

DOCTRINE AND OPINIONS

THE ROLE OF THE THREE-STEP TEST IN THE ADAPTATION OF
COPYRIGHT LAW TO THE INFORMATION SOCIETY¹

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In spite of what may have been said or written, new information technologies have deeply affected copyright law and have revealed the urgent need to adapt a law designed in a time when today's communication technologies only existed in science-fiction novels. Changing the law becomes even more pressing when one considers the fact that the technological evolution was accompanied by a penetration of these new instruments in the social body.² Indeed these instruments form an increasingly important part of the public's daily life, and nowadays members of the public use them for entertainment, but also for information, or even training (for instance the issue of distance teaching is taking a whole new dimension thanks to the possibilities offered by the Internet). As a consequence, the public feels ever more concerned by the regulation of these technologies, and thus by copyright too, and from now on intends to express its views.

These "societal" mutations were contemporaneous with a profound change in economic data. The intangible economy is certainly the sector of activity that has grown the most in the past few years.³ In fact certain eminent specialists have boldly stated that the 21st century will enshrine the supremacy of communication and information over the more traditional economic branches.⁴ Moreover the role of the so-called "cultural industries" for development and competitiveness in a globalized world is regularly put forth. As to the others, they are still unfortunately often rejected. In debates on the future of copyright, authors express their

¹ The opinions expressed in the present study are those of the author. They do not reflect nor commit UNESCO or its Member States.

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² See, e.g., on this subject A. Mattelard, *La communication-monde*, Paris, Éditions de la Découverte, 1992.

³ On the progressive mutation of an industrial economy to an intangible economy and on the implications of this change, see the very interesting work of D. Cohen, *Trois leçons sur la société post-industrielle*, Paris, Seuil, 2006.

⁴ See e.g., D. Foray, *L'économie de la connaissance*, Paris, La découverte, 2000. See also, clearly in this sense, the article by the Director General of UNESCO K. Matsuura, *Le partage du savoir est un multiplicateur de croissance: Le Figaro*, 27 septembre 2006, in which he states that "in the future the development potential of a society will depend less on its natural resources than on its capacity to create, disseminate and use knowledge."

opinions ever so rarely, at least in comparison with other interest groups, which may be the sign of a worrying lack of interest for questions, which, in principle, affect them directly. Whereas the first copyright laws and first international conventions were strongly influenced by the mobilization of famous writers, today one cannot find one great author committed to copyright law issues...

Be that as it may, the “digital revolution” commanded a reevaluation and adaptation of the underlying balances in order to preserve a fair balance between the many interests at stake. To that end, several initiatives were undertaken. Initially, at the international level, the first step was to strengthen the prerogatives of right holders, to adapt the economic rights to the digital environment and to insure the legal protection of technological protection measures.⁵ Indeed, faced with the difficulty of enforcing copyright law on the Internet, right holders put great hopes in technical measures, to a point where some authors even heralded the replacement of copyright protection by technical protection.⁶

However, as concerns the sensitive issue of “exceptions and limitations,”⁷ the question was postponed. On the one hand the 1996 WIPO treaties did not settle the question of the interface between technical measures and limitations to copyright law, ignoring the fact that technology is “blind” and thus cannot respect the balances set by the law, and may therefore potentially prevent perfectly legal uses.⁸ On the other hand, as regards the adaptation of the system of exceptions, the WIPO Copyright Treaty simply indicates— quite imprecisely— in its article 10, that “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.” This is what is often referred to as the “three-step test.” However, in order for States to retain a certain latitude as to the adoption of new exceptions in the digital environment,⁹ the three-step test was accompanied by an Agreed Statement, expressly specifying 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 network environment.” The signatory parties thus clearly wanted to avoid giving the three-step test too

⁵ See the WIPO treaties of 20 December 1996: WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) adopted in Geneva on 20 December 1996.

⁶ T. Vinje, *Should We Begin Digging Copyright's Grave?: EIPR* 2000, p. 555; L. Lessig, *Code and other laws of cyberspace*, New-York, Basic books, 1999; P.B. Hugenholtz, *Code as Code, Or the End of Intellectual Property as We Know It: Maastricht Journal of European and Comparative Law* 1999, Vol. 6, n° 3, p. 308.

⁷ The WIPO treaties, the TRIPS Agreement and the Directive of 22 May 2001 systematically use both terms. Nonetheless, in our opinion, the term “limitations” seems more appropriate than “exceptions” to describe the legal nature of the uses allowed by the law. Indeed limitations to the exclusive right do not constitute exceptions to a rule, but need to be viewed as techniques by which the law circumscribes the monopoly. However as the term “exception” is more commonly used, we will continue to use it, bearing in mind that in this context the term will be used for descriptive purposes and not for its notional meaning (See on this question C. Geiger, *De la nature juridique des limites au droit d'auteur: Propr. intell.* 2004, n° 13, p. 887).

⁸ On this problematic, see the excellent work by S. Dusollier, *Droit d'auteur et protection des œuvres dans l'univers numérique*, Bruxelles, Larcier, 2005, p. 152. See also C. Geiger, *Droit d'auteur et droit du public à l'information, Approche de droit comparé*, Paris, Litec, 2004, n° 229.

⁹ See in this sense M. Senftleben, in: T. Dreier/ P.B. Hugenholtz (ed.), *Concise European Copyright Law*, Kluwer Law International, 2006, WCT, art. 10, n° 6.

much importance and too restrictive a scope, thereby delaying, thanks to vague drafting, the settling of the thorny question of exceptions in the digital environment.

Besides, reference to the three-step test in international treaties was not new. The three-step test appeared for the first time in 1967 at the Stockholm Conference, whose objective was to revise the Berne Convention, which mainly aimed at enshrining the reproduction right at the international level. This right had previously been absent from the Convention even though it played a major role in several national laws¹⁰ (article 9.1). But since many countries already had a few exceptions to the reproduction right in their national laws—and did not wish to modify their law—a second *alinéa* was added to article 9 providing a vague and general criterion that allowed Member countries to grant exceptions to the newly enshrined right. It was thus a formulation of compromise, broad enough to cover all exceptions included in the legislation of signatory countries, whether under an enumerative list or under a general fair use-type clause or fair dealing exception.¹¹

Incidentally, it is precisely this broad and little-binding formulation that insured the test's success during the negotiations of subsequent intellectual property agreements, since it allowed settling the extremely sensitive question of exceptions by referring to an article of general scope, to which countries of both continental and common law tradition could relate. As such, the test was used again in the TRIPS Agreement¹² in 1994 and extended to all economic rights (article 13). Due to the consensual character of this legal instrument, different types of “three-step tests” (their formulation sometimes varies slightly), were also enshrined with little debate in TRIPS in the field of trademarks (art. 17), designs and models (art. 26(2)) and patents (art. 30). Presenting a discrete—yet not insignificant—change, the third step of the test, TRIPS version, aims at protecting the legitimate interests of the “right holder,” and not the author as stated in the Berne Convention. This may indicate a progressive slide from the protection of authors to that of owners, who were already indirectly affected by the second step relating to the non-conflict with a normal exploitation of the work.

Because of the consensual character of this legal instrument, it is not surprising that the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society¹³ (hereinafter “the Directive”), which was designed to transfer the WIPO treaties in community law, incorporated the three-step test in its article 5.5, yet slightly modifying its wording.¹⁴ Some national legislators saw an opportunity to transfer the triple test into national law and integrated it in their legislation while transferring the Directive.¹⁵ China had done so while reforming its legislation.¹⁶ However these subtle slides in the drafting of the test and its

¹⁰ For a detailed historical overview, see M. Senftleben, *Copyright, Limitations and the Three-Step Test*, The Hague, Kluwer, 2004, p. 43-98.

¹¹ See in this respect S. Ricketson, *International Conventions and Treaties*, in: L. Baulch, M. Green et M. Wyburn (ed.), *Journées d'Étude de l'ALAI - Les Frontières du droit d'auteur: ses limites et exceptions*, Actes du congrès de l'ALAI 1998, Sydney, Australian Copyright Council, 1999, p. 10 *seq.*

¹² 1994 WTO Agreement on TRIPS (Trade Related Aspects of Intellectual Property Rights (establishing the World Trade Organization (WTO) and including the GATT of 1994), annex 1(C), signed at Marrakech on 15 April 1994.

¹³ *JOCE* 22 June 2001, L-167, p. 10.

¹⁴ On this issue, see below.

¹⁵ See below.

¹⁶ Article 21 of the Law of 14 August 2002: “Unauthorized use of published works under the related provisions of the Law, shall not conflict with the normal exploitation of the work, and shall not unreasonably prejudice the legitimate interests of the rights holder”. It is thus rather a “double test” since the Chinese test does not include the first step.

integration into the Community legal order deeply modified its scope. It now seems that national judges have the possibility, or even the obligation, to use the test when confronted with the application of an exception.¹⁷ We will revert to this later. At this point, one may nevertheless note that in this case, it would not only be the legislator's freedom of adaptation of the system of exceptions that would be "limited" by the imprecise rule of the three-step test, but also the judge's discretionary power.

One may therefore ask the provocative question: at the national level, is there still freedom in the necessary adaptation of copyright's system of limitations, or is the system now condemned to a worrying *status quo*? The object of this article is to analyze the legislator's and judges' discretion that remains in the three-step test. In this frame of mind, we will successively see whether the three-step test constitutes a hurdle for legislative (I), then judiciary (II) adaptation of copyright law to the digital environment.

I. The three-step test, hurdle to legislative adaptation of copyright law in the information society?

The question may seem surprising when one remembers the history of the adoption of the three-step test rule during the elaboration of the Treaties. We have indeed seen that the signatory States did not wish to give it a very broad scope in order not to restrict their freedom to adopt new exceptions in the future. Besides, as a sign of indifference vis-à-vis this legal instrument, scholars did not give the three-step test much attention at first and for a long time very few studied it. Things changed however when the WTO Panel convicted the United States for having adopted a law in violation of article 13 of TRIPS, thus indicating to the world that the three-step test was to be taken very seriously and that the United States were not free to do as they pleased in the field of exceptions.

1. The freedom of the legislator reduced by the triple test

In a decision dated 25 June 2000,¹⁸ the WTO Panel, referred to by the European Union, stated that the exception adopted by the American legislator (which exonerated all commercial establishments that broadcast music, such as bars or restaurants¹⁹ from copyright royalty payments) violated the TRIPS Agreement's three-step test.²⁰ For the first time, the Panel

¹⁷ For more developments on this question, see C. Geiger, From Berne to National Law, via the Copyright Directive: The Dangerous Mutations of the Three-Step Test (to be published in EIPR 2007). Certain passages of the present contribution are borrowed from that article.

¹⁸ Panel Rep. of 15 June 2000, United States-Article 110 (5) of the US Copyright Act, WT/DS160/R.

¹⁹ 17 U.S.C. § 100 (5), as modified by an act of 1998 (*Fairness in Music Licensing Act*).

²⁰ Concerning this decision, see e.g., Y. Gaubiac, Les exceptions au droit d'auteur : un nouvel avenir ? : *Comm. com. électr.* June 2001, p. 12 (see also from the same author: *Propri. intell.* 2002, n° 2, p. 17); J. C. Ginsburg, Vers un droit d'auteur supranational ? La décision du groupe spécial de l'OMC et les trois conditions cumulatives que doivent remplir les exceptions au droit d'auteur: *RIDA* 2001, n° 187, p. 2; A. Lucas, Le « triple test » de l'article 13 de l'accord sur les ADPIC à la lumière du rapport du Groupe spécial de l'OMC « Etats-Unis -Article 110 5) de la Loi sur le droit d'auteur », in: P. Ganea, C. Heath, G. Schricker (ed.), *Urheberrecht, Gestern- Heute- Morgen, Mélanges A. Dietz*, Munich, Beck, 2001, p. 423; B. C. Goldmann, Victory for Songwriters in WTO Music-Royalties Dispute Between US and EU- Background of the Conflict Over the Extension of Copyright Homestyle Exemption: *IIC* 2001, p. 412; M. Ficsor, Combien de quoi ? Les 'trois conditions cumulatives' et leur application dans deux affaires récentes de règlement de différends dans le cadre de l'OMC: *RIDA* 2002, n° 192, p. 111; D. J. Brennan, The Three-Step Test Frenzy-Why the TRIPS Panel Decision might be considered Per Incuriam: *IPQ* 2002, n° 2, p. 212; P. B. Hugenholtz, De wettelijke beperkingen beperkt. De WTO geeft de driestappentoeets tanden: *AMI* 2000, p. 10; J. Oliver, Copyright in the WTO: The Panel Decision on the Three-Step Test: *Columbia Journal of Law & the Arts* 2002, Vol. 25, n° 2/3, p. 119; M. Clément-Fontaine, in: *Les grands arrêts des la propriété intellectuelle*

offered a definition of the conditions set by the test, whose content had until then been very vague. Since then scholars have proposed other interpretations, as many gray areas remain concerning the exact scope of the test's steps. It is not our purpose to examine the Panel's decision in detail, which has been analyzed many times already, nor to present an in-depth study of the content of the three-step test. We would rather refer to the brilliant papers that exist on the question.²¹ We will merely attempt to expose the way in which the national legislator's freedom could be restricted.

Let us swiftly skip over the test's first step, i.e., the requirement of "certain special cases." According to the Panel, the condition implies that "an exception or limitation in national legislation must be clearly defined" (which corresponds to the requirement of a "certain" case) and then that it has "an individual or limited application or purpose" (which corresponds to the requirement of a "special" case). Whereas the Panel adopts a quantitative approach, asking for a quantitative restriction of allowed uses,²² other commentators have proposed a qualitative appreciation, taking into account the justification of the exception and the underlying public interest.²³ We do not intend to settle the debate, even if it seems obvious that the function of the exception should always be taken into account, for it can be derived from texts on fundamental rights to which signatory states are also bound.²⁴ We will simply note that the first criterion requires that the uses covered by the text of the exception be generally determinable. As underlined by one author, "an overly vague provision whose scope of application could not be foreseen would not be admissible."²⁵ In countries of continental tradition, where legislation includes a limited list of exceptions, the question is not really relevant. To a certain extent, the enumerated cases generally indicate the scope of the exception and this first condition is met without much difficulty. In common law countries however, which use an "open" system of exceptions with a fair use or fair dealing -type clause, the condition could cause some problems.

In this sense, a few authors have wondered if the fair use exception was really compatible with the special case requirement, some even answering (often with serious arguments) in the negative.²⁶ In our opinion however, the history of the three-step test allows us to reject this analysis. One can not forget that the definitive formulation of the test —accepted at the Stockholm conference— was proposed by the United Kingdom, which has a fair dealing exception. Similarly, the United States did not need to modify their legislation when they joined the Berne Convention in 1989. The argument according to which the fair use exception would violate the first step of the test thus appears refuted by the diplomatic context of the

(under the dir. of M. Vivant), Paris, Dalloz, 2004, p. 169. See also more recently M. Senftleben, Towards a Horizontal Standard for Limiting Intellectual Property Rights? WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law: *IIC* 2006, no.4, p. 407.

²¹ See e.g. the excellent work of M. Senftleben (*prec.* note 10), as well as from the same author: Grundprobleme des Dreistufentests : *GRUR Int.* 2004, p. 200.

²² § 6.108 and s. of the Panel Report.

²³ See e.g. M. Senftleben (*prec.* note 10), p. 138 *seq.*; M. Ficsor (*prec.* note 20), p. 132; S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, Kluwer, 1987, p. 482, according to whom the term 'special' means that "the exception must be justified by some clear reason of public policy or some other exceptional circumstance".

²⁴ For a reflection in this sense, see more generally C. Geiger, « Constitutionalising » Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union: *IIC* 2006, p. 371.

²⁵ S. Dusollier, L'encadrement des exceptions au droit d'auteur par le test des trois étapes : *I.R.D.I.* 2005, p. 218.

²⁶ See for instance H. Cohen-Jehoram, Restrictions on Copyright and Their Abuse: *EIPR* 2005, p. 359.

adoption of this legal instrument,²⁷ which one can find in articles 1705(5) and 1706(3) of the North American Free Trade Agreement (NAFTA) of 1994. Similarly, it is noteworthy that the United States were the main promoters of the TRIPS Agreement. It is very improbable that they intended to adopt (on many occasions, since the solution was afterwards used in 1996 in the WIPO treaties²⁸) a provision that would have been radically contrary to their legal tradition. However, one cannot deny that to this day the question is not entirely settled. If in the future, a European country having a limited list of exceptions decided to introduce more flexibility in its system in order to better adapt to technical and social changes, could it be accused of violating its international commitments?

Nevertheless the condition that really raises a problem, since it has the potential of considerably restricting the freedom of national legislators, is that of non-conflict with the normal exploitation of the work. Indeed how is “normal exploitation” to be understood? Neither the various treaties nor the Directive really shed light on this point and interpretation of the notion is far from being clear. In this instance, reference is often made to the WTO Panel’s report, in which the criterion of normal exploitation was deemed to involve consideration of the forms of exploitation that currently generate an income for the author as well as those which, in all probability, were likely to be of importance in the future.²⁹ This interpretation includes a certain number of dangerous potentialities. On the one hand, it could impose a *status quo* and prevent any extension of exceptions to new situations unforeseen by the letter of the text, but which could derive from its spirit. On the other hand, reference to future exploitations runs the risk of paralyzing exceptions every time a technical evolution allows to control previously uncontrollable uses, and thus creates new possibilities for exploitation.³⁰ As concerns the control by right holders of the uses of their works through technical measures, this could even lead, in the long run, to the disappearance of limitations in the digital environment.³¹

In any case it is not at all certain that this interpretation could be applied in the context of the Berne Convention, 1996 WIPO Treaties or article 5.5 of the Directive. Indeed, the Panel’s interpretation revolved around article 13 of the TRIPS Agreement, which follows a predominantly economic logic. The socio-cultural dimension of copyright law, very much present in Europe, should lead, at least in the context of the Directive, to a more normative approach to the second step, notably taking into account Member States’ cultural policy objective.³² Because in the opposite case, it would leave almost no discretion to national

²⁷ See in this sense M. Senftleben (*prec.* note 10), p. 163 and 168, as well as from the same author: Die Bedeutung der Schranken des Urheberrechts in der Informationsgesellschaft und ihre Begrenzung durch den Dreistufentest, in: R.M.Hilty/A.Peukert (ed.), *Interessenausgleich im Urheberrecht*, Baden-Baden, Nomos, 2004, p. 177. See also on this question J. Griffiths’ intervention, “The ‘Three-Step Test’ – its Relationship with the Common Law concepts of ‘Fairness’ and ‘Public Interest’”, during a workshop on: “Rethinking the Three-Step Test”, jointly organized by the Max Planck Institute for Intellectual Property Law and Queen Mary University in London, Paris, ULIP, 16 February 2007.

²⁸ See the Comptes rendus analytiques de la Commission principale de la négociation du Traité OMPI (CRNR/DC/102, n° 488) where it is obvious that the general exception of fair use, although very broad in its application, was not prohibited.

²⁹ Panel Rep. of 15 June 2000 (*prec.* note 18), § 6.180.

³⁰ In this sense also M. Buydens and S. Dusollier, Les exceptions au droit d’auteur : évolutions dangereuses: *Comm. com. électr.* Sept. 2001, p. 13; J. C. Ginsburg (*prec.* note 20), p. 48, which underlines the risk that “the traditionally free uses, such as for training purposes or parody, be considered as normal exploitations, supposing that right holders manage to implement a profitable collecting system.”

³¹ See also in this sense M. Buydens and S. Dusollier (*prec.* note 30), p. 12. For more developments, see C. Geiger (*prec.* note 8), n° 418 and s.

³² For a normative approach of the second step, see also J. C. Ginsburg (*prec.* note 20), p. 23.

legislators for the implementation of new limitations in the future, especially to adapt the system to technical or social evolutions.³³ The WTO Panel has incidentally expressly admitted this normative approach in the framework of the interpretation of article 30 of the TRIPS Agreement, which also provides a three-step test in patent law.³⁴ According to this report, to which reference is rarely made in the debate regarding the test's steps, exploitation must be considered normal when it is "essential to the achievement of the goals of patent policy."³⁵ The formulation remains, it is true, somewhat vague, but it seems to provide the possibility for the legislator to take normative elements into account and thus not limit it to a strictly economic approach.

In our opinion, it is advisable to go a little further and adopt, in addition to a normative approach, an extremely restrictive approach of the notion of normal exploitation of a work in order to avoid the annihilation of the legislator's and the judges' discretionary powers. In fact such interpretations have been put forth. According to Martin Senftleben, conflict with normal exploitation should occur only if "the author is deprived from a current or potential market of considerable economic and practical importance."³⁶ The notion of normal exploitation would then cover, as justly underlined by Séverine Dusollier, only "the main avenues of the exploitation of the work, i.e. those which constitute the author's major sources of income."³⁷ That being said, the problem is that even when adopting a restrictive approach and when integrating a normative dimension, the approach remains above all economic and the viewpoint, that of the owner.

Similarly, payment of a fair remuneration in exchange for the use as part of a statutory license scheme, could not be taken into account at this stage.³⁸ At least this is what seems to follow quite clearly from the preparatory works that led to the inclusion of article 9(2) of the Berne Convention,³⁹ even though in a decision of 25 February 1999,⁴⁰ the German Federal Court stated that payment of a fair remuneration foreclosed the possibility that an unjustified prejudice be caused to the legitimate interest of the author *and* conflicted with a normal exploitation of the work, mixing the second and third steps. The German High Court's judges seem to consider that payment of a fair remuneration in exchange for an exempted use should be taken into account during the examination of the second step of the test as well. This interesting and common sense reading is however not unanimous. This is not surprising given that the three-step test may be considered as an instrument of preservation of the exclusive

³³ Such a reading would be clearly incompatible with the spirit of the three-step test of the 1996 WIPO Treaty (article 10), as expressed in the above-mentioned Statement.

³⁴ Art. 30 TRIPS: "Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties." In it true that the wording of the second step is somewhat different and could imply that a conflict with a normal exploitation could be justified, under a normative approach at the second step. Article 30 thus allows a more flexible application of the test.

³⁵ WTO Panel Report of 17 March 2000 (WT/DS114/R), n° 7.58. On this report, see the very interesting article of M. Senftleben (*prec.* note 20). See also the intervention of this author on the different reports of the WTO Panel during the workshop on "Rethinking the Three-Step Test", jointly organized by the Max Planck Institute for Intellectual Property Law and Queen Mary University in London, Paris, ULIP, 16 February 2007.

³⁶ M. Senftleben (*prec.* note 10), p. 193.

³⁷ S. Dusollier (*prec.* note 25), p. 220. This author adds that "to reason otherwise would make the exceptions lose their meaning and gradually disappear."

³⁸ Remuneration which should in principle only be taken into account during the examination of the test's third step.

³⁹ See M. Senftleben (*prec.* note 10), p. 130.

⁴⁰ BGH, 25 February 1999, JZ 1999, p. 1000, "copy transmission service".

character of copyright. Nevertheless, as eminent authors have judiciously noted, remuneration provided by a statutory license, often distributed equally among authors and owners,⁴¹ may in certain cases be financially more interesting than the remuneration received by the author for the exploitation of his exclusive right.⁴² The German Federal Court has expressly admitted it in a widely noticed decision of 11 July 2002.⁴³ In this perspective, one may believe that an increase in the number of exceptions – combined with the obligation to pay a fair remuneration – would serve the interests of the author.⁴⁴ If it is really the author that is at the center of this system, as this is unquestionably the case in the context of the Berne Convention and the WIPO Treaty, it seems that this aspect should be seriously considered in the interpretation of the second step.

Therefore the determinative question is: which perspective must be taken into account? Does the three-step test aim above all at protecting the interests of authors? Or those of right holders? Or does it aim at finding a fair balance between all the interests at stake? Depending on the answer to this question, the test will probably have to be read in different ways. The third step is formulated differently in the various texts. Indeed, while in the Berne Convention and the WIPO Treaty, exceptions and limitations must not “unreasonably prejudice the legitimate interests of the author”, the TRIPS Agreement and the Directive speak of the “legitimate interests of the right holder.”

The question is far from being merely theoretical. We know that to face the economic problem caused by “peer-to-peer” file sharing, many authors have suggested the creation of a non-voluntary license to legalize these practices in exchange for remuneration.⁴⁵ The solution was in fact seriously considered in France during the parliamentary works that led to the adoption of the Law of 1st August 2006.⁴⁶ Indeed French deputies even adopted an amendment in this sense on 21 December 2005, of which it has hastily been said that it legalized peer to peer,⁴⁷ and on which they have subsequently come back. Yet it seems hard to

⁴¹ For example, in France, this exists for private copying remuneration (art. L. 311-7 CPI), but also in part for remuneration resulting from the statutory license set for the public loan of works (art. 133-4 1^o CPI), implemented by the Act of 18 June 2003.

⁴² A. Dietz, Continuation of the Levy System for Private Copying also in the Digital Era in Germany: *A&M* 2003, p. 348; R.M. Hilty, La transposition de la Directive sur le droit d’auteur et les droits voisins dans la société de l’information, *Analyse critique et prospective*, *Propr. intell.* 2005, n^o 15, p. 142 *seq.*, as well as from the same author: *Verbotsrecht vs. Vergütungsanspruch: Suche nach Konsequenzen der tripolaren Interessenlage im Urheberrecht*, in: A. Ohly, T. Bodewig, T. Dreier, H.-P. Götting, M. Haedicke, M. Lehmann (ed.), *Festschrift für G. Schrickler*, Beck, 2005, p. 325 *seq.*

⁴³ BGH, 11 July 2002, « *Revue de presse électroniques* », *JZ* 2003, p. 473, note T. Dreier.

⁴⁴ See in this sense the very interesting article by K. Gaita et A. F. Christie, Principle or Compromise? Understanding the Original Thinking behind Statutory License and Levy Schemes for Private Copying: *IPQ* 2004, p. 426. See also C. Geiger, Les exceptions au droit d’auteur en France (analyse critique et prospective), in: C. Geiger, M. Bouyssi-Ruch, R.M. Hilty (under the dir. of), *Perspectives d’harmonisation du droit d’auteur en Europe*, Paris, Litec, 2007 (to be published).

⁴⁵ See e.g. N. W. Netanel, Impose a Noncommercial Use Levy to All Free Peer-to-peer File Sharing: *Harvard J. of Law & Technology* 2003, p. 19; W. W. Fischer, *Promises to keep, Technology, Law and the Future of Entertainment*, Stanford, Stanford University Press, 2004, p. 199-251; L. Lessig, *The Future of Ideas*, New York, Random House, 2001, p. 254 *seq.*

⁴⁶ See on this topic C. Geiger, La loi du 1^{er} août 2006, une adaptation du droit d’auteur aux besoins de la société de l’information?: *RLDI* 2007, n^o 25, p. 67 (English version to be published in IIC, no. 4).

⁴⁷ Actually it only settled the act of file downloading, which was anyway covered by the private copying exception. The text of the amendment voted on 21 December 2005 was the following: “Also, the author cannot forbid reproductions made on any support from an online communication service by a physical person for his own private use and for directly or indirectly non-commercial purposes, except copies of software other than a backup copy, only if these reproductions are subject to a remuneration such as the one provided under article L. 311-4.” As to the act of uploading, on which the representatives did not speak, it

reconcile such solutions with the second step, even by adopting a restrictive conception of the notion of “normal exploitation.”⁴⁸ Such a solution would certainly encroach directly on the main market of online exploitation of works and would therefore violate the three-step test.⁴⁹ Yet the problem appears in general for all adjustments intended to extend the field of statutory licenses for the future, and those will thus henceforth be limited to exceptional cases. Still a statutory license scheme may be, in certain cases, an interesting compromise to protect the balance of interests.⁵⁰ The author loses his right to forbid but not his right to receive a fair remuneration. This remuneration may be distributed equally between the author and the owner. The statutory license may also be a means to protect, in addition to contractual copyright, the author against the owner. It would therefore be incorrect to describe the statutory license as a mechanism promoting the interests of users only. However the three-step test, and especially the second step, seems to bar new solutions built on the statutory license model, outside the cases already provided for in international texts.⁵¹ This brings us to explore the leads that other theoretical constructions with similar effects have indicated, notably mandatory collective management.

2. A solution: Mandatory Collective Management?

It must be underlined at the outset that none of the aforementioned treaties expressly settle the question of mandatory collective management. As we have seen they only state that any restriction to the exclusive right must be compatible with the three-step test. Moreover international conventions set the conditions for the implementation of non-voluntary licenses. Certain provisions are designed to allow Member countries to set up non-voluntary licenses for the benefit of certain groups of users, notably broadcasting organizations. These conditions are stated in article 11*bis* of the Berne Convention, to which the TRIPS Agreement (article 9(1)) and the WIPO Copyright Treaty (article 1(4)) refer. The idea is therefore to replace the exclusive right by a right to fair remuneration. Once again we are faced with a restriction to the exclusive right since the use is allowed by law.⁵²

was not a statutory license that had been foreseen, but a mandatory collective management system, more easily compatible with the three step test (see *infra* I. 2). See on this point the very interesting study by C. Bernault and A. Lebois, *Peer-to-peer et propriété littéraire et artistique*, (under the dir. of A. Lucas), Nantes, June 2005; L. Thoumyre, La licence globale optionnelle : un pare-feu contre les bugs de la répression : *RLDI* 2006, n° 15, p. 80.

⁴⁸ See in this sense A. Peukert, International Copyright Law and Proposals for Non-Voluntary Licenses regarding P2P File sharing, in: F.W. Grosheide & J.J. Brinkhof (ed.), *Intellectual Property Law 2004*, Antwerpen/ Oxford, Intersentia, 2005, 439 *sq*; P. Runge, Die Vereinbarkeit einer Content-Flatrate für Musik mit dem Drei-Stufen-Test: *GRUR Int.* 2007, p. 130.

⁴⁹ See however the very interesting article of A. Peukert, « A Bipolar Copyright System for the Digital Network Environment »: *Hastings Communications and Entertainment Law Journal* 2005, n° 28, p. 1 *seq.* According to this author, the solution could be compatible with the three-step test, subject to the author having the choice to individually manage the exploitation of his works through technical measures and in this case not participate in the benefits generated by the statutory license.

⁵⁰ For more developments in this sense see C. Geiger (*prec.* note 8), n° 366-380.

⁵¹ See below.

⁵² See however M. Ficsor, La gestion collective du droit d’auteur et des droits voisins à la croisée des chemins: doit-elle rester volontaire, peut-elle être « étendue » ou rendue obligatoire ? *Copyright e-Bulletin*, October – December 2003, p. 4, according to whom mandatory collective management would also be included under these provisions since it constitutes a restriction to the exclusive right. See also in this sense P. Sirinelli, Logiques de concurrence et droit d’auteur, Contribution to the seminar Peer-to-Peer : droit d’auteur et droit de la concurrence, reproduced in : *RLDC* Apr./June 2007, n° 11, p. 185, who believes, relying of a study led by M. Ficsor for WIPO (M. Ficsor, Collective Management of Copyright and Related Rights, Report prepared by WIPO, 1989, p. 327 *seq.*, spec. n° 261 of the Report), that collective management can only be imposed in cases where non-voluntary licenses can be implemented. An analysis of the history of article 11*bis* al. 2 of the Berne Convention seems to indicate however that this article only deals with the

Hence the real question is to determine whether to subject the exclusive right to mandatory collective management is incompatible with international law, for it constitutes a restriction to the exclusive right, a limitation or an exception to the right of the author. It is not fitting to revisit terminology issues, as there are numerous scholarly interpretations of the terms “limitation” or “exception”.⁵³ As we have already signaled,⁵⁴ the TRIPS Agreement, the WIPO treaties and the Directive frequently use both terms. One thing is certain however: a limitation or exception affects the existence of the exclusive right, because the author loses control of the use in question. The use is subject to his exclusive right, regardless of remuneration.

When remuneration is provided, one speaks of “statutory license,” even if this term may be misleading. Indeed, the term “license” seems to imply that the use enters the perimeter of the right, but that authorization is not from the author, but from the law. However it is not the case since the use is located outside the field of exclusiveness. In our opinion it would thus be more appropriate to speak of an “exception with remuneration”, or even a “right to remuneration.” Yet mandatory collective management does not deal with the existence of an exclusive right, which remains intact and is not questioned. It only intends to solve the question of the exercise of rights, of modalities of implementation: the exclusive right can only be exercised through the collective management society. It is in fact clearly the substance of Community case law, which specifies that collective management deals only with the exercise of rights and not with their existence.⁵⁵

Collecting societies carry out these exclusive rights on behalf of authors, according to, most of the time, their mandate. The author, by joining a collecting society, may (theoretically) have an influence on the modalities of exercise of his right, since by becoming a member he will be able to participate in the determination of the licensing fees. Sometimes he will even be able to designate the society of his choice. Besides, collecting societies do not always need to grant licenses. Indeed if it is true that, in some countries, they have a legal obligation to do so (like in Germany) it is not always the case (namely in Switzerland and France). Absent such an obligation to enter into a contract, the society could in principle refuse to grant authorization if the conditions are deemed unsatisfactory,⁵⁶ even if in practice this will rarely

restrictions to exclusive rights *for the benefit of users* (non-voluntary license). Since mandatory collective management does not deal with the relationship between authors and users, it would thus not fall under this article (see in this sense *S. v. Lewinski*, La gestion collective obligatoire des droits exclusifs et sa compatibilité avec le droit international et le droit communautaire du droit d’auteur : *Copyright e-Bulletin*, Jan.-Mar. 2004, p. 5).

⁵³ On the question see C. Geiger (*prec. note 7*).

⁵⁴ *Supra* note 7.

⁵⁵ European Commission Decision of October 8, 2002, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA (European Economic Area) Agreement (COMP/C2/38.014 – IFPI “*Simulcast*”), Official Journal of the European Communities (OJ) L 107/58, dated April 30, 2003, p. 58, point n°66. See also more recently in the framework of the mandatory collective management set up by art. 9 (2) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission., CJCE, 1st June 2006, *Uradex SCRL c/ Union Professionnelle de la Radio et de la Télé-distribution (RTD) et Sté Intercommunale pour la Diffusion de la Télévision (Brutele)*, case C-169/05, where the Court of Justice reaffirms that the Directive has, for legal certainty and simplification of procedures, implemented a mandatory collective management of the exclusive right of cable retransmission. For a commentary see F. Pollaud-Dulian, *RTDcom*. July/Sept. 2006, p. 603.

⁵⁶ See in this sense F. Siirainen, *Le caractère exclusif du droit d’auteur à l’épreuve de la gestion collective*, Thesis, Nice, 1999, p. 441. According to this author, this would link mandatory collective management closer to the exclusive right than to the non-voluntary license.

be the case (especially to avoid infringing competition law). There is a very important theoretical nuance to be made with the remuneration rights (or statutory licenses) which are most of the time also collected by collecting societies, since in that case the collecting society is only used to collect a remuneration right (i.e. a claim), the distribution conditions of which are often determined by law. In the case of mandatory collective management, it is the exclusive right that is enforced, which gives the collecting society greater bargaining power.

Comparison with French law offers an additional clue. Indeed in France there are two cases of mandatory collective management. The first one is the management of the reprographic reproduction right (article L. 122-10 of the Intellectual Property Code (hereinafter CPI)) and the second is cable retransmission right management of a broadcast work (article L. 132-20-1 CPI for copyright; article L. 217-2 CPI for performers, phonogram and videogram producers). In the first case, article L. 122-10, CPI states the principle that the publication of a work implies granting the right to a certified collecting society. Yet French doctrine is unanimous to argue that it is not at all a case of “statutory license,” since only the modalities of the exercise of the exclusive right are settled.⁵⁷ In addition, it must be underlined that some Community directives sometimes authorize, or even impose, mandatory collective management. It is the case of Directive of 27 September 1993 for cable retransmission,⁵⁸ but also of Directive of 19 November 1992, which allows mandatory collective management of the rental and lending right,⁵⁹ as well as Directive of 27 September 2001 for the *droit de suite*.⁶⁰ Compliance of these solutions with international law has never been questioned.

Lastly, even though the Treaties do not include specific provisions on mandatory collective management, their preambles sometimes lay out certain objectives, which may help interpret these international texts. Thus the WIPO Treaty underlines the “need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information.” Yet in certain situations it may be in the public interest to have rules on mandatory collective management. But one must not forget that a collective management system also protects the interests of authors. The individual exercise of a right by the author is in reality often difficult, sometimes impossible even, for mass uses of works.⁶¹ Moreover collective management is often a lot more advantageous for the author

⁵⁷ P.-Y. Gautier, *Propriété littéraire et artistique*, 5^e éd., Paris, PUF, 2004, n° 195 ; A. et H.-J. Lucas, *Traité de la propriété littéraire et artistique*, 3rd éd., Paris, Litec, 2006, p. 562, note 43 ; F. Pollaud-Dulian, *Le droit d’auteur*, Paris, Economica, 2005, n° 746 *seq.* and n° 1644.

⁵⁸ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, *JOCE* L 248 of 6 Oct. 1993, p. 15; article 9.1, entitled “*Exercise of the cable retransmission right*”: “Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.”

⁵⁹ Council Directive No. 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, *JOCE* L 346 of 27 Nov. 1992, p. 61; article 4. 3: “The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers.” and article 4. 4: “Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected.” (Art. 5. 3 of the codified version of 12 December 2006, *JO* L 376 of 27 Dec. 2006 p. 28).

⁶⁰ Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, *JOCE* L 272 of 13 Oct. 2001, p. 32; article 6. 2: “Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1.”

⁶¹ F. Siirainen, *Théorie générale de la gestion collective - Dimension d’intérêt général et régulation de la gestion collective* : *Jurisclasseur PLA*, Fasc. 1552, Jan. 2006, n° 17, according to whom the rights managed

because a collecting society generally has greater bargaining power. Distribution is usually a lot more favorable to the author when he has granted his rights to an owner, especially in the absence of an efficient contractual right protecting the author against the owner. As we have pointed out before, this has been expressly admitted by the German Federal Court in the framework of remuneration rights,⁶² but the argument is valid *a fortiori* for mandatory collective management. One may therefore contend that this solution is a means to protect the author against the pressure of owners, and thus a regulation in his interest.⁶³ It constitutes a “manner as effective and uniform as possible” to “develop and maintain the protection of the rights of authors” (preamble of the WIPO Treaty). One must conclude that mandatory collective management constitutes a means “to reach a satisfactory re-balancing between the different interests at stake and to guarantee the dissemination of works within the social body, in keeping with the social function of copyright.”⁶⁴

We may therefore reckon that mandatory collective management does not limit existing exclusive rights.⁶⁵ It is simply a form of exercise of the exclusive right, which is not dealt by (and therefore not forbidden by) international law. The three-step test is hence not an obstacle. In addition it is, by way of the fair balance it proposes, entirely compatible with the objectives of international conventions and could even constitute a legal solution to be developed in the future, contingent upon, of course, a strict regulation of collecting societies’ activities to avoid abuses caused by their monopoly situation.

That being said, except this precise case, the three-step test considerably restricts the national legislator’s freedom to adopt new solutions to adapt the exception system to the imperatives of the information society. But the legislator is not the only one to which the triple test is addressed and it seems that the national judge could also use this legal instrument to control the compliance of an exception with the conditions laid out in the test. We shall now see whether the three-step test may also be an obstacle to a judiciary adaptation of the exceptions to exclusive rights.

by mandatory collective management are “exclusive rights collectively exercisable by nature”, inasmuch as these rights would not exist absent collective management; F. Pollaud-Dulian (*prec. note 57*), n° 1155, who states “efficiency reasons” as justification to mandatory collective management.

⁶² Judgment of 11 July 2002 (*prec. note 43*).

⁶³ See also in this sense *S. v. Lewinski*, La gestion collective obligatoire des droits exclusifs et sa compatibilité avec le droit international et le droit communautaire du droit d’auteur (*prec. note 52*), p. 9.

⁶⁴ C. Geiger (*prec. note 8*), n° 383. See also in this sense F. Siiriainen (*prec. note 61*), n° 2 et 17 *seq.*, according to whom mandatory collective management has a regulatory function: It makes protection effective while allowing users to accomplish their task and the public to access works. See more generally D. Gervais, The Changing Role of Copyright Collectives, in: D. Gervais (ed.) *Collective Management of Copyright and Related Rights*, The Hague, Kluwer, 2006, p. 18 *seq.* This author claims to be in favor of a Scandinavian style “extended” system of collective management to guarantee a fair balance between the interests of authors and those of the public.

⁶⁵ See also in this sense *S. v. Lewinski*, La gestion collective obligatoire des droits exclusifs et sa compatibilité avec le droit international et le droit communautaire du droit d’auteur (*prec. note 52*), p. 5 *seq.*; K.J. Koelman, « The Levitation of Copyright: An Economic View of Digital Home Copying, Levies and DRM »: *Ent.L.R.* 2005, p. 81, also reproduced in: F.W. Grosheide & J.J. Brinkhof (ed.), *Intellectual Property Law 2004*, Intersentia, Anvers/Oxford, 2005, p. 436 *seq.*; C. Bernault and A. Lebois, *Peer to Peer et propriété littéraire et artistique* (*prec. Note 47*), n° 128, these authors concluding (with reason, in our opinion) that it would be possible to subject the peer-to-peer file-sharing upload of works to a mandatory collective management system.

II. The three-step test, obstacle to a judiciary adaptation of copyright to the information society?

In cases where the judge would need to use the three-step test in litigation, it would be bound in his interpretation by the conditions set out in the test. We have seen that the criterion of normal exploitation does not leave much discretion with regards to the justification for exceptions. There is hence a danger that the judge's interpretation be restricted by mostly economic considerations, leading to a reduction of the scope of exceptions rather than to a fair adaptation in keeping with social, technical and cultural evolutions. Certain cases, particularly a widely commented decision by the French Cour de cassation, may unfortunately indicate such an evolution.⁶⁶ We will first consider the judicial application of the three-step test (A), to then see if the test, instead of being an obstacle to a judicial adaptation of exceptions, could not on the contrary constitute an effective instrument to insure the system's flexibility (B).

A. Judicial application of the three-step test

Before examining the possible consequences of a judicial application of the triple test, it seems fitting to first determine whether the judge is really the addressee of the test, or if the latter is only addressed to the legislator.

1. The judge, addressee of the three-step test?

The question was mostly raised after the integration of the three-step test in the Community legal order, in a wording however slightly different than that found in the Treaties.⁶⁷ Indeed, article 5.5 of the 2001 Directive aims directly at the *application* of exceptions, as Recital 44 specifies that "Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the right holder or which conflicts with the normal exploitation of his work or other subject-matter."⁶⁸ Since in principle the one who applies the exceptions is the judge, the question of the determination of the real addressee of the three-step test included in Community texts was raised early on: is it only the legislator when including a limitation in the national law or is it also the judge when appreciating the application of a limitation in a case submitted to him? The question was intensely debated among scholars, and if the majority of authors admit that the Community legislator wanted to submit the interpretation and the transfer of exceptions by Member States to the CJCE's control,⁶⁹ many

⁶⁶ On this decision see *infra* (note 88).

⁶⁷ On this question see e.g. M. Buydens, *La nouvelle Directive du 22 mai 2001 sur l'harmonisation de certains aspects du droit d'auteur et des droits voisins dans la société de l'information: le régime des exceptions*, *A&M* 2002, p. 442; H. Cohen Jehoram (*prec. note* 26), p. 364; M. Buydens and S. Dusollier (*prec. note* 30), p. 12; S. Dusollier (*prec. note* 8), p. 440; P. Sirinelli, *La transposition de la Directive sur le droit d'auteur et les droits voisins dans la société de l'information en France, État des lieux : Propr. intell.* 2005, n°15, p. 133; C. Geiger, (*prec. note* 8), n° 305. See also T. Heide, *The Berne Three-Step Test and the Proposed Copyright Directive: EIPR* 1999, p. 105.

⁶⁸ One must note that the test had already been foreseen twice by previous Directives, but in the particular context of computer programs and databases (article 9.3 of the Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs and article 6.3 of the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.)

⁶⁹ See e.g. V.-L. Benabou, *La Directive droit d'auteur, droits voisins et société de l'information: valse à trois temps avec l'acquis communautaire: Comm. com. électr.* Oct. 2001 p. 10; J. Reinbothe, *EG-Richtlinie zum Urheberrecht in der Informationsgesellschaft: GRUR Int.* 2001, p. 740; S. v. Lewinski and J. Reinbothe, *The WIPO Treaties 1996: Ready to Come into Force: EIPR* 2002, p. 204.

are those who refuse to see the test as an instrument available to the national judge.⁷⁰ It is true that we can not find traces in the preparatory work of clear explanations in this sense. We may hence assert that if the Community legislator had wanted such a change in the triple test's scope, it would have been more explicit. It is not convenient here to develop all the arguments that have been put forth from one side or the other. The definitive answer on the manner to read the Community text will probably not be known until the Court of Justice statutes on the issue. It is however compelling that the text of the Directive is far from being clear.⁷¹ In fact it has been understood in very different ways by Member States, certain countries like Germany,⁷² the Netherlands,⁷³ Belgium,⁷⁴ or the United Kingdom⁷⁵ having refused to transfer the test in their legislation believing that only the legislator was the addressee of the test, whereas others like France,⁷⁶ Greece,⁷⁷ Italy,⁷⁸ Luxembourg,⁷⁹ Portugal,⁸⁰ or Spain⁸¹ have

⁷⁰ Skeptics includes e.g. K.J. Koelman, Fixing the Three-Step Test: *EIPR* 2006, p. 407; P. Gaudrat, *RTDcom*. Apr/June 2006, p. 389; M. Vivant and G. Vercken, note under CA Paris, 22 Apr. 2005, *Légipresse* 2005, n° 227, p. 233; V.-L. Benabou note under Cass. 1^{re} civ., 28 févr. 2006, *Légipresse* 2006, n° 231, p. 71.

⁷¹ See in this sense F. Gotzen, Le droit d'auteur en Europe: *Quo Vadis?* Quelques conclusions après la transposition de la Directive d'harmonisation dans la société de l'information: *RIDA* 2007, n° 211, p. 24 *seq.* See also the study conducted by the IViR of the University of Amsterdam, *The Recasting of Copyright & Related Rights for the Knowledge Economy*, November 2006 (www.ivir.nl), p. 71: "It is fair to say that the question of the true addressee of the three-step test remains uncertain and thereby, that the role of the three-step test either as a guideline for legislative action or as a rule of interpretation also remains undecided". For this reason, the study recommends the European legislator to clarify the exact role of the three-step test (p. 75).

⁷² See the preparatory work of the Law of 12 Sept. 2003 (and especially the motives to the bill of the law of the government of 6 November 2002 (BT-Drs. 15/38, p. 15).

⁷³ On this question and on debates that have taken place in the Netherlands, see P.B. Hugenholtz, La transposition aux Pays-Bas de la Directive 2001/29/CE: *RIDA* 2005, n° 206, p. 126.

⁷⁴ See the preparatory work of the Law of 22 May 2005 (especially the bill, motives, Doc. Parl., Ch. Rep., sess. 2003-2004, n° 51-1137/1, comment on art. 4).

⁷⁵ See the preparatory work of the Law of 3 October 2003 (especially the "Consultation on UK Implementation of Directive 2001/29/EC on Copyright and Related Rights in the Information Society: Analysis of Responses and Government Conclusions, p. 6": "The test is a matter to be taken into account with regard to the framing of exceptions in national law, rather than for direct incorporation into law, as is also understood to be the view of the Commission"). See also M. Hart and S. Holmes, Implementation of the Copyright Directive in the United Kingdom: *EIPR* 2004, p. 255.

⁷⁶ Law n° 2006-961 of 1st Aug. 2006 on copyright and neighboring right in the information society, published in the *JO* of 3 Aug. 2006 (see on this topic C. Geiger, La transposition du test des trois étapes en droit français: *D.* 2006, p. 2164). The solution was validated by the Conseil constitutionnel which believes that the Directive imposes the subordination of the *exercise* of exceptions to the three-step test, France having merely transferred "an unconditional and precise provision" on which "it was not to the Conseil constitutionnel to statute." (Decision n° 2006-540 DC of 27 July 2006, *JCP G* 2007, II, 10066, note M. Verpeaux). For a comment see V.-L. Benabou: *Prop. intell.* 2006, n° 20, p. 240.

⁷⁷ Art. 28 c of the Greek Copyright Law, introduced during the transfer of the Directive by Law 3057/2002, *JO A/ 239/* of 10 Oct. 2002.

⁷⁸ Art. 71 nonies and art. 71 sexies al. 4 in the framework of the private copying exception (introduced in the Italian law during the transposition of the Directive by Law of 9 April 2003).

⁷⁹ Article 10 (2) of the Luxembourg Copyright Law, introduced by the Law of 18 April 2004 during the transfer of the Directive (*Mémorial A*, No. 61, 2004, p. 941). See on this topic J. Neuen, La transposition en droit luxembourgeois de la Directive européenne du 22 mai 2001 sur l'harmonisation de certains aspects du droit d'auteur et des droits voisins dans la société de l'information: *RIDA* 2004, n° 202, p. 153.

⁸⁰ Article 75(4) of the Portuguese Copyright Law, introduced during the transposition of the Directive by Law n° 50/2004 of 24 Aug. 2004 (*Diário da República- I Série- A*, No. 199, 24 de Agosto de 2004, p. 5658). See L. F. Rebello, « Transposition de la Directive n° 2001/29/CE dans le droit portugais »: *RIDA* 2005, n° 206, p. 153.

⁸¹ Art. 40 *bis* of the Spanish Copyright Law (introduced in Spanish law in 1998 during the transfer of the Database Directive of 11 March 1996). Indeed, instead of transferring the test only for exceptions concerning databases (art. 6.3 of the Directive), the legislator extended the solution to all copyright exceptions.

incorporated it in their national law. In the latter case, it seems difficult to believe that the three-step test is only addressed to judges. In any case, it must be noted that since the adoption of the Directive, certain courts have “grasped” the test and now analyze the application of limitations in light thereof, and so even in countries that chose not to transfer it into their national law.⁸² It is indeed possible to think that the interpretation of an exception “in light of” the Directive can lead the national judge to see whether the application of this limitation complies with the triple test of article 5.5.⁸³ Besides, even in countries that have chosen not to incorporate the test in their national legislation, preparatory work sometimes reveals that the test could also be used by judges. Thus the Belgian legislator decided not to incorporate the test in copyright law, stating that “the three-step test, as it is drafted in article 5.5 of the Directive is destined above all to the legislator”, but added: “which does not foreclose however that the test may be used as guidelines for courts in applying the law.”⁸⁴ The judicial application of the three-step test seems inevitable. Actually judges have not always waited for an invitation from the Community level to use the three-step test, sometimes referring directly to article 9.2 of the Berne Convention,⁸⁵ even though there is no question that this text only applies to the national legislator.

2. Consequences of a judicial application of the three-step test

The main consequence of a judicial application of the three-step test is that it bestows a heavy responsibility on courts: these will have to interpret exceptions in light of the test and verify case by case if their application meets the conditions set out in article 5.5. A use covered *a priori* by the letter of an exception could thus be declared illicit *a posteriori* by the judge for failing to meet one of the steps. The result for the user could be a lack of foreseeability as to the use of spaces of freedom that the law provides for his benefit.⁸⁶ This insecurity could have

⁸² For recent examples see the decision of the TGI Bruxelles of 13 Feb. 2007, *Google v. Copiepresse, RLDI* 2007, n° 25, p. 24 (on this decision see L. Costes, *RLDI* 2007, n° 24, p. 5). See also the judgment by the German Federal Court of 11 July 2002 (*prec.* note 43), according to which the extension of the limitation allowing press reviews to press panoramas in electronic form for the company’s internal purposes is compatible, under certain conditions, with the three-step test (the judgment is, it is true, prior to the German transfer law of 10 Sept. 2003). It is interesting to note that a recent Dutch decision in a similar case arrives at the opposite conclusion (Court of first instance of the Hague (Rb’s-Gavenhage), 2 March 2005, *Computerrecht* 2005, p. 143, note K. Koelman). Yet in the Dutch case, press reviews were enriched with a search and archiving function, which implies a more important prejudice to right holders. However the interpretation of the test by national judges still differs considerably. On these decisions see the intervention of S. Dusollier, « The Application of the Three-Step Test by National Courts », during the workshop on: « Rethinking the Three-Step Test », jointly organized by the Max Planck Institute for Intellectual Property Law and Queen Mary University in London, Paris, ULIP, 16 Feb 2007.

⁸³ See also in this sense the comment on the decision of the Conseil constitutionnel (*prec.* note 76) in the Cahiers du Conseil constitutionnel n° 21, which underlines that the Directive calls for “an appreciation *in concreto* (by the judge in case of litigation) of the compliance with the three-step test in each particular case”.

⁸⁴ Bill, motives, Doc. Parl., Ch. Rep., sess. 2003-2004, n° 51-1137/1, comment on art. 4. See also motives on the German Bill of 22 March 2006, p. 42 (called the “second basket” because it is the second transfer law of the Directive), according to which the judge may use the test when enforcing exceptions. See also in this sense S. Bechtold, in: T. Dreier et P.B. Hugenholtz (ed.), *Concise European Copyright Law*, Kluwer Law International, 2006, p. 382.

⁸⁵ See for example the decision by the German Federal Court of 25 Feb. 1999 (*prec.* note 40). See also the decision of the French Cour de cassation of 28 Feb. 2006, *RIDA* 2006, n° 209, p. 323; *IIC* 2006, no. 6, p. 760. On this decision see *infra*.

⁸⁶ See in this sense in the context of the French law of 1st Aug. 2006: A. Lucas, *Propr. intell.* 2006, n° 20, p. 315; P.-Y. Gautier, L’élargissement des exceptions aux droits exclusifs, contrebalancé par le « test des trois étapes » : *Comm. com. électr.* Nov. 2006, p. 12. This enforceability makes the social acceptance of the legal norm more and more difficult. But it is true that the movement of “disorganization of the law” is not

a deterrent effect: fear of being considered as a counterfeiter could discourage users to proceed to an excepted use and conversely encourage them – when in doubt – to systematically ask authorization from the right holder. The exceptions, often already put “out of order” by technical measures, could very well become, to use the expression of an author, “areas of precarious freedom,”⁸⁷ very precarious indeed. The problem is not so much of enforceability, which characterizes all “evolutive” norms (each legal system has framework notions and general clauses).⁸⁸ The problem is that it is a one-way flexibility, from which only right holders can benefit. In fact the judge that will apply the test to an exception will have a hard time taking into account the conflicting interests, and especially those of authors and the public. A balancing of interests is only possible at the third step, according to which the use must not cause an “unjustified” prejudice to the interests of the author, which implies that there are “justified” prejudices thanks to the protection of interests deemed superior to those of right holders. Indeed this step, which requests an examination of the justification that underlies the limitation, will only be analyzed by the judge once the second step is passed. Yet under this second step, the use is exclusively considered from the standpoint of the *exploitation* of the work. We have already seen that it is not at all obvious to see what is meant by “normal exploitation.” And especially, when is there a “conflict” with this exploitation? Difficult and expensive economic studies will have to be conducted, which only the rare litigants who have the legal means to do so will be able to produce. As to the judge, he will not have the means to conduct cross-expert reports and will have to rely on data, which he will not have the capacity to verify. He will have to use a legal instrument that visibly was never designed to be applied by the national courts and will have to make decisions, which in principle fall within the political field, without the benefit however of preserving a fair balance of interests, which should be his mission.

One can actually find in a judgment dated 28 February 2006 by the French Cour de Cassation a perfect illustration of the problems that a judicial application of the three-step test may present.⁸⁹ In this widely commented judgement,⁹⁰ the High Jurisdiction applies for the first time the test to set aside the enforcement of an exception against a technical protection measure, considering in an abstract and general manner that the private copying of a DVD constitutes a conflict with the normal exploitation of a work. However it does not give any definition of the notion and simply affirms generally that the latter “may be appreciated with regards to the inherent risks in the new digital environment concerning the preservation of copyright and the economic importance that the exploitation of the work, in the form of a DVD, represents for the recovery of the cinematographic production costs”. It appears to us that these criteria are far too vague not to present a risk of arbitrary abuse.

limited to copyright law and several academic studies denounce the disorder related to the growing legal insecurity in the many branches of law (see e.g. on this theme, V. Lasserre-Kiesow, *L'ordre des sources ou le renouvellement des sources du droit*: *D.* 2006, p. 2279, according to whom “the legal disorder seems to characterize a new era, one of legal disorganization and insecurity”).

⁸⁷ C. Caron, *Les exceptions, L'impact sur le droit français* : *Prop. intell.* 2002, n° 2, p. 26.

⁸⁸ See for copyright C. Castet, *Notions à contenu variable en droit d'auteur*, Paris, L'Harmattan, 2004.

⁸⁹ Cass. 1^{re} civ., 28 Feb. 2006 (*prec.* note 85).

⁹⁰ Cass. 1^{re} civ., 28 Feb. 2006, *D.* 2006, act. p. 784, obs. J. Daleau; *JCP G* 2006, II, 10084, note A. Lucas; *JCP E* 2006, act. 148, note C. Vilmart ; *Comm. com. électr.* Apr. 2006, p. 24, obs. C. Caron ; *RLDI* 2006, n° 15, p. 17, note D. Melison and p. 49, note C. Geiger; *Légipresse* 2006, n° 231, p. 71, note V.-L. Benabou; *Prop. intell.* 2006, n° 19, p. 179, 1^{er} esp., obs. A. Lucas ; *Prop. ind.* July-Aug. 2006, p. 25, note J. Schmidt-Szalewski; *RTDcom.* Apr.-June 2006, p. 370, obs. F. Pollaud-Dulian and p. 400, obs. P. Gaudrat; *A&M* 2006, n° 2, p. 177, note S. Dusollier; *RDTI* 2006, n° 25, p. 207, note T. Léonard.

From a vague diplomatic consensus, has the three-step test applied by the judge been transformed into a legal instrument allowing to review freedom spaces within copyright law, to the detriment of its social function and a fair balance between all the interests at stake?⁹¹ The picture is perhaps not as grim as it seems. Indeed it is very likely that the courts will not be satisfied with the role that the law seems to confine them in, which consists in endorsing the claims of right holders, and it may be that in the future they will propose more balanced interpretations of the test. One may even believe that the three-step test could become an instrument of flexibility allowing to “open” the system of exceptions and to extend the scope of exceptions to cases not foreseen in the law.

B. The three-step test, an instrument of flexibility?

One may think that the most fervent promoters of the three-step test nourished the hope to see the scope of exceptions reduced by the judge in the digital environment, the latter being forced to apply an instrument that supported, because of its wording, an approach favorable to right holders. It is not certain that the calculation was accurate. Because if judges are given the means to adjust exceptions on a case by case basis, they will be able to benefit from a true instrument of flexibility allowing them to adapt exceptions to the digital environment.

1. Flexibility of the system, guarantee of its adaptation to the information society

It is known that the question of copyright limitations is a sensitive one and national legislators often hesitate to intervene to adapt the system to the imperatives of the information society.⁹² The consequence is therefore the following: whereas the system is regularly modernized as far as rights—which are constantly progressing—are concerned, limitations remain confined to a narrow conception. The balance of interest is hence seriously modified in favor of right holders and limitations, as “barometers of the harmonious reception of copyright law in the social body,”⁹³ appear insufficient to cover a few uses, which are however necessary to insure that copyright fulfils its social function.⁹⁴ This sometimes leads to excessive enforcement of exclusive rights, often causing a reaction of reject in the public. Copyright law, many underline this now, is going through a serious legitimacy crisis. Yet in order to avoid an un-nuanced application of intellectual property rights and to guarantee that the system takes fundamental values into account, judges need to have a legal instrument to “knock it into shape” and restore a fair balance between the interests at stake.⁹⁵ The judge must not replace the legislator, but insure in every case a balanced application of copyright limitations, compliant with the law’s main function of “insuring peaceful coexistence of the human group, or, as it has been often said, to harmonize the activity of members of society.”⁹⁶

⁹¹ On the concept of balance of interests in copyright law, see R.M. Hilty et C. Geiger (under the dir. of), *La balance des intérêts en droit d’auteur*, Munich, 2006 (online publication, available at: www.intellecprop.mpg.de/ww/de/pub/forschung/publikationen/online_publicationen.cfm).

⁹² See on this question C. Geiger, *L’avenir des exceptions au droit d’auteur*, Observations en vue d’une nécessaire adaptation et harmonisation du système: *JCP G* 2005, I, 186.

⁹³ To use an expression of Professor Caron (article *prec.* note 87), p. 25.

⁹⁴ On the social function of copyright law see C. Geiger (*prec.* note 8), n° 27. For intellectual property see M. Vivant, in: M. Vivant (under the dir. of), *Les grands arrêts de la propriété intellectuelle*, Dalloz, 2004, notice n° 1; J.-M. Bruguière, *Droit des propriétés intellectuelles*, Ellipses, 2005, p. 107.

⁹⁵ See C. Geiger, *Pour une plus grande flexibilité dans le maniement des exceptions au droit d’auteur: A&M* 2004, p. 213, for a re-balance through the application of fundamental rights.

⁹⁶ C. du Pasquier, *Introduction à la théorie générale et à la philosophie du Droit*, 4th ed., Delachaux et Niestlé, 1967, p. 19.

The three-step test could become this instrument of flexibility⁹⁷ if a different reading from that of the French Cour de Cassation in the aforementioned case could be made. Indeed the Court completely skips over the third step, which is by far the most important one, since it allows an examination of the justification that underlies the limitations. Under the third step, the application of copyright limitations can not cause an “unjustified” prejudice to the right holder. In effect the right holder can not have the power to control *all* uses of his works, as some prejudices may be justified in light of values deemed superior to the interests of the right holder.⁹⁸ This formulation invites the judge to carry out a proportionality test, which reminds us of the method used to settle conflicts between fundamental rights.⁹⁹ The judge must then consider the justification behind the limitation and come to a differentiated analysis in light of the many interests and fundamental rights at stake.¹⁰⁰ This leads to a particularly interesting result. One could thus combine the security of a closed system of exceptions with the flexibility of fair use,¹⁰¹ permitting an adjustment of the application of limitations not only in function of the economic interest of the right holder, but also of the diverging interests of users or even of authors when these differ from those of right-holding owners.

2. The necessity to “re-think” the test: for a new interpretation

However in order to do so, it would be necessary to “re-think” the three-step test and to adopt a new reading of it. Indeed, to come to balanced solutions, it could be useful to begin with the third step and to use the second step afterwards as a corrective measure to eliminate the most abusive conflicts with the exploitation of the work. This would amount to a reverse reading of the test, which no text seems to forbid.¹⁰² In fact the interpretation problem that the French Cour de cassation proposes is that as soon as a conflict with the normal exploitation is noticed, the examination of the third step is no longer necessary. It is for that reason that the Court does not continue its analysis. This could not possibly be the meaning of the three-step test, which by the way must also be analyzed in light of the European Human Rights

⁹⁷ See in this sense C. Geiger, Right to Copy v. Three-Step Test, The Future of the Private Copy Exception in the Digital Environment: *Computer Law Review international (CRi)* 2005, p. 7, as well as from the same author: The Three-Step Test, a Threat to a Balanced Copyright Law?: *IIC* 2006, p. 683; J.-C. Galloux, Limitations et exceptions au droit d’auteur en France, Exception française ou paradoxe français ?, in : C. Geiger, M. Bouyssi-Ruch, R.M. Hilty (under the dir. of), *Perspectives d’harmonisation du droit d’auteur en Europe*, Litec, 2007 (to be published) ; M. Senftleben, L’application du triple test - vers un système de « fair use » européen ?, intervention during the colloquium IRPI/AFPIDA on « Droit d’auteur et numérique, Quelles réponses de la DADVSI ? », Paris, 9 March 2007 (acts to be published).

⁹⁸ The German Constitutional Court specified this very clearly in its “school books” decision of 7 July 1971, *GRUR* 1972, p. 481.

⁹⁹ M. Senftleben (*prec. note* 10), p. 226; S. Dusollier (*prec. note* 25), p. 221; C. Geiger, The Three-Step Test, a Threat to a Balanced Copyright Law? (*prec. note* 97), p. 696.

¹⁰⁰ See also in this sense the intervention of P.B. Hugenholtz, « Free Speech and The Three Step-Test: a Tongue Twister », during the workshop on: « Rethinking the Three-Step Test », jointly organized by the Max Planck Institute for Intellectual Property Law and Queen Mary University in London, Paris, ULIP, 16 Feb. 2007.

¹⁰¹ See in this sense M. Senftleben (*prec. note* 97); C. Geiger (*prec. note* 97). Professor Sirinelli concludes his synthesis report of the ALAI Days dedicated to copyright limitations by judging that such a solution combining both approaches is probably ideal (Synthesis of ALAI Study Days, in: L. Baulch, M. Green and M. Wyburn (ed.), *Les Frontières du droit d’auteur : ses limites et exceptions*, Actes du congrès de l’ALAI 1998, Australian Copyright Council, 1999, p. 136).

¹⁰² For such a reading see also C. Geiger (*prec. note* 97), p. 12. See also the intervention of M. Vivant, « Rethinking the three-step test: What are the possibilities left by interpretation of the conditions? », during the workshop on: « Rethinking the Three-Step Test », jointly organized by the Max Planck Institute for Intellectual Property Law and Queen Mary University in London, Paris, ULIP, 16 Feb. 2007, approving this reading.

Convention, a text that preempts the Directive in the hierarchy of norms.¹⁰³ An analysis of the test led exclusively from the perspective of right holders' economic interests is incompatible with a fundamental rights approach, whose starting point is a postulate of equality between rights of equal value.¹⁰⁴ To give priority to the right holder would thus contradict the European legal order.¹⁰⁵

As we have already underlined, it is appropriate to adopt an extremely restrictive approach to the notion of normal exploitation of the work, in order to place the third step—which allows a balancing of the different interests at stake—at the center. But it is not enough and we must insure that the judge examines the third step. In order to do so, we propose to examine the test in reverse. The psychological effect would not be negligible: after having balanced the interests, the judge would certainly be less inclined to censor the use by adopting a purely economic approach and would therefore use the second step to “knock it into shape.”

Another solution would be to read the test as stating a number of factors that need to be considered by the judge, on the model of the American doctrine of fair use.¹⁰⁶ In fact the second step of the test is strongly reminding of the fourth factor of article 107 of the American Copyright Act of 1976, according to which the effect of the use upon the potential market for or value of the copyrighted work must be taken into account. However it is only one factor among others. The second step of the impact on normal use of the work would thus constitute *one of the criteria* to implement, one of the parameters to take into account during the analysis of the application of a limitation. But it would not be the only one.¹⁰⁷

One could obviously contend that such a reading, causing a flexibilization of the limitations system, could lead to unfortunate legal insecurity. It is true, and this has been rightly underlined, that the fair use doctrine leads to unpredictable results, which may constitute an obstacle for users who would refrain from using limitations for fear of being sued.¹⁰⁸ That being said, it would never aim at replacing the list of limitations with a general clause. In most cases, the use will clearly fall (or not) under a limitation provided in the law. It would

¹⁰³ See V.-L. Benabou, La transposition des Directives en droit interne : l'exemple du droit d'auteur : *Légicom* 2004, n° 30, p. 35. More generally see H. Scheer, The Interaction between the ECHR and EC Law, A Case Study in the Field of EC Competition Law: *ZEUS* 2004, p. 690.

¹⁰⁴ See C. Geiger, Les droits fondamentaux, garanties de la cohérence du droit de la propriété intellectuelle?: *JCP G* 2004, I, 150 (for an English version see *IIC* 2004, n° 3, p. 26).

¹⁰⁵ See in this sense C. Geiger, « Constitutionalising » Intellectual Property Law? (*prec. note* 24).

¹⁰⁶ For such a reading see the article by K.J. Koelman, « Fixing the Three- Step Test » (*prec. note* 70), as well as the intervention from the same author: « The Room for Interpretation of the Three-Step-Test », during the workshop on: « Rethinking the Three-Step Test », jointly organized by the Max Planck institute for Intellectual Property Law and Queen Mary University in London, Paris, ULIP, 16 Feb. 2007.

¹⁰⁷ An approach in terms of “usage loyal” is not at all unthinkable in a country of continental tradition, like this is sometimes put forth. It corresponds in our opinion to this “reasonable” approach to copyright, dear to Prof. Sirinelli (P. Sirinelli, Brèves observations sur le « raisonnable » en droit d'auteur, in: *Mélanges A. Françon*, Paris, Dalloz, 1995, p. 397 *seq.*). Judges are not insensible, like in this very interesting decision of the Court of Appeal of Saragoza of 2 Dec. 1998 (núm. 708/1998, rec. 136/1998), in which the Court verified if reproductions for teaching purposes in universities had been “loyal”. According to the Spanish judges, “in order to determine if the use of a work in a specific case is loyal, and, as a consequence, constitutes a licit exception to the right of reproduction, it is necessary to take into consideration the four following factors: 1°. The destination and character of the use, mainly the commercial nature of the use or its destination as a non-profit purpose; 2°. The nature of the protected work; 3°. The volume and importance of the part used in relation with the entire protected work; and 4°. The influence of the use on the potential market of the protected work or its value.”

¹⁰⁸ See in this sense the very interesting article by D. Nimmer, The Public Domain, Fairest of Them All, and Other Fairy Tales of Fair Use: *Law & Contemp. Prob.* 2003, n° 66, p. 280.

only be in exceptional circumstances, i.e., when the spirit of a text would impose that a use not be seized by the exclusive right, that a kind of openness would remain desirable.¹⁰⁹ Indeed, why would flexibility have to lead only to a reduction of exceptions? Logic would want that, if we admit the principle of discretion left to the judge, it goes both ways, and not only in the restrictive sense.¹¹⁰ Judges have in fact already used the three-step test to enshrine an extensive interpretation of an exception in order to adapt it to technical change.¹¹¹ It is not conceivable to accept legal insecurity when it favors right holders and not when it favors users.

Insecurity is unfortunately unavoidable if we want to refine the application of limitations (in one way or the other) in order to adapt the system to new circumstances.¹¹² Besides, copyright law is already affected by a certain lack of legal security when it comes to access to protection. Indeed, the eminently subjective criterion of originality (French version) or of individuality (German version), defined as the imprint of the author's personality, does not allow us to know in advance whether a work meets this condition or not. It is agreed nonetheless that a filter is necessary to maintain the ideas or certain forms of non-original expressions in the public domain, because of interests deemed superior to those of right holders.¹¹³ The judge proceeds (or at least, in an ideal world, *should* proceed) to a balancing of interests when deciding of the originality of a creation of the mind. Besides one cannot fail to notice that the motivations of judges are more often than not rather opaque, and a lot of imagination may be needed to see the personality of the author in a bolt, a shelf, or a salad shaker, creations to which the courts have sometimes granted copyright protection. Therefore it would perhaps be a good idea to set up a kind of three-step test for access to copyright protection and to replace the originality standard by clearer criteria.¹¹⁴ If we agree that the

¹⁰⁹ See M. Senftleben, *Beperkingen à la carte : Waarom de Auteursrechtlijn ruimte lat voor fair use : AMI* 2003, n° 1, p. 10. The author demonstrates in a very convincing way that the exhaustive list of the Directive does not foreclose a certain openness thanks to the three-step test.

¹¹⁰ Well understood, the three-step test could therefore, instead of constituting the symbol of a prejudicial disorganization of law, become a safeguard for an evolutive legal order. Indeed, as underlined by P. Roubier, "as soon as the legal order presents loopholes in the concrete, it is very natural to go fetch in the spontaneous social order, i.e. in the content brought about by life experience and by the necessities of new relationships, the elements to fill these blanks": *L'ordre juridique et la théorie des sources du droit*, in: *Le droit privé français au milieu du XXe siècle, Études offertes à G. Ripert*, LGDJ, 1950, p. 19). Yet who is better placed than the judge to insure that this adaptation of the law to the "spontaneous" mutations of society takes place? The adaptation of copyright law to the "information society" could not only be a case for the legislator.

¹¹¹ See for instance the German Federal Court judgment of 11 July 2002 (*prec.* note 43), that validates the extension of the limitation that allows press reviews at press panoramas in electronic format.

¹¹² It is true that such a conception may seem to move away from the continental tradition to come closer to common law methods, where the judge has a greater discretionary power. That being said, the Community harmonization context in which copyright law finds itself today requires in our opinion a certain permeability as to the methods used by judges in applying the law. Indeed Community texts move largely away from the continental tradition as far as their drafting is concerned. Yet they still have to be transferred. As a result law has lost the coherence and intelligibility that it could have had in the past (see in this sense J. de Clausade, *Sécurité juridique et complexité du droit: considérations générales du Conseil d'Etat: D.* 2006, p. 737). It appears to us that if the legislative method changes, so should the judiciary method, especially when the latter comes up with balanced solutions. Or else the integration process as a whole should be rejected (on this questions see the fascinating article by K.H.T. Schiemann, judge at the Court of Justice of the European Communities: *Should we come together? Reflections on different styles of judicial reasoning: ZEuS* 2006, p. 1).

¹¹³ The most classical doctrine is unanimous on this point.

¹¹⁴ For a proposal in this sense see C. Geiger, *La privatisation de l'information par la propriété intellectuelle : Quels remèdes pour le droit de la propriété littéraire et artistique?: Revue Internationale de Droit Économique (RIDE)* 2006, n° 4, p. 389.

principle is freedom and the exception exclusiveness, this would not be illogical, quite the contrary in fact.¹¹⁵ But this is another debate...

To conclude, it must be noted that the adaptation of the system of exceptions to the imperatives of the information society remains a great challenge at the global, European and national levels. We have seen however that the freedom of national legislators was strongly reduced by the rules of the three-step test. Moreover, it could very well be that the judge, forced to use the test in the cases that lay before him, sees his discretionary power also diminished and finds it difficult to take into account the authors and users' diverging interests. Unless he adopts a different reading of the conditions set out in the test, which would therefore not be considered as "steps" but as criteria that need to be considered during the balancing process.¹¹⁶ Finally, what seems regrettable is not that Member States are not free to do as they please, for this is the rule of the game in any commitment at the international level. What seems shocking is that there has been no debate over the true scope of this legal instrument, whose dangerous potentialities have gradually appeared. Yet it is very likely that, at the time, Member States had not thoroughly measured the breadth of their commitment. This could lead them to trigger in the future a revision of the existing agreement to recapture their sovereignty in the field of exceptions. The acceptance of copyright law within the social body could depend on it.

¹¹⁵ See in this sense Professor Vivant's beautiful metaphor, whereby intellectual property rights are "an archipelago where every private right, each one attached to a particular creation of the mind, emerges like an island in an ocean falling under the regime of freedom" (J. Foyer et M. Vivant, *Le droit des brevets*, Paris, PUF, 1991, p. 9).

¹¹⁶ In France, scholars sometimes use the notion of "triple test" as opposed to "three-step test" (C. Alleaume, *Le rôle du triple test, une nouvelle conception des exceptions ?*: *RLDI* 2007, n° 25 (supplement), p. 48 ; B. May, *Droit d'auteur : le « triple test » à l'ère du numérique* : *RLDI* 2006, n° 15, p. 63). This notion, albeit little known in other countries, has nonetheless the advantage of allowing a reading of the test which is not "by step" and thus attempts to be more neutral. In the reading proposed herein, this appellation hence appears preferable.