception” would not have been acceptable even if its coverage had not been higher than that of the “homestyle exception”.

6. Interpretation of the “three-step test”: the other two conditions. The FIMLA panel has adopted the same kind of interpretation of the condition that an exception or limitation must not “conflict with a normal exploitation” of the work as the above-mentioned patent panel. It took duly into account the “negotiating history” of Article 9(2) – “the mother of all provisions on three-step tests” – and rightly enough found a “persuasive guidance” in the statements of the Study Group set up for the preparation of the Stockholm revision conference, which, as also quoted in part II.5, above, suggested “[to] limit the recognition and the exercising of that right, for specified purposes and on the condition that these purposes should not enter into economic competition with these works” in the sense that “all forms of exploiting a work, which have, or likely to acquire, considerable economic or practical importance, must be reserved to the authors.”{51}

Page 233 The panel also followed the finding of the patent panel in regarding this test as reflecting both empirical and normative aspects of “normalcy”, but it turns out from the report, more or less in the same way as from the report of the patent panel, that the dominant and decisive factor is the normative aspect. This is so since the FIMLA panel also recognized that there might be a conflict with a normal exploitation of a work also in the case of a potential form of exploitation (in the case of which, by definition, no empirical data may still be available about the actual exploitation of works).{52}

The interpretation of the third condition under the “three-step test” by the FIMLA panel seems to be correct also, and corresponds to the considerations discussed in part II.6 above. The panel interpreted “legitimate interests” basically as a legal interests “from a legal positivist perspective” (although it added that “it has also the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underline the protection of exclusive rights”).{53} It regarded “prejudice” as “damage, harm or injury” (obviously to legitimate – legal – interests).{54} In fact, the parties agreed on the “legitimacy” of the interest of right holders to exercise their rights for economic gain,{55} thus the crucial question became which level of “prejudice” might be considered as “unreasonable”. The panel gave the quite “reasonable” answer to this question that “prejudice to the legitimate interests **Page 235** of the right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the right owner”.{56}

7. The impact of Article 13 of the TRIPS Agreement on the interpretation of the provisions of the Berne Convention on exceptions and limitations; the case of Article 11bis(2). The panel report includes the following statements: “As regards situations that would not meet the above-mentioned three conditions [that is, the “three-step test”], a government may not justify an exception, including one involving use free of charge, by Article 13 of the TRIPS Agreement. However, also in these situations, Article 11bis(2) of the

Berne Convention (1971) as incorporated into the TRIPS Agreement would nonetheless allow Members to substitute, for an exclusive right, a compulsory licence, or determine other conditions provided that they were not prejudicial to the right holders right to obtain an equitable remuneration.”{57}

This statement seems to suggest that the “three-step test” provided for in Article 13 is not applicable to Article 11*bis*(2). Some doubts may arise as to whether this position is well-founded.

Article 11*bis*(2) of the Berne Convention – incorporated by reference into the TRIPS Agreement – provides for a limitation of the exclusive right of **Page 237** broadcasting. The panel has adopted the right finding that Article 13 applies not only to the rights not recognized in the Berne Convention and provided only in the TRIPS Agreement, but also to the economic rights provided in the Berne Convention and incorporated by reference into the Agreement. {58} Thus, Article 13 cannot be regarded irrelevant for the application of Article 11*bis*(2) of the Berne Convention. In particular, it is questionable whether under the TRIPS Agreement – in view of its Article 13 – it would be allowed to introduce a non-voluntary licensing system in a case where this would be in conflict with a normal exploitation of the works concerned.

Audiovisual works offer a good example. If the owners of rights in such works are unable to control the sequence of exploiting their works in different market segments, this would clearly undermine a number different forms of normal exploitation of these works (if a film might be shown in television programs on the basis of compulsory licenses, the owners of rights would be unable to exploit appropriately the markets of cinema presentations, pay tv, sales and rental of copies, etc.). It is submitted that allowing such a result would be in conflict with Article 13 of the TRIPS Agreement.

8. No happy ending: the arbitration award. The United States have not followed the recommendation of the panel, and have not brought subparagraph (b) of Section 110(5) of the Copyright Act **Page 239** into conformity with its obligations under the TRIPS Agreement. On July 23, 2001, the European Communities and the United States notified to the WTO Dispute Settlement Body their mutual agreement to resort to arbitration pursuant Article 25 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

The award of the arbitrators adopted on November 9, 2001, determined the level of benefits for the EC which are being nullified or impaired as a result of the operation of Section 110(5)(B) as amounting to 1,219,900 euros (or 1, 100,000 US dollars) per year. {59} This does not seem to be a happy ending; not only for the reason that the conflict with the TRIPS Agreement has not been eliminated, but also because this amount is surprisingly low.

It would require another article to analyze the arbitration award. Nevertheless there are two negative elements of it that deserves being mentioned here.

First, the award stated as follows: “In view of the Arbitrators, it is clear that the exercise and enforcement of the rights conferred by Articles 11*bis*(1)(iii) and 11(1)(ii) would not be the responsibility of the United States but of the EC right holders.” {60} This statement is undoubtedly correct as regards *exercise* of rights, but it may raise doubts concerning the *enforcement* of rights, since it seems to be in conflict with the basic principle concerning enforcement of intellectual property rights under Article 41.1 of the TRIPS Agreement:

“Members shall ensure that **Page 241** enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.”

Second, in calculating the size of curtailment of the rights of EC rights holders, the arbitrators have taken into account the data on distributions of royalties by the two major US collecting societies – ASCAP and BMI – in 1996-1998. Laurence R. Helfer in his article referred to above^{61} describes what kind of unacceptable situation had emerged before 1998 as a result of the resistance of commercial establishments to the application of the provisions of the Copyright Act concerning the use of broadcast music. The collecting societies did not receive the necessary legal means for the enforcement of their rights, and, due to this resistance allowed without appropriate legal consequences, they were obliged to give up due exercise of the rights granted to the rights owners represented by them. The acceptance, as a calculation basis, of the situation created by such infringing practice, tolerated without any appropriate legal consequences and enforcement measures, in a way, meant that the results of the violation of obligations had been taken into account in favor of those who have violated their obligations to the detriment of the interests of those whose rights have been violated.

Page 243 VII. CONCLUSIONS

In the two WTO dispute settlement cases, the panels made an important contribution to the clarification of the relationship between the Berne Convention and the TRIPS Agreement and to the interpretation of the “three-step test” in a process towards what Jane C. Ginsburg sees as a possible emerging “supranational copyright law”^{62} on the basis of a kind of case-law development through panel decisions adopted in the framework of the WTO dispute settlement mechanism.

In the panel decisions analyzed in this article, the positive and promising elements dominate. There are, however, certain aspects of the findings in the FIMLA report which – although they have not necessarily resulted in direct negative consequences in the given case (in fact, the panel decision has rightly been perceived as a victory of copyright in its present quite defensive “public relations” situation) – may raise dangers for copyright protection in future cases, unless – what otherwise seems to be normal in case-law-driven legal development -- certain corrections are made.

It seems that the issue where such correction is, in particular, needed is the interpretation of the first condition in the “three-step test”; that is, the condition that exceptions and limitations may only cover “special cases”. It does not seem to be compatible with the TRIPS Agreement (and equally with the WCT and the WPPT) – and, in respect of the right of reproduction, with **Page 245** the Berne Convention – to allow the introduction of exceptions and limitations with the only condition that they should be somehow limited, without the obligation to offer sound and valid special legal-political justifications. The proliferation of exceptions and limitations based on such an uncontrolled practice might lead to the undermining of the value of economic rights.

Those who worked out and adopted the “three-step test” in Stockholm in 1967 were not satisfied with the answer to the incomplete question “how much?”; they insisted that the

possibility of restricting rights should depend on the response to the truly meaningful question “how much of what?”.

Endnotes

{1} Article 17 of the TRIPS Agreement, reads as follows: “Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.” As can be seen, the concept of “limited exceptions” also appears in Article 30 of the Agreement, and the concept of “legitimate interest” is a common element in Article 9(2) of the Berne Convention, Article 13 and 30 of the TRIPS Agreement, Article 10 of the WCT and Article 16 of the WPPT. Nevertheless, Article 17 differs in so many aspects from the just mentioned other provisions that it would not be justify further discuss it in this article.

{2} *Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967*, WIPO, Geneva (1971) (hereinafter: “*Records 1967 Stockholm*”) p. 111.

{3} *ibid*, pp 111-12.

{4} *ibid*. p. 112.

{5} *ibid*.

{6} *ibid*.

{7} *ibid*, footnote 2.

{8} *ibid*, footnote 1.

{9} *ibid*, pp 112-13

{10} *ibid*, p. 113.

{11} *ibid*, p. 690.

{12} *ibid* pp. 691-92.

{13} *ibid*, p.687.

{14} *ibid* p. 1145, para 85 of the Report of Main committee I.

{15} S. Ricketson, *The Berne Convention: 1886-1986* (hereinafter: “*Ricketson*”), p. 482.

{16} *Records 1967 Stockholm*, p. 111.

{17} C. Masouyé, *Guide to the Berne Convention*, p. 58, para 10.2.

{18} *Records 1967 Stockholm*, p. 112.

{19} *ibid*.

{20} *ibid*.

{21} *New Short Oxford Dictionary* (Oxford,1993), p. 1563.

{22} *Records 1967 Stockholm*, p. 113.

{23} *ibid*, p. 687.

{24} *ibid*, p. 111.

{25} *ibid*, p. 1145, para. 84.

{26} *ibid*, p. 883.

{27} Article 18.6 provides as follows: “Any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3 [the provisions on the rights of performers and producers of phonograms], provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. However, the provisions of Article 18 of the Beme Convention (1971) shall also apply, *mutatis mutandis*, to the rights of performers and producers of phonograms in phonograms.”

{28} *Implications of the TRIPS Agreement on Treaties Administered by WIPO* (WIPO publication N° 464 (E), 1997), pp. 22-23.

{29} D. Gervais, *The TRIPS Agreement – Drafting History and Analysis*, p. 90.

{30} *ibid*, p. 91.

- {31} Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions – Geneva 1996 (WIPO No 348 (E)) (hereinafter: “*Records Geneva 1996*”), p. 212, para 12.02.
- {32} See www.wto.orgT.
- {33} WTO document WT/DS114/R, paras 6.14-6.15.
- {34} *ibid*, paras 6.56-6.57.
- {35} *ibid*, para 6.57.
- {36} L.R. Helfer, *World Music on a U.S. Stage: a Berne/TRIPS and Economic Analysis of the Fairness in Musical Licensing Act*, in Boston University Law Review, Vol. 80, February 2000, pp. 93-204.
- {37} WTO document WT/DS160/R, para 7.1.
- {38} *ibid*, para 7.2.
- {39} *ibid*, para 6.47.
- {40} *ibid*, para 6.55.
- {41} *ibid*, paras 6.80-6.81.
- {42} *ibid*, para 6.93.
- {43} *ibid*.
- {44} *ibid*, 6.58.
- {45} *Documents de la Conférence réunie a Bruxelles du 5 au 26 juin 1948*, International Office, Berne, 1951, 263-64.
- {46} *Ricketson*, p. 482.
- {47} WTO document WT/DS160/R, footnote 114.
- {48} *ibid*, para 6.111.
- {49} According to the study used as a basis by the panel, 73% of all eating establishments, 70% of all drinking establishments and 45% of all retail establishments are covered by the exception under Section 110(5)(B).
- {50} According to the study mentioned in the preceding note, 16% of all eating establishments, 13,5% of all drinking establishments and 18% of all retail establishments are covered by the exception under Section 110(5)(A).
- {51} *Records Stockholm 1967*, pp. 111-12.
- {52} WTO document WT/DS160/R, para 6.178.
- {53} *ibid*, para 6.224.
- {54} *ibid*, para 6.220.
- {55} *ibid*, para 6.226.
- {56} *ibid*, para 6.229.
- {57} *ibid*, para 6.89.
- {58} *ibid*, para 6.80.
- {59} WTO document WT/DS160/ARB25/1, paras 4.73 and 5.1.
- {60} *ibid*, para 3.25.
- {61} See note {36} above.
- {62} J.C. Ginsburg, *Toward supranational copyright law? The WTO Panel decision and the “three-step test” for copyright exceptions*; in R.I.D.A, No. 187, January 2001.

**4. számú melléklet a Szerzői Jogi Szakértő Testület SzJSzT-17/06/1. számú szakértői
véleményéhez**

**Kivonat a WIPO által 2003-ban No. 891(E) számon kiadott következő című könyvéből:
“Glossary to the Copyright and Related Rights Treaties Administered by WIPO and
Glossary of Copyright and Related Rights Terms”**

**(a kivonatban foglalt rész a Berni Egyezmény 9. Cikke (2) bekezdésére vonatkozik és a
könyv 56.-60. oldalain található; a kivonatban az eredeti lábjegyzetszámozás
értelemszerűen megváltozott)**

Paragraph (2): “three-step test” for exceptions and limitations

BC-9.11. Paragraph (2) corresponds to the requirement stated in the very early stages of the preparatory work of the Stockholm revision conference and consistently taken into account during the conference itself; namely, that the recognition of a general right of reproduction must go along with general provisions concerning the scope and conditions of the application of exceptions to this right. The scope and conditions of such exceptions are determined in the form of the so-called “three-step test” included in paragraph (2).

BC-9.12. The origin of the expression “three-step test” may be found in the way Main Committee I of the Stockholm revision conference described how to apply paragraph (2). The relevant part of the report reads as follows: “If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment.”⁴⁰

BC-9.13. It is to be noted that, since 1967, the technological aspects, the nature and the impact of reprographic reproduction – which was chosen for the examples in the report -- have changed fundamentally; therefore, these examples, may not be necessarily valid any more under the present circumstances. The description in the report of the way paragraph (2) should be applied continues to be valid, however, in respect of the indication of the *structure* of the test provided for in it; that is, in respect of its being a “three-step test.” From this viewpoint, it should be stressed that, although the condition that the exception may be allowed only in special cases is mentioned at the end of this description, in fact, it is the first condition to be checked. Not only because it is the first one mentioned in the text of the paragraph, but also because it is obvious that, if it is found that the coverage of a proposed exception is broader than just a special case, it is needless to consider the other two conditions; in such a case, the exception is not allowed under the Convention.

First step: the meaning of “special cases”

BC-9.14. Although neither the text of the Convention nor the report of Main Committee I of the 1967 Stockholm revision conference contains a precise definition on what

⁴⁰ Ibid, pp. 1145-1146, para 85.

cases may be regarded “special,” the proposals and debates about limitations of, and exceptions to, the right of reproduction, as reflected in the records of the Stockholm conference, as well as the context of the Convention (in particular, the specific provisions on exceptions to the right of reproduction) offer sufficient orientation in this respect.

BC-9.15. On the basis of these sources of interpretation, it may be stated that the concept of “special cases” includes two aspects: first, any exception or limitation must be limited in its coverage; no broad exception or limitation with a general impact is permitted; and, second, it must be also special in the sense that there must be some specific and sound legal-political justification for its introduction.⁴¹ The first aspect is easily understandable and it may hardly be reasonably questioned. It is rather the second aspect which requires explanation.

BC-9.16. The text of the existing provisions of the Berne Convention on special cases of exceptions to the right of reproduction and other rights clearly shows that the revision conferences have always introduced exceptions on the basis of some clearly identifiable reasons of public policy; as the basic proposal submitted to the Stockholm revision conference, in referring to the suggestions of the Study Group, underlined it, in consideration of “various public and cultural interests.”⁴²

BC-9.17. The text and the negotiating history of the Convention indicate that certain specific public and cultural policy purposes not only have served as the basis for the adoption of provisions on exception, but also that, under the Convention, they must be kept in mind constantly in the application of the relevant provisions. Some examples for this:

Article 10(1) – on exceptions for quotation -- provides, *inter alia*, that free quotations are only possible *if “their extent does not exceed that justified by the purpose”*[emphasis added]. The purpose to which reference is made here is the clear public policy purpose of guaranteeing study, criticism and free speech.

Article 10(2) allows the “utilization...of literary and artistic works by way of illustration in publications, broadcast or sound or visual recordings for teaching, provided such utilization is compatible with fair practice” “*to the extent justified by the purpose*”[emphasis added]. Here, illustration for teaching purposes and in broader terms, promoting education by some reasonable exceptions – is the public policy purpose.

Public information is the clear purpose in the case of Article 2(4) on the possibility of excluding official texts of a legislative, administrative and legal nature, and official translations thereof, and Article 10*bis*(1) and (2) on exceptions for the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character under certain conditions, on the one hand, and, on the other hand, for reproduction and making available to the public of works seen or heard in the course of events for reporting current events by means of

⁴¹ Ricketson, for example, expresses this in the following way: “First, the use in question must be for a quite specific purpose: a broad kind of exemption would not be justified. Secondly, there must be something ‘special’ about this purpose, ‘special’ here meaning that it is justified by some clear reason of public policy or some other exceptional circumstance.” (See Ricketson, p. 482).

⁴² Records of the 1967 Stockholm conference, p. 111.

photography, cinematography, broadcasting or communication to the public by wire. In the case of Article 10bis(2), it is explicitly stated that this is only allowed “*to the extent justified by the informatory purpose*” [emphasis added].

It would be possible to continue analyzing all the special cases covered by exceptions provided for by the Berne Convention in detail. In all those cases, it is also possible to identify certain specific public and/or cultural policy purposes serving as a basis for their adoption.

BC-9.18. The public policy foundation of the purposes serving as a basis for special cases covered by exceptions and limitations under the Convention seems to require more justification than that policy makers wish to achieve *any kind* of political objective. There is a need for a clear and sound political justification, such as freedom of expression, public information, or public education; it is not allowed to curtail authors’ rights in an arbitrary way. (It has been argued that public policy considerations are not involved in the determination of “certain special cases,” but rather are foreseen as elements in the application of the two subsequent steps of the three-step test. Those steps, however, only imply public policy considerations in an indirect way, because their text focuses on the impact of the exceptions and limitations on the right owners’ interests. In that respect, a public policy element also applies, as discussed in the comments to the third step of the test below, but this only means that public policy justification is necessary, both in relation to in which areas limitations and exceptions are introduced and in relation to which particular burdens for the benefit of others society will allow to be put on specific categories of its citizens. Therefore, the two latter steps alone do not fully guarantee against arbitrary curtailment of authors’ rights.)

Second step: the meaning of “[conflict with] normal exploitation”

BC-9.19. The meaning of the word “exploitation” seems to be quite clear: it means the activity by which the owner of copyright employs his exclusive right to authorize reproduction of his work in order to extract the value of this right. What requires interpretation in this context is rather the adjective “normal.” It may be understood in two different ways: either as a reference to an empirical conclusion about what is common in a given context or in a given community, or an indication of some normative standards. The records of the Stockholm revision conference grant appropriate assistance for finding out which of these two possible meanings were taken into account during the preparatory work and at the conference.

BC-9.20. It seems to be particularly relevant what is included in the 1964 report of the Study Group set up for the preparation of the revision of the Berne Convention, as referred to in the annotated basic proposal submitted to the revision conference (document S/1). The Committee of Governmental Experts which adopted, in 1965, the draft text of Article 9, in accordance with the basic proposal (already containing the condition “does not conflict with a normal exploitation of the work”), based its discussions on the above-mentioned report of the Study Group. According to the annotations to the basic proposal, “the Study Group observed that... it was obvious that *all forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance* must in principle be reserved to the authors; exceptions that might restrict the possibilities open to authors in these respects were

unacceptable” [emphasis added].⁴³ The annotations to the basic proposal quoted the text proposed by the Study Group in which the embryonic form of Article 9(2) appears as follows: “However, it shall be a matter for legislation in the countries of the Union, having regard to the provisions of this Convention, to limit the recognition and the exercising of (the right of reproduction) for specified purposes and on the condition that these purposes *should not enter into economic competition with these works*” [emphasis added].⁴⁴

BC-9.21. The context of the basic proposal shows that the exploitation-oriented condition included in it (“does not conflict with a normal exploitation of the work”), which then became part of the final text of Article 9(2) of the Convention, has its roots in, and has practically the same objective as that of, the above-quoted exploitation-oriented condition in the proposal of the Study Group. There is no indication to the contrary in the records of the revision conference. It follows from this that, in Article 9(2), the term “normal exploitation” does not refer to some mere empirical findings on how owners of rights usually exploit their works (and, of course, their rights in the works); it is rather a normative condition: an exception “conflict(s) with a normal exploitation of the work” if it covers any form of exploitation which has, or is likely to acquire, so considerable importance that those who make use of it may enter into economic competition with the exercise of the author’s right in the work (in other words, which may undermine the exploitation of the work by the author – or his successor-in-title in the market).

BC-9.22. There is one more reason for which it is quite clear that the adjective “normal” is not of a mere descriptive, empirical nature here, but rather of a normative one. The reason is that, with technological developments, new means and forms of reproduction keep emerging, and when, at the beginning, they are applied for the first time, certainly it would be difficult to speak about a form of exploitation that might be described – in the empirical sense of the word – as “usual,” “typical” or “ordinary.” At the same time, these new forms of reproduction may be very important for the owners of copyright to extract market value from the right of reproduction in their works, the more so because they may replace some other, more traditional forms. The fact that such new emerging forms of reproduction are also covered by the requirement of not creating any conflict with any normal exploitation of works is also underlined by the above-quoted principle referred to in the annotated basic proposal: “all forms of exploiting a work, which have, or *likely to acquire, considerable economic or practical importance*, must be reserved to the authors”[emphasis added].⁴⁵

Third step: the meaning of “unreasonable prejudice to the legitimate interests of authors”

BC-9.23. No direct and explicit guidance may be found in the text of the Convention or in the records of the 1967 Stockholm revision conference concerning this concept.

BC-9.24. If the dictionary definition is taken as a basis (which may be done, of course, very cautiously and under the control of the more direct interpretation sources), it can be seen that “legitimate” (which seems to be the key adjective in this expression) is commonly defined as follows: (a) conformable to, sanctioned or authorized by, law or principle; lawful, justifiable;

⁴³ Ibid, p. 112.

⁴⁴ Ibid.

⁴⁵ Ibid.

proper; (b) normal; regular; conformable to a recognized type.⁴⁶ Here, the first definition in point (a) seems to be relevant. That definition, however, may also be understood in two different ways. If the “conformable to, sanctioned or authorized, by law...; lawful...” variant is taken as a basis, it suggests, in the context of this condition of Article 9(2), a “legal interest”; in other words, the interest of the owner of copyright to enjoy and exercise the right of reproduction provided for in paragraph (1) of the same Article as fully as possible. If this meaning is taken into account, the only possible basis for exceptions and limitations is that, although the owner of rights has such a legitimate interest, it may still be neglected in cases where the prejudice does not reach an unreasonable level. If, however, the “conformable to, sanctioned... by... principle; ... justifiable; proper” variant is accepted, the term “legitimate interests” may be understood to mean only those interests that are “justifiable” in the sense that they are supported by social norms and relevant public policies. (This is the sense of the adjective “legitimate” that frequently appears in statements such as “X does not have any legitimate interest to do this.”)

BC-9.25. The condition included in the basic proposal submitted by the Committee of Governmental Experts in 1965 in preparation of the 1967 Stockholm revision conference, according to which an act of reproduction (covered by an exception or limitation) “[must not be] contrary to the legitimate interests of the author”⁴⁷ corresponded rather to the above-indicated second, non-legal, normative meaning of “legitimacy.” However, the delegation of the United Kingdom seemed to take the first meaning – mere “legal interests” -- as a basis, and this seemed to be the reason for which it proposed the addition of the adverb “not unreasonably.”⁴⁸ With the addition of this adverb, the meaning of the term “legitimate interests” was switched; as combined with this adverb, it could not be understood any more in any other reasonable way than that it really only meant “legal interests.” However, the meaning of this condition, as a result of this switch combined with the restricting adverb “not unreasonably,” did not change substantially.

BC-9.26. The reasons for this interpretation are as follows: It is impossible that, in the basic proposal, the condition that “the reproduction is not contrary to the legitimate interests of the author” was meant to mean mere “legal interests” of the author to enjoy and exercise his right as fully as possible, since, in this case, exceptions and limitations would hardly be possible. It was only possible to regard the text in the basic proposal as meaningful if it was meant according to the above-indicated first, non-legal meaning of “legitimate interests”; that is, if this term was meant as a balancing tool between the legal interests of the author and some other reasonable, justified interests to be taken into account. The argumentation of the United Kingdom delegation, in turn, seemed to reflect the fear that “legitimate interests” still might be interpreted as mere legal interests, and this seemed to be the reason for which it sought guarantees against this possibility by introducing a balancing concept according to which authors must accept that their “legitimate” interests be prejudiced in cases where such prejudice does not reach an unreasonable level. As regards the desirable result of this kind of balancing, it is indicated in the basic proposal, which referred – in agreement – to the principle established by the Study Group in 1964: “all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors.”⁴⁹

⁴⁶ New Short Oxford Dictionary (Oxford, 1993), p. 1563.

⁴⁷ Records of the 1967 Stockholm conference, p. 113.

⁴⁸ Ibid, p. 687.

⁴⁹ Ibid, p. 111.

BC-9.27. It is duly reflected in the French version of the provision that the requirement that no prejudice must be unreasonable means that it must be duly justified (by appropriate public policy considerations). The report of Main Committee I refers to this in the following way: “The Working Group decided to adopt the amendment proposed by the United Kingdom, with some slight alterations in the English version [...] It proved very difficult to find an adequate French translation for the expression ‘does not unreasonably prejudice’. In the Committee, it was finally decided to use the expression ‘*ne cause pas un préjudice injustifié*.’ That is, “unjustified” was accepted as a synonym of “unreasonable.”⁵⁰

BC-9.28. All this means that, with the introduction of the adverb “not unreasonably” before the verb “[to] prejudice”, the “justification” test – in harmony with the above-mentioned second, non-legal normative sense of “legitimacy” – concerning the limits of defensible interests of authors, would be just repeated within this third, interest-related condition of the “three-step test.” This obviously could not have been the intention of the Stockholm conference. This is the reason for which, by the addition of this adverb, the concept of “legitimate interests” was automatically switched back to the first, legal-normative sense of “legitimacy” which, with this change, seems to have become the only appropriate reading in the context of the provision, and this is the reason for which the meaning of the provision did not, in fact, change with the new wording.

BC-9.29. The fact that the conference had taken into account the term “legitimate interests” in its “legal interests” sense – and that it was the adverb “not unreasonably” that had been intended to offer an appropriate basis for determining the permissible scope of exceptions – is also reflected by the unchallenged statement of the Chairman of Main Committee I: “Since any exception to the right of reproduction must inevitably prejudice the author’s interests, the Working Group had attempted to limit that prejudice by introducing the term... ‘unreasonable.’”⁵¹

⁵⁰ Ibid, p. 1145, para. 84.

⁵¹ Ibid, p. 883.