Discussion paper on the question of Exceptions to and limitations on copyright and neighbouring rights in the digital era

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STEERING COMMITTEE ON THE MASS MEDIA (CDMM)

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GROUP OF SPECIALISTS ON THE PROTECTION OF RIGHTS HOLDERS IN THE MEDIA SECTOR

(MM-S-PR)

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Discussion paper on the question of Exceptions to and limitations on copyright and neighbouring rights in the digital era

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Secretariat Memorandum prepared by the
Directorate of Human Rights

Introduction

At its 5th meeting (23-24 October 1997, cf. document MM-S-PR (97) 21, paragraphs 19-21), the Group of Specialists requested the Secretariat to perform a neutral analysis of the question of exceptions and limitations in the light of new developments in the communications sector.

This document reproduces the results of the requested analysis which has been prepared by the

Secretariat in collaboration with Ms Lucie Guibault, project researcher at the Institute for Information Law, University of Amsterdam, with the financial support of the Norwegian Ministry of Culture.

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1. Introduction

The digital networked environment brings severe modifications to the balance of interests between rights holders and users of protected material. Users have now access to infinite quantities of information, are now able to reproduce works in an unlimited number of exact copies and to communicate them to countless others [1]. Because of the technical possibilities,

there is justifiable fear that works distributed over the information highway will be subject to slavish copying. Moreover, arguments are being made that the functional equivalent, in the digital world, of some of the uses that are authorised under the law with respect to the analogue world may seriously affect the legitimate interests of the rights holders [2]. New uses of works over the network, such as browsing and caching, are also likely to pose a threat to the interests of the rights holders.

Such developments bring up the issue of the scope of rights to grant authors, performers and phonogram producers with regard to works circulating in the new environment. In connection to this, both rights holders and users ask for a reassessment of the limitations on the exercise of exclusive rights currently admitted in favour of users. Current discussions raise the following question: what can or cannot be done on the information highway with respect to protected material, and on what grounds? Are there limitations which are based on the safeguard of fundamental rights, such as freedom of expression, freedom of information and the right to privacy, or based on other public interest considerations and which should not be ignored in the digital environment?

Generally speaking, the scope of rights granted to creators under the copyright and neighbouring rights Acts can be stated either in broad or in narrow terms. When creators enjoy broad exclusive rights, which encompass all possible uses of a work, some limitations on the exercise of such rights may be justified to preserve, in specific circumstances, the public's right to make unauthorised uses of protected material. In contrast, when the rights are stated in narrow terms, thereby excluding certain acts from the protection regime, exemptions in favour of users may not be needed at all. One must realise that limitations on the exercise of exclusive rights are but one alternative conceived by legislators and courts in defining the scope of a right owner's exclusive rights [3].

As regards the digital networked environment, where users have the possibility to scan printed works, to load and/or store them in digital form and to transmit them through the network, it is well admitted that the two most important economic rights to be granted to creators are the reproduction right and the right to communicate or make a work available to the public [4]. While in most countries the scope of the latter right is rather straightforward, discussions have arisen in a certain number of countries as to whether current provisions on making a work available to the public extend to on-demand services. In contrast, much debate surrounds the scope of the reproduction right. Indeed, not all technical reproductions should constitute a reproduction in the sense of the copyright and the neighbouring rights Acts [5]. Law makers now have the task of drawing the line between permitted and reserved acts of reproduction, that is, either by defining a broad reproduction right accompanied by a number of limitations or by carving out certain acts from the reproduction right. In practice, during the discussions that led to the adoption of the two new *WIPO Treaties* [6], most delegations were said to favour broadly stated rights coupled with a definite set of limitations [7]. There seems to be consensus however, that current limitations should not be automatically transposed into the digital networked environment [8]. Furthermore, before transposing existing limitations or implementing new ones, a careful examination of their relevance and their impact on the right holders' interests should be carried out.

The definition of limitations on the exercise of exclusive rights has been identified as one of the major remaining issues to be resolved, in relation to the digital networked environment. Generally speaking, limitations take one of the three following forms: 1) an exclusion from the protected subject matter; 2) a restriction on the scope of rights allowing particular kinds of use; or 3) a statutory licence, with or without the payment of remuneration. Limitations which consist

in the exclusion of certain elements from the list of protected subject matter, such as news of day and speeches delivered in the course of legal proceedings, will probably not be affected by the current discussion [9]. These elements should remain outside of the copyright protection, whether they are used in the analogue or in the digital world. The controversy over the application of restrictions to the exercise of exclusive rights in the digital networked environment centres on a number of limitations that fall under one of the two other categories, namely those which consist in a restriction on the scope of rights allowing particular kinds of use and those which take the form of a statutory licence. The controversy over the creation of limitations on the exercise of exclusive rights should not be confused however with the possible modification of other limits to the copyright and neighbouring rights regimes, such as their duration and the principle of exhaustion, which is not dealt with in the framework of this document.

Aware of the economic significance of the electronic exchange of information and of the importance of ensuring greater legal certainty in the field, governments are now in the process of adapting the copyright and neighbouring rights rules to this new medium [10]. Ideally the new rules should guarantee sufficient protection for creators to maintain their level of investments in the production of new works distributed on-line, while maintaining the public's right to consume those works, including the possibility to make, in certain well-defined circumstances, limited uses of those works without the rights holder's consent. The fact that legislative action is already underway on this subject in a number of countries by no means implies that the debate is settled however.

This document is divided into three main sections. The first section draws a portrait of the current international context, including comments on the relevant provisions of the *Berne Convention*, the *Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* [11], the new *WIPO Treaties* and the *Proposal for an EC Directive on Copyright and the Information Society*. The second section discusses, from an international and comparative law perspective, the statutory copyright and neighbouring rights limitations most likely to be applied in the digital environment and their grounds for implementation. The final section discusses the three most controversial issues raised in the digital environment with respect to limitations, which are the question of browsing and caching, the status of the private use exemption and the library privilege. The distinction between the copyright and *droit d'auteur* regimes is outlined, throughout the report, only where it is particularly relevant for the discussion. It must also be noted that this discussion paper does not address issues relating to moral rights, nor does it deal with limitations specifically adopted, under the *Berne Convention* and other international instruments, in favour of developing countries.

Also, the terms “limitations”, “exemptions” and “exceptions” used in the text are not to be taken as equivalents. The expression “limitations on the exercise of exclusive rights”, which is most often employed in the following pages, puts the emphasis on the authors, performers and phonogram producers and the restrictions imposed on the exercise of their rights. This expression may in turn include both “exemptions” and “exceptions” to creators' rights. The term “exemptions” is the preferred alternative, signifying that a user is free, under specific conditions, from copyright liability which otherwise subsists as regards others. The term “exceptions” is the term generally used in most international instruments and in some national legislation, and is employed in this document only inside citations. The use of the term "exceptions” seems to suggest that some instances do not follow the rule or that some acts are all together excluded from the application of the law, where in fact the rules of copyright and neighbouring rights law continue to apply and are simply relaxed in particular circumstances and under specific conditions [12].

Before getting further into the subject of limitations on the exercise of copyrights and neighbouring rights in the digital networked environment, it is worth pointing out that, in adapting old rules or designing new ones, the task of policy makers will undeniably be influenced by two important factors. The first one relates to technology. Indeed, encryption methods and other similar techniques allow rights holders to control more effectively the use made of their works. While the use of encryption techniques could be encouraged as an efficient mode of protection, the implementation of these techniques should not result in blocking access to public domain material, such as uncopyrightable subject matter and material whose protection has lapsed. In addition, the adoption of criminal sanctions for the use of circumvention techniques should take into account the fact that not all unauthorised reproductions are condemnable under the law, given the existence of statutory limitations on copyright and neighbouring rights protection.

The second factor pertains to the contractual practices occurring on the information highway. Contract law is seen by many as a ready solution for the determination of the conditions of use of protected material in the digital networked environment. However, the conclusion of contractual agreements in this field raises several questions as to the boundary between copyright law and contract law. To what extent may the terms of a copyright licence override copyright principles such as statutory exemptions aimed at preserving user freedoms? Are copyright limitations default or mandatory rules? More fundamentally, should there be limits to the freedom of copyright contracts and, if so, on what grounds should such contracts be regulated? Although important for the outcome of the discussion on limitations, these questions are not dealt with in the framework of this document [13].

2. International context

Recent years have witnessed some intense activity at the international level, in view of harmonising current copyright and neighbouring rights rules and of adapting them to the new digital environment. Both the harmonisation of the rules and their adaptation to the technology are undertaken as a means to reduce the perceived trade barriers within the "copyright industry", which includes such products as books, sound recordings, films, multimedia products and software. The increasing economic importance of this industry [14] certainly explains the interest shown by several multilateral organisations devoted not only to the protection of intellectual property but also to international trade, such as the World Trade Organisation [15].

International efforts to accommodate the rules of copyright and neighbouring rights law to the characteristics of the information highway have led to the adoption of the two *WIPO Treaties* in December 1996. Member States are now in the process of implementing the provisions of these new instruments into their national laws. At the European level, the implementation process is intended to first go through the adoption of a Directive by the European Parliament and the Council, to be later transposed into the Members' legislations. To this end, the European Commission has recently issued the proposed *Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society*, which would implement the main obligations of the new Treaties on the protection of authors, performers and phonogram producers.

The current international context surrounding the scope of copyrights and neighbouring rights in the digital networked environment is thus characterised by the existing rules of the *Berne Convention* and the *Rome Convention*, by those of the new *WIPO Treaties* and, at the European level, by the proposed *Directive*, once adopted. These instruments are designed to set out the minimum standard of protection for authors, performers and phonogram producers. And, as shown below, they also contain provisions establishing the contours of the limitations on the exclusive rights

which countries may implement into their respective legislation.

2.1 Berne & Rome Conventions

Always a result of some compromise on the part of nations participating to their negotiation, the provisions of the Berne and the Rome Conventions constitute the minimum protection that countries are to implement with respect to copyrights and neighbouring rights. In this sense, countries may grant stronger protection for authors, performers, producers of phonograms and broadcasting organisations, then that set out in the Conventions, but they may not grant weaker protection. While having the obligation to implement any mandatory limitation on the exercise of exclusive rights, countries may thus decide whether or not to incorporate into their national legislation any or all optional limitations allowed under these international instruments.

Although never exempt from controversy as to their scope and form, the idea of imposing limitations on the exercise of exclusive rights has been present in the copyright discourse since the very beginning of the Berne Union. In fact, the founding members of the Union already agreed to the inclusion of two limitations in the text of 1886. The first one allowed, under initial Article 7, the legal reproduction and translation of articles taken from newspapers and periodicals, unless forbidden by the author or publishers of those articles. Article 7 further stated that no such prohibition was permissible in the case of articles of "political discussion... news of the day or miscellaneous information". The second provision granted Union members, under initial Article 8, the discretion to regulate the taking of excerpts of works for educational and scientific publications, and for inclusion in chrestomathies [16]. Both proposals were said to be justified by public interest considerations and at least the first one seemed to reflect the content of some of the bilateral agreements in force at the time [17].

From its first adoption in 1886 to the Paris Revision in 1971, the text of the Berne Convention underwent a total of seven re-writes. Although proposals were put forward at almost every one of these Diplomatic Conferences to introduce new or revised limitations, the current text is essentially a creation of the Stockholm Conference held in 1967. In addition to the exclusion of certain material from the list of protectable subject matter [18], we find basically three limitations that are still relevant to the digital networked environment. Founded on public interest considerations, these limitations are meant to promote the free flow of information, to permit the use of material for teaching purposes, or, more generally, to allow the reproduction of works in particular circumstances. The *Berne Convention* also allows members of the Union to implement statutory licenses for the broadcasting and the recording of works [19] or the ephemeral recordings of broadcast works. However, except for the question of whether statutory licenses for the broadcasting of works cover digital broadcasting, statutory licenses for the recording of works and for ephemeral broadcasting would seem to be too technology specific or too purpose specific to bear any impact on the digital world.

Public interest preoccupations played a major role in the adoption of most of the limitations included in the *Berne Convention*. In view of the language used in several articles, the safeguard of the free flow of information and the promotion of science and knowledge were never far in the mind of its drafters. However, one must remember that public interest is mostly a matter of national policy: what is in the public interest in one country, is not necessarily in the public interest in another. Thus the limitations listed in the *Berne Convention* are the result of serious compromise on the part of national delegations – between those that wished to extend user privileges and those that wished to keep them to a strict minimum – reached over a number of diplomatic conferences and revision exercises. Consequently, all but one limitation set out in the text of the *Berne Convention* are optional: countries of the Union are free to decide whether or not

to implement them into their national legislation. These limitations are meant to set the boundaries within which such regulation may be carried out.

Article 10 is a direct remodelling and renumbering of the original Article 8 of the *Berne Convention of 1886*, which gave countries the possibility to regulate the taking of excerpts of works for educational and scientific publications, and for inclusion in chrestomathies. At the Stockholm Conference, this provision was split into two paragraphs: the first paragraph grants the right of quotation, while the second relates to the utilisation of works for teaching purposes. The right of quotation is thus the only mandatory limitation contained in the *Berne Convention*, at Article 10(1), which provides that:

"It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries".

According to this article, quotations may be taken from any category of works, including literary works, films, records, radio or television programmes etc., as long as they are made from works that have already been made available to the public. This excludes quotations from unpublished works. Although some delegations fought hard to incorporate an element of measure regarding the length of allowable quotations, no such requirement was inserted in the text of the *Berne Convention* : quotations must simply be "compatible with fair practice" and "not exceed that justified by the purpose" [20]. Quotations made for scientific, critical, informational or educational purposes are also covered by this article, just as those made for judicial, political and entertainment purposes.

The regulation of the "utilisation of works by way of illustration" for teaching purposes has been left to the discretion of national legislations [21]. Under Article 10(2) of the *Berne Convention*, such utilisation is lawful if it is made for the purposes of teaching, if it is "justified by the purpose" and if it is "compatible with fair practice". Illustrations can be made by means of publications, broadcasts or sound and audio-visual recordings, provided that they fulfil the listed requirements. Article 10(2) has been interpreted to apply to teaching at all levels, if dispensed in educational institutions and universities, municipal, state and private schools, but not to teaching dispensed outside these institutions such as general public and adult education facilities [22]. As in the case of quotations, the utilisation for teaching purposes is not subject to any determined quantitative restriction. The words "by way of illustration" do impose some limitation on the size of the borrowing, but would not exclude the use of the whole of a work in appropriate circumstances [23].

Article 10 *bis* of the *Berne Convention* contains an additional limitation, designed to promote the free flow of information. This provision, concerning the use of articles of newspapers and periodicals, was surrounded by much controversy at the time of its first adoption in 1886, but also during several of the Diplomatic Conferences on the revision of the Convention. Under Article 10 *bis* (1), it shall be a matter for legislation in the countries of the Union to permit the reproduction of articles published in newspapers or periodicals on current economic, political or religious topics and the broadcast works of the same nature [24]. The permissible acts not only include the reproduction of articles, but also the broadcasting of works and their communication to the public by wire. To be lawful, the material reproduced, broadcast or communicated to the public by wire must be qualified as "current" and must relate to economic, political or religious topics [25]. Again no restriction as to the length of the reproduction, broadcast or communication of a work has been set, so the use of an entire work would be acceptable if the

circumstances justify it. Indication of the source of the work constitutes the only condition for compliance with this provision. Finally, Article 10 *bis* (2) leaves it to the countries of the Union to determine the conditions under which such reproduction or making available is possible, but always to the extent justified by the informational purpose [26].

Probably the most directly relevant and most significant limitation to the digital environment is set out in Article 9(2) of the Convention in relation to the reproduction right. A formal reproduction right was not introduced in the text of the *Berne Convention* until the Stockholm Conference. The right of reproduction contained in article 9(1) is written in very broad terms, and is intended to apply to current technology as well as to any future developments [27]. Considering the extent of the right granted, a number of delegations saw the need to impose a limitation on this right in certain circumstances. The current wording of Article 9(2) was finally agreed upon, after long and difficult negotiations among the delegations. It provides for the right of any country of the Union "to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author". The limitation of Article 9(2) has been implemented in most cases to allow private use and reproductions for purposes of teaching and research, but has also been implemented to cover judicial and administrative use, as well as industrial and commercial purposes.

All reproductions permitted under Article 9(2) must be for a specific purpose and conform to the two conditions set out in the article. These conditions are cumulative: a reproduction must not conflict with the normal exploitation of the work, and it must not unreasonably prejudice the legitimate interests of the author. However, there is no clear interpretation of what constitutes a "normal exploitation of a work" or an "unreasonable prejudice to the legitimate interests of the author" [28]. Basically, where the normal exploitation of the work is threatened, no reproduction is authorised. If the normal exploitation is not affected, one must still examine whether the reproduction causes an unreasonable prejudice to the interests of the author. Assuming that all unauthorised reproductions are prejudicial to the interests of the copyright owner, the question is whether the prejudice is unreasonable in the circumstances. Unreasonable prejudice may be avoided by the payment of remuneration under a compulsory or statutory license [29]. These parameters are now commonly known as the "three-step test" of the *Berne Convention* and have become the standard reference for the implementation of any new limitation on the exercise of exclusive rights [30]. According to Ricketson, these criteria of evaluation are also to be taken into account when examining whether a quotation and "utilisation by way of illustration" are compatible with fair practice [31].

The history of neighbouring rights is more recent. While a few countries had granted certain rights to performers at an early stage, most countries did not afford such protection until their adhesion to the *Rome Convention* of 1961. When the Convention was finally adopted after a long negotiation process, it covered not only performers' rights but also those of phonogram producers and broadcasting organisations. Under the *Rome Convention*, producers of phonograms were granted an exclusive right to authorise or prohibit the reproduction of their phonograms as well as an optional right to remuneration in the case of broadcasting or communication to the public of a record, while broadcasters were granted rights with respect to rebroadcasting, fixations of broadcasts and certain reproductions. Contrary to the exclusive rights granted to producers and broadcasters, performers were given a mere right of remuneration for the reproduction or broadcast of the fixation of their performances [32]. Consequently, when adhering to the *Rome Convention*, countries like Germany [33], where performers had enjoyed exclusive rights for a number of years, modified their regime of protection back to that of a remuneration right. In the context of the digital networked environment, the question has been

raised whether equitable remuneration rights granted to performers should be modified into exclusive rights to better suit their needs. This issue however is not dealt with in the framework of this document.

Considering the limited scope of rights granted to performers, producers of phonograms and broadcasting organisations, limitations on their exercise did not need to be very extensive. Thus Article 15(1) of the *Rome Convention* provides that:

"Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:

(A) private use;

(B) use of short excerpts in connection with the reporting of current events;

(C) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;

(D) use solely for the purposes of teaching or scientific research".

These limitations are not as narrowly confined as in the copyright field. This is particularly true with respect to the private use exemption which, under copyright law, is based solely on Article 9(2) of the *Berne Convention* and is therefore subject to the "three-step test". They are applicable to all three categories of beneficiaries, only insofar as they are implemented into national legislation [34]. Furthermore, according to the second paragraph of Article 15, the list of possible limitations to neighbouring rights permitted under the *Rome Convention* is not exhaustive:

"Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organisations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with this Convention".

This second paragraph allows Contracting States to provide for exemptions other than those enumerated in the first paragraph, if their copyright laws already contain such limitations. As specified in the WIPO *Guide to the Rome Convention*, the four specific limitations in paragraph (1) are those mainly used to limit authors' rights, but there may be other minor ones. Hence, the second paragraph avoids the risk that neighbouring rights owners are treated better than authors with respect to limitations [35]. However, according to the last sentence of Article 15(2), none of the uses enumerated in Article 15 are to amount to a statutory license, where the use of the right would be permitted without the authorisation of the right owner under certain conditions, but against equitable remuneration. The only statutory licences that Contracting States may implement are those that are expressly permitted under articles 7.2(2), 12 and 13(d) of the Rome Convention [36].

2.2 WIPO Treaties

By the late 1980s, the spectacular growth of the digital networked environment had sparked the need to review the rules of copyright and neighbouring rights law. The protection afforded to

authors, performers and phonogram producers under the *Berne Convention* and the *Rome Convention* was deemed no longer sufficient to cope with the characteristics of the new environment. However, instead of calling for a diplomatic conference on the revision of the existing conventions, the World Intellectual Property Organisation (WIPO) convened the countries of the Union for the negotiation of new norms of protection. This led to the adoption in December 1996 of the *WIPO Copyright Treaty* (WCT) and the *WIPO Performances and Phonograms Treaty* (WPPT) [37].

During the preparatory work, delegations spent much time discussing what would be the appropriate scope of protection to grant rights owners in the digital environment. Among the several questions examined was that of the applicability of the right of reproduction to the new environment, and the possible limitations to it. After lengthy debates, delegations came to the conclusion that the wording of Article 9(1) of the *Berne Convention* was sufficiently broad to cover digital reproductions. On the basis of this consensus, Contracting Parties to the WPPT agreed to upgrade the protection afforded under the *Rome Convention* by granting performers and phonogram producers "the exclusive right of authorising the direct or indirect reproduction of their performances fixed in phonograms [or of their phonograms], in any manner of form" [38]. As further analysed below in the section on "browsing and caching", no consensus could be reached however on the wording of a possible limitation to allow transient or incidental forms of temporary reproductions, which a number of delegations believed should not be covered by the exclusive right of authorising reproduction. At the close of the Diplomatic Conference on the *Copyright Treaty*, delegations adopted the following Agreed Statement:

"The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention".

A similar Agreed Statement was also adopted concerning the *Performances and Phonograms Treaty*. It is therefore to be understood that the concept of reproduction under Article 9(1) of the *Berne Convention* fully applies to the digital environment, including in cases where the reproduction is made through storage in an electronic memory. Moreover, exemptions allowed under Article 9(2) of the *Berne Convention* are also applicable. It has been suggested that this Agreed Statement could constitute an appropriate basis for the introduction into the Contracting Parties' national laws of any justified exemptions in cases of transient and incidental reproductions, subject to compliance to the "three-step test" of Article 9(2) of the Convention [39].

Other exclusive rights have been formally introduced, both under the *Copyright Treaty* and the *Performances and Phonograms Treaty*. Among these are the right of distribution, the right of rental, and the "right to communicate a work to the public" under the WCT, with its equivalent "right of making available of a sound performance" under the WPPT [40]. Both rights of "making available" are meant to encompass all "on-demand" communications of works or sound performances, which are now subject to authorisation from the rights owner. No specific limitation was adopted with respect to these rights.

As in the case of Article 13 of the *WTO/TRIPS Agreement*, Article 10 of the WCT and Article 16 of the WPPT set out the only possible limitation on the exercise of the rights provided therein. Both provisions are modelled after Article 9(2) of the *Berne Convention*. However, the new treaties not only confirm the application of this test in the area of copyright - making it applicable to all authors' rights and not only to the reproduction right - but extend it also to the area of neighbouring rights. The model of the *Rome Convention* has thus been abandoned, which would

have allowed Contracting Parties to provide for limitations to the rights as regards certain types of use, irrespective of any potential prejudice to the interests of performers and producers of phonograms, [41] Article 10 of the WCT reads as follows:

(1) Contracting Parties may, in their national legislation, provide for limitations of or 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 of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

The first paragraph of this provision has been interpreted as applying to the new rights conferred by the Treaty, namely the rental right, the distribution right, the right to communicate certain categories of works to the public as well as the interactive transmission right [42]. All limitations on these new rights must therefore comply with the "three-step test": they must be confined to special cases, they must not conflict with normal exploitation of the protected subject matter nor must they unreasonably prejudice the legitimate interests of the author. The second paragraph introduces an obligation for Contracting Parties to apply these same conditions to any limitation that they would make to the rights provided for in the *Berne Convention*. This provision in fact determines the permissible scope of limitations under the Convention.

Article 10(2) of the WCT must be read in conjunction with Article 20 of the *Berne Convention*, according to which provisions included in a separate copyright agreement may only increase the protection granted to authors or at least maintain the same level of protection [43]. The idea has been put forward that those limitations, which have been adopted pursuant to the *Berne Convention* but which do not currently comply with the "three-step test", would have to be revised to ensure conformity. This obligation could even extend to the revision of "minor reservations" sometimes found in national legislations, according to which certain exemptions are permitted for example in respect of religious ceremonies or performances by military bands or for the requirements of education and promotion of culture. The argument has been made that, in the digital environment, formally "minor reservations" may in reality undermine important aspects of protection [44]. However, this last interpretation is contested. Some authors raise the possibility that the obligation to review existing limitations to ensure their conformity with the "three-step test" may come in contradiction with the Agreed Statement concerning Article 10 [45]. The interpretation and the weight to be given to the following Agreed Statement are thus far from evident:

"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 acceptable 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 networked environment.

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

In any case, Article 10(2) of the WCT extends the application of the "three-step test" to all economic rights provided in the *Berne Convention*. With respect to the *Performances and Phonograms*

Treaty, Article 16(2) extends the "three-step test" to the new rights provided under the Treaty, in the same way as does Article 10(1) of the WCT. Article 16(1) of the WPPT reproduces the main principle of Article 15(2) of the *Rome Convention* and states that: "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". This provision avoids once more that performers and producers of phonograms get better treatment than copyright holders. Finally, the Agreed Statement concerning Article 10 of the WCT applies *mutatis mutandis* to Article 16 of the WPPT.

The application of the "three-step test" to the digital environment raises several questions. What constitutes a normal exploitation of a work in the digital networked environment? If technology makes copyright owners capable of controlling every use made of their work on the information highway and of collecting royalties for every authorised act, does this automatically imply that they should be allowed to do so? [46] Would the imposition of a limitation in this case systematically affect the normal exploitation of the work? If the normal exploitation of the work is not affected, is the prejudice to the legitimate interests of the rights holder always unreasonable? Should some of these limitations be maintained for the purpose of safeguarding user freedoms, even if they affect the normal exploitation of a work?

Compliance to the "three-step test" for the introduction of new limitations will force national legislatures to examine what are the conditions of normal exploitation of works, performances and phonograms in the digital environment and what unreasonable prejudice may be caused to the legitimate interests of rights owners. They will conclude in a number of cases that normal exploitation and unreasonable prejudice in the information highway differ substantially from what occurs in the analogue world [47]. However, the basis for adoption of the different limitations to copyright and neighbouring rights should also be examined. It may turn out that some of these limitations are based on the defence of the constitutional rights of users, and that they should be upheld in the digital world, in spite of the fact that the normal exploitation of the work is affected.

2.3 Proposal for an EC Directive on Copyright and the Information Society

Since the early 1990s, the European Community has engaged intense efforts towards the harmonisation of the copyright and neighbouring rights rules. Five Directives were adopted on copyright and related rights, bringing with them the obligation for Member States to implement these rules into their national legislation [48]. However, the same period saw the rapid growth of the information highway, to which the European Commission had to devote equal attention. Of particular interest were the on-going works at the WIPO in view of the adoption of the new Treaties. All this activity led to the publication, in July 1995, of the *Green Paper on Copyright and Related Rights in the Information Society* [49]. A vast consultation process with the industry, rights holders, users and other interested parties, followed the publication of the Green Paper. Over one year later, the Commission published a second document, based on the results of the consultation. The *Follow-up to the Green Paper* was written to set out the Commission's Internal Market policy in the area of copyright and related rights in the Information Society and explain the reasoning behind the approach taken notably with respect to the priorities and means of action chosen [50].

As a result of this consultation process, the Commission presented, in December 1997, a *Proposal for an EC Directive on Copyright and Related Rights in the Information Society* [51] . According to the Background Document, the Proposal would adjust and complement the existing legal

framework, and would particularly harmonise the rules pertaining to the right of reproduction, the right to communicate to the public, and the distribution right. The Proposal is also meant to implement the main obligations of the new *WIPO Treaties*, in view of their ratification by the Community.

The structure of rights and limitations of the *Proposal for a Directive* differs somewhat from that of the *WIPO Treaties*. In contrast to the *Treaties*, the *Proposal* seeks, in Article 2, to extend to all rights holders recognised in the *acquis communautaire* the exclusive right to authorise or prohibit the direct or indirect reproduction, whether temporary or permanent, in any manner or form. This would not only include authors, performers, and phonogram producers, but also film producers and broadcasting organisations. The same rights holders would also enjoy, under Article 3, the exclusive right to authorise or prohibit the communication to the public of all categories of works, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them. This new right of communication to the public would cover interactive on-demand transmissions of works and sound performances, as in the *WIPO Treaties*, but also of audio-visual and any other type of protected material. Following this Proposal, the scope of the exclusive rights granted and the number of beneficiaries of such protection would be, in some respects, broader than what is required under the international obligations.

Contrary to the *WIPO Treaties* which contain no specific limitation besides the reference to the "three-step test", the Proposal would introduce an **exhaustive** list of limitations in addition to the test. Member States would not be allowed to provide for any exemptions other than those enumerated in Article 5. The Commission believes that without adequate harmonisation of the exemptions to the reproduction right and to the right to communicate in public, as well as of the conditions of their application, Member States might continue to apply a large number of rather different limitations and exemptions to the rights and, consequently, apply the rights in different forms to the detriment of the Internal Market. The prohibition to impose limitations other than those included in the list would therefore extend to limitations that are implemented in relation to the digital networked environment, as well as to those that apply only in the analogue world. Thus, the impact of the Proposal would not only be on future limitations adopted for the promotion of the Information Society but also on current exemptions.

Although Article 1(2) of the Proposal states that, "unless otherwise provided, the Proposal shall apply without prejudice to existing Community provisions relating to" copyright and related rights, the relationship between this Proposal and current limitations put in place by Member States is not clear. For instance, it is safe to assume that the specific exemptions of the Computer Programs Directive and of the Database Directive would continue to apply [52]. However, there is no indication as to the intended fate of "minor reservations", which are implemented in some countries on the basis of local public interest considerations. Would these small limitations have to be abolished, even if they have no economic significance for the Internal Market [53] ?

The Proposal would also submit all limitations to the requirements of the "three-step test", according to Article 5(4) which reads as follows:

"The exceptions and limitations provided for in paragraphs 1, 2 and 3 shall only be applied to certain specific cases and shall not be interpreted in such a way as to allow their application to be used in a manner which unreasonably prejudices the rightholders' legitimate interests or conflicts with normal exploitation of their works or other subject matter".

As we have seen above, opinions vary as to the interpretation and weight to be given to the

Agreed Statement concerning Article 10 of the WCT, as well as to the extent to which States must ensure the compliance of existing limitations to the "three-step test". The Commission seems to take the view however, that all such limitations must be made compatible with the requirements of the "three-step test", as shown by this comment from the Explanatory Memorandum accompanying the Proposal:

"It goes without saying that the obligations under the new Treaties have to be met in any case. Both Treaties provide for important clarifications and further guidance, which will have to be respected by those adhering to the Treaties. In particular the "three step test" will serve as an important guideline for the definition and application of limitations. This implies that, also with respect to the reproduction right, certain limitations set out at Community level as well as at national level will have to be amended to be brought in line with the new WIPO Treaties also in the Community and its Member States " [54]. (Our emphasis)

As it currently stands, Article 5 of the Proposal is divided into four paragraphs, the fourth one stating the principles of the "three-step test". The first and second paragraphs would provide for limitations relating to the reproduction right, whereas the exemptions of the third paragraph would be applicable to both the reproduction right and the right to communicate to the public. Thus, Article 5(1) would introduce the only mandatory limitation, according to which "temporary acts of reproduction referred to in Article 2 which are integral to a technological process made for the sole purpose of enabling a use of a work or other subject matter and have no independent economic significance, shall be exempted from the right set out in Article 2". This provision would cover purely technical and ancillary reproductions, made for the sole purpose of accomplishing other acts of exploitation of works, and which have no separate significance of their own. The Explanatory Memorandum gives the example of an on-demand video transmission between a computer in Germany and another in Portugal, where such a transmission implies the making of close to one hundred, often ephemeral, acts of storage of the video along the transmission to Portugal.

The second paragraph lists three optional exemptions to the reproduction right: 1) the reproduction on paper or similar support by using any kind of photographic technique or other processes with similar effects ("reprography"); 2) the reproduction on audio, visual or audio-visual recording media made by private individuals for private use and non-commercial ends ("home taping"); and 3) specific acts of reproduction made by public libraries, museums and other establishments accessible to the public, which are not for direct or indirect economic or commercial advantage ("library privilege") [55]. In its Explanatory Memorandum, the Commission writes that the first sub-paragraph concerning reprography does not focus on the technique used but rather on the result obtained, which has to be in paper form. This, clearly, would not apply to the digital environment. The background document to the Proposal further explains that:

"The effect of these optional exceptions would be that Member States could, for example, maintain their current systems for compensating right holders for **private copying** or photocopying (e.g. levies on sales of blank tapes and audio and video recorders, levies on photocopiers and photocopies). The Directive would not, therefore, introduce any obligation on Member States to introduce such private copying or photocopying levies or harmonise their level".

Hence, the essential purpose of Article 5(2) would be to ensure the legality of such limitations, whether current or future, and to submit them to the requirements of the "three-step test". Interestingly, the Commission stresses, in the Explanatory Memorandum, that the exemption

allowing the implementation of reprography regimes is left as an option in the Proposal, despite existing differences between Member States that provide for such exemptions, as their effects are in practice rather similar. The Commission then goes on to say that "the Internal Market is far less affected by these minor differences than by the existence of schemes in some Member States and their inexistence in others" and that "those Member States that already provide for a remuneration should remain free to maintain it, but this proposal does not oblige other Member States to follow this approach" [56].

Under Article 5(3) of the Proposal, Member States would also have the option of applying further exemptions to both the reproduction right and the right to communicate to the public. Such limitations would be permitted, provided that they conform to the "three-step test", in the following five circumstances:

1. use for the sole purpose of illustration for teaching or scientific research as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;

2. for uses to the benefit of visually-impaired or hearing-impaired persons, which are directly related to the disability and of a non-commercial nature and to the extent required by the specific disability;

3. use of excerpts in connection with the reporting of current events, as long as the source is indicated, and to the extent justified by the informatory purpose;

4. quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, the source is indicated, their making is in accordance with fair practice and to the extent required by the specific purpose;

5. use for the purposes of public security or for the purposes of the proper performance of an administrative or judicial procedure.

These limitations would apply to any category of work. They are modelled either on the provisions of the *Berne Convention* or on the provisions found in the legislation of many Member States. In the Commission's view, these limitations have more limited economic importance. Article 5(3) therefore only sets out minimum conditions for their application, and it is for the Member States to define the detailed conditions of their use, albeit within the limits set out by the provision.

The structure of Article 5 of the *Proposal for a Directive* raises three major comments. First, as pointed out by the Legal Advisory Board (LAB) concerning the possible adoption of an **exhaustive** list of limitations, harmonisation does not necessarily mean uniformity [57]. According to the LAB, rules should be converging, but should also allow distinctive features found in national legislations to subsist, as long as they do not hinder the Internal Market. The *Berne Convention* constitutes a good element of comparison, where the option of adopting a more complete list of exemptions, which would have been exhaustive, had been examined at the Stockholm Conference. However, this proposal was rejected for two main reasons. First, because in order to encompass all the principal exemptions existing in national laws, such a list would have had to be very lengthy, and it would still not have been comprehensive. The second motive for rejecting this option was based on the fact that not every country recognised all the possible exemptions, or that some of them were granted only subject to the payment of remuneration under a statutory licence. It was feared that by including an exclusive list of limitations, States

would be tempted to adopt all the limitations allowed and abolish the right to remuneration, which would have been more prejudicial to the rights owners [58]. These remarks hold true today in respect of the *Proposal for a Directive* as they did for the *WIPO Treaties*.

Second, considering the **exhaustive** character of the list of limitations included in the Proposal, the manner in which these limitations are intended to interact with pre-existing limitations is not obvious from the text of the Proposal: are the limitations listed in the Proposal to abrogate and replace all prior rules? As mentioned above, Article 1(2) of the Proposal contains no indication as to the fate of the limitations found in the statutes of some Member States. This issue is not discussed in either the Explanatory Memorandum or the Background Document on the Proposal. Third, in its Explanatory Memorandum, the Commission puts much importance on contractual relationships, as a means for information producers, intermediaries and end users to determine directly the conditions of use of protected material. As the LAB pointed out in its *Reply to the Green Paper*, "there is good reason to expect that in the future much of the protection currently awarded to information producers or providers by way of intellectual property, will be derived from contract law". However, there is also reason to fear that, without appropriate contractual boundaries, users may be forced to forego some of the privileges recognised by law, in order to gain access to protected material. Whereas the Computer Programmes Directive and the Database Directive both specify which exemptions may not be circumvented by contractual agreement, the Proposal keeps silent on this issue.

As shown in the following pages, some copyright restrictions have been widely recognised in most copyright and *droit d'auteur* countries as contributing to the free flow of information and to the safeguard of user freedoms. Exemptions pertaining to the study, research, criticism, news reporting and parody constitute such fundamental limitations implemented for the defence of the public's freedom of information, freedom of speech and right to privacy. It would probably go against the provisions of *European Convention on Human Rights* and against fundamental policy objectives to allow parties to a contract to waive the application of any of these limitations.

3. Limitations and their Justification

Like any other type of private property right, copyright and neighbouring rights are not absolute rights [59]. Even the countries most committed to the advancement of author's rights recognise the need for restrictions or limitations upon these rights in particular circumstances [60]. There are several reasons to restrict the exercise of copyright and neighbouring rights, all of which are aimed at maintaining a balance between the rights holders and the users [61]. Some are based on fundamental principles of law, some on public interest considerations, and others on economic factors.

The justifications for the creation of such limitations are not static however: limitations based today on public interest considerations may eventually be justified as remedies to market failure, and likewise, limitations which are currently implemented in response to perceived market failure may take a public interest dimension in the future. It is also quite possible that certain limitations have more than one ground of justification. For the purposes of this document, we have identified three main grounds for adoption of limitations on the exercise of exclusive rights: 1) the defence of fundamental rights; 2) the promotion of education, culture and knowledge; and 3) market failure. Subsection 4 regroups a small number of limitations, simply because they are all based on considerations other than those discussed in the previous sections. The last subsection

is dedicated to the common law defences of fair use and fair dealing.

While most exemptions to copyrights and neighbouring rights originate in international instruments such as the *Berne Convention* and the *Rome Convention*, States have always maintained national sovereignty to decide whether to implement them into their laws, and if so how. Hence, differing policy orientations, distinct drafting techniques and judicial interpretation result in a variety of copyright limitations found among the countries of the Berne Union, ranging from the minimal exemptions allowed under the French *Code de la propriété intellectuelle*, to the lengthy, hard-to-read and hard-to-apply exemptions recognised under the British *Copyright, Designs and Patents Act 1988* [62]. Solutions for the same problem also tend to vary from one country to another: a particular use may be carved out from the scope of protection in one country, and take the form of a statutory license, with or without remuneration, in other countries.

3.1 Limitations based on the defence of fundamental rights

Two months before the approval of the European Commission's *Proposal for a Directive*, the European Parliament issued a Resolution containing its main guidelines and recommendations for the elaboration of a Directive. The safeguard of the public's fundamental rights constitutes an important preoccupation for the European Parliament. Among other points, the Parliament stresses "that it is essential to make a distinction between the protection of copyright and related rights and the protection of individual freedoms, such as freedom of expression and, in general terms, the interests of the general public, the right to respect for human dignity and privacy or the public's right to be informed (...)" [63]. At paragraph 19 of the Resolution, the Parliament adds that, in support of the principles expressed in the Ministerial Declaration of July 1997, "rules on responsibility relating to copyright and neighbouring rights must take into account their impact on freedom of speech, respect public and private interests and not impose disproportionate burdens on actors".

One method used to confine the possible impact of broadly defined copyrights and neighbouring rights on the public's rights and freedoms is by designing appropriate limitations on the exercise of exclusive rights. Indeed, several of the limitations currently found in international instruments and national statutes are based on the safeguard of individual's rights and freedoms, namely the freedom of expression, the freedom of information and the right to privacy. While the scope and content of the limitations may vary from one country to another, the objectives pursued are the same and most copyright and neighbouring rights legislations effectively protect these fundamental rights and freedoms.

3.1.1 Freedom of expression and right to information

The individual's freedom of expression and the public's fundamental right to information are guaranteed in Article 10 of the *European Convention for the protection of Human Rights and fundamental freedoms* (ECHR) and Article 19 of the *International Covenant on Civil and Political Rights* [64]. Protection is guaranteed to all members of society, whether authors, performers, or simple users of protected material. But the rights holders' freedom of expression, which materialises ultimately in copyright or neighbouring rights protection on their works, is not absolute: it is counterbalanced by the public's same fundamental rights and freedoms. Hence, rights holders must, in making use of their own rights, take account of those of others [65]. The balance between the rights of the creators and those of the public contributes in maintaining the free flow of information within society.

The fact that, as a principle, copyright law only protects the form of expression and not the

underlying ideas tends to limit the possible impact of copyright on freedoms of speech and the right to information. Following this principle, anyone may publish or reproduce the ideas of another contained in copyrighted material provided that the form of expression is not also reproduced [66]. While the freedom to use another's ideas contributes substantially to the freedom of public debate and news reporting, there may be circumstances where it is important to be able to use not merely a person's ideas, but also his form of expression in order to have effective reporting or criticism of his/her thoughts. For example, it may be important to capture the mood, the tone or the nuances in an address, which may not be possible without reproducing a substantial part of the speaker's form of expression [67]. Such right to quote is based on Article 10(1) of the *Berne Convention*. And as Kéréver points out in the case of polemic writings and political speeches:

"Or, dans le cas d'écrits polémiques – et les discours ou programmes politiques se prêtent évidemment à la polémique – le polémiste est "justifié" à citer les oeuvres de son adversaire dans la mesure nécessaire pour identifier et authentifier ce qu'il entend combattre. La citation est même imposée par l'honnêteté intellectuelle, sous peine que l'auteur soit soupçonné de déformer les thèses combattues. Ces thèses étant dûment identifiées, il appartient au polémiste de démontrer par des développements dont il est l'auteur propre, la fausseté ou les dangers de ce qu'il entend pourfendre. Interdire la liberté de citation en matière polémique reviendrait à paralyser la liberté d'expression dans ce domaine: imagine-t-on Raymond Aron, entreprenant de réfuter le matérialisme historique, obligé de solliciter l'autorisation de Karl Marx afin de pouvoir citer des extraits du "Capital" dans l'administration de sa démonstration ?" [68] (Our emphasis)

The *Berne Convention* 's mandatory right to make quotations, at Article 10(1), may also be invoked as a means to promote research, criticism and dissemination of knowledge, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose [69]. Quotations are indeed a necessary element of the scientific process, as Bochurberg explains in these terms:

"L'enseignement, la pédagogie, la science, l'éducatif ou le didactique sont employés cumulativement ou alternativement par toutes les législations. Au-delà de la différence entre les termes, il s'agit du but "scientifique" au sens large. Les citations peuvent en effet être le support de toute démonstration. Elles sont le meilleur vecteur du matériau brut, sans déformation de la part de celui qui fait par exemple une démonstration. L'utilisation d'un matériau vrai, précis et vérifié convient parfaitement au but scientifique. L'expression en matière scientifique ne souffre pas d'erreurs. Or, la citation évite le risque de dénaturation du sens."

Whether from the *droit d'auteur* or copyright tradition, most countries have enacted some measures designed to safeguard the individual's freedom of speech and the public's right to information, and to promote the free flow of information. These limitations are established within the boundaries set by the *Berne Convention* and the *Rome Convention*. In this respect, we have seen that the *Berne Convention* makes the right to quotation mandatory, but leaves the decision to Member States whether to adopt exemptions in favour of the press and whether to exclude official texts, political speeches and speeches delivered in the course of legal proceedings from copyright protection. The *Rome Convention* simply allows States to provide for limitations as regards the use of short excerpts for the reporting of current events, as well as to extend to neighbouring rights any limitation existing in their domestic law in connection with copyright. The adoption of limitations on the exercise of copyright and neighbouring rights is also permitted under Article 10(2) of the ECHR and Article 19(3) of the *International Covenant*, whereby States may impose statutory restrictions that are necessary in a democratic society for the protection of the rights of others. As a matter of fact, in 1991, the Committee of Ministers of

the Council of Europe recommended their member States to adopt rules on the right to make short reports of major events acquired in a transfrontier context [70], in order to enable the public to exercise its right to information.

To make a list of all possible limitations adopted for this purpose pursuant to the Berne and the Rome Conventions proves very difficult, particularly in view of the many nuances brought by national legislators and by linguistic subtleties. Some limitations relate to the informational character of the protected material, such as political speeches and other similar public addresses, while others regulate the manner in which protected material may be used without the rights holder's consent. Most limitations are subject to strict conditions of application. However, uses allowed under these provisions often, but not always, do not entail monetary compensation for the rights holders. It is deemed in the general public interest that such material or such uses be allowed without the authorisation of the rights holder and without payment of a fee [71]. Among the numerous limitations that may be introduced into national legislation for the promotion of the free flow of information are the following:

a) Right to quote works or public addresses of critic, polemic, informational or scientific character for purposes of criticism, news reporting [72];

b) Right to take over press reviews, news reports, miscellaneous reports or articles concerning current economic, political or religious topics that have appeared in a daily or weekly newspaper or weekly or other periodical or works of the same nature that have been broadcast in a radio or television programme [73];

c) Right to reproduce, make available, or broadcast political speeches and other public addresses [74] ;

d) Right to reproduce individual articles, reports or other texts which have appeared in a daily or weekly newspaper or weekly or other periodical, or short passages from books, pamphlets or other writings, in so far as they are scientific works [75] ; or

e) Right to record, show or announce a literary, scientific or artistic work in public in a photographic, film, radio or television report, provided this is necessary in order to give a proper account of the current affairs that are the subject of the report [76] ;

f) Right to reproduce works for purposes of parody [77];

The right to quote and the right to reproduce works for purposes of criticism and news reporting are generally subject to specific conditions of application, the scope and rigour of which may vary from one country to another. In most cases, quotations are only allowed with respect to works which have been lawfully communicated or made available to the public. It is also required that the name of the author and the source of the work be given in the quotation or reproduction. Often, legislation or case law will provide that quotations must be made in conformity with that which may be reasonably accepted in accordance with social custom and the number and length of the quoted passages must be justified by the purpose to be achieved.

Most countries also allow users to make quotations from works for scientific purposes [78]. Paragraph 51 of the German *Urheberrechtsgesetz* provides for example that isolated scientific works may be taken over in their entirety, inside an independent work, for purposes of explaining the new work's content. The possibility to quote a work in full is strictly limited to scientific works that have been lawfully made available to the public. In any case, all quotations must be justified

by the purposes to be achieved [79]. They must also be accompanied by a clear indication of the source and of the name of the author. Other countries recognise the right to quote for scientific purposes, basically under the same conditions, except that the right to quote is generally limited to parts of works or short extracts.

These criteria receive various interpretations, mainly as regards the length of the quotation and the nature of the work quoted. In France and Belgium, for instance, quotations must be short and justified by the purposes to be achieved [80]. The strictness with which this requirement is applied has led to some controversy regarding the possibility to quote artistic and graphic works, which are generally quoted in their entirety. The main jurisprudential opinion in France considers that citations may not extend to entire works of art, photographs or drawings, and therefore must be limited to literary works [81]. Moreover, even short citations may constitute an act of infringement if the character of the work in which the quotations are incorporated does not justify them [82]. The *Dutch Copyright Act* also requires that quotations from literary works be short. However, in contrast with the *French Code de la propriété intellectuelle* , short works or works of plastic and applied art, photographs and drawings may be quoted in their entirety, provided that there be a clear difference between the quotation and the original, by the size or other method of reproduction [83].

Because of the wording of the relevant provision or because of the interpretation given to the requirement of finality, quotations are sometimes limited to specific categories of works. For example, French law does not recognise the right to quote musical works. This is due in part because of the impossibility to attribute the work, but mainly because the quoting work in which the musical work is incorporated may not be regarded as having the required "criticism, polemic, teaching, scientific or informational character" [84]. In contrast, the German *Urheberrechtsgesetz* expressly allows the taking over of small portions of published musical works for incorporation into other works, as justified by the purposes of the quoting works [85]. However, and although the Act is silent on this point, German courts have upheld by analogy the right to quote artistic and film works, but only to the extent that these quotes be part of a political debate or of an information broadcast [86]. The *Belgian Copyright Act* expressly provides that short fragments of works or entire works of plastic art may be reproduced or communicated to the public for information purposes upon making an account of current affairs [87].

The discrepancies noted above, concerning the conditions under which quotations of works are permissible, might have a direct impact on the information highway. It is indeed well recognised that quotations made for purposes of criticism and news reporting are an integral part of a free and democratic society. Moreover, the digital networked environment is becoming a privileged medium for political, social, economic and cultural debate, where most major newspapers and broadcasting enterprises around the world are already engaged in on-line activities, such as real-time communication of news reports and electronic publishing [88]. It is thus important that users know under which conditions, to what extent and from which types of works they are allowed to make quotations in the digital networked environment. Although there might appear to be no need to modify the right to quote at the national level [89] , there may be a need to harmonise this limitation at the international level, considering the global character of the digital environment. In any case, all limitations adopted on the basis of the defence of the freedom of speech and the right to information should receive special attention in the digital environment.

3.1.2 Right to privacy

Traditionally, copyright owners were never able to prevent personal use of their works, that is to prevent someone from reading, listening to or viewing privately a work that has been made

available to the public [90]. It is generally thought that the copyright and neighbouring rights do not protect against acts of consumption or reception of information [91]. Nowhere in the *Berne Convention* is it stated however that an author may not object to the performance or broadcast of his work in the family circle [92] or to its reproduction for private use [93]. Nevertheless such limitations have long been introduced in the legislation of many countries partly on the basis that copyrights and neighbouring rights do not extend to the private sphere of individuals, and partly on the basis that reproduction for private use does not affect the interests of the rights holder. It has been argued that the structure of some of the exclusive rights granted to authors, performers and phonogram producers implies that rights holders are not meant to control the use made of their work in one's own home. In many legislations, rights holders are indeed granted the exclusive right to execute in "public", to communicate to the "public", and to present a work at a "public" exhibition [94]. Consequently rights owners may not prohibit the accomplishment of these acts, as long as they are restricted to the private circle. Admittedly, these provisions raise some controversy in case law, as to the proper definition of "public" and "private" and as to what can be considered a close family tie or an intimate friendship of the participants to a performance [95]. Furthermore, to be generally considered lawful, no admission fee must be charged on the audience of such a representation.

The basis of the right to make reproductions for private purposes follows the same grounds of analysis as those set out above, despite of the fact that the reproduction right covers all reproductions of a work in any manner of form, notwithstanding any possible distinction between the private and the public sphere. It was initially thought that the hand copying or the typewriting of a manuscript could not affect the normal exploitation of the work, and that such practice could therefore be considered lawful [96]. On this basis, many statutes still provide that a reproduction is lawful if it is realised for personal or private purposes and if it is made without any motive for profit [97]. Other statutes will require further that the user not resort to the services of a remunerated third party to make the copies [98]. It is understood that these reproductions must not be put into circulation so as to reach the public in any way, or they would otherwise come in conflict with the normal exploitation of the work. Generally, reproductions made for personal use are limited in length that is, only small extracts of the work may be copied, and limited to the making of only a very small number of copies. The same conditions would seem to apply in the case of private use of phonograms and of fixations of performances thereon [99].

The considerations at the root of the right to make single copies of a work were soon put to the test with the development of more sophisticated techniques of reproduction. At the time of the Stockholm Conference for the revision of the *Berne Convention* in 1967, reprography of literary works and home taping of sound recordings were becoming wide spread among the population. And although no consensus could emerge on the introduction of a specific limitation on private use, delegations agreed to the adoption of the "three-step-test" of Article 9(2) and to specify, in Article 9(3), that "any sound or visual recording shall be considered as a reproduction for the purposes of this Convention". As Ricketson explains, these provisions have been interpreted by the Main Committee I of the Stockholm Conference, both as a justification for the existence of the private use exemption and as the basis for adoption of home taping regimes:

"This clearly envisages that exceptions under Article 9 (2) may take the form of either absolute exceptions or compulsory licences, depending essentially on the number of copies made. (...) As a matter of language, it also makes sense. The power under Article 9 (2) is to permit the reproduction of works in certain special cases, and there is nothing in the wording of the provision which forbids the imposition of conditions on the grant of such permission, such as an obligation to pay for it (or to acknowledge the source of the work reproduced, for that matter)"

[100].

A few years before the negotiations of the Stockholm Conference took place, it had already become obvious that the practices of photocopying and home taping of sound recordings were severely affecting the normal exploitation of works as well as the economic interests of rights holders. Home taping conflicts with the normal exploitation of the work as the loss of a sale deprives the author and possibly the performer of a musical work of their royalties and the phonogram producer of the sale of the phonogram. The same reasoning holds true for acts of reprography of literary works. In view of the large profits lost in the hands of home taping, the German collecting society GEMA brought action, in 1955, against producers of tape recorders, asking the court to prohibit the producers of tape recorders from selling the recorders without reference to the legal situation and to the responsibility of the purchasers to observe the exclusive copyrights of the owners of the rights and to grant damages for past infringement [101].

The German Supreme Court granted GEMA's motion on all points except the claim for damages. The Court considered that, given the fact that the legislator could not have foreseen the problem of home taping in its 1901 Copyright Act, it was entitled to develop the law by interpretation. Accordingly, it held that in case of a conflict between the interest of the user of a work and those of a creator, the latter had to be favoured. The Court further granted authors the exclusive right to prohibit such private recordings, saying that the unenforceability of the rights was irrelevant to their legal recognition. Moreover, in the opinion of the Court, authors had a right to remuneration for the exploitation of their works even if that particular exploitation did not show any direct economic profit [102].

As Reinbothe describes, preoccupations concerning the safeguard of the individual's fundamental right to privacy arose following the judgement of the Supreme Court, when rights owners expressed their intention to start monitoring the use of their works in the private sphere:

"GEMA attempted to enforce the rights of authors with respect to taping in the private sphere. But this attempt soon proved to be impracticable since the actual amount of private home taping could not be completely monitored. Moreover, legal difficulties arose due to the right of every citizen to keep the privacy of his home unmolested, a right which is protected by the Constitution in the Federal Republic of Germany" [103].

Indeed, in order to know whether people were infringing copyrighted works through private copying, owners would have had to physically enter, search and possibly seize material in individual's homes, which was both highly intrusive and practically unenforceable. Again in 1964, the Supreme Court of Germany decided on the same grounds, that the collecting society GEMA could not oblige sellers of home taping equipment to request from their customers that they reveal their identity thus enabling the society to verify whether they engaged in lawful activities [104]. Such actions would have conflicted with the fundamental right to privacy of each individual, which is not only guaranteed under the German Basic Law, but also under Article 8 of the ECHR and Article 17 of the *International Covenant on Civil and Political Rights*. The German Supreme Court decisions and their effects strongly influenced the preparatory work for a reform of the German copyright law. The new Copyright Act was adopted in 1965. It introduced the first known statutory right to equitable remuneration in favour of authors, performers and phonogram producers for home taping, through the imposition of a levy on the sale of sound recording equipment [105].

The German experience has influenced to a great extent the future legislative actions undertaken

in other countries with respect to the establishment of home taping regimes [106], originally with respect to sound recordings, and eventually to audio-visual works. Such regimes have been put in place in a number of countries for two reasons: first, to protect the citizens' fundamental right to privacy [107], as guaranteed under Article 8 of the ECHR, and second, to provide rights holders with monetary compensation for the private use of their works. But in the absence of international provisions on the subject, the regulation of home taping is left to national legislations. Not surprisingly then, the structure of these regimes varies significantly from one country to another, if and where such regime is in place at all. Under most existing regimes, manufacturers, importers and distributors pay a levy on blank audio and videotapes and, in some cases, on recording equipment as well [108]. The sums paid are often to be administered on a mandatory basis by a collective society, for the benefit of authors or performing artists and phonogram producers, as the case may be.

There has been some talk, in the recent years, of harmonising European law on the subject of private copying, through implementation of a directive dealing specifically with this issue [109]. To date however, the efforts of the European Commission have not led to any concrete proposal. Nevertheless, the provisions of the *EC Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property* [110] seem to have been drafted to take account of the problem of home copying, affecting performing artists and phonogram producers . Contrary to the *Rome Convention* which prohibits the adoption of any statutory license incompatible with the rights provided therein, Article 10.3 of the Directive states that "paragraph 1(a) shall be without prejudice to any existing or future legislation on remuneration for reproduction for private use". Through this provision, Member States may go around Article 10.2 and stipulate that the exclusive reproduction right does not cover home taping or that home taping is legally licensed and therefore may be undertaken without the consent of the right-owners, subject to a possible right to equitable remuneration [111]. The text of the Directive does not harmonise further the statutory rules pertaining to the home copying regimes in force in the Member States. It merely provides a ground for adoption of such non-voluntary licences, which in view of the circumstances surrounding their creation, may often be seen as a cure to market failure as well. The same approach seems to prevail in the context of the *Proposal for a Directive*, where Article 5(2)b) would allow Member States to adopt limitations on the reproduction right for home taping of audio and audiovisual material, without distinction between analogue and digital technology, but without harmonising further the national home taping regimes.

3.2 Limitations based on the promotion of education and culture

Although not founded on the defence of fundamental rights and freedoms, some limitations are nevertheless adopted on the basis of major public interest considerations, such as the promotion of education, culture and knowledge. Statutory provisions passed to this end encompass a wide range of measures designed to allow institutions like schools, libraries, museums and archives [112], to make unauthorised use of protected material. Some of these restrictions have been implemented pursuant to Article 10(2) of the *Berne Convention* which gives full discretion to the countries of the Union to regulate the "utilisation of works by way of illustration" for teaching purposes. Under the category of limitations based on the promotion of education and culture are also acts of reproduction accomplished under a reprography regime, the whole in conformity with Article 9(2) of the Convention.

Whereas an individual's private use of a work is allowed under the conditions described in the section above, multiple reproductions done by schools, libraries, and other such institutions do not fall under the private use exemption [113]. Such a practice leads in fact to copies that are

intended for collective use, the collective body in question being that formed by the pupils, students or library patrons [114], which violates the owner's exclusive right of reproduction. Nevertheless with the development of reprographic techniques in the early 1970s, the number of photocopies made within educational institutions, libraries and other public and private organisations grew drastically. Although such reproductions may have followed public interest objectives, they became very damaging for the normal exploitation of works and the legitimate interests of rights holders. In some countries, this problem has been left for the parties to solve, generally through the negotiation of licences between rights owners and users [115].

A number of countries have chosen however to regulate the reprographic use of protected material by educational institutions, libraries and other institutions through the implementation of a non-voluntary licence regime. According to such a regime, a fixed levy is imposed on domestic manufacturers, importers or acquirers of reprographic equipment. The law may also provide for (additional) payment per page reproduced, from physical and legal persons making the copies or, as the case may be, from entities who make such equipment available to others. The sums paid under reprography regimes are administered by a collective society, often on a mandatory basis [116]. Reprography regimes are usually not limited to schools or libraries, but may also extend to all reproductions made by governmental organisations, enterprises, administration offices and copy shops where reprographic equipment is available [117].

For example, the creation of a reprography regime in Germany followed, as in the case of the home-taping regime, a landmark decision, this time rendered by the Federal Constitutional Court. In the "Kirchen- und Schulgebrauch" case [118], the Constitutional Court reminded that copyright is a property right protected under Article 14(1) of the Basic Law. However, under Article 14(2) of the Basic Law, property rights may be restricted to serve the public interest. The Court considered further that it was indeed in the general public interest that schools have access to protected material. On the other hand, this did not mean that authors and other rights holders should be deprived of proper compensation for the use of their work. Although the "Kirchen- und Schulgebrauch" case was decided in 1971, the *Urheberrechtsgesetz* was not modified in this sense until 1985, when Germany decided to establish an individual right to remuneration for authors whose works were photocopied by users [119]. These amendments also introduced a distinction between private use and personal use. Under the private use exemption, individuals are allowed to make single copies of published works for their private use only. Several acts may fall under the personal use exemption, including for example the reproduction of works for scientific or teaching purposes, all of which are subject to strict conditions of application and to payment of equitable remuneration under paragraph 54 of the Act. One element worth noticing is that, contrary to the private use exemption, the personal use exemption is not only open for acts done by individuals, but also by enterprises, schools, administration offices and public organisations [120].

A number of countries have decided not to adopt specific provisions applicable to educational institutions, libraries, archives or museums, outside of the mandatory right to quote for scientific purposes, the private use exemption and the setting up of a reprography regime [121]. In countries where special measures have been introduced with respect to schools and other educational institutions, the most important limitations to be found in national legislations are the following:

1) the right to make compilations of only short works or of short passages of works by one and the same author and, in the case of artistic works, photographs or drawings, only a small number of those works, for purposes of teaching [122];

2) the right to take over parts of works in publications or sound or visual recordings made for use as illustrations for teaching [123];

3) the right to communicate to the public parts of works by broadcasting a radio or television programme made to serve as an illustration for teaching purposes [124] ;

4) the right to perform and display a work in the course of teaching activities [125].

Such taking over is usually allowed provided that the work from which was taken over has been lawfully communicated to the public and that the taking over is in conformity with that which may be reasonably accepted in accordance with social custom. As in the case of citations, the source must be clearly indicated, together with the indication of the author if it appears in the source. Furthermore, the law often provides for the payment of an equitable remuneration to the author or his successors in title.

With respect to libraries, the public lending right was harmonised at the European level through the adoption of the *Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property* [126], whose provision on this matter may be explained in the following terms:

"The Commission, having considered proposing a public lending right in the form of a remuneration right only, finally proposed an exclusive right as a basic principle but, at the same time, offered Member States the opportunity to choose a remuneration right as set out in Article 4 of the original proposal instead of the exclusive right. This double structure was chosen, *inter alia*, in order to emphasise that lending is, at least from a rightholder's point of view, a form of copyright exploitation which is similar to rental and must accordingly be covered by an exclusive right. The possibility of derogation provided by Article 4 was intended to allow for the Member States' cultural policies, in particular the need to guarantee access for consumers to public libraries. In addition, it was intended to facilitate a compromise between the Member States, which have strongly differing provisions, if any, on lending rights" [127].

Unlike other European copyright acts, Article 38 of the British *Copyright, Designs and Patents Act of 1988* provides for very extensive and complex library privileges. Under this Act, librarians may, subject to the prescribed conditions, supply to any of their patrons one copy of one article from an issue of a periodical publication or one copy of a reasonable proportion of a work other than an article. In order to receive such copy, the user must provide the librarian with sufficient evidence that this copy will serve for purposes of research or private study only [128]. Paragraph 108 of the *U.S. Copyright Act* contains a similar provision, allowing employees of public libraries "to reproduce no more than one copy or phonorecord of a work, or to distribute such copy or phonorecord", under the conditions specified in the Act. Both under the English and the American statutes, the right of librarians to make reproductions of works for their patrons is subject to elaborate regulatory conditions. This right also extends to inter-library loans, which are also subject to strict conditions of application. However, as discussed in the last section of this document, the applicability of these limitations to the digital networked environment raises important concerns, both on the part of the rights holders and of the users.

3.3 Limitations based on market failure considerations

Other forms of copyright limitations have been implemented in view of alleviating the perceived market failure in the production and exploitation of protected material. Market failure can best be described in cases where market conditions make bargaining between individual copyright

owners and potential users of copyrighted material impossible or prohibitively costly, or where copyright owners are unable in practice to enforce their rights effectively against unauthorised users [129]. In such circumstances, economic efficiency demands that alternate ways be found to make up for the absence of negotiations between rights holders and users and to compensate the unenforceability of the exclusive rights for the unauthorised uses made of works. Most limitations based on market failure take the form of non-voluntary licences, such as the home-taping levy on blank cassettes and recording equipment for sound and audio-visual works [130], or that of a remuneration right for the broadcast of sound recordings [131]. However it is also possible that this type of limitations consists simply in a restriction on the scope of protection in favour of users, without any kind of monetary compensation to the rights holder.

Because of the arrival on the market of audio and video-recorders permitting users to make inexpensive and good quality copies of sound recordings and films for private purposes, rights owners have lost an important part of their revenues on sales and royalties. As indicated earlier in this document, both the enforcement of exclusive rights and the direct negotiation of licences with users are practically impossible in the case of home copying. In consequence, several national legislatures have set up non-voluntary licence regimes to the benefit of authors, performing artists and phonogram producers. These provisions are intended to give the holders of copyrights and neighbouring rights compensation for the exploitation of their protected works by means of private home taping [132]. The solution has been chosen in other instances as well, whenever the collective enforcement of rights makes more sense or is the only possible method in comparison to individual enforcement.

Considering that electronic copyright management systems and other digital techniques give rights holders the ability to license directly for the use of their works and to receive payment for the authorised uses, thereby eliminating the main cause of market failure, it has been suggested that this type of copyright exemption should be lifted as regards the digital environment [133]. This should be done of course only if one considers that the only basis for adoption of these exemptions is market failure. However home copying regimes may also be justified as a means to protect the public's fundamental right to privacy. This issue is further discussed below in the section on private use in the digital environment.

3.4 Limitations based on other considerations

A number of other limitations can be found in national legislations, which are commonly recognised as serving the general public interest. Among these, are limitations to the reproduction right adopted in favour of the physically handicapped [134] and those adopted for administrative and judicial purposes [135], both of which were already envisaged as one possible application of the limitation set out in Article 9(2) of the *Berne Convention*, during the negotiations of the Stockholm Conference in 1967 [136]. Public interest is also invoked as a basis for the adoption of other forms of copyright limitations, but which in fact result primarily from the strong lobby exercised by the stakeholders [137]. Furthermore, the search for an equitable balance between rights holders and users has lead to the adoption of some restrictions, which are especially drafted to mirror established industry practices. These restrictions do not aim at preserving any constitutional right or freedom, nor do they express any public interest consideration. Rather, they have been implemented on the basis of competition law considerations, to prevent any abuse of dominant position within the software industry. Among the exemptions of this category, the most commonly invoked are those relating to the limited right of lawful owners to reproduce computer programs [138].

Under the *EC Directive on the legal protection of computer programs*, lawful owners of a copy of a

computer program have the right to make, in the absence of specific contractual provisions, a permanent or temporary reproduction of the program as well as to make a translation, adaptation, arrangement or any other alteration. These acts are allowed under the sole condition that they are necessary for the use of the computer program in accordance with its intended purpose, including for error correction. Lawful users may also make one back-up copy of the computer program. The right to a back-up copy may not be prevented by contract insofar as it is necessary for that use. The Directive further provides that the rightful owner of a copy of a computer program may, without the authorisation of the right holder, observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do [139]. Authorised users of databases protected under the new *European Directive on the legal protection of databases* are also entitled to accomplish similar acts with respect to the databases, without the rights holder's authorisation [140]. Notably, the limitations set out in both Directives are subject to the "three-step-test".

3.5 Special case of the fair use and fair dealing defences

Common law countries admit a particular type of limitation on the exercise of exclusive rights in the form of an equity defence invoked in copyright infringement proceedings. Shortly after the adoption of the *Statute of Anne of 1709* in England, courts started to develop a relatively cohesive set of principles governing the use of a first author's work by a subsequent author without the former's consent [141]. This defence, known as "fair dealing" or "fair use", has evolved as a judicial doctrine for over two centuries throughout the British Empire and America, until it was codified inside the copyright statutes of each country [142]. Although sharing the same origins, the doctrine of "fair dealing" found in the Anglo-Saxon countries differs slightly from that of "fair use" admitted in the United States. For reasons indicated below, the American doctrine of "fair use" would seem to have a broader scope of application and would appear more flexible than the Anglo-Saxon doctrine of "fair dealing".

In countries like Australia, Canada, England, and New Zealand, the doctrine of "fair dealing" applies strictly to cases of research or private study, criticism or review, and news reporting [143]. Fair dealing of a work, a performance or a phonogram, for anyone of these five purposes, does not infringe the owner's exclusive rights if the source and the name of the author or other rights owner is mentioned. Although mainly invoked in cases of unauthorised reproductions, the doctrine of fair dealing is not *per se* limited to a particular class of exclusive right and could be raised in cases of unauthorised performance in public, communication to the public, display or exhibition of a work in public.

However, acts accomplished for one of the five purposes listed do not automatically amount to a "fair dealing". To constitute a "fair dealing" under the law, courts must first establish if the taking is "fair", then determine if the taking was done for one of the purposes enumerated in the Act [144]. In determining whether a reproduction of a work made for purposes of research and private study is "fair", courts have developed a series of factors to take into consideration. Whereas England and Canada have continuously refused to incorporate these factors into their copyright acts, the main criteria have been codified in those of Australia and New Zealand, according to which courts must give regard to the following matters:

1) purpose of the copying;

2) the nature of the work copied;

3) whether the work could have been obtained within a reasonable time at an ordinary commercial price;

4) the effect of the copying on the potential market for, or value of, the work; and

5) where part of a work is copied, the amount and substantiality of the part copied taken in relation to the whole work [145].

These criteria would appear generally the same as those followed by American tribunals when deciding if a reproduction falls under the defence of "fair use". Indeed the American doctrine of "fair use" has been codified at paragraph 107 of the *Copyright Act of 1976*, which reads as follows:

"Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use to be considered shall include –

(A) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

(B) the nature of the copyrighted work;

(C) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(D) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors".

On the other hand, the American doctrine of "fair use" would appear broader and more flexible than the "fair dealing" defence, mainly because of its adaptable scope of application. The circumstances under which a use may be found fair extend beyond the five purposes enumerated in the Anglo-Saxon legislation, for example to acts done for purposes of teaching (including multiple copies for classroom use) and scholarship. In other common law countries, unauthorised multiple copies for classroom use do not fall under the defence of "fair dealing"; at best they are allowed under specific provisions for schools and educational institutions, otherwise they constitute an act of infringement. Furthermore, because of the enumeration's opening words "such as", it can be inferred that the list of purposes for which the defence is admissible is non-exhaustive. Hence, situations calling for a finding of "fair use" may fall outside the list provided in the Act, but may nevertheless be admissible in court. Indeed, the "fair use" defence has been at the heart of much of the case law recognising the lawfulness of the disassembly, decompilation and reverse engineering of computer programs [146] and is now raised periodically in cases involving the use of works found on the information highway [147]. The following list gives an example of the many activities that have regarded as fair use by

American courts:

1) quotation of excerpts in a review or criticism for purposes of illustration or comment;

2) quotation of short passage in a scholarly or technical work, for illustration or clarification of the author's observations;

3) use in a parody of some of the content of the work parodied [148];

4) summary of an address or article, with brief quotations, in a news report;

5) reproduction by a teacher or student of a small part of a work to illustrate a lesson;

6) reproduction of a work in legislative or judicial proceedings or reports;

7) incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported [149].

Upon closer look, one can see from the American case law that the uses for which the "fair use" doctrine has been admitted generally correspond to the limitations allowed under the *Berne Convention*, whether it be a quotation, a "utilisation of works by way of illustration for teaching purposes", or an unauthorised reproduction made in compliance with the "three-step-test". One must also keep in mind that, contrary to most copyright legislations, the *U.S. Copyright Act* does not grant a separate right to quote, nor does it contain specific provisions allowing for the reproduction of material for purposes of private or administrative and judicial use, or for criticism and news reporting. Moreover, the *U.S. Copyright Act* does not regulate separately the use of political speeches and other public addresses, press reviews, news reports, miscellaneous reports or articles concerning current economic, political or religious topics. The "fair use" defence constitutes therefore the one provision of the *U.S. Copyright Act* which safeguards the individual's freedom of expression and the public's right to information, and which promotes the free flow of information. This provision also ensures that major public interests are preserved, albeit not through Parliamentary action but through judge made law. One could even argue that the criteria set out in the Act for the purpose of evaluating whether an unauthorised use falls under the scope of the "fair use" defence lead roughly to the same result as those of Article 9(2) of the *Berne Convention*, that is, whether the circumstances of the use are special, whether the use affects the normal exploitation of the work and whether it causes unreasonable prejudice to the legitimate interests of the rights holder [150].

The "fair use" doctrine has thus the advantage of applying stringent criteria of evaluation to all limitations imposed on the exercise of exclusive rights on the basis of paragraph 107 of the Act, while being flexible enough to extend to new types of uses when the circumstances call for it. Some authors believe that, because of its traits, the "fair use" defence will take increased importance in the digital networked environment:

"Countries that do not have fair use or fair dealing doctrines may find it more difficult to adapt their copyright laws to dealing with questions posed by digital technologies because they lack a balancing mechanism of this sort. Since it is necessary to make copies of digital works in order to use them, a copyright law that regards all uses of digital versions of copyrighted works as infringements may be too rigid to be enforceable or to command respect" [151].

Interestingly, while the "fair use" doctrine is foreign to most civil law countries [152], the Dutch Supreme Court has recently opened the door to the introduction of a similar defence into that country's copyright law. In the case before it, the Court found that the unique circumstances called for the exoneration of the defendant from copyright infringement liability, notwithstanding the fact that the situation did not fall under the scope of any existing statutory limitation [153]. Dutch authors have also expressed regret that the *Dutch Copyright Act* does not contain a "fair use" defence, saying that many circumstances would justify the leniency afforded by such a doctrine, which the law in its present state may not concede [154].

Recent legislative action introduced before United States Congress in view of implementing the *WIPO Treaties* has raised much concern among user groups as to the fate of the "fair use" defence in the digital environment. Bills HR 2281 and S 1121, which were introduced in July 1997, have recently been approved by unanimous vote of the House Judiciary's Subcommittee on Courts and Intellectual Property. These bills are intended to provide protection against the circumvention of technological copyright protection mechanisms, and against the falsification, alteration, or deletion of copyright management information attached to a work [155]. Concerns come from the fact that the bills do not indicate clearly that the provisions on anti-circumvention are not intended to impede or prohibit research, scholarly work, or other similar activity which is permitted under the copyright law [156].

4. Issues raised in the digital environment

4.1 Browsing and caching

The reproduction right is now generally understood as encompassing all acts of reproduction of a work, either directly or indirectly, in any manner or form, including storage in a digital form. Legislatures and tribunals of a number of countries have already come to the conclusion that any digitisation of a work, any uploading or downloading of works from or onto a server as well any incidental copy created in the course of using a computer file constitute acts which are exclusively reserved to copyright owners [157] . However, the question of whether temporary digital reproductions are to be included in the reproduction right is far from settled. In a digital environment, protected material is very often kept during transmission, in whole or in part, only for very short periods of time, for example when digital information is stored on an electronic network, when making use of the caching technique or when end users make a temporary reproduction onto their computer's memory in order to view the work. In all of these instances, the fundamental question to be resolved is whether temporary reproductions, made for purely technical or functional purposes, fall under the right of reproduction. In other words, should rights holders have exclusive rights over all technical acts of reproduction, or should copyright law only extend to acts which open new exploitation opportunities for the work [158] ?

The argument has been made that if browsing and other similar acts accomplished on the Internet were considered infringements of the reproduction right, the public's access to and personal use of information in the digital networked environment could be seriously impaired, since digital works must necessarily be reproduced in one technical form or another in order to be used [159]. To recognise an exclusive right on all technical or functional reproductions could have a direct impact on the potential liability of on-line intermediaries and end users, and could create a serious impediment to regular on-line operations and activities. In any case, it remains to be shown whether incidental and transient reproductions, such as caching and browsing, have any significant impact on the economic rights of the owners. In this sense, the LAB believes that

a normative approach to the interpretation of the notion of reproduction may lead to more satisfactory results than focusing on technological details. According to the LAB, acts of reproduction may be better understood if they are not simply seen in a purely descriptive and technical manner, but rather if they are analysed in a purpose-oriented fashion and used to define and delimit existing proprietary rights in a sensible and acceptable way. Thus, if the use of a protected work transmitted over a computer network causes it to be temporarily stored, this technical fact should not, in itself, justify the conclusion that an exclusive right to reproduction is infringed [160].

The issue whether browsing should fall within the scope of the "fair use" defence or of a similar exemption was discussed during the negotiations leading to the adoption of the *WIPO Copyright Treaty*. Proposed article 7(2) of the *WIPO Copyright Treaty* stated:

"Subject to the provisions of Article 9(2) of the Berne Convention, it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the work that is authorized by the author or permitted by law".

However, no consensus could emerge on the language and scope of the limitation and in consequence, the provision was altogether withdrawn from the text of the final treaty [161]. The *WIPO Treaties* thus left for resolution at the national level the particularly controversial issue of whether temporary storage of digital copies, such as storage in computer RAM, caching, and Internet browsing, will infringe reproduction rights -- and if so what the liability should be for infringing acts of, among others, internet service providers.

In Europe, the reproduction right has been harmonised as regards two categories of works, namely computer programs and databases. The *Computer Programs Directive* and the *Database Directive* both define the acts of reproduction as including temporary reproductions [162] . Under the *Proposal for a Directive*, this interpretation of the reproduction right would be extended to all categories of protected material and would benefit all rights holders recognised by the *acquis communautaire*, including authors, performers, producers of phonograms, broadcasting organisations and film producers.

In its Resolution of October 1997, the European Parliament stressed the need to define the responsibilities of the person who acts merely as a transmitter, in particular the responsibilities of those firms which only provide infrastructure services. The Parliament reminded that one must bear in mind that the mere provision of equipment designed to facilitate or make a communication does not in itself constitute an act of communication within the meaning of the legislation governing copyright and related rights. The Parliament also pointed out that where "ephemeral and incidental copies are necessary for the functioning of a service, such as internet, telecommunications or eventually emerging new services, or for the use of a work by a legitimate user, the conditions of authorisation and exceptions must be defined appropriately" [163]. On the basis of the Agreed Statement of the Contracting Parties to the *World Copyright Treaty* on Article 9 of the *Berne Convention*, the Commission has introduced a limitation to the reproduction right , which, according to Recital 23 of the Proposal, also covers acts of caching and browsing. Article 5(1) of the *Proposal for an EC Directive* reads as follows:

"Temporary acts of reproduction referred to in Article 2 which are integral to a technological process made for the sole purpose of enabling a use of a work or other subject matter and have

no independent economic significance, shall be exempted from the right set out in Article 2".

As mentioned in the introduction, it is essentially a matter of policy orientation and legislative drafting whether to grant broad exclusive rights accompanied by a series of limitations or to define narrower rights without limitations. In this case, the European Commission has opted for the definition of a broad right of reproduction, coupled with a limitation applicable in cases of purely technical and functional reproductions. If this provision were adopted, courts would come to examine first, whether a particular act of reproduction falls within the category of those accomplished as an "integral [part of] a technological process made for the sole purpose of enabling a use of a work" and second, whether such act has an "independent economic significance". Notably both criteria of evaluation set out in the *Proposal for a Directive* are foreign to current European copyright law. It could be argued that, instead of imposing a limitation strictly directed to technical processes which may prove insufficient in the long run, the adoption of a "fair use" type limitation, for those countries who would wish to do so, would have the advantage of being more flexible to similar situations calling for an exoneration from liability in the future. Furthermore, the introduction of a "fair use" type limitation could incorporate the more familiar and more elaborate criteria of evaluation developed in the United Kingdom and elsewhere.

4.2 Private use

As we have seen in previous sections of this document, the private use exemption was initially admitted under most legal regimes on the two assumptions that copyright and neighbouring rights do not extend to the private sphere and that, at least in the early days, private use did not significantly affect the normal exploitation of works or the legitimate interests of rights owners. On the other hand, home taping regimes were implemented mainly in response of the market failure occurring in the exploitation and enforcement of exclusive rights on sound and audio-visual recordings and as a safeguard of the public's fundamental right to privacy. Today, with the development of technical systems capable of tracking uses made over the digital environment, rights owners are able to conclude direct licence agreements with users, thereby eliminating most signs of market failure. Consequently, many consider that the possibility for rights holders to control the use of their works should logically lead to the abolition of these limitations, so as to give rights owners the full control on the exploitation of their works in the digital networked environment [164]. Furthermore, it is believed that should these limitations subsist, private use and home recording of digital material will seriously affect the normal exploitation of works and the rights holders' legitimate interests. Rights holders fear that copies of digital material obtained under the private use exemption could come to compete with the original works.

It has therefore been suggested that the private use exemption be restricted so as not to apply to digital copies. This solution would seem to coincide with the approach taken by the European Commission in its *Database Directive*, where reproductions for private purposes are permitted only with respect to non-electronic databases. In contrast, the Commission seems to have modified its approach in the framework of the *Proposal for a Directive*. While Recital 26 of the *Proposal* states that "digital private copying is not yet widespread and its economic impact is still not fully know", that "it appears to be justified to refrain from further harmonisation of such exceptions at this stage" and that it "will closely follow market developments with respect to digital private copying and consult interested parties, with a view to take appropriate action", Article 5(2)(b) would allow for limitations on the reproduction right, applicable to both analogue and digital technology, as long as such reproductions are made by individuals for private use and for non-commercial ends. Basically, the Commission would leave the decision up to the Member States to maintain or to introduce limitations for digital private copying, until further harmonisation is

conducted [165].

Another solution could be to extend the home copying regimes to the digital world and impose a levy on manufacturers, importers and distributors of computer hardware and modems [166]. A third solution could be to differentiate, along the lines of the German provisions and if technically possible, between private use of a work by individuals, which could remain available to users with or without payment of a remuneration, and personal or internal use of works within enterprises, public organisations and the like, being either subject to the authorisation of the rights holder or subject to the payment of an equitable remuneration [167].

Considering the above, legislatures are now asked to decide whether these exemptions are still relevant and necessary with respect to the digital environment? This question is not an easy one however. First, because the economic impact of the digital networked environment on the exploitation of works is not yet fully known. Second, because it is felt that eliminating the private use exemption could disrupt the traditional balance between rights holders and users, where the latter have always been able, in the analogue world, to privately receive and consume works, that is to read, listen to or view publicly available works for their own learning or enjoyment. Third, because although the signs of market failure may come to disappear with the development of technology, privacy issues are likely to take another dimension in the digital environment. The electronic monitoring of the use of protected material would not entail the conduct of a search and seizure into anyone's home, as it did in the analogue world, but would risk putting several aspects of the protection of electronic personal data in jeopardy [168]. Hence, the protection of the individual's fundamental right to privacy still remains a major preoccupation in the digital world. Should a private use exemption not be maintained in the digital environment, care would have to be taken that the user's privacy and autonomy are duly protected.

4.3 Library privilege

The issue of the library privilege draws particular attention because it is generally considered to be in the public interest that public libraries gain free or relatively low-cost access to information. Public and research libraries occupy a central role in supplying the public with information. Either through catalogues, electronic databases, compilations of press articles, and other sources, libraries make current social and cultural information available to the public on a non-profit basis. In this context, one can easily understand the libraries' wish to be able to continue to provide the same services in the digital environment as they are providing in the analogue world [169].

The main issue surrounding the fate of the library privilege in the digital environment relates to electronic document delivery. Document delivery can best be described as the supply of copies of documents on demand to individual customers and users. Document supply is offered by a wide range of service providers: libraries (public, private, university), scientific institutions and laboratories, commercial document suppliers, host organisations, publishers, database publishers, subscription agents, and the like. In the framework of an electronic document delivery service, documents are selected by end users from bibliographic databases, ordered electronically, scanned or copied from existing digital files, transmitted through digital networks and subsequently downloaded [170].

Until now, document delivery services were allowed either under a private use exemption, where library employees would provide their patrons with single paper copies of works for purposes of research and study, or under specific library exemption, which usually required compliance with strict conditions. The involvement of public libraries in the sphere of electronic document

delivery is increasingly considered as coming in direct competition with the services of publishers or other commercial information providers, thereby affecting the normal exploitation of works and the legitimate interests of rights holders. Unfortunately, there is only little information currently available on the true economic impact of the activities of public libraries on the electronic exploitation of protected works. It is thus rather difficult to determine the proper form and scope of any possible limitation intended to benefit public libraries with respect to the digital environment. Ultimately, such a limitation would take into account the interests of the rights owners, as well as the information and cultural policies at the root of the public library system. In the meantime however, many believe that the existing limitations should not apply in the case of electronic document delivery, which would therefore be subject to the rights owner's authorisation [171].

In light of this, the European Commission has decided, in its *Proposal for a Directive*, to restrict any possible exemption implemented by Member States in favour of establishments that are accessible to the public, such as public libraries, to the reproduction right. Such library exemption would therefore not apply to the right to communicate a work to the public. These institutions would have to obtain licenses from copyright holders if they wanted to make on-line material available to the public. As stated in the Explanatory Memorandum, the Commission believes that any other solution would severely risk conflicting with the normal exploitation of protected material on-line and would unreasonably prejudice the legitimate interests of rights holders.

In the United States, public and research libraries are urging Congress to adopt measures which would allow them to maintain, in the digital networked environment, the privileges that they currently enjoy with respect to the use of protected material, above all the preservation of the fair use defence [172]. Bill HR 2281 was recently approved by the House of Representatives Subcommittee on Courts and Intellectual Property, with two amendments. One of these amendments creates a narrow exemption in favour of libraries that defeat copyright protection devices for the sole purpose of reviewing materials that they are interested in buying. According to official documents, the amendment is an attempt to appease representatives of schools and libraries who have argued that the Bill did not ensure "fair use" rights of material online. The amendment would require the court to remit damages if the defendant is a non-profit library, archive, or education institution that either:

- was unaware and had no reason to believe that it had violated the Act, or
- had circumvented technological measures in order to gain access to a copyrighted work to determine whether to purchase the work [173].

The amendment would also exempt non-profit libraries, archives, or educational institutions from criminal liability for violations of the act. Another defeated amendment would have provided an exemption, rather than a defence, for libraries, archives, and educational institutions that circumvent technological measures in order to browse through potential purchases. Many believe however that these amendments are insufficient to allow educators and librarians to fully exploit the creative benefits of new technology because they would be subjected to unwarranted on-line service provider liability or to purchase or use devices essential for displaying or recording educational materials or useful other information [174].

Finally, with the advent of digital technology, some countries are also considering the adoption of or have adopted limitations designed to allow public library and other similar institutions to make a reproduction of a work in their permanent collection in an alternative format, i.e. in a digital format, if the original is currently in an obsolete format or the technology required to use

the original is unavailable [175]. Such exemption must also comply with the "three-step-test".

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5. Points for discussion

1. If technology allows rights owners to control every use made of their work on the information highway and to collect royalties for every authorised act, does this imply that they should automatically be allowed to do so under any circumstance? In other words, should every technical reproduction lead to a reproduction in the sense of the copyright and the neighbouring rights acts?
2. If exclusive rights are defined in broad terms in relation to the digital networked environment, are there circumstances under which it would be justified to impose limitations on their exercise? For example, are the existing limitations designed to safeguard the individual's freedom of speech or right to privacy, to defend the public's right to information, or to promote education, culture and knowledge, still relevant in the digital networked environment?
3. What constitutes a normal exploitation of a work in the digital networked environment? Would the imposition of limitations systematically affect the normal exploitation of the work? If the normal exploitation of the work is not affected, is the prejudice to the legitimate interests of the rights holder always unreasonable? How does the "three-step-test" of article 9(2) of the *Berne Convention*, of Article 13 of the *TRIPS Agreement* and Article 10 WCT or 16 WPPT apply in the digital environment?
4. Should limitations adopted for the purpose of safeguarding the users' fundamental freedom of speech and right to information be maintained in the digital networked environment, even if they risk affecting the normal exploitation of works? Would it be advisable to expand to the digital environment the right to quote and the several limitations allowing the taking over of material for purposes of news reporting and criticism?
5. Should certain transcient and incidental reproductions made solely for the purpose of using a work in the digital networked environment be covered by an exemption from the reproduction right? If so, how would such a limitation be best formulated? Would a "fair use" type limitation offer a workable solution, as being more flexible to technological changes while incorporating strict criteria of evaluation?
6. Does the private use exemption affect the normal exploitation of works in the digital environment? Is there some way to preserve, in the digital environment, the individual's traditional right to read, listen to or view works that are made available to the public for purposes of research or study? How can legislators reconcile the rights owners' wish to monitor private uses and the need to protect the users' personal data?
7. To what extent do exemptions adopted in favour of educational institutions and libraries affect the normal exploitation of works in the digital environment? Under what circumstances may schools and other educational institutions use protected material available on-line for purposes of teaching? Under what mechanism can public libraries continue to fulfil their role of providing the public with social and cultural information available in the digital networked environment, without affecting the rights owners legitimate interests?

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