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STUDY ON LIMITATIONS AND EXCEPTIONS FOR COPYRIGHT AND RELATED RIGHTS FOR TEACHING IN AFRICA

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[*] The views and opinions expressed in this study are the sole responsibility of the author. The study is not intended to reflect the views of the Member States or the WIPO Secretariat.

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WARNING

The purpose of this study was to report on exceptions and limitations for education, both in international conventions and in the laws on copyright and neighbouring rights of 45 countries located in sub-Saharan Africa. It was therefore a very ambitious undertaking, both geographically and legally. However, its implementation was hampered by two major obstacles.

The first difficulty, of a material nature, consisted in locating the "sources" – the different texts necessary for the conduct of the study. This difficulty was only partly overcome. Despite the efforts made by the relevant departments at WIPO, Internet searches and the artist's personal contacts, it was not possible to locate all of the laws. Consequently, the reader will note that a number of countries were not taken into consideration: Burundi, Comoros, Equatorial Guinea, Eritrea, Gabon, Guinea Conakry, Guinea-Bissau, Lesotho and Sierra Leone.[1] To put this gap into perspective, however, it will be recalled that some of the countries which belong to the African Intellectual Property Organization (OAPI) continue to apply Annex VII of the Bangui Agreement concerning the establishment of the Organization, the amended version of which came into force in 2002. This is the case with Gabon, Guinea Conakry and Guinea-Bissau.[2]

The second difficulty, of an intellectual nature, was to understand and interpret the different national laws drafted in three different languages (English, French and Portuguese) reflecting the fact that in Africa there are two separate families of literary and artistic property: those of author's rights and those of *copyright*. The author endeavoured to incorporate the requirements of each legal family, taking into consideration the common foundations provided by international conventions. However, he is mindful of any possible shortcomings. One should bear in mind that even in the field of intellectual property, which is strongly influenced by a host of multilateral agreements, national texts inevitably remain immersed in domestic socio-juridical contexts which justify some of their provisions, making it somewhat difficult for an outsider to understand them fully. Accordingly, the author wishes to beg the reader's indulgence for any misinterpretation of a domestic law.

[1] As for Rwanda, when the study was finalized, the text in use was still a draft. However, it had already been adopted and was merely awaiting publication.

[2] Under Article 3, para 1of the Bangui Agreement, " the rights related to the fields of intellectual property, as provided for in the Annexes to this Agreement, shall be independent national rights subject to the legislation of each of the member States in which they have effect." This provision should be interpreted to mean that the Annexes to the Agreement shall be applicable as national legislation in the member States, as long as they have not legislated accordingly. If they have done so, the provisions of the Annex shall constitute subsidiary legislation which fills the gaps in domestic legislation.

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SUMMARY

This study on exceptions and limitations for teaching in Africa is part of a series of research projects conducted under WIPO auspices on the key issue of exceptions and limitations for copyright and neighbouring rights. The present study was preceded by similar studies devoted to the digital environment, the visually impaired and libraries. In addition, it only concerns Africa insofar as other similar studies have been undertaken for other parts of the world.

The study is of clear interest. It makes it possible, first of all, to highlight the notion of teaching, deemed synonymous with education. This notion used by certain international conventions does not pose any particular problems when it comes to conceptualization. Rather, the difficulty consists of identifying the types of education that could benefit from the exception or limitation enshrined in law. In this respect, it would be preferable to exclude education for profit, which should be subject to normal copyright rules.

Next, the study provides an opportunity to revisit the international sources that inspired the exceptions and limitations contained in national laws. It can be seen from the main international conventions that the cross-cutting source of the exceptions and limitations is the now famous rule of the triple criteria, also known as the triple-test rule or the three-stage test. Here, States must restrict any limitations or restrictions they place on the rights enshrined in international conventions to certain cases that do not conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the rights holder. In other words, whenever an exception contained or to be included in a national text no longer satisfies or fails to satisfy the different stages of the test ((1) Does the exception constitute a special case? (2) Does the exception conflict with a normal exploitation of the work; (3) Does the exception unreasonably prejudice the legitimate interests of the rights holder?), it must be rethought and

amended, possibly by introducing a licence for the benefit of the rights holders. Today, this rule has become a precious tool for striking a balance between the interests of rights holders and those of the general public, particularly in the field of education.

The second major source of exceptions and limitations for teaching is Article 10 of the Berne Convention, which provides a direct framework offering national lawmakers the possibility of introducing restrictions for teaching. This article contains a special provision establishing a veritable right of quotation and a related general provision offering a platform for national legislators to follow in establishing such a restriction for teaching. As a result of these provisions, quotation is an imperative exception and the general exception is but a faculty.

The third key source for Africa in particular is the Appendix to the Berne Convention, which foresees a system of compulsory licenses for teaching purposes in developing countries. To be sure, the goal pursued by the inventors of these licenses was praiseworthy indeed. Today, however, these licenses have been undermined by an extremely complex procedure which hampers their implementation. Nearly 40 years after their inclusion in the mechanism of the Berne Convention, they are still not in widespread use, and the onslaught of digital technology will hardly improve matters. Finally, if we truly wish to maintain these exceptions and ensure that they are more than a mere deterrent aimed at obliging rights holders to work for the benefit of developing countries, we will have to dust off the system in order to make it more attractive.

The last category of sources is that of the TRIPS Agreement, the WCT and WPP Treaties as well as the Rome Convention. These various instruments back up the provisions contained in the Berne Convention, adapting them to a business setting (TRIPS), the technological environment (WCT and WPPT) and neighbouring rights (Rome Convention and WPPT). Granted, reconciling these various texts has not always been an easy task, but on the whole there is consensus that the shared goal that has been pursued has made it possible to arrive at more or less homogenous solutions.

Finally, the study makes it possible to examine in detail the exceptions and limitations contained in the national laws of the African countries. Here, an initial comment is in order: all the laws analyzed contain an exception or limitation for education. These differ in terms of extent and scope, as the above-mentioned international texts give States a certain amount of leeway. One example has to do with the nature of the restriction chosen. Some legislations opt for a single exception or limitation while others also provide for a license or pave the way for this solution. But regardless of the option chosen, a licence can replace an exception or limitation if the latter does not meet or no longer meets the second and/or third stage of the triple test. It is this understanding that justifies the fact that in several countries where the law contains an exception or a limitation for teaching, contracts have been signed or are being negotiated with educational establishments and universities with a view to the fair payment. A second example comes from the acts in conjunction with the restriction for education. A large share of countries merely speak of “using” the work by way of illustration for teaching, tending to indicate that the range of permissible acts is relatively broad, whereas another fraction stipulates the type of teaching covered by the exception for some acts. Similarly, some States do not include the performance of all or part of the protected subject matter in the scope of the exception or limitation, which implies that the normal rules of intellectual property would apply. Such an option is regrettable.

A second comment is also in order: despite the wide range of conditions to which the exception or limitation is subjected, virtually all countries require an indication of the author's name and the source, if this name appears in the work.

A third, two-edged comment may also be made. On the one hand, there is a certain amount of suspicion with regard to digital copying and clear distrust on the part of lawmakers when it comes to means of mass reproduction and especially reprography. With regard to the former, this has led to a worrying complete or partial silence, even in laws adopted after the WCT and WPPT Treaties. With regard to the latter, it leads to more specific regulation than for the other forms of use of works for teaching.

On the whole, a number of key proposals can be made with a view to improving the international and national norm-setting apparatus:

- The international conventions provide a relatively satisfactory framework for tolerance for the benefit of teaching. However, the licensing system introduced by the Appendix to the Berne Convention and incorporated by subsequent conventions must be simplified and made more attractive.

- Domestic legislations in force do not seem to meet all the needs of digital technology, so changes should be made. These changes will make it possible to incorporate unequivocal provisions concerning the digitization of works in conjunction with educational activities, the use of works in a teaching setting relying on the Internet and the fate of technical protection measures which have been put to the test by educational requirements.

- It appears necessary to introduce a legislative framework capable of facilitating negotiations for the granting of licenses, taking into consideration such parameters as the level of the educational establishment, the amount of tuition fees charged and the volume of utilization of works.

- The restriction for teaching should be extended to all categories of works, because all protected subject matters are likely to be used within the framework teaching in schools or universities. In particular, no legislation should exclude audiovisual works from the scope of protection. In addition to the African context, objects created for teaching purposes should not be excluded from the scope of the restriction concerning teaching.

- There is a need to ensure that the exception for teaching covers all ordinary acts required by educational activity.

I. INTRODUCTION

The study focuses on several fundamental notions, the contents of which must be clarified. On the one hand, there are the notions of limitation and exception, and on the other hand there is the concept of teaching. Conceptualizing in this manner enables us to understand the contours of the present study, appreciate its usefulness and justify its goals.

A. Notions of limitation and exception

The terms “exception” and “limitation” must be clarified. According to established doctrine[3], the word *limitation* refers to situations where an exclusive right gives way to a right to compensation. As for the word *exception*, it describes a situation where the exclusive right is paralysed, in which an act (for example reproduction or communication to the public) stemming in principle from the exclusive right of the rights holder can be performed without his consent. However, the point should be made that some exceptions affect the very existence of the right whereas others affect only its exclusive nature. Exceptions in the first category are those which cannot in any way entitle the rights holder to compensation, such as the exception of a short quotation or the exception of parody. As for the exceptions in the second group, they are likely to give rise to compensation when certain conditions are met.[4] The same holds true for the exception for private use and the exception for teaching.[5]

The term “exception” crops up in several African laws, particularly those of Benin, Botswana, Namibia, Nigeria and South Africa. As for the term “limitation”, it is used by the laws of Burkina Faso, Congo, Côte d'Ivoire, Madagascar, Swaziland, Togo, Tanzania and Uganda, and appears in Annex VII of the Bangui Agreement. In other legislations, the two terms are paired: for example, Chapter VI of the corresponding Angolan law is called “Copyright Limits and Exceptions”. In the last group of laws, no specific term is used. For example, Cameroon has recourse to a circumlocution, with the beginning of Article 29 worded as follows: “if the work has been published with the author’s permission, this latter may not prohibit:...”. This is also the case with certain laws such as that of Niger, which merely refers to “free usage”. Yet when one reads the content of the legislative provisions, everything would tend to indicate that the aim of the drafters, regardless of the wording chosen, was to define an area of free use that was outside the control of holders of copyright or neighbouring rights[6], as the case may be, in exchange for fair compensation. Accordingly, each of these notions helps to determine the scope of IP enforceability, or stated in mundane language, to “determine the uses of protected elements that are not subject to authorization or compensation.”[7] Consequently it is pointless, within the framework of the present study, to enter into a semantic quarrel. For in the final analysis, the key issue justifying the fact that the two terms appear together for the first time in the TRIPS agreement, then are taken up by the two WIPO treaties (WPPT and WCT) is the same, namely, helping to strike a fair balance between the interests of the public and those of rights holders. The two expressions will therefore be used cumulatively in connection with this paper.

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[3] A. and H.-J. Lucas, *Traité de la propriété littéraire et artistique*, 3rd edition, Litec, 2006, No. 314 and 321, pp. 256 and 259.

[4] Primarily the second and third stages of the triple test rule, to which we shall revert.

[5] Cf. C. Alleaume, *Les exceptions de pédagogie et de recherche*, Communication – Commerce électronique, Nov. 2006, p. 14.

[6] Moreover, even Annex VII of the Bangui Agreement, of which Chapter IV of the First Part of Title I is devoted to the “limitation of economic rights”, contains several provisions which all concern “free reproductions” or “free utilizations”.

[7] Cf. P. Sirinelli, *Exceptions et limites aux droits d’auteur et droits voisins*, Workshop on the implementation of the WIPO Copyright Treaty (WCT) and the WIPO Treaty on Performances and Phonograms (WPPT), Geneva, December 6–7, 1999, which may be consulted at *www.wipo.int/copyright/fr/limitations/studies.html*. Moreover, this author thinks that the notions of “limits” and borders flow from the same philosophy.

B. Notion of teaching

The notion of teaching does not pose any special problems as far as a definition is concerned. For the French dictionary *Le Robert*, which rightly deems it synonymous with education, it is “the action or art of teaching, of transmitting knowledge to a student”. This definition highlights three essential elements.

The first and the most visible is the student. In a specific sense, this is a person who is receiving teaching provided in an educational establishment. However, the notion of student must not be defined narrowly. Indeed, the teaching received by the student can be dispensed in establishments of varying levels. It can also be provided in a public and private institution, free of charge or for commercial purposes. This implies that, whether we are speaking of kindergarten or university, whether the educational establishment is the property of the State fulfilling its public service mission of education or an individual who is seeking financial gain, the persons receiving the teaching are all students.

The second element concerns the persons doing the teaching. These are all so-called “supervisors" whose role is to transmit knowledge to students. These supervisors are of different orders depending on the level of teaching in question, ranging from schoolteachers through secondary school teachers to university professors. As far as they are concerned, it matters little whether they have been trained to teach. What is essential is that they are involved in the process of transmitting knowledge within an educational establishment.

The last element concerns the knowledge transmitted. In absolute terms, education cannot be limited to a specific type of knowledge. It may concern either general knowledge or technical knowledge. In other words, as long as the learners are students who are being taught within an educational establishment, the content of such teaching matters little. The category of educational establishments may include both general and technical schools, high schools and universities where the latter category could contain both public and private vocational training schools.

All in all, it is clear that teaching as defined above covers a relatively wide range, encompassing “both teaching at all levels, that is in schools or universities, in both public (municipal or State) schools and private schools.” [8]

However, two other elements are worth mentioning. On the one hand, does the notion of teaching only cover traditional face-to-face teaching, that is, classroom education? Or can it be extended to correspondence and Internet courses where students are not in the physical presence of a teacher?[9] Moreover, must we exclude training courses and special literacy campaigns which target adults?

[8] Report by Mr. Bergström, Records of the Berne Convention, Vol. II, No. 97, p. 1155), quoted by A. Françon, A. Kerever and H. Desbois, *Les conventions internationales du droit d’auteur et des droits voisins*, Dalloz, 1976, No. 171, p. 202.

[9] The most commonly used expression in recent years refers to “Open Distance Learning”. According to Mr. Garnett, it encompasses several modalities: ongoing training, self-training, adult education, technology-based teaching, etc. Cf. N. Garnett, *Etude sur les systèmes automatisés de gestion des*

[Footnote continued on next page]

The first question is important because "Internet has become an essential tool for training and transfer of knowledge, whether it serves as a simple tool for face-to-face teaching or genuine training provided entirely on a distance learning basis. As with face-to-face courses, online course teachers and designers frequently rely on elements protected by copyright."[10] The above teaching criteria can a priori easily be adapted to distance learning and e-learning. The learners are indeed students who are taught skills by teachers, and the training institutions which provide such knowledge have a vocation of general interest, as do traditional institutions. Finally, in many countries, this type of teaching has grown in importance. Perhaps it would therefore be wise not to exclude it from the definition of the notion of teaching, as it should be understood for the benefit of a copyright exception or a limitation.

The importance of the second question stems from the fact that great emphasis is sometimes placed on courses for adults. This category includes language courses, skills upgrading and retraining courses and even literacy-building campaigns. Yet in the Records of the Stockholm Conference we find a recommendation to exclude "teaching outside of establishments or organizations of a general nature which are at the disposal of the public." Should we then follow this recommendation and refuse to consider granting public or private institutions offering such courses a restriction for teaching?

All of these questions converge towards the issue of determining whether all three types of teaching should benefit from the exceptions and limitations on copyright and neighbouring rights foreseen in international conventions and domestic laws.

The answer is open to debate. Indeed, some feel that the exception of article 10, paragraph 2 of the Berne Convention, to which should be added the other international agreements which foresee exceptions for teaching, should apply to all types of teaching, regardless of whether or not such teaching is free.[11] Using this logic, the criterion which would take precedence would be the one drawn from the fact that teaching should be provided in an establishment or a body of a general nature that is open to the public. Applying this criterion would ensure that IP restrictions benefit a great many training institutions, provided only that they are of a general nature and are open to the public.

Other authors think that teaching, as defined by the international conventions and national legislations on exceptions and limitations, must be limited to "instruction for non-commercial purposes or a teaching based on a program taught by educators to students in non-profit educational establishments".[12] In other words, teaching for commercial purposes must be excluded from the scope of limitations on exceptions. This opinion can be justified. If the promoters of this type of teaching seek financial gain by sometimes charging very high tuition

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droits et limitations et exceptions relatives au droit d'auteur, which may be consulted at *http://www.wipo.int/meetings/fr/doc_details.jsp?doc_id=59952*.

[10] P. Laurent, *Les nouvelles exceptions au droit d'auteur en faveur de l'enseignement : l'ère de l'e-learning,* Auteurs & Media No. 2008/3, p. 180.

[11] G. Karnell, *L'utilisation d'œuvres protégées par le droit d'auteur aux fins d'activités didactiques et d'enseignement*, Bulletin du droit d'auteur, vol. XX, No. 1, 1986, p. 8.

[12] L. Guibault, *Nature et portée des limitations et exceptions au droit d'auteur et aux droits voisins au regard de leurs missions d'intérêt général en matière de transmission de connaissances : l'avenir de leur adaptation à l'environnement numérique*, under the guidance of B. Hugenholtz, *e.Bulletin* du droit d'auteur, October–December 2003, p. 4.

fees, they must pay fees in exchange for the use of the protected subject matter. Moreover, the relatively large number of texts excluding teaching that is not “directly or indirectly for financial gain” from the scope of the exception or limitation militates in favour of this interpretation, which advocates purely and simply returning to normal IP rules.

If we follow this line of reasoning, even adult training courses must be considered as teaching provided for profit and be subject to the payment of royalties. When literacy-building courses are involved, the State taking the initiative is not pursuing any financial gain. On the contrary, it is fulfilling a social mission. Must we therefore expect rights holders to help us unwillingly to achieve this goal? It would be fitting if the State were to consider that rights holders should not have to contribute more than other citizens to educating the illiterate, and it should pay these rights holders fair compensation in exchange for the use of their works to promote adult literacy.

C. Presentation of the study

As they do their job on a day-to-day basis, educators strive to tailor their teaching methods to fit their environment. To hold the attention of students and improve their learning capacity, they rely to a large extent on contemporary books, newspapers, magazines, photographs, video recordings, slides, sound and visual recordings, broadcasts and PowerPoint presentations, and now Internet and all other modern communication media as well. As we can see, protected works are at the heart of education. They constitute the main raw material. But how can we preserve the rights of those who own such works without calling into question the opposing need to disseminate knowledge?

By means of an analysis of provisions relating to exceptions or limitations for the educational system, this study sets out the compromises that international conventions and African lawmakers have found to these conflicting concerns. It then attempts to go further, by making a value judgement on each of these domestic or international legal instruments, with a view to making suggestions for improvement.

D. Value of the study

Educational establishments have a unique status insofar as they are both producers and users of works protected by copyright and neighbouring rights. Contradictory arguments have been put forward to justify or reject the introduction of exceptions and limitations of teaching. Those in favour of their creation argue on the one hand that freedom of expression, the right to information and more generally the right of every people to access knowledge assume that the rights of those who benefit from the protection of copyright and neighbouring rights provide sufficient manoeuvring room for the implementation of these fundamental values. Moreover, the fact that laws provide for exceptions and limitations for teaching makes it possible to avoid a certain amount of hypocrisy. It is argued that whether or not the law makes provision for exceptions or limitations, it is simply not possible to subject all uses of protected works at school or university to the payment of royalties. Two cogent arguments are put forward against the creation of exceptions and limitations. According to the first argument, giving free rein to negotiation will solve the problem. This will enable rights holders to closely monitor the consumption of their protected subject matter and to align their compensation with such consumption. As far as the second argument is concerned, an exception or limitation for teaching does not pass the three-stage test: it inevitably conflicts

with a fair exploitation of the work and unreasonably prejudices the legitimate interests of rights holders.[13]

This quarrel takes on particular importance in Africa, parts of which are characterized by abnormally low school attendance rates, a yawning digital divide with the Western countries and by the fact that these countries taken as a whole belong to the category of developing countries. Owing to these three mutually self-explanatory factors, demand for consumption of protected works is even more acute. Nevertheless, the same question arises as with the developed countries which tackle the subject, namely, determining whether and to what extent the interests of rights holders should be sacrificed.

Opting to favour the interests of the public encourages education by facilitating free access to works. In this case, rights holders do not receive any compensation. This in turn acts as a deterrent to creativity, with the risk that over time, this could penalize education. If on the other hand priority is given to the interests of rights holders, educational institutions and governments will be forced to pay royalties whereas they sometimes have difficulty collecting the minimum amount of funds needed to run these institutions. Given these opposing interests, there is ample justification for this study. As we shall see, virtually all countries have adopted an exception or limitation, in general without compensation for rights holders. But we shall also see that regardless of the option foreseen by the law, a convention-based or legal system allowing fair payment is without doubt the best means of reconciling the opposing interests.

E. Purpose of the study

The study will make it possible to examine exceptions and limitations relating to educational activities as foreseen by the international conventions on copyright and neighbouring rights, including the Appendix of the Berne Convention. It will also and above all make it possible to examine the said restrictions in domestic laws in order to appreciate, perhaps through concrete cases, the problems encountered by pupils, students and teachers in the transmission of knowledge and the solutions offered by national laws. Above and beyond this, it will make it possible first of all to compare these different laws in order to identify those which offer the most effective solutions for educational activities. In addition, this will provide us with an opportunity to reflect on the adaptation or adaptability of existing rules to digital technology and to the development of distance learning, in particular e-learning.

II. FRAMEWORK OF THE STUDY

The study is limited to a given spatial framework and to a very specific scientific framework.

A. Spatial framework

The study was conducted in the countries of sub-Saharan Africa, including South Africa, and therefore covers most of the continent. In this respect, no distinction was made as to

[13] These arguments are admirably summed up by A. Lebois in *Les exceptions à des fins d'enseignement et de recherche, la consécration?* Revue Lamy Droit de l'immatériel, Supplement No. 25, March 2007, p. 18.

whether the countries concerned have adopted legislation based on copyright or a tailor-made version or whether their official language is English, French and Portuguese.

However, it was not possible to locate the domestic laws on copyright and neighbouring rights of some countries. Nevertheless, references to these laws are sometimes given, as is the case with Burundi. With regard to the other countries concerned, the unavailability of domestic laws is inexplicable. It is true, however, that some of these countries, namely Gabon, Guinea Conakry or Guinea-Bissau, are members of OAPI, which would tend to indicate that they apply Annex VII of the above-mentioned Bangui Agreement on literary and artistic property and the protection of cultural heritage.

B. Scientific framework

The definition of the scientific framework of this study calls for a number of clarifications. First, this study only concerns teaching in the strict sense of the term and excludes research, libraries and archiving centres. Second, the study does not examine the specific case of the visually impaired.

1. Teaching in the strict sense of the term

The study is devoted to teaching as defined above. In this connection, all of the exceptions and limitations relating to teaching shall be considered, but in differing proportions. This distinction is justified by the simple fact that some exceptions or limitations are only indirectly related to teaching or are not solely intended to meet teaching needs. For example, the general exception of private copying concerns both reproductions made by private individuals who have no ties to an educational establishment and covers certain utilizations by persons with ties to an institution in or through which they receive teaching.

Other situations pertaining to teaching are not dealt with because they have already been considered or because they pose questions that are not germane to teaching-related issues. This is primarily the case with research and libraries, but it also applies to the visually impaired.

2. Exclusion of research

Research often parallels teaching. However, there are specific problems with research, such as the ownership of the rights to the objects created and the scope of researchers' manoeuvring room with regard to existing creations. Consequently, research will not be taken up in connection with this study.

3. Exclusion of libraries

As with research, libraries are a necessary counterpart to the educational institutions that benefit from the exceptions and limitations to which this study is devoted. However, they have already been covered in depth by Mr Kenneth Crews, within the framework of a previous study commissioned by WIPO.

4. Exclusion of teaching for the visually impaired

To borrow a definition from Judith Sullivan[14], the visually impaired may be considered as persons who "cannot read works protected by copyright in the form in which they then published". Such persons constitute a truly special category of consumers of works of the mind, and the scope of the acts performed by them or for them in relation to these works differs in several respects from the scope found in the field of traditional teaching. This is no doubt why WIPO commissioned a study on the exceptions and limitations that concern them.[15] As a result, the visually impaired do not fall within the purview of this study.

III. INTERNATIONAL SOURCES OF EXCEPTIONS AND LIMITATIONS FOR TEACHING

Several international sources can be used to justify exceptions and limitations contained in national laws, in fact all of the international conventions relating to copyright and neighbouring rights which contain binding or optional provisions to this effect. By chronological order of adoption, we can see for example that the Berne and Rome Conventions contain provisions relating to the subject matter of this study, as do the TRIPS Agreement, the WCT and the WPPT. These international instruments provide a common foundation which may be viewed as a cross-cutting source.

A. The cross-cutting source of all international conventions: the triple criteria

The main international conventions relating to copyright and related rights lay down a rule granting national lawmakers the power to provide for exceptions to the rights protected while setting limits on this power. This now famous rule which was set by the Berne Convention and incorporated into the TRIPS more by "chance than deliberately insofar as it was a formula that was immediately available and ready for use",[16] was taken up by the two subsequent WIPO Conventions on copyright and neighbouring rights. This is the famous triple criteria rule, three-stage test or triple test. Article 9, para 2 of the Berne Convention stipulates that "It shall be a matter for legislation in the countries 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."

Article 13 of the TRIPS Agreements provides as follows: "Members shall confine limitations or exceptions to exclusive rights for certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder."

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[14] J. Sullivan, *Etude sur les limitations et exceptions au droit d'auteur en faveur des déficients visuels,* which can be consulted at *www.wipo.int/meetings/fr/doc_details.jsp?*

[15] Ibid.

[16] S. Ricketson, *Etude sur les exceptions et limitations au droit d'auteur et droits connexes dans l'environnement numérique,* which can be consulted at *http://www.wipo.int/meetings/fr/doc_details.jsp?doc_id=16805.* This author adds that he is not certain that "if we were to start over from scratch, we would adopt the triple criteria as a formula which is generally applicable to limitations and exceptions."

Article 10 of the WCT, which takes up these provisions twice, is worded as follows:

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

Finally, Article 16, para 2 of the WPPT stipulates that "contracting parties shall confine the limitations of or exceptions to rights provided for in this treaty to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram." These various provisions have given rise to the now famous rule of the above-mentioned triple criteria. An abundant doctrine[17] exists with regard to this rule. The authority for which it is meant within a State signatory to one of the relevant Conventions is subject to debate as far as both content and scope are concerned. Some feel that this "corresponds to the prerogative for a State body to disregard an exception enshrined in the law, if it would do disproportionate damage to the detriment of the rights holders of the rights, defeating the purpose of the exception and exhausting its cause".[18] According to this school of thought, "the three-stage test constitutes the framework of legitimacy for exceptions which either the legislator or the judge, depending on one's interpretation of the test, must take into consideration when he adopts or applies exceptions to copyright and neighbouring rights."[19] Thus, as far as these authors are concerned, the test is meant for lawmaker or judge alike in each State. In rebuttal of this theory, some think with regard to the Berne Convention that the provisions "are unambiguously meant for lawmakers of the countries of the union, not for judges".[20] Be that as it may, the authors unanimously agree on the number and wording of the criteria which exceptions or limitations foreseen by national legislation must satisfy. According, they will be presented only in summary fashion within the framework of this study. In fact, they can be neatly summed up by three questions which in the final analysis allow us to verify whether an exception or limitation complies with the requirements of the international conventions:

1 – Is the exception a special case? The answer to this question is apparently in the affirmative when the exception is not general but rather for a special purpose. This first stage has led to a dispute between the European Community and the United States of America. The

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[17] S. Ricketson, previously mentioned study, in particular pp. 73 and following, and S.I.; V.-L. Benabou, *Les dangers de l'application judiciaire du triple test à la copie privée, A propos de la vénéneuse décision de la Cour de Cassation dans l'affaire "Mulholland Drive"*, Juriscom.net, April 20, 2006, http://w*ww.juriscom.net*; A. Lucas notes under Cass. 1e civ. February 28, 2006, JCP G 2006, II, 10084; and H.-J. Lucas, *Traité de la propriété littéraire et artistique*, 3e éd., Litec, No. 331 and 332, pp. 269 and 270; C. Geiger, *Le test des étapes, un danger pour l'équilibre du droit d'auteur ?*, Revue Lamy Droit de l'immatériel, No. 15, April 2006, p. 49.

[18] P. Y. Gautier, *L'élargissement des exceptions aux droits exclusifs, contrebalancé par le « test » des trois étapes »*, Communication – Commerce électronique, November 2006, p. 10.

[19] S. Dusollier, *L'introuvable interface entre exceptions au droits d'auteur et mesures techniques de protection*, Communication – Commerce électronique, November 2006, p. 21.

[20] C. Geiger, op. cit.

former considered that Article 110.5 of the United States Copyright Law, which stipulates that exclusive copyright did not apply under certain conditions to the dissemination of music over the radio or television by commercial establishments, did not pursue a special purpose. A WTO working group[21] agreed with the European Community on the grounds that too many establishments were exempted.[22]

2 – Does the exception conflict with a normal exploitation of the work? For some, this stage requires us to determine whether the exception, as foreseen by the law, has a measurable influence on the mode of exploitation in question. According to the above-mentioned working group, the condition of the lack of violation of the normal exploitation of the work is not fulfilled "if the exempted users deprive rights holders of significant or tangible commercial gain given the real and potential impact on the technological and commercial conditions that currently prevail or will prevail in the near future".

3 – Does the exception unreasonably prejudice the legitimate interests of the rights holder? The notion of unreasonable prejudice is difficult to define.[23] What we do know is that this stage of the test "makes it possible to examine the justification underlying the limit."[24] It admits the idea that the holder of the right must not be able to control all utilizations of his works, as some prejudice would be justified by taking into consideration values deemed superior to his interests. Consequently, it will be understood that the exclusive right of the rights holder gives way to the value of the promotion of teaching.

What we also know is that the digital environment has heightened the impact of existing exceptions. Consequently, we are obliged to suggest that the effects of the exception or limitation should be taken into consideration when determining whether or not the prejudice is justified. If the effects are truly harmful, there is a need to move towards a system of licensing combined with a right to compensation, as is the case with private copying.

With regard to exceptions for teaching, it is important to note, as we shall see, that special provisions have been devoted to them. Nevertheless, the three-stage test must be considered as the foundation on which all exceptions and limitations are based. This means that no special provision foreseeing an exception or limitation for teaching or any other purpose must be interpreted as meaning that national legislators have the right to ignore the three-stage test.[25] For example, if an exception for teaching purposes, albeit covered specifically by article 10, paragraph 2 of the Berne Convention and by the Appendix of that Convention, can end up by unreasonably prejudicing the legitimate interests of the rights holder, it must be rethought and if not eliminated at least replaced by a licence.

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[21] Report by the Special Group, WT/DS/160/R, June 15, 2000 – see *http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm.*

[22] A. and H.-J. Lucas, op.cit., No. 331 and 332, pp. 269 and 270. These eminent authors judge the solution open to criticism, because simply circumscribing an exception within quantitative limits does not suffice to make it a special case.

[23] In fact, we may even ask ourselves if a prejudice at the time when it is appropriate to call it such can be justified in this way.

[24] C. Geiger, *Le test des étapes, un danger pour l'équilibre du droit d'auteur?*, op.cit., p. 70.

[25] Contra : S. Ricketson, op.cit., p. 70.

B. The Berne Convention and its Appendix

The Berne Convention contains several specific provisions that can justify several exceptions or limitations contained by a national law. In addition to the provisions already cited, one may refer to article 10 and the entire Appendix to the Paris Act of 1971.

1. Article 10 of the Berne Convention

As one might expect, Article 10 of the Berne Convention constitutes the essential source of the exceptions and limitations for teaching foreseen in national laws.

Everything starts with paragraph 1, which lays the foundations for the right of quotation: "It shall be permissible to make quotations from a work which has already been lawfully made available to the public, providing 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 text, quotation is lawful. In other words, making provision for the right of quotation is not a faculty that is left to national legislators. Rather, it is an imperative exception which they must foresee.[26] As such, it can be incorporated into the field of restrictions foreseen for teaching.

The conditions laid down by the Berne Convention for a quotation to be lawful are relatively clear. First of all, the work quoted, that is, the one providing the material, must have been "made lawfully available to the public." This requirement essentially refers to the lawful disclosure of the work.[27] Next, article 10 para one stipulates that the quotation must be compatible with fair practice. The reproduction of a long extract from the work is most certainly not compatible with fair practice insofar as not only does makes it unnecessary to consult the work that provided the material for the quotation but it could therefore conflict with its normal exploitation. In addition, as we shall see, compatibility with fair practice assumes that the portion borrowed from the previous work of an author is incorporated into a new work belonging to the borrower. In other words, the quotation is not compatible with fair practice if it is not incorporated into the exposition of the person using it. To simplify even more, we can say that the exposition of the borrower must be able to stand on its own if the quotation is deleted. Finally, the quotation is limited by the purpose. This requirement makes it possible to set limits on borrowing from a previous work. Indeed, quotation is generally accepted as a borrowing made in a literary work for purposes of instruction, argument, science, criticism, etc. Consequently, these needs must serve as a yardstick for determining the length of the borrowing.[28]

Yet it is paragraph 2 of article 10 that contains the most important source meant to guide national lawmakers wishing to create exceptions or limitations for teaching. According to this text, "it shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications,

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[26] Cf. L. Guibault, *Nature et portée des limitations et exceptions au droit d'auteur et aux droits voisins au regard de leurs missions d'intérêt général en matière de transmission de connaissances : l'avenir de leur adaptation à l'environnement numérique*, mentioned above.
[27] Cf. infra.
[28] The conditions for quotation will be presented in greater depth in the part of the study devoted to an analysis of exceptions and limitations in national legislations. Cf. infra.

broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice." This paragraph 2 is supplemented by paragraph 3, which provides that "where use is made of works in accordance with the preceding paragraphs of this Article, mention should be made of the source, and of the name of the author if it appears thereon."

The last two paragraphs of Article 10 set out the conditions for a general exception or limitation for teaching.

First of all, the point should be made that the Convention does not impose an obligation to foresee an exception or limitation for this purpose. On the one hand, it limits itself to leaving it up to national lawmakers and to the bilateral and multilateral agreements between the member countries of the Union to decide whether or not it is appropriate to create a restriction on the rights protected. On the other hand, it takes pains in exchange to set limits on the action of countries that decide to create such exceptions or limitations.

The *first* such limit has to do with works. Here, the Convention does not specify which works are covered by the limitation or exception. By speaking of "literary or artistic" works, it refers to the fact that any work may be used in conjunction with the restriction, if such use is by way of illustration for teaching. Clearly, however, the provision is primarily aimed at literary works and hence the works of art or photographs illustrating them. Yet the use of works that have been disclosed in other forms, especially sound or audiovisual formats, is not unlawful. Moreover, reliance on digital technologies for teaching makes the use of such works inevitable.

The *second* pertains to the amount or volume of use of works for teaching. Here, it appeared realistic to avoid setting any quantitative limit and to merely provide guidelines. Thus, paragraph 2 of article 10 provides that the exception is only admissible "to the extent justified by the purpose" in conjunction with "illustration for teaching" through "publications, broadcasts or sound or visual recordings." Combining these guidelines helps us first understand the framework of the restriction determining the volume of utilizations (this framework is the illustration for teaching, the latter notion being understood as defined above). Once the framework has been mapped out, it determines the volume of the use, which may not exceed this framework. It is therefore meant to serve as a boundary for the number of copies made in the case of publications or sound or visual recordings, just as it is meant to serve as an instrument for verifying the public meant to hear the broadcasts for educational purposes. In a digital world, it is designed to provide a means of measuring the use of works for distance learning, which is now primarily based on the Internet.

The *third* limits serves as a variable barometer for checking the way that each teaching institution uses the protected objects. The aim is to ensure compatibility "with fair practice." Mr Ricketson[29] considers that use is not compatible with fair practice if it conflicts with the normal exploitation of the work or unreasonably prejudices the legitimate interests of the author. He adds that this would be the case if students or pupils were to make a great many copies. Under such circumstances, he proposes compensation in the form of a legal licence to guarantee that use is compatible with "fair practice." This suggestion is relevant but may be simplified, for if we take a close look at the requirement of compatibility with fair practice, there is reason to believe that it means that the use made of the protected work must be neither excessive nor for profit.

[29] S. Ricketson, previously mentioned study, p. 17.

With regard to the notion of excessiveness, the number of copies may effectively characterize the existence of misuse of the work by way of illustration for teaching. If this number is so large that it results in considerable loss of expected income for the author, the use is most certainly not compatible with fair practice. The appropriateness of the use of the work may also constitute a criterion for assessing compatibility with fair practice. In fact, if recourse to the work is of no interest or objectively negligible interest by way of illustration for teaching, this means that the teacher had no reason to have recourse thereto and that the use is not compatible with fair practice. Finally, even the duration of use or conservation may provide a criterion for assessment. Although it is true that in the field of teaching some documents span different periods and never go out of date, it is just as true that if it is necessary to use and reuse the same work by way of illustration for teaching, this implies that the work in question is essential for such teaching and that legitimate copies must be made available to learners. If, on the contrary, every school year new reproductions are made or the same reproductions are used, use is most certainly not compatible with fair practice.

As for the gainful or non-gainful nature of the use, this is easy to judge. It refers to the requirement of a total lack of compensation paid by the recipients (pupils and students) of the use, for the benefit of their teacher or the training institution, apart from perhaps the cost for making the copies or staging the performance. This interpretation seems moreover to have inspired several African lawmakers. Indeed, some legislators purely and simply reproduce the language of the Berne Convention by creating an exception or limitation for teaching. Others go into more detail and specify that the exploitation must not be excessive or gainful and sometimes foresee provisions relating to the number of copies and the duration of their conservation. Still others stipulate that in borderline cases, authors should receive compensation.

The *last* limit comes from paragraph 3 of article 10 mentioned previously, which stresses the need to respect the moral right of the author, specifically the right of paternity. It means very simply that the use of the work must always be accompanied by sufficient identification of the author, by his last name, possibly his first name or pseudonym. It also means that the details concerning the publication of the work and the name of any broader work in which the work in question is included must be mentioned. This requirement appears word for word in virtually all of the African national laws.

2. The Appendix to the Berne Convention

At the time of the Paris revision of 1971, special provisions were adopted for developing countries. These were set down in an Appendix that establishes a system of compulsory licenses constituting a limitation on the rights of reproduction and translation of authors of works produced in the North and not available in the countries of the South under conditions enabling their use for instruction or research.

In order to benefit from these licenses, which are of great interest to this study, the country from which the applicant comes, that is, a developing country, must have deposited, when it ratified or acceded to the Paris Act of the Berne Convention or even at a later date, notification whereby the country stipulates that it may avail itself of this option. It should,

however, be noted straight away that most authors feel that the system is complex.[30] This is no doubt true, as the conditions for the granting of such licenses are many in number and not always easy to understand (a). The same holds true for the provisions organizing the system (b).

a) Conditions allowing the grant of licenses set out in the Appendix to the Berne Convention

The licenses for reproduction and translation foreseen by the Appendix to the Berne Convention can only be granted to a national from a developing country. Second, they only apply to certain works of the mind. Finally, they presuppose that the applicant for the licence has not been able to sign an ordinary contract of reproduction and translation with the holder of the copyright, that he has respected certain deadlines and that he is subject to a very rigorous procedure.

The country whose national requests the licence must be a developing country. This requirement flows from Article 1 of the Appendix, which sets out two criteria, one subjective and the other objective, to ascertain whether or not a country is a developing country.

The subjective criterion comes from the fact that the country which ratifies the Convention, after assessing its own level of economic development and social or cultural needs, deems itself incapable of ensuring a satisfactory level of protection "immediately" and therefore deposits the above-mentioned notification. This criterion, which is very favourable to member States, is difficult to apply because it is "vague and arbitrary, as the country in question is so to speak both judge and judged."[31]

The objective criterion implies that the country must be considered as a developing country "in conformity with the established practice of the General Assembly of the United Nations" (Article 1, paragraph 1. Yet this reference is somewhat surprising insofar as the General Assembly of the United Nations does not draw up a list of countries deemed developing countries. Nor does it set out criteria for development. How then can we classify a State in conformity with the "practice" of this body?

Several proposals have been made,[32] but it would appear that the one that best reflects the spirit of the Appendix is the approach focusing on research into annual per capita income, which has the advantage of being easy to use and accurately reflecting the state of economic growth: a country whose inhabitants are reduced to eking out a living is not inclined to encourage the creation of literary and artistic works, for a taste for literature and the arts implies that essential needs are satisfied as far as material goods are concerned."[33]

Annual per capita income can indeed be used as a yardstick for measuring the level of economic development of a country and hence for whether or not to classify it as a developing

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[30] Cf. in particular *C. Colombet, Grands principes du droit d'auteur et des voisins,* op.cit. pp. 150 and following ; D. Ladd, *Le droit d'auteur dans le contexte technologique international,* Bulletin du droit d'auteur, vol. XVII, No. 3, 1983, p. 1.

[31] C. Colombet, op.cit., p. 150.

[32] On the question as a whole, see A. Françon, A. Kerever, H. Debois, *Les conventions internationales du droit d'auteur et des droits voisins,* Dalloz, Paris, No. 218 and following and pp. 260 and following.

[33] Ibid., No. 220, p. 262.

country in order to allow it to benefit from licenses foreseen in the Appendix. However, it cannot serve as a barometer for measuring cultural development: one can very well paint, sing or write about one's poverty. Subject to this reservation, we may take annual per capita income into consideration in deciding whether a national from a given country qualifies for a licence for reproduction and translation.

Those works that can be reproduced under the license shall be limited to "works published in printed or analogous forms of reproduction" according to Article II, paragraph 1 and Article III, paragraph 7(a) and (b) of the Appendix – in short, any form of literary production. This implies that a license for reproduction covers a summary, a manual dealing with any subject, an anthology of literary works, a treatise of elementary physics or a manual devoted to the functioning of a motor. Moreover, it applies to all other works capable of being printed. This is the case with musical compositions with or without words, dramatic works and even works of art. The only category excluded from the field of the license of reproduction is phonographic recordings,[34] which are not published in printed or analogous forms of reproduction. The Appendix also covers works (Article III, paragraph 7.b) published in audiovisual form. For the latter, the license for reproduction covers not only images and sounds (in particular music) but also the translation of the accompanying text into a language of general use in the country in which the license is sought. However, the audiovisual fixations in question must have been designed and published for the sole purpose of systematic instructional activities.

As far as the license for translation is concerned, the reference to printing implies the same constraints as with the determination of the works concerned. In addition, paragraph 7 of Article II stipulates that for works which are composed mainly of illustrations, a license to make and publish a translation of the text and to reproduce and publish the illustrations may be granted only if the conditions of Article III are also fulfilled. In other words, for this type of work, the license to translate and publish the translation of texts must be accompanied by a license to reproduce and publish the illustrations.

As with licenses for reproduction, licenses for translation may be granted for audiovisual works. In fact, as can be seen from the Appendix, a license may also be granted to any broadcasting organization having its headquarters in a developing country which has met the conditions examined above. The organization may then be authorized to translate a printed work from a lawfully produced and lawfully acquired copy and to use such translation in broadcasts which have themselves been lawfully made and meant for teaching, without any commercial purpose. It may also be authorized to translate any text incorporated in an audiovisual fixation where such fixation was itself prepared and published for the purpose of systematic instructional activities.

The question that may arise today is determining whether works published on networks can give rise to a compulsory license for reproduction or translation on the basis of the Appendix to the Berne Convention. In the light of Articles II and III, may we consider that these works, available in the form of texts, sound and/or images which constitute publications in written form or an analogous process? The question is all the more interesting in view of the fact that everything tends to indicate that when the work constituted by the texts is viewed on a computer screen, it is printable rather than printed. This applies to both texts presented in the initial format or in a secondary format such as scanners (regardless of the format, JPEG or

[34] A. Françon, A. Kerever, H. Desbois, op.cit., No. 248 and following, and pp. 260 and following.

otherwise). Should we therefore consider that the publication of the work in digital form through its making available to the public on networks constitutes a printed form? If we respond in the affirmative, we considerably broaden the body of works likely to give rise to a license, an approach which clearly favours developing countries. Yet such an option must be ruled out because we may consider that making the work available on networks solves the problem of publication in the country in which the license is applied for. If we follow this line of reasoning, even the connection costs can serve as an alibi for the license. Indeed, we can only say that in countries where costs are high, the work is not made available to the general public at a price that would allow its use in connection with systematic instructional activities. Moreover, if such licenses were granted, how could other conditions, such as the one prohibiting the export of works reproduced under license, be met?[35]

The problem should be different as far as translation is concerned. Indeed, the question would be simply to determine whether it is possible to take a work available on the networks and publish it in a language in general use in the country in which the license is applied for. It is hard to give a clear-cut answer here insofar as it could indeed be important for this country to obtain a translation of the work if such a translation does not exist either on the networks or in printed form. One suggestion could be to open these works up to a license for translation while limiting the circulation of translated copies to the printed form in order to comply with the export ban upon which the license is contingent.

The problem is the same for the category of audiovisual works covered by the Appendix both for the license for reproduction and for the license for translation. The answer seems easier, given that in all likelihood, the only restriction imposed by the Convention is that the audiovisual work in question must have been "itself prepared and published for the sole purpose of being used in connection with systematic instructional activities." Consequently, if a work of this nature is available on the networks and meets the condition of the purpose for which it was prepared and published, it should qualify for a license.

The purpose of the license is to encourage education and research. Precisely, the above-mentioned works can only be reproduced under license for purposes of instruction or research. Yet this purpose is not enough on its own to justify the granting of the license. A second requirement is that after a certain time running from the first publication of an edition, copies of this edition have not been put on sale in the country in which the license is applied for to meet the needs of the general public or those of systemic instruction by the holder of the right of reproduction or with his authorization, at a price reasonably related to that normally charged in the country for comparable works (Article III, para 2). A license is also an option if the work has been placed on sale in the country but no authorized copies of that edition have been on sale for a period of six (6) months (Article III, para 2(b)). If the work consists of a translation, the license will not be granted if the translation was published under a compulsory license or if it is not in a language in general use in the country (Article III, para 5(i) and (ii)).

If the license sought is a license for translation, the purpose must be the same (Article II, para 5). In addition, as with the license for reproduction, a certain period must lapse after the first publication without the translation of the work having been published in a language in general use in the country in which the license is applied for by the owner of the right of

[35] It would be necessary to resolve the difficulty relating to the arrangements for placing the reproduced copies in circulation. In particular, it would be necessary to decide whether such placing in circulation would take place solely through the production of copies.

translation or with his authorization (Article II, para 2(a)), or all of the editions of the translation published in the language concerned must be out of print.

The license for reproduction or translation may also be granted in cases where it is not possible to sign an agreement with the owner of the rights. In reality, the system of licenses foreseen by the Appendix is not designed to replace negotiations because it constitutes a major infringement of the rights to the works that are reproduced or translated under license.[36] Accordingly, every possible effort must be made to sign an agreement.[37] The mechanism of the license only comes into play if no such agreement can be reached.

It may not be possible to sign an agreement for two reasons, one of which is normal and the other of which is a real infringements of the rights to the work concerned.

The first reason precluding the signing of an agreement could be that it is impossible to enter into contact with the owners of the right of reproduction or translation (Article IV, paras 1 and 2). In this case, the mechanism of the license arrives at just the right moment to solve an inextricable problem facing the applicant.

The second reason would be the refusal of the author contacted (Article IV, para 1). In this case, the impossibility is only relative if one considers that the negotiations probably stumbled over the terms of the agreement. The logic of copyright would dictate that the applicant refrain from reproducing or translating the work. However, thanks to the system of compulsory licenses, he can manage to get around the refusal of the rights holder.

Compliance with the various time limits is also one of the imperative conditions. These time limits are twofold in nature and vary according to the license for reproduction or translation.

With regard to the license for reproduction, the first category of time limits concerns those which must be respected counting from the date of first publication of the work, before the submission of any application for a license: these are the *time limits for immunity.* Starting with the date of publication of a given edition of the work concerned, a time limit of five (5) years in principle must pass before any license can be granted. However, this time limit is reduced to three years for works of the natural or physical sciences or works dealing with technology. On the other hand, it is extended to seven years if the work belongs to the domain of the imagination. This is the case with novels, works of poetry, drama, music and art books.

This first category of time limits is justified by the fact that there is a need, despite the necessities, to give the legitimate owners sufficient time to put copies of the work in circulation in countries where there is potential demand. This time limit is shortened to three years for works of the natural or physical sciences owing to the rapid pace of scientific discovery, which rapidly renders the related works obsolete. As for works relating to the imagination, the length of the time limit for immunity can be justified by the fact that such works are often of secondary importance in school and university curricula and do not go out of date nearly as fast. Lastly, the regular time limit applies to any work which is not subject to the time limit of three years or that of seven years: this is the case with works of law.

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[36] In this respect, see D. Ladd, quoted above.

[37] And if the work concerned is a translation, the author of the latter must also be consulted: in this respect, see A. Françon, A. Kerever and H. Desbois, op.cit. No. 249, p. 296.

The second category has to do with the time limits to be observed starting from the date on which the application was made: this is the *waiting time*. It is inspired by paragraphs (a) and (b) of Article III.4 of the Appendix, whereby the applicant must wait an additional six months in cases where the license is obtained after a three-year time limit, that is, in cases where the license concerns a work dealing with natural or physical sciences or technology. He must wait three months in the other two cases. These additional time limits start to run the day the applicant initiates the procedure for obtaining the license. In other words, it would enable the author or the beneficiaries to proceed to put copies on sale, resupply the market or readjust prices with a view to avoiding the compulsory license option.[38]

As for the license for translation, the immunity period is three years. However, this is only a minimum period if the language in which the work is to be translated is not a language in general use in one or more developed countries. In this case, the legislation of the developing country which offers its nationals the possibility of requesting licenses may stipulate a longer period. During this period, no translation may be published in a language in general use in that country. On the other hand, in a case where the planned language of translation is not a language in general use in one or more developed countries, the immunity period is reduced to one year (Article II, para 3(a)). This period may also be less than three years but must be at least one year if the country in which the license is applied for manages to secure the unanimous agreement of the member countries of the Union using the same language.[39]

As for the *waiting period*, it is six months if the immunity period is three years and nine months if the immunity period is one year (Article II, para 4(a)). As with the license for reproduction, the starting point for this time period takes into consideration the start of the procedure for obtaining the license. Likewise, if a translation is published during the waiting period by the rights holder or with his permission in the language for which the application was made, the licence shall not be granted.

Finally, *a great many formalities must be completed to obtain the license.* They are set out in Article IV, paras 1 and 2, and are aimed at obliging the applicant to negotiate with the holders of the right of reproduction or of translation. Accordingly, the license may only be granted if the applicant can prove that, after having asked the holders of the rights for authorization to reproduce or translate the work and publish it (in conformity with the provisions in force in the country concerned), he was not able to obtain such authorization or after due diligence on his part, he was unable to locate the holders of the rights.

A clause at the end of Article IV, para 1 stipulates that, in addition to his request to the rights holders, the applicant shall inform any national or international information centre designated in a notification to that effect deposited with the Director General of the World Intellectual Property Organization, by the Government of the country where the publisher is believed to have his principal place of business.

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[38] The license may no longer be granted if, during this time limit, copies of the work have been placed on sale or returned to sale at a price reasonably related to that normally charged in the country for comparable works.

[39] This possibility is excluded if the language concerned is English, French or Spanish. In any case, the Director General is notified of any agreements reached.

But it is above all in the case where it was not possible to contact the owner of the rights that the designated national or international centre becomes the cornerstone of the system. It becomes so to speak the alibi of the license. Nevertheless, in addition to the above conditions, the applicant for a license shall send, by registered airmail, copies of his application, submitted to the authority competent[40] to grant the license, to the publisher whose name appears on the work.

b) the system of the international license for reproduction

The system of licenses is extremely restrictive as far as licensees are concerned. The latter are subject to major constraints, not only due to their characteristics but also because of the obligation to compensate the author and to respect his moral rights. Finally, licenses are somewhat uncertain because they can be rendered invalid in certain circumstances.

The characteristics of the license impose a number of constraints. The concern behind the creation of the license for reproduction by international law was to allow nationals to own meet their educational needs in terms of foreign works. This operation should not result in excessive gain for a private individual. Accordingly, it is neither assignable nor exclusive (Article II and III paras 1).[41]

In the case of the license for reproduction, the copies produced may not be exported. In other words, one could imagine a situation where in one and the same country, several licensees have obtained authorization to make copies of the same work which they are obliged to sell within the borders of their State.

A restrictive interpretation of this export ban would lead us to think that licensees may not produce copies outside the country. However, this would penalize States lacking printing facilities. Accordingly, printing may be carried out outside the national territory. Nevertheless, certain conditions must be met for printing to be done outside the territory of the State granting the license. First of all, the State must lack printing facilities or, if such facilities exist, they must not be suitable, on economic or practical grounds, for the production of copies. Second, the country where the printing is to be done must be a member country of the Berne Union. Third, the establishment handling the printing in the foreign country must not be specialized in this type of activity and must undertake to send the copies printed back to the State which has ordered them in a single batch or several combined batches. Finally, all of the copies must contain an indication that they are only available for distribution in the country or territory to which the said license applies (Article IV, para 5).

In any case, inside the beneficiary country, the copies made under license may only be distributed for use in schools and universities, which implies that only pupils, students and their supervisors may acquire them.

In the case of a license for translation, exports are also prohibited, that is, according to Article IV, para 4(b), “the notion of export shall include the sending of copies from any territory to the country which, in respect of the territory, has made a declaration under Article

[40] The competent authority may be administrative, judicial or a special instance: in this respect see C. Colombet, op.cit., p. 151.

[41] However, Messrs Desbois, Françon and Kerever consider that assignment should be possible with the consent of the competent authority. Cf. *Les conventions internationales du droit d’auteur et des droits voisins*, op.cit., No. 254, p. 304.

I(5).” However, this export ban is not absolute. Indeed, where a governmental or other public entity has granted a license to make a translation into a language other than English, French or Spanish, export is permissible if the recipients are nationals of the State sending the copies outside its territory, if the copies are to be used only for the purpose of instruction or research without any commercial purpose, and if the country to which the copies have been sent has agreed with the country whose competent authority has granted the license to allow the receipt and/or distribution, or both (Article IV, paras 3 and 4).[42]

The compulsory license is not free. It provides, in favour of the owner of the right of translation or of reproduction, “for just compensation that is consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned” (Article IV, para 6(a)(i)). This means that the recipient has an obligation to compensate the author, either in a lump sum or proportionately, on the basis of the rules laid down by the competent authority for the granting of the license. Such compensation must be “fair”. However, the point should be made that the limitation as to those who can acquire copies of the work inevitably influences the amount to be paid to the author, especially in view of the fact that this amount necessarily depends on the price of sale, which must be less than or equal to the price charged for analogous works in the beneficiary country.

Despite these many unknowns, appropriate steps must be taken at the national level to ensure that this compensation is transferred in an internationally convertible currency or in its equivalent, relying as the case may be on international mechanisms, where national foreign exchange regulations exist (Article IV, para 6(a)(ii)).

Respect for moral rights constitutes another requirement for the license. It should be noted, on the one hand, that the right to respect must be observed with both variants. With regard to the right to respect the work, Article IV, para 6(b) stipulates that “due provision shall be made by national legislation to ensure a correct translation of the work, or an accurate reproduction of the particular edition, as the case may be.”[43] Second, with regard to the right to respect the paternity of the author, paragraph 3 of the same text requires the licensee to indicate the name of the author on all copies of the translation or reproduction published.

In addition, a second constraint relates to the right to reconsider or of withdrawal to which literary or artistic creators are entitled in writings of a personalist inspiration: the license for translation may never be granted if the author has withdrawn from circulation all copies of his work (Article II, para 8). With regard to the license for reproduction, no license shall be granted if the author has withdrawn from circulation all copies of the edition for the reproduction and publication of which the license has been applied for (Article III, para 4(d)). A question that could be asked is what would happen if the right to reconsider or of withdrawal was exercised after the granting of the license. The answer is simple *a priori*: the granting of a license may not paralyze the exercise of this right by the holder. Thus, we cannot rule out the case where one day, someone might withdraw from circulation copies published under license in addition to copies produced with the author’s authorization on and outside the territory for which the said license has been granted. This extreme situation could occur if, out of calculated self-interest, an author wished to avoid competition from a licensee, especially if the license had been granted because the works sold were marketed at a higher price than that

[42] The Director General of WIPO must be notified of any such agreement.
[43] In the case of a translation, the original title (that is, the untranslated title) must also appear on all of the copies.

of analogous works. In reality, however, this would suit neither the licensee nor the author. Moreover, in such a case, the licensee would be one of the persons whom an author exercising his right to reconsider would have to compensate.[44]

The license becomes null and void in certain circumstances. Some of these circumstances are of the author's doing while others are beyond his control.

With regard to acts of the author's doing, two scenarios are possible. The author may decide to withdraw from circulation the work that has been reproduced or translated under license in one or more developing countries; above all, however, he may put in circulation himself or through a third party translations or copies of this work for the general public or in connection with systematic instructional activities. In the latter case, if copies or translations of the work are sold at a price reasonably related to that normally charged in the country for comparable works and if such edition is in the same language and with substantially the same content as the edition which was published under the said license, the Appendix provides (Articles II and III, para 6) that the license shall automatically terminate. Nevertheless, it stipulates that any copies already made before the license terminates may continue to be distributed until their stock is exhausted. Consequently, the survival of the license depends more or less on the good will of the owner of the rights.

With regard to circumstances beyond the author's control, two scenarios are also possible. On the one hand, it should be recalled that the license is granted solely in favour of developing countries, which comes down to saying that the license is allocated for a more or less long and uncertain period: once a State has ceased to be regarded as a developing country, it ceases *ipso facto* to benefit from the provisions of the Appendix to the Paris Act of 1971. This case of nullity stems from Article I, para 3 and applies to any State, whether or not it formally withdraws its declaration on the possibility for it to avail itself of the provisions of the Appendix or whether or not it has renewed this declaration which expires after a ten-year period.

Moreover, and rightly so, the expiry of the ten-year period automatically puts an end to the declarations made at the beginning of or during these period. Consequently, licenses which may have been granted become null and void.[45]

Clearly, there are advantages to this procedure. As far as the person applying for a license is concerned, time limits are the key factor rather than certainty or uncertainty as to the outcome of the procedure. This is why, in response to the complaints by some developing countries as to the slow pace and complicated nature of the procedure, one author states that "to be fair, one must (...) say that the system of licenses, as it stands, should never be used, and the fact that this last recourse exists is a powerful reason for reaching a compromise by mutual agreement in the interests of both parties".[46] On the other hand, there are two disadvantages: the procedure is complex and unpredictable. It is complex because of the many

[44] In virtually all of the national legislations, the exercise of the right to reconsider or of withdrawal is conditional upon the prior compensation of the author's beneficiaries.
[45] Developing countries which have not ceased to be regarded as such at the expiry of the ten-year period shall retain the possibility of renewing their declaration for another ten-year period.
[46] Accordingly, the system of licenses foreseen in the Appendix is a genuine deterrent capable of forcing the owners of the rights to works protected in the developed countries to negotiate. V.D. Ladd, mentioned previously.

conditions required for the granting of a license and because of the different stages of the procedure. It is unpredictable because its outcome and survival depend to a certain extent on the goodwill of the owners of the rights. This is no doubt why the nationals of developing countries are reluctant to avail themselves of this special system that was officially created in their favour.

C. The Rome Convention

There is very little that can be said specifically about the 1961 Rome Convention on the protection of the rights of performers, producers of phonograms and broadcasting organizations. There are at least two reasons for this brevity. First, the clauses in Article 15 of the Convention providing for exceptions must be correlated with the TRIPS Agreement and WPPT; otherwise, it cannot be properly studied. Second, previous studies, including the one by Mr. Ricketson,[47] have helped to clarify the content of Article 15. Only three main elements shall be recalled. First of all, this provision stipulates as a precondition that the exceptions it foresees shall be optional for signatory States. Next, the point should be made that it contains a positive enumeration of the exceptions. It is in this spirit that it aims to meet the needs of teaching in para 1(d). Finally, it is worth mentioning that para 2 opens up to national legislations. According to this paragraph, States have the faculty to provide for the same kind of limitations as those foreseen for copyright with regard to the rights of performers, producers of phonograms and broadcasting organizations.[48]

D. The TRIPS Agreement

The Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) takes up the protection of literary and artistic works as set out in the Berne Convention. In addition, it extends protection to new categories such as computer programs[49] and compilations of data. With regard to the question of exceptions and limitations, a distinction must be made depending on whether the TRIPS are correlated with the Berne Convention or the Rome Convention.

1. The TRIPS Agreement and the Berne Convention

With regard to the relationship between the TRIPS and the Berne Convention, the point should be made at the outset that the approach used by the TRIPS consists of taking up the substance of the Berne Convention by means of a reference to Articles 1 through 21 of this prior instrument, with the exclusion of Article 6*bis* relating to moral rights,[50] and of adding some new solutions. Despite this technique, several provisions tend to indicate that this

[47] S. Riketson, study mentioned previously, pp. 48 and following.
[48] The only restriction concerns compulsory licenses which may only be granted " insofar as they are compatible with the provisions of this Convention. "
[49] The point should be made that TRIPS protection for computer programs is foreseen in reference to the Berne Convention, insofar as Article 10 of the TRIPS Agreement provides that the protection of these programs shall work by means of borrowings from the protection of literary works as foreseen by the Berne Convention.
[50] This is reflected by the wording of Article 9 of the TRIPS: "Members shall comply with the provisions of the Berne Convention (1971) and the Appendix to the said Convention. Nevertheless, members shall not have any rights or obligations under this agreement with regard to the rights conferred by Article 6*bis* of the said Convention or the rights derived therefrom."

Agreement can constitute the basis for a restriction for teaching, as far as national legislations are concerned.

We find a first allusion to exceptions in Article 3, para 1 of the TRIPS, relating to national treatment. According to this provision, "Each Member shall accord to the nationals of other Members treatment no less favourable than it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, ... the Berne Convention (1971)...." This provision has been interpreted as meaning that "members may apply the exceptions foreseen by the Berne Convention, at least with regard to foreigners applying for protection under the TRIPS Agreement."[51] Next, Article 8 of the TRIPS Agreement provides that "Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided such measures are consistent with the provisions of this Agreement." This provision clearly implies that, when interpreting the TRIPS Agreement, there is a need to offset the interests of the owners of rights with other, opposing public interests such as teaching needs.[52]

Finally, Article 13 of the Agreement stipulates that any exception or limitation must satisfy the triple test of the Berne Convention, in a slightly amended version of Article 9, para 2 of that Convention: "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder." This Article must be interpreted separately from Article 9, para 2 of the Berne Convention: Article 9, para 2 of the Berne Convention covers only the right of reproduction whereas Article 13 of the TRIPS Agreement applies comprehensively to "exclusive rights." We may then logically ask whether Article 13 allows for exceptions or limitations to all of the exclusive rights foreseen by the Berne Convention, including the right of reproduction, and those foreseen by the TRIPS, in particular the right of rental.

The WTO special group which worked on the exception for "private use" and for commercial use as foreseen by Article 110.5 of the United States Copyright Law of 1976[53] answered this question in the affirmative. Mr. Gaubiac also thinks that "the TRIPS exception covers all of the rights introduced by the Berne Convention and taken up by the TRIPS as well as the rights specifically introduced by the latter instrument."[54] However, if one views the TRIPS as a Special Arrangement as defined by Article 20 of the Berne Convention, this interpretation lends itself to criticism. Indeed, according to this latter provision, member States of the Berne Union may only enter into special arrangements insofar as such agreements grant authors broader rights than those granted by the Convention or contain other provisions not contrary to the said Convention. Consequently, as Mr. Goldstein notes, the only possible reading of Article 13 of the TRIPS Agreement gives members a general charter enabling them to impose limitations on rights other than the right to reproduction and that it cannot therefore be used to justify derogation from a minimum right laid down by the Berne

[51] S. Ricketson, study previously quoted, p. 51.
[52] S. Ricketson, study previously quoted, p. 53.
[53] Report dated June 15, 2000, WT/DS/160/R, p. 33, quoted by S. Ricketson, op.cit., p. 52.
[54] Y. Gaubiac, *De l'amélioration du dispositif normatif de la Convention de Berne,* Record of the forum organized at Lyons on November 18, 1994, on copyright and the Marrakesh Convention, Les petites affiches, January 11, 1995, p. 11.

Convention.[55] We may therefore deduce that national legislators wishing to create exceptions to the rights protected by the Berne Convention (with the exception of the right of reproduction) will have to base themselves on the Berne Convention itself rather than Article 13 of the TRIPS Agreement. If the Berne Convention does not make it possible to justify such exceptions, they will have to refrain from any such exceptions. With regard to teaching-related issues, this implies that TRIPS member States must refer to Article 10 of the Berne Convention studied above, which outlines the framework, and to the Appendix which is also covered by Article 9 of the TRIPS Agreement, if the exception concerns a right covered by the Berne Convention. On the other hand, if the member State wishes to create, in favour of teaching, an exception relating to the right of rental of cinematographic works and computer programs foreseen by Article 11 of the TRIPS Agreement, the basis for action by the national legislator will be this Agreement insofar as the right in question was created by this Agreement. As far as the application of such an exception is concerned, the national legislator shall see to it that the exception satisfies the triple condition foreseen in Article 13 (insofar as Article 11 does not provide for an exception for teaching, as does Article 10 of the Berne Convention).[56]

2. The TRIPS Agreement and the Rome Convention

The relationship between the Rome Convention and the TRIPS Agreement is somewhat complex. With regard to the question of exceptions and limitations, three TRIPS provisions should be mentioned. The first is Article 2, para 2, which obliges member States to respect the obligations they have undertaken under various prior international conventions, such as the Rome Convention. The second is Article 3, para 1, devoted to the national treatment rule. The third is Article 14, para 6, which stipulates that any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention."

It appears difficult to combine all of these provisions. However, it is only by exploiting them simultaneously that we can form an opinion with regard to the use of the TRIPS Agreement as a binding source for national legislators in the creation of exceptions and limitations to neighbouring or related rights. Indeed, Article 2, para 2 contains a general rule aimed at obliging members to comply with the rules of the Rome Convention, whereas Article 3, para 1 supplies details with regard to national treatment. According to the logic of the TRIPS Agreement, the national treatment foreseen by the Agreement does not extend to the rights foreseen by the Rome Convention, but only to those contained in paragraphs 1 to 5 of Article 14 of this Agreement.[57] Finally, Article 14, para 6 which comes after the enumeration of rights protected by the TRIPS Agreement clearly states that the only allowable exceptions are those authorized by the Rome Convention. On the whole, contrary to what Mr. Ricketson thinks,[58] it is this latter provision which constitutes the seat of the powers available

[55] P. Goldstein, *International Copyright: Principles, law and practice*, Oxford University Press, Oxford and New York, 2001, pp. 295 and following, quoted by S. Ricketson, op.cit., p. 54.
[56] It should also be noted that to comply with Article 2, para 2, such an exception must not exceed the limits foreseen by the Berne Convention.
[57] According to Article, para 1, "(…) In respect of performers, producers of phonograms and broadcasting organizations, this obligation (national treatment) only applies in respect of the rights provided under this Agreement (...)."
[58] S. Ricketson, study mentioned previously, p. 54.

to national legislators wishing to find support in the Agreement to create an exception or limitation.[59]

E. The WCT

Already in the preamble of the WCT, we can find wording indicating that this Convention is in no way intended to put an end to the exceptions admitted under the system of the Berne Convention. It is mentioned that that signatory States recognize "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention." Thus, things are stated clearly with regard to the tolerant approach made possible by the application of this new international tool, in respect above all of the exceptions for teaching already admitted or to be admitted by national laws under the system of the Berne Convention. This tolerance can be seen in Article 1, para 1, which stipulates the legal nature of the WCT: a Special Arrangement defined by the Berne Convention. In this respect, none of its provisions derogate from the obligations of States parties under the Berne Convention. Accordingly, if an exception was already planned and was in compliance with the latter Convention, the WCT should not serve as a basis for calling it into question.

Next, it can be seen by an obligation similar to the one set out in Article 9, para 1 of the TRIPS Agreement, whereby members are to comply with Article 1 through 21 of the Berne Convention and the Appendix thereto, including Article 6*bis* of that Convention relating to moral rights. In all likelihood, this provision means that it is enough for an exception for teaching to be in compliance with Article 10, para 2 of the Berne Convention or the Appendix thereto for it to also be in compliance with the WCT. If a State signatory to the WCT is not a party to the Berne Convention, for the exception for teaching to be valid, it must comply with Article 10, para 2 of the Berne Convention. Moreover, in this case, the State signatory to the WCT that is not a member of the Berne Union cannot avail itself of the system of licenses foreseen in the Appendix studied above, insofar as this system stems from notification deposited at the time of depositing the instrument of ratification or accession to the Berne Convention or subsequently.[60]

This requirement that the exception must comply with the Berne Convention is crucial when the protected right comes under this Convention. In this situation, it so happens that the WCT cannot on its own provide the necessary autonomy to justify the exception. Moreover, it was noted during the preparatory meetings for the WCT that "the intention was not to modify the status quo under Berne." This idea is borne out by the second paragraph of the Agreed Statement concerning Article 10, which is worded as follows: "It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention."

Finally, the tolerance announced in the preamble of the WCT is reflected in paragraph 1 of the Agreed Statement concerning Article 10: "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

[59] In this respect, see J. Sullivan, *Etude de l'OMPI sur les limitations et exceptions au droit d'auteur en faveur des déficients visuels*, op.cit., pp. 23 and following.
[60] Article 1, para 1 of the Appendix to the Berne Convention.

permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment." In other words, even though it is clear that the WCT is not intended to change the status quo with regard to the Berne Convention, it is just as clear that taking the digital environment into consideration assumed an adjustment to this environment. With regard to exceptions and limitations, that inevitably entailed either the creation of new exceptions and limitations or the adaptation of existing ones to the new possibilities for exploiting or utilizing the protected subject matter. This provided the impetus for the creation of temporary reproductions in several national legislations, such as Cameroon and Senegal. The source and scope of the power of national legislators must however be clearly stipulated: in the case of adaptations stemming from technological development that affects the exploitation of rights protected by the Berne Convention, the latter is to serve as a frame of reference for exceptions and limitations concerning such rights.

However, the reasoning would be different if the right concerned was one of those foreseen by the WCT itself. This is the case with the right of distribution set out in Article 6, the right of rental set out in Article 7 and the right of communication to the public set out in Article 8, all of which are prerogatives that are particular to the WCT.[61] As far as they are concerned, the rule of the triple test which applies to them is the one contained in Article 10, para 1 of the WCT. Consequently, the creation of an exception for teaching concerning these rights can only be done in compliance with the WCT, to the exclusion of the Berne Convention, which does not recognize such rights.

F. The WPPT

The WPPT takes up the question of limitations and exceptions in the same way as the WPT, while providing a different system. Like the WCT, the WPPT recognizes in its preamble the need to "maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information." This recognition can be interpreted as a tangible sign of the identity of the philosophy which has irrigated the two treaties.

Next, by establishing a link with the Rome Convention, the WPPT announces, like the WCT, that none of its provisions "shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961."

Finally, more directly, we can read what follows in Article 16:

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

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of

[61] This latter right is not new. It inevitably includes the rights covered by Article 11*bis*, para 1 of the Berne Convention.

the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram."

It should be noted that these provisions must be read in conjunction with the relevant Agreed Statements which are borrowed from the Agreed Statements accompanying certain provisions of the WCT, in particular the one specifying the adaptability of the digital environment to the rights flowing from the Berne and Rome Conventions, and from the WPPT itself, as well as the one which stipulates the limits that the WPPT places on national legislations with regard to the question of exceptions and limitations.

By exploiting the body of these provisions, one may, first of all, conclude with Mr. Ricketson that, by virtue of Article 16, para 1 above, the limitations and exceptions included in national copyright laws may be adapted *mutatis mutandi* to neighbouring rights. In other words, if a national law has foreseen an exception for a right relating to literary or artistic works, it may foresee a similar exception for the same right relating to subject matter protected by virtue of neighbouring rights. This implies in the final analysis that for Article 16, para 1, copyright limitations serve as a source and a point of reference for limitations on neighbouring rights. This logic adopted by the WPPT brings the copyright convention (Berne, TRIPS and WCT) into play insofar as the copyright exception foreseen by national law must have been in compliance with one of these instruments.

However, Article 16, para 1 clearly stipulates that the creation of exceptions with regard to the protection of performers and producers of phonograms inspired by those foreseen for the rights protected for the benefit of authors is a faculty, not an obligation.

One could, therefore, consider that if a State is a signatory to the Rome Convention and the WPPT, Article 16 of the latter instrument should be read together with Article 15 of the former. According to this logic, the first impression that emerges is that the faculty opened up by the States party to the WPPT is broader than the one granted to them by the Rome Convention. Such an approach would be erroneous. In reality, even though Article 15, para 1 of the Rome Convention lists the various exceptions which are likely to be included in national law, it does so more out of a desire for clarification than to create specific situations not covered by paragraph 2. Indeed, given that the exceptions mentioned in paragraph 1 are foreseen in virtually all countries with regard to rights protected for the benefit of authors, they would have been foreseen automatically by virtue of paragraph 2 even if the enumeration contained in Article 1 had not existed.

With regard specifically to the exception for teaching, from the moment that such an exception could have been created by virtue of Article 10, paragraph 2 of the Berne Convention, it could also have been created by simple recourse to paragraph 2 of Article 16 of the WPPT, even if paragraph 1 had not existed. Moreover, as asserted above, the three-stage test permeates all of the exceptions, even those foreseen by specific provisions. Consequently, we cannot believe that, under the influence of the WPPT, a system could be more or less favourable for a signatory country, given that this instrument, like the WCT, was in no way designed to change the status quo with regard to exceptions and limitations.

It follows from the above that if a State signatory to the Rome Convention is also a signatory to the WPPT, the exceptions it has created under the first of these Convention, if they were inspired by those created by copyright and if they complied with international instruments relating to the protection of literary and artistic works, may in case of need simply be adapted to the digital environment, in compliance with the triple criteria imported to

neighbouring rights by the WPPT. This implies that with an exception where no such adaptation is necessary, the assumption is that the status quo will be maintained.

If a WPPT member State is not a signatory of the Rome Convention, the WPPT, a convention which, having taken up and modified the provisions of the Rome Convention, does not refer back to the provisions of another treaty, would provide a sufficient basis for creating an exception or limitation. In this logic, the restriction incorporated into national law must merely comply with the triple criteria foreseen in paragraph 2 of Article 16.

IV. ANALYSIS OF EXCEPTIONS AND LIMITATIONS FOR TEACHING IN NATIONAL LEGISLATIONS IN AFRICA

An analysis of exceptions and limitations for teaching assumes the examination of several complementary questions. The first consists of considering whether the restriction concerns copyright, neighbouring rights or both. The second leads us to ask whether the restriction is a genuine exception or merely a license. The other questions, which are very diverse, bring us to look at the types of teaching concerned, the protected subject matter involved, the rights concerned, the acts authorized, the activities covered, the beneficiaries of the restrictions and the conditions to which they are subjected. However, technological advances impose two additional questions: the impact of digital technology and of technical protection measures on the benefits of restrictions.

A. Legal field of the exception or limitation

The question of the legal field concerned by exceptions and limitations for teaching in Africa leads us to check whether such exceptions and limitations are foreseen solely for copyright or whether they are also foreseen for neighbouring rights. In this respect, a distinction must be made between two categories of national legislations.

A first category foresees limitations for teaching exceptions solely for copyright whereas a second category foresees them for both copyright and neighbouring rights.

In the first category, we find Angola, Cape Verde, Central African Republic, Chad, Côte d'Ivoire, Kenya, Madagascar, Mali, Namibia, Niger, Nigeria, Seychelles, South Africa, Swaziland and Zambia.

In the second category we find Annex VII of the Bangui Agreement, Cameroon, Benin, Botswana, Burkina Faso, Congo, Ghana, Malawi, Mauritius, Mozambique, Democratic Republic of Congo, Tanzania, Togo and Zimbabwe.[62] It is not always clear why such differences appear in national legislations. Some of the laws that do not include restrictions for teaching with regard to related rights have not yet incorporated the protection of these rights, while others have already incorporated such protection but have preferred to limit restrictions to copyright.

[62] The point should however be made that it is impossible to delimit the two fields in the same way in all countries. Protection is not always spelled out for neighbouring rights. Some *copyright* countries attribute the prerogatives of author's rights to certain subject matters such as phonograms whereas these are only protected as neighbouring rights in those countries that have opted for a personalist approach.

A question may therefore be posed: in a country that has a restriction for teaching with regard to copyright but not neighbouring rights, can the holder of such a right oppose the use authorized in this way by virtue of his exclusive right?

Three elements can help us answer this question. First of all, we can consider that what is authorized for authors should be authorized for holders of neighbouring rights insofar as the rights of the latter are defined by borrowing from the rights of the former. Moreover, the texts relating to neighbouring rights consistently assert that the protection they grant does not affect the protection accorded to authors of literary or artistic works.

Next, we can assert that even in cases where the national law is silent, use authorized for copyright but not neighbouring rights can be covered by recourse to Article 15(1)(d) of the Rome Convention if the State concerned is a party thereto. If the State concerned is not a party thereto but is a signatory to the WPPT, it should be able to use the latter instrument to justify the exception.

Finally, one may think that legislators' failure to address the issue of the creation of restrictions for neighbouring rights is justified by the nature of the works likely to be used for teaching. Most often, these are literary works for which no one holds neighbouring rights.

None of these arguments is entirely satisfactory. With regard to the first, *a fortiori* reasoning cannot suffice, given the tendency towards autonomy that characterizes the two components of literary and artistic property. With regard to the second, we note that recourse to the two international conventions cannot fill all the gaps of a given national legislation. First of all, the exceptions and limitations foreseen in these texts are a faculty, not an obligation, and second, the choice is left up to national legislators by means of delegation.

As far as the third argument is concerned, literary works are the most commonly used in teaching. However, they are not the only type of works. Some works involving several beneficiaries of neighbouring rights are also used in this framework. This is the case for example with audiovisual works, musical works and works of art.

However, we must not overdramatize the issue. It would appear that the fact that national laws remain silent on exceptions and limitations with regard to neighbouring rights, while incorporating them for copyright is due to a certain amount of negligence rather than to the exclusion of such restrictions in this field. Holders of neighbouring rights often seek to avail themselves of the protection afforded by such rights, not so much to oppose any utilization of the protected objects as to benefit from the various types of compensation. Accordingly, they will probably not be opposed to the exercise of an exception that has been foreseen with regard to copyright. On the contrary, if the restriction, albeit foreseen solely for copyright, has led to a license, it is in their interest to be associated with the distribution of the fair payment made.

B. Legal nature of the restriction

African national legislations offer two categories of restrictions for teaching. Some foresee genuine exceptions for copyright and possibly neighbouring rights (1), while others take note of the prejudice that can result from the utilization of the protected subject matter for teaching to accompany the exceptions by one or more systems of licenses (2).

1. Exception

The great majority of national laws that impose restrictions on the protection of copyright and possibly neighbouring rights opt for the system of exceptions. The titles of the related articles as well as the wording used leave no doubt as to this choice. For example, Article 12(4) of the South African Law is entitled “General Exceptions from Protection (...)” and is worded as follows: “The copyright in a literary or musical work shall not be infringed by using such work, to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching (...)”. In a similar vein, the law of Botswana includes a section entitled “Exceptions to Exclusive Right to Copyright” and introduces the following: “Notwithstanding the provisions of section 7, the following dealings with a work shall be permitted without the authorization of the author or other owner of the copyright (...)”.

The legal nature of the restriction is deduced from the law, even when it has not specifically used the term *exception*. In some national laws, we find a circumlocution announcing a series of restrictions including the one for the benefit of teaching. This is the case in particular with the restrictions inspired by French law, in Benin, Burkina Faso, Cameroon, Central African Republic, Chad and Togo, and where the articles devoted to the main series of exceptions open with the following wording: “when the work has been lawfully made available to the public, the author may not prohibit (...)” or by equivalent wording that comes down to the same thing in practice: “when the work has been published with the authorization of the author the latter may not prohibit (...).”

Even certain texts of Anglo-Saxon inspiration introduce exceptions using circumlocutions, such as the laws of Kenya and Mauritius. In the former, Article 26, para 1 devoted to economic rights ends with the following words: “but copyright in any (...) work shall not include the right to control (…).”

The same applies to the laws of Portuguese inspiration such as the laws of Angola and Cape Verde. In the former instance, Chapter VI, the provisions of which are devoted to exceptions, is entitled “copyright limits and exceptions”. Within this chapter, Article 29 on uses for teaching purposes is entitled “lawful uses without authorization” and the circumlocution allowing us to understand that an exception is involved reads as follows: “the following modalities for the use of works shall be permissible, independently of any authorization by the author and without any compensation (...)”. In the latter, an identical circumlocution is used, even though the title “use” given to Article 48 devoted to the question does not refer at all to a restriction of the protected rights.

In other national legislations, the term “limitations” or limits” is used. However, a closer look shows that the term “exception” could just have well have been used without misrepresenting the intention of the legislator. This is the case with Congo Brazzaville, where Article 33 of the law entitled “General Limitations” is in fact devoted to numerous exceptions, including the one for teaching. This is also the case with Angola as already mentioned, with the countries applying Annex VII of the Bangui Agreement and with Benin, Burkina Faso, Côte d’Ivoire and Madagascar.

In a last category of national laws, the provision devoted to restrictions on protected rights is called “free use”, “permitted use of work protected by copyright” or “acts not controlled by copyright”. This is the case with the laws of Niger, Ghana and the Seychelles. A

look at the content of these restrictions shows that the legislators well and truly intended to create exceptions to the protected rights.

In addition, in those countries which protect neighbouring rights, when exceptions are foreseen with regard to such rights, the wording used is on the whole identical to that found in connection with copyright (cf. for example Title XII of the law of Benin entitled “free use” and Article 30 of the law of Mauritius entitled “limitations on protection”).

The Senegalese law has used wording that is worth a closer look. It has merely transposed the exceptions foreseen for copyright to the field of neighbouring rights. In Article 89, it provides that “Exceptions to copyright (...) shall apply *mutatis mutandi* to neighbouring rights”. The same approach was adopted by the legislators of Zimbabwe, Tanzania and Rwanda. The first merely recalled that all acts authorized by virtue of the provisions relating to copyright are also authorized by neighbouring rights, whereas the second, before proceeding to make such a reminder, enumerated some acts specific to the exception for teaching with regard to related rights.

In general, however, the different terms used in the laws do not have any significant impact. Often, the most important consideration is the goal pursued by the legislative body.

Opting for the exception has major repercussions for rights holders. It means in principle that rights holders cannot benefit from any compensation for the use of their works. In the African context, this type of option, which is permitted by the international conventions as we have seen above, can be largely justified. Populations are impoverished on the whole and the systematic payment of author’s rights by the State which owns most of the teaching establishments could be a heavy cost burden. Even when the establishment belongs to a private individual who charges tuition fees, payment of royalties is not necessarily desirable insofar as it could drive up tuition fees.

Sometimes, despite a system of exceptions, steps are taken with a view to the payment of compensation by educational establishments. This situation has occurred in Cameroon. Article 29 of the corresponding law provides as follows:

“When the work has been published with the authorization of the author the latter may not prohibit:

b- Free performances staged for school educational purposes or during a religious ceremony and in premises set aside for that purpose;

e- The use of literary or artistic works by way of illustration for teaching by means of publications, broadcasts or sound or audio recordings, provided that such use is not abusive and is not for profit”.

These provisions do not leave any doubt as to the free nature of the use of works of the mind in a teaching setting. However, two decisions have been signed by the Cameroonian Minister in charge of culture setting royalty rates to be paid. Article 1 of the first decision[63]

[63] Decision No. 004/073 MINCULT/CAB of August 5, 2004 setting the amount of annual royalties due for copyright and neighbouring rights by kindergartens, primary and secondary schools, in Textes usuels de droits d’auteur et droits voisins applicables au Cameroun, PUA, 2006, p. 284.

provides that “the amount of the annual fee due as royalties and neighbouring rights from kindergartens and primary and secondary schools shall be a lump sum according to the following breakdown:

- Kindergartens and primary schools: One hundred (100) CFA francs per pupil and per year;
- Secondary schools: Two hundred (200) CFA francs per pupil and per year.”

The second decision[64] provides in Article 1 that “the annual fee due as royalties and neighbouring rights from training centres and private university institutions shall be a lump sum of five hundred (500) CFA francs per student and per year.”

No text has been adopted to cover the seven State universities in Cameroon. Despite this silence on the part of the administration, the society in charge of the collective management of the rights to literature and the dramatic arts wrote to the different rectors of the State universities to request the payment of royalties, setting the amount due for each student at one thousand (1000) CFA francs. Here, one important point should be noted: this correspondence went through the Ministry of Higher Education, which suggested that the rectors respond to the request by a “favourable opinion”.

Several remarks are in order with regard to these decisions. First of all, the decision concerning the kindergartens and primary and secondary schools does not specify who must pay the fee when the user establishment is a public one. Consequently, the question arises of determining whether this compensation should be paid out of the establishment’s budget, by the State or directly by the students’ families. The last option is the most likely. Indeed, as primary public school is free in Cameroon, students do not pay any fees to their establishment, which therefore has no operating budget. It merely receives an endowment of teaching material called a “minimum package”. As far as State-run secondary schools are concerned, tuition fees paid by students are relatively low and would not cover the fee of 500 CFA francs required by the decision. On the other hand, private sector primary and secondary educational establishments charge relatively high tuition fees. These vary from one establishment to another, but the amount is generally moderate for private religious schools. Accordingly, they cannot be put in the same category as those for which this represents a large sum, among private profit-making educational establishments. Consequently, they may be treated in the same way as schools belonging to the State or a decentralized territorial authority.

The decision relating to training centres and private universities is no doubt justified by the fact that these training institutions for higher education are veritable commercial enterprises as far as their promoters are concerned. Private universities offering vocational level training and diplomas as well as other professional institutions that sometimes partner with national public universities or with foreign public or private universities generally charge such high tuition fees that these private universities may be considered as institutions established for purposes of financial gain. It is therefore only normal that they should have to pay the corresponding royalties. The same reasoning can apply to training centres. In addition, most training centres focus on adult education, as do language centres and other private

[64] Decision No. 004/074/MINCULT/CAB of August 5, 2004 setting the amount of the annual fee due as royalties and neighbouring rights from training centres and private university institutions, in, Textes usuels, op.cit., p. 284.

centres offering different kinds of training. Consequently, it is understandable that when promoters pursue the goal of financial gain, they should pay royalties.

Yet one may wonder whether it would not be preferable to start by amending the relevant legislation. At least two elements can help us answer this question.

The first element is taken from the rule governing the interpretation of exceptions. According to personalist doctrine and jurisprudence, exceptions are to be interpreted strictly.[65] Consequently, the scope of application may never be extended to teaching fields which are not covered by the international conventions that authorize restrictions for educational purposes.

A second element may be drawn from the triple criteria rule studied above, where no exception to or limitation on a protected right may be created or maintained if it unreasonably prejudices the legitimate interests of the author or conflicts with a normal exploitation of the work. If the work is used by profit-making teaching establishments, the fact that the promoters make a profit can very well be deemed to unreasonably prejudice the rights of the holders of the rights and explains why they could share in this profit.

A third element flows from the fact that a contract may very well neutralize an exception. Whereas according to the personalist logic exceptions do not constitute subjective rights for the benefit of users,[66] the fact that the parties exercise free will enables the holder of the rights to get his contracting party to accept a clause limiting or neutralizing an exception from which he would have benefited under the law.[67] This is not hard to understand: the restriction for teaching is "an exception to the exclusive nature of rights, not an exception to the existence of the right."[68] Consequently, it does not erase the right to the protected work, which remains latent and reappears under certain circumstances (infringement of normal exploitation and unreasonable prejudice to the interests of the rights holders) to turn the exception into a license.

With regard to training centres, the target public often consists of adults capable of acquiring legitimate copies of the works used in conjunction with their training. Consequently, if they are not urged to acquire these copies, one can say that this infringes the normal exploitation of the work. There is nothing shocking about this approach if one recalls the system often reserved for exceptions and limitations: not only are these not rights for the benefit of the public, but it is always possible to derogate from an exception foreseen by the law by means of a convention. On the first point, apart from specific cases such as quotation and parody[69] which benefit other authors, exceptions do not constitute rights benefiting users. On the second point, which flows from the first, it should be noted that the fact that the law

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[65] The approach would be different in the "copyright countries where the emphasis is placed on the public interest, which leads to a more closed system in terms of prerogatives and a more open one in terms of exceptions" cf. A. and H.-J. Lucas, *Traité de la propriété littéraire et artistique*, 3rd edition, Litec, 2006, No. 321, p. 260.

[66] The logic is different in the copyright countries. As limitations are placed on an equal footing with exclusive rights, "one cannot speak of misuse of users' rights." A. and H.-J. Lucas, op.cit., No. 322, pp. 260 and 261.

[67] Cf. along the same lines: J. Sullivan, previously mentioned study, p. 49.

[68] C. Alleaume, *Les exceptions de pédagogie et de recherche,* Communication – Commerce électronique, Nov. 2006, p. 14.

[69] Along similar lines, cf. A. and H.-J. Lucas, op.cit., No. 322, pp. 260–1.

foresees an exception does not hinder negotiations with a view to the payment, by the beneficiary of the exception, of compensation in exchange for use of the protected works.

It ensues from all of the above that when an exception for teaching exists, it must not be automatically extended to all training institutions. In particular, those which operate on a profit-making basis must pay the corresponding royalties. In addition, this exception may very well be dropped in practice in exchange for compensation freely negotiated between the training institutions and the holders of the rights. However, the process must be based on negotiation, not an administrative decision. Resorting to this kind of decision gives the impression that the Executive has taken back with one hand that which the Legislative has given with the other. It leads one to think that the Executive has turned free use into a legal license without having been delegated to do so by the Legislative.

In any event, there is no getting round the fact that the body for the collective management of copyright and neighbouring rights in the field of literature and dramatic arts in Cameroon has never been able to collect the royalties set by these decisions. On the other hand, even though no State university has paid such royalties to date, there is nothing preventing them from doing so.

2. License

Two categories of licenses can be used to make up for the loss of earnings suffered by the rights holders in conjunction with educational activities. The first category consists of the licenses granted by virtue of an internal provision (a), while the second is made up of the licenses covered by the Appendix to the Berne Convention (b).

a) License granted by virtue of a provision of the national law

Benin, Mali and Togo are unique examples because they have established a legal license for teaching.

Article 79 of the Beninese Law provides that when the reproduction of literary or artistic works is done on a private basis by photocopying “and if the devices meant for the making of such copies are made available to the public in schools and other educational establishments (...) in exchange for payment, the author shall be entitled to payment of remuneration which shall be paid to the collective management body by the operator of the device.” This solution has several merits, the most important of which is the fact that it exists. Indeed, while fixing the principle of remuneration to be paid in conjunction with private reproduction carried out on the premises of an educational establishment in exchange for payment of photocopying expenses, it provides a framework for negotiations to set the amount of compensation. In addition, it reflects the real situation in African schools and universities, where private individuals often install photocopying facilities with or without authorization either on campus or nearby with a view to offering photocopying services. Whereas this service constitutes the occupation of the owner of the photocopying machines, it enables learners and teachers to make copies for their private use.

Yet turning to the notion of private use can lead us to ask ourselves whether we are still in the field of the exception for teaching. The answer is clearly in the affirmative, because the devices in question must be made available to the public in schools or other educational establishments, for this particular license to apply. In any event, giving a different answer would imply that in Beninese schools, photocopies are regulated by two systems: one system

which does not entitle rights holders to any payment, which is applicable when the copy meant for use in lessons is made on the premises of the establishment, possibly on photocopiers belonging to the establishment, and another system which applies to copies made on the premises of the establishment on photocopiers belonging to third parties, which are intended for private use and for which the owner of the photocopiers must pay a fee. Clearly, this kind of interpretation would needlessly complicate the system of reprographic reproductions. Everything tends to indicate that with this license, lawmakers wanted to offer authors fair payment in exchange for reproductions made on the premises of an educational establishment.

It ensues from this approach that the Beninese solution cannot be extended to all of the countries which provide for remuneration for private copying of printed works. When, for example, the Cameroonian Law foresees such remuneration (Article 72 to 74), it does not base it on the volume of reproductions, as the Beninese law seems to suggest. On the contrary, the persons liable to pay compensation are not the owners of the devices, who could pass them on to the price of the copies, but rather the manufacturers and importers of such devices, who are obliged to pay the said compensation before putting such devices into circulation in Cameroon.[70] Consequently, payment for private copying of printed works, as foreseen by the law in Cameroon, must be interpreted outside the framework of the exception for teaching.

The license foreseen by Article 110 of the corresponding law in Togo is worded as follows: “The Ministry for Culture may issue licenses for the production of copies of phonograms when such reproduction is meant solely for use in teaching or scientific research, is made and distributed on the territory of Togo to the exclusion of any exploitation of copies, and includes for the producer of the phonograms fair payment set by the said Ministry, taking into consideration in particular the number of copies to be made and distributed.” Its field, which is limited to phonograms meant for teaching and scientific research, considerably reduces the scope and makes the exception virtually pointless. Moreover, other media are tending to replace phonograms as far as use in academic activities is concerned.

On the other hand, the exception set out in Article 40 of the corresponding law in Mali is extremely interesting. It seems to be a useful complement to the exception which in principle allows free use of works in a teaching setting. According to this provision, “the Ministry for Arts and Culture may authorize, in case of need and in exchange for fair payment, public libraries, non-commercial documentation centres, scientific institutions, educational establishments and literacy centres to reproduce the number of copies needed for their activities, by means of a scientific process, provided that such reproduction does not conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the author.” This can be taken to mean that when required, an educational establishment may make reproductions for the needs of one or more lessons, in exchange for fair payment. This license is only meant to apply when such reproductions are relatively large in scale, given that copies made separately by each of the actors in education remain subject to the general exception. To put it simply, if for example only some of the students must reproduce the work, such reproduction may come under the exception for teaching if it is not covered by private use. On the other hand, if most or all of the students or all of the students must make

[70] It took a decision, No. 004/033/MINCULT/CAB of July 14, 2004 by the Ministry for Culture to establish an annual fee to the tune of 10,000 CFA francs per device, payable by the owners of photocopiers.

the copy, the establishment may group them together and ask the Ministry for authorization to make copies and distribute them collectively, then collect or pay the sum required in the form of payment. As can be seen, the system of this license is entirely satisfactory insofar as it takes up the conditions laid down in the “triple test” rule.

Other countries, namely Botswana and Mauritius, allude to licenses, stating that educational establishments may only enjoy the legal exception if a license does not already exist. The wording used is rather cryptic. The two texts provide that reproduction for teaching purposes may be authorized subject to several conditions, *inter alia* “there is no license available, offered by a collective administrative organization in a way that the educational institution is aware or should be aware of the availability of the license, under which such reproduction can be made.” The thrust of the two texts is original. In fact, it tends to indicate that whenever there is a collective license offered by a collective management body of which the educational establishment is aware or likely to be aware and under which the reproduction can be made, the exception does not apply. In other words, we find ourselves in a system where the existence of the contractual license replaces the exception foreseen by the law, providing additional proof that with a contract, the legal restriction for the benefit of teaching may be set aside by educational actors and the rights holders.

These systems whereby a license and a free restriction coexist in the law are relatively tempting. In particular, the Malian system is attractive for two reasons: first, it authorizes the exception for teaching for all use other than reproductions and for reproductions of negligible scope, and second, it obliges educational establishments to seek a license from the Ministry for Culture when such use is on a larger scale. However, it may appear complicated in certain respects. Indeed, it is based on the good faith of the directors of educational establishments, who must themselves judge the situations in which the bounds of the acceptable are crossed and on verification that could be exercised *a posterior* by the collective management organizations. On the other hand, the system in Benin, which provides for systematic use of licenses when reproductions are made in exchange for payment to the third party owners of the photocopiers, may be extended to all cases where reproductions represent the usual occupation of the said owners. We must still resolve the case of reproductions made on the premises of educational establishments by their own means, namely those made on photocopiers which are sometimes available in their offices, libraries or documentation centres. It is clear that if we agree to leave performances out of the scope of application of the license owing to their limited impact on the exploitation of rights, we have to admit that the fact that we give free rein in all circumstances to reproductions for teaching could dry up this source.

b) License granted by virtue of the Appendix to the Berne Convention

In all likelihood, no developing country has to date issued a license for reproduction or translation basing itself on the system foreseen by the Appendix to the Berne Convention. However, some countries have incorporated into their laws provisions tending to take up those of the Appendix and to follow it in the event that one of their nationals requests such a license. This is the case with Angola (Article 30), Central African Republic (Articles 19 and 20), Congo Brazzaville (Articles 35 and 36), Malawi (Articles 17 to 21), Mali (Article 41 and 42, Articles 96 to 114, 118 and following), Nigeria, Rwanda (Articles 238 and following), Togo (Articles 24 and 25) and Uganda (Articles 17 and following). Unfortunately, research conducted in conjunction with this study did not reveal any license granted within the framework of these provisions. This means that nationals from developing countries have not found the mechanism attractive enough, which is no doubt justified by the consensus as to the

complex nature of the procedure for granting the said licenses.[71] However, the complexity of the procedure could not explain such a lack of interest if the outcome could be economically worthwhile for an economic operator wishing to invest in making books available for schools or universities in his country. It would appear that the most plausible justification may be found in the narrow nature of the book market. In the majority of developing countries, this market is above all hamstrung by the weak purchasing power of the public. Next, it is occupied by new and used books. New books are generally reasonably priced for the majority of subjects on school curricula, while the price of used books is negotiated easily by mutual agreement with sellers. Moreover, in some countries such as Cameroon, these used book sellers offer what they call "book exchanges", a service which consists of accepting used books and offering others, whereby the person exchanging books only pays the difference when the books provided are worth less than the books received.

The market for universities is even narrower. Learners are not under any obligation to purchase books. In addition, since 1988, some developed countries such as France have introduced book subsidy programmes[72] as a result of which the prices charged in Africa are lower than sales prices in France. Moreover, a number of countries have eliminated customs duties on books, helping bring costs down. Finally, the book market is threatened by the fact that reprography has become widespread. As a result, achieving a return on investment in the sector is not that easy.

The combination of all these factors can no doubt explain the lack of enthusiasm for the licenses foreseen by the Appendix to the Berne Convention. To encourage nationals from developing countries to apply for such licenses, the first step would be to simplify the procedure, by significantly reducing the period of immunity and by purely and simply eliminating the waiting period. The former tend to render the knowledge irrelevant before it can be made available to nationals of the countries of the South through licenses, whereas the latter represent a real deterrent for those considering applying for a license. To put it plainly, publishers in the North who have been informed that an application for a license has been filed in the South should hasten to send copies to the applicant's country of origin, because if the applicant is requesting a license, it is because a potential market exists. Consequently, it should not be in anyone's interest to draw a merchant's attention to the existence of a profit that he would like to have for himself.

This simplification process would also entail a rethinking of the basic conditions for granting the license. For example, the licensee should have the right to export copies or translations to other countries of the South with a similar level of development which are not covered by the original copies and which have made the declaration required by the Appendix.

C. Types of teaching covered by the exception or limitation

In most cases, the corresponding national laws in Africa do not specify the type of teaching that is likely to benefit from the exception. Indeed, the majority of the texts contain

[71] See in particular C. Colombet, *Grands principles du droit d'auteur et des droits voisins*, op.cit., pp. 150 and following; D. Ladd, *Le droit d'auteur dans le contexte technologique international*, B.D.A., vol. XVII, No. 3, 1983, p. 1.
[72] For more details on this programme, see *http://celf.fr/programm.htm*.

more or less general wording. They simply tend to say that the restriction has been foreseen for “teaching purposes”, for “purposes of instruction” or “by way of illustration for teaching”.

Other texts, however, are more specific. Some laws stipulate that for some aspects of the restriction for teaching, the education in question must not be for profit. Others add that the exception or limitation includes vocational training.

In the first group, we find the Botswanan law on exceptions for the reprographic reproduction of protected subject matter for face-to-face teaching. According to Article 15(b) of the Law, such reproduction is only authorized for educational institutions whose activities are not directly or indirectly for financial gain. One could also refer to the corresponding laws of Mauritius and Mozambique (Article 15, para 1(b) and 11(b) respectively), which contain a similar provision. What kind of scope should this clarification have? Should we deduce that for the other aspects of the restriction for which no clarification is provided, all types of teaching, including those for profit, are eligible? In practical terms, the question leads us to wonder whether, in these countries, a distinction should be made within the exception for teaching. This appears to be necessary. As a corollary, we have on the one hand the use via reprographic reproduction for which we must determine whether or not the teaching is for profit. If this is indeed the case, the benefit extended by the exception is not granted. On the other hand, when the use of the work does not imply any reproduction or implies reproduction by another process, no effort is made to determine whether or not the teaching is for profit, for in this case all types of teaching would be eligible to benefit from the restriction. This difference in terms of systems would tend to indicate that the legislators who provided clarifications with regard to the for-profit nature of teaching in the aspect of the restriction concerning reprographic reproductions really intended to circumscribe this form of use of works, which is particularly dangerous for creativity.

This dual-track approach can be avoided if we recall that teaching benefiting from the exception foreseen by international conventions must not be for profit. According to this logic, the distinction within these laws is no longer valid: regardless of the aspect of the restriction we take into consideration, the reasoning must therefore be the same. If teaching generates profits for its promoter, it must be subject to the payment of royalties.

In the second group which adds that the exception may be extended to vocational training, we find Cape Verde, Congo, Ghana, Malawi and Tanzania. At least two observations are in order.

The first remark consists of distinguishing between education and vocational training, while the second consists of verifying those who receive training. The distinction between education and vocational training may seem sterile in certain regards. As we have seen, the category of educational establishments encompasses primary and secondary schools and general universities as well as technical educational institutes, whereas the latter category can include both public and private vocational training schools. According to this logic, and depending on the for-profit nature of the teaching or training, vocational training could be eligible to benefit from the exception for teaching activities. In other respects, however, the distinction can be rich because, to tell the truth, one may wonder whether, by referring to vocational training in national laws without any clarifications, the legislators are not going beyond the limits foreseen by the provisions of the relevant international conventions. The latter do not appear to have intended, by referring to “teaching” or “education”, to include all types of vocational training in their scope. Some training centres, even though they teach young learners technical skills, are not structured in such a way that they can be classified as schools or universities, the only bodies covered by the relevant international instruments.

The second comment consists of verifying the target public for training. As we have emphasized, there is a need to be rigorous when the training is meant for adults. In such cases, the vocational training establishment should only be able to benefit from the exception for teaching if it can be classified as a school or university and if the training is not for profit.

D. Subject matter concerned by the exception or limitation

The subject matter concerned by the exceptions and limitations constitutes one of the most problematic aspects within the framework of this study, not because the identification of the said subject matter poses any particular problems but because some law limit its scope. A first group of laws refrains from specifying the types of subject matter concerned by the restriction granted for teaching, whereas a second group provides such clarification.

The first group is in the majority. Indeed, in most of the national laws in question, legislators merely utilize general wording. Most often, one finds the term “oeuvre” or the expression “oeuvre protégée”, in English “work” and in Portuguese “obra”. Such wording does not leave any doubt as to the intent of the legislator: all works of the mind are likely to be used in conjunction with the said laws, by way of illustration for educational activities.

In countries which foresee protection in the form of neighbouring rights and which provide for an exception relating to educational activities, the logic is the same overall. A provision is devoted to exceptions or limitations, among which is the one for education.

A first explanation can no doubt be sought in the structure of the law. In most cases, the exception for teaching is buried in the midst of several other exceptions in a section, chapter or article devoted, as we have seen, to “exceptions”, “limitations”, “limits”, “free use” or “acts not controlled by copyright”. Thus, insofar as the section, chapter or entire article concerning exceptions to the protection of all works or all subject matter falling under neighbouring rights, the law no longer specifies what specific type of work is likely to be concerned by the restriction for teaching.

The logic is the same for neighbouring rights. This is the case in particular with Article 97 of the relevant law of the Republic of Congo, which begins by stating that “the articles concerning neighbouring rights shall not apply in the following cases:”. This is also the case with Article 69 of the relevant law of Benin, which states that “notwithstanding the provisions of Articles 60 to 66 (which specify the subject matter and persons protected) of this Law, the following acts shall be permissible without the authorization of the beneficiaries mentioned in these Articles:”. Finally, this is also the case with Article 67 of the relevant law of Cameroon, Article 80 of the relevant law of Burkina Faso and Article 47 of the relevant Laws of Mozambique and Niger. Such general wording clearly means that any subject matter protected by means of neighbouring rights is subject to the exception for teaching activities. These laws therefore cover performances, phonograms, videograms and programs.

A second justification may be of a technical nature: all works of the mind are effectively likely to be used by way of illustration for teaching. As Ms Guibault quite rightly states, teaching activities “rely to a large extent on contemporary books, newspapers, magazines, photographs, video recordings, slides, sound recordings, broadcasts and other communication

media."[73] She adds that "in practice, schools make millions of photocopies every year of objects protected by copyright. In addition, the performance of works and the dissemination of radio or television broadcasts and video or sound recordings are particularly well suited to classroom teaching." Finally, with regard to higher education, she writes that because "it involves information ranging from complex graphic and audio data to simple texts and is addressed to both Nobel Prize winners and first-year students in remedial classes, university communication must cover all types of content and rely on all types of media."[74] It is therefore clear that any intellectual creation or any subject matter protected by neighbouring rights is likely to be used in one form or another within the framework of a school or university activity, even if it is only during remedial or peripheral teaching which, along with basic teaching, helps to educate the student. In these conditions, when the law merely foresees an exception or limitation without specifying the subject matter concerned, it must be interpreted in such a way as to include everything that is protected.

The laws in the second group, although they are in a minority, follow a different logic. In fact, some laws limit the exception for teaching to literary works alone (Swaziland) or to literary and musical works (Namibia, Seychelles and South Africa). Even when it comes to neighbouring rights, the exception for teaching is limited to certain types of subject matter. This is the case with Article 35 of the relevant law of Ghana, which limits the exception for teaching to performances by artists as well as broadcasts. However, this is easy to explain: this country has only protected these neighbouring rights.

In any case, it will be noted that those countries which restrict limitations and exceptions for teaching to certain types of protected subject matter are all of the Anglo-Saxon tendency. The only French-speaking country where the relevant law is difficult to understand on this point is that of the Democratic Republic of Congo. In Article 25, the text protecting copyright provides that "with a view to illustrating a text, the reproduction of *photographs* in anthologies intended for teaching purposes and in scientific works shall be authorized." Article 27 of the relevant law adds that "the *lessons* given in a teaching setting may be reproduced or summed up by those for which they are intended. However, they may not be published, in full or in part, without the prior authorization of the author, or their rightful beneficiaries." Finally, Article 31 stipulates that free performances may be given without the author's prior consent, provided that the *work* has already been disclosed, if they are staged in an educational establishment, during class time, and are directly related to the subject of the course." It is not easy to interpret such a text. In all likelihood, there is a need to combine the various provisions in order to determine which works lie within the purview of the restrictions for teaching, and then reallocate the same provisions in order to identify the protected rights restricted by the exceptions or limitations. Following this logic, we may reason in three stages. First of all, we can say that only photographic works may, in accordance with Article 25, be used in conjunction with an educational activity involving reproduction. Next, we can add that, in accordance with Article 31, when the teaching activity only involves a performance, any work may be used, if it is "directly related to the subject of the course." Finally, when the work is a lesson, Article 27 permits its reproduction or summing-up by the persons for whom the said lesson is intended while prohibiting its publication without the

[73] L. Guibault, *Nature et portée des limitations et exceptions au droit d'auteur et aux droits voisins au regard de leurs missions d'intérêt général en matière de transmission des connaissances : l'avenir de leur adaptation à l'environnement numérique*, under the editorship of B. Hugenholtz, e.Bulletin du droit d'auteur, October–December 2003, p. 4.
[74] Ibid.

author's consent. Specifically, this latter situation does not provide anything new with regard to the other national laws which do not contain such an allusion. The reason is simple: the essence of the lesson taught is to be reproduced by the learner, and then summed up in order to provide a synthesis with a view to facilitating revision. Consequently, the restriction concerning lessons is unnecessary. Moreover, the point should be made that even in the absence of specific provisions, learners may not, without infringing the author's rights of their teacher, proceed to publish his course.

The restriction for teaching with regard to neighbouring rights is no less cryptic. Article 89 of the relevant law of the Democratic Republic of Congo provides that "broadcasting organizations may, without the authorization of the performers, make fixations of a performance rendered by an artist for the sole purpose of using it for a pre-determined number of teaching or cultural broadcasts." This tends to indicate that the sole type of subject matter protected by neighbouring rights and to which it is possible to have recourse by way of illustration for teaching is the performance, provided that the procedure described in the law is followed. These limits on the exception are all the harder to understand in view of the fact that the relevant law of the Democratic Republic protects broadcast programs, phonograms and videograms along with the performances covered by the exception.

In any event, given that the law itself reduces the scope of the exception to these works, it is not possible to extend it to others. This option can nevertheless be criticized to the extent that, as we have seen, all types of protected subject matter are likely to be used in conjunction with school or university teaching. In particular, no law should exclude audiovisual works from the scope of the restriction concerning teaching: it has always been accepted that one picture may sometimes say more than a thousand words. Moreover, the limitation on the scope of the exception creates practical problems in some of the above-mentioned countries. This is the case for example with South Africa, where educational institutions are obliged to secure the agreement of the rights holders to present works of this nature, thereby hindering the circulation of the information presented in this form.

In this country, a course devoted to the history of Germany could not be illustrated by the screening of a documentary on the fall of the Berlin Wall. This situation restricts the access of teaching circles to the protected resources which are likely to serve by way of illustrations for teaching. It would be preferable for the exception to be extended to all categories of works, as in the majority of countries.

E. Economic rights covered by the exception or limitation

To enhance the clarity of the paper, a distinction should be made between the economic rights affected by exceptions with regard to authors and those involved with regard to the holders of neighbouring rights.

1. Copyright affected by the exception or limitation for teaching

Two prerogatives flowing from the international conventions benefiting authors are primarily affected in conjunction with the limitations and exceptions for teaching: the right of reproduction and the right of representation.

With regard to the *right of reproduction*, the point should first be made that its recognition by African laws has not given rise to any debate. Indeed, regardless of the country considered, this right is foreseen, practically in the same terms and in the same scope. The

protection of this right is tacitly extended by some national laws to adaptations of the protected works, translations and even the distribution of the copies reproduced. This is the case with the relevant law of Côte d'Ivoire, which provides an excellent example in this respect. This law, after having defined the notion of reproduction, specifies its components: "Reproduction shall mean the material fixation of the work by all processes making it possible to communicate it directly to the public, namely:

1°The reproduction of the work in a material form, including in the form of a cinematographic film or a phonogram or graphic or photographic processes;

2°The placing into circulation of the work reproduced in this way, in particular the public performance of the reproduction by film or by phonogram;

3°The translation, adaptation, arrangement or other transformation of the work."

The outcome of this provision inspired by French author's rights is that the right of reproduction covers all modalities of the reproduction of the work.

Other laws have turned offshoots of the right of reproduction into specific rights. This is the case with Cameroon (Articles 15 and following), Botswana,[75] Benin (Article 4.2), Burkina Faso (Article 16), Congo Brazzaville (Article 28), Ghana (Article 5), Tanzania (Article 9), Togo, etc.[76] Only the relevant law of the Democratic Republic of Congo asserts the protection of author's rights (Article 20) without specifically enumerating them. Nevertheless, a look through the law leaves no doubt as so the protection of the right of reproduction.

With regard to this right, the restrictions for teaching are of several orders. Taking into consideration the fact that some countries have foreseen limitations based on the Appendix to the Berne Convention, the following limitations may be listed as relevant to the right of reproduction:

- The insertion of an extract or the whole of the protected work, in the original version or in translation, in a publication;
- The translation of the work with a view to its use in conjunction with educational activities;
- The making of several copies of the original or translated work, with a view to its distribution or sale in conjunction with educational activities;
- The reproduction via reprography or a photographic process of the work or extracts from the work;
- The insertion of the work or extracts from the work in broadcasts intended for educational activities;

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[75] According to Article 7.1 of the relevant law of Botswana, "Subject to the provisions of sections 13 and 21, the author or other owner of copyright shall have the exclusive right to carry out or to authorize the following acts in relation to the work-

(a) reproduction of the work;

(b) translation of the work;

(c) adaptation, arrangement or other transformation of the work."

[76] The point should nevertheless be made that all of these prerogatives are not always foreseen under specific designations as in the relevant law of Cameroon, which takes pains to speak of the *right of reproduction*, the *right of distribution* and the *right of transformation*.

- The fixation of broadcasts intended for educational activities;
- The fixation of the work in written, sound or audiovisual form on an analog or digital medium;
- Quotation;
- Adaptations or other transformations of the work when they are intended as illustration for teaching;
- The uploading of a work on a platform meant for students following distance learning courses;
- The downloading of the work on a hard or movable disk, by a teacher, pupil or student registered for a distance learning course or for use in conjunction with face-to-face teaching and the subsequent fixation of this work.

With regard to the *right of performance*, similar reasoning can be applied. Indeed, all of the relevant national laws recognize this right using more or less similar names. They define it in relation to the meaning it is traditionally given in intellectual property, namely, in relation to the direct or indirect communication to the public, of the public performance. The relevant law of Cameroon stands apart in this respect insofar as it is remarkably exhaustive and owing to the original borrowing from the WPPT treaty with regard to the right of making available[77] used to define the right of performance. Accordingly, Article 16 of the WPPT is worded as follows:

"(1) *Performance* shall mean the communication of a literary or artistic work to the public, including its making available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them. The performance shall include in particular:

(a) The public recitation or dramatic performance of the work by any means or process;
(b) The public exhibition of the original or copies of a work of art;
(c) The broadcasting, that is, the dissemination by wireless means, such as radio or television broadcasting, either by wire or by any analogous technical mechanism, of sounds, images, texts or messages of the same nature.

(2) The broadcasting of a work towards a satellite is placed in the same category as a performance, even if the said broadcast is made outside the national territory, if it has been made at the request, on behalf of or under the control of a communication enterprise with its main place of business on the national territory."

However, the majority of the relevant national laws do not devote a separate article to the topic and prefer to include it with the right of reproduction in a single article entitled "economic rights" (for example Article 17.1(a) of the relevant law of Angola; Article 4(2) of the law of Benin, the above-mentioned Article 7.1 of the relevant law of Botswana, Article 16 of the relevant law of Burkina Faso, Article 28(1)(b) of the relevant law of Cape Verde, Article 5 of the law of Ghana, Article 4 of the law of Mauritius, Article 7 of the law of Mozambique, Article 5 of the law of Niger, etc.). Despite this general spirit of concision that emerges from the inclusion of the two prerogatives in a single provision, the relevant African

[77] Article 10 of the WPPT provides that "performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them."

laws enumerate in as detailed a way as possible the acts subject to the control of the rights holder in the guise of the right of performance. In addition, they most often end this enumeration with wording tending to indicate that the possibilities with terms of performances are not listed exhaustively. This is for example the case with the relevant law of Tanzania, Article 9(d) of which speaks of the "public exhibition of the work", followed by "public performance of the work" in 9(g) and finally "other communication to the public of the work" in 9(i). This is also the case with several other texts which end with wording similar to the "communication of the work to the public by any means or process whatsoever" or "any other means" (for example Angola (the above-mentioned Article 17(1)(a); Cameroon (the above-mentioned Article 16(1)(a), etc.).

The understanding of the right of performance must not be different when the law has merely evoked, without further detail, the "public performance right". In the logic of the body of these texts, the aim is to manage to submit to the control of the rights holders any means utilized to communicate the work to the public.

With regard to the right of performance, the restrictions for teaching are less numerous than those affecting the right of reproduction. They involve:

- The direct communication of the work to the public by means of performances before a school audience;
- Dissemination by means of radio or television broadcasts of the work fixed;
- Transmission of the work by digital means, that is, the making available of the work to a school audience via the Internet.

2. Neighbouring rights affected by the exception or limitation for teaching

When a country protects neighbouring rights, the prerogatives affected in this regard by the exceptions and limitations for teaching are based on the model applied to the copyright owners. Given that the rights recognized for the auxiliaries of creation, namely the performers, the audiovisual communication companies and the producers of phonograms and videograms, are based on those of the copyright owners, it is logical that the exceptions should affect similar prerogatives.

Thus, the economic rights recognized for the various beneficiaries of neighbouring rights are concerned by the exceptions and limitations.

As far as the performers are concerned, what is involved is the right of communication to the public of their performance, including the making available to the public, by wire or wireless means, of their performance fixed on phonogram, of the right to the fixation of their unfixed performance, of the right to the reproduction of a fixation of their performance, of the right to the distribution of a fixation of their performance, via the sale, exchange or rental to the public, of the right to the separate utilization of the sound and image of the performance, when this has been fixed for both the sound and the image. It also involves all of the prerogatives they often enjoy with regard to the exploitation of their performances by broadcasting organizations. Indeed, some laws specify that, unless stipulated otherwise, the broadcasting authorization granted to an audiovisual communication firm is personal and does not imply the authorization to reproduce the fixation; finally, the authorization to fix the performance and reproduce such fixation does not imply the authorization to broadcast the performance using the fixation or its reproductions. We can see this in the relevant laws of

Benin (Articles 60 and following), Cameroon (Article 57), Chad (Article 98) and Ghana (Article 32).

For the producers of phonograms and videograms, what is involved is the right of reproduction, the right of making available to the public via the sale, exchange, rental or communication to the public of the phonogram or videogram, including the making available to the public by wire or wireless of their phonograms or videograms (for example, Article 65 of the law of Benin, Article 25 of the law of Botswana and Article 93 of the law of Congo).

For audiovisual communication firms, what is involved is the right to rebroadcast their programs, fixations of their programs, the reproduction of their programs as well as the communication to the public of their programs by a means other than the broadcasting and the making available to the public of their programs by sale, exchange or rental (for example, Article 65 of the law of Cameroon, Article 111 of the law of Chad, Article 33 of the law of Ghana and Article 17 of the law of Zambia.)[78]

Special emphasis should be placed on two aspects. The first pertains to the right of making available, recently recognized by the WPPT. It is important to give thought as to whether, in the case of an exception or limitation foreseen by a national law, the right of making available can be cancelled for the benefit of teaching. This question is important because this right enables those who benefit therefrom to block access to the protected subject matter and to make such access contingent upon the payment of compensation via an accepted means on the Internet.

Legally speaking, the answer to this question is clear: given that the limitations and exceptions affect the rights opened in the form of neighbouring rights or related rights, no prerogative can be excluded. Following this logic, both the right of making available and the other rights are affected by the restriction for teaching.

From a practical standpoint, the situation is not as easy, for it is impossible *a priori* to know whether use will be made in conjunction with an exception or in other circumstances. As we can see, the problem raised by the right of making available comes under the general issue of the technical control measures governing access to the protected subject matter. This question is of paramount importance and will be examined subsequently.[79]

The second aspect concerns the right which broadcasting organizations enjoy with regard to their programs, notably the right to fixation or rebroadcasting, in relation to radio stations which are sometimes located on the campus of secondary or higher educational establishments and often called “campus radio”. A distinction should be made depending on whether or not the broadcasts serve an educational purpose. In the former case, the campus radios should enjoy the right to broadcast programs or fix them with a view to rebroadcasting them at a time when the pupils or students of the school or university concerned are likely to be free to listen to them. In the event that the programs aired by broadcasting organizations do not serve an educational purpose, campus radios should not enjoy any such rights and should

[78] The point should nevertheless be made that the law of Zambia makes no formal distinction between copyright and neighbouring rights. Indeed, the same Article 17 foresees rights to literary or musical works, rights to audiovisual works and sound recordings, rights to artistic works and rights to broadcast programs and typographic compositions.
[79] Cf. below.

have to pay royalties to the audiovisual communication firm which holds the rights for broadcasting them either live or on a pre-recorded basis.

F. Acts authorized in conjunction with exceptions and limitations

The African legislators (Appendix VII, Angola, Burkina Faso, Cape Verde, Côte d'Ivoire, Congo Brazzaville, Ghana, Malawi, etc.) primarily rely on the term "use", which is sufficiently generic to encompass the reproduction, performance and transformation of the work,[80] provided that the educational purpose remains constant and that the acts that come under such use do not cause any unreasonable prejudice or conflict with a normal exploitation of the work. In this logic, recognition of the principle of the existence of the exception or limitation for education must not be called into question by the digital nature of the work or the presence of the work on digital networks. At the most, adjustments could be made to the exception or limitation in order to take specific risks into consideration. With the benefit of these clarifications, the acts of reproduction authorized in national laws come under reproduction, transformation or performance.

1. Reproduction

Acts relating to reproduction are more likely to be carried out in conjunction with the use of works for teaching purposes. Within the framework of educational activities, several types of reproductions are performed on a daily basis, most of which come under reprography. However, other types of reproductions are also performed.

a) Reprography

Reproductions which come under reprography are the most common in an educational setting. This is no doubt why many national laws foresee special treatment in this respect. For example, Article 13(iii) of Annex VII of the Bangui Agreement on the one hand, and Articles 21 and 45 (paragraphs 2) of the relevant laws of Benin and Madagascar provide, in virtually identical language, that it is possible "to reproduce by reprographic means for teaching or testing in educational establishments whose activities are not directly or indirectly for financial gain, and to the extent justified by the purpose, separate articles lawfully published in a newspaper or periodical, short extracts from a lawfully published work...".[81] This specific regulation of reprography can be justified by the frequent recourse to this mode of reproduction, and is intended to specify which acts are authorized.

For example, the reproduction of a complete article published in a review, newspaper or periodical is permitted. In this case, the article, although it constitutes a complete work in itself, is incorporated into a compilation of other contributions, making it an extract from the said compilation. *A contrario*, it is clear that if an article is sufficiently long to constitute the exclusive content of the newspaper or periodical, this logic no longer applies. The issue of the review must be considered as a whole, and the reprographic reproduction may only cover an extract. Consequently, we can understand that for a work, the right to make reproductions using reprography is limited to extracts.

[80] It should however be noted that some texts, after having used the term "to use", specify the various possible uses of the work with a view to curtailing the scope of the exception.
[81] Article 206.2 of the relevant law of Rwanda runs along similar lines.

In any case, the tendency, as we shall see, is to limit reproduction using reprography. Sometimes, the law itself contains a provision constituting a veritable warning for actors in the educational sphere. For example, the relevant law of Cameroon provides that the exception for private copying does not in any case authorize the reprographic reproduction of an entire book. Such a provision reflects the lawmaker's concern to safeguard the interests of the rights holders while granting third parties the right to benefit from an exception. Sometimes it is a licensing contract between a society of authors and educational institutions that determines the scope of reproduction using reprography or a similar means. For example, the convention proposed by the Mauritius Society of Authors (MASA), the Copyright Society of Malawi (COSOMA) and the Reproduction Rights Society of Kenya (KOPIKEN) contains the following clauses relating to the delimitation of the reproduction authorized:

"For each employee, student, etc. reproduction from a single book or similar publication is limited to 15% of the total number of pages. However, an entire chapter or similar unit, an entire short story, or an entire scene of a play may be reproduced from one and the same publication.

The extent of reproduction from a single book or similar publication that is no longer available commercially or directly from the publisher is limited in corresponding fashion to 30%. Before the right to reproduction beyond the limits set in Section 8 (21) (e) above is exercised, the university must write to the publisher and satisfy itself that the particular publication cannot be obtained within a reasonable time by means of publishing on demand or a similar method.

The limitations set forth in Section 8 (21) above do not apply to reproduction from periodical publications such as newspapers, weeklies, learned or professional journals, etc., nor to reproduction from brochures or other publications intended for publication free of charge. Nonetheless, reproduction from any single issue of a learned (scientific) journal is limited to two articles for any given end user per year, and must in no case exceed 25% of the total number of pages in that issue of the journal.

The extent of reproductions from sheet music (a score or similar publication of a single musical work) and from collections of sheet music (collections of the scores of two or more musical works) is limited to 15%, but with a maximum of 10 pages from each separate publication. However, it is permitted to reproduce one whole movement or similar segment from sheet music for use in instruction in music theory."

We can therefore understand that the complete reproduction of a work or a substantial part thereof is only permitted in very specific cases, when the means used is reprography or a similar process. On the whole, only a relatively small percentage of the works can be reproduced under the general reproduction license. If the institution wishes to make large-scale reproductions, it is urged to ask the collective management body to facilitate the signing of a contract with the rights holders.

The actual means of reprographic reproduction is itself another centre of interest. In some national laws, such as that of Angola, what is covered is reproduction by photographic means or analogous processes. Photography is generally presented as the technique which makes it possible to create images through the action of light. Photocopiers are indeed tools which rely on this technique, insofar as the pages placed on the glass surface are "photographed" and reproduced on paper. This restriction leads us to consider the extension of the exception to the printing of a text file initially in digital form and the use of scanners. The answer is clear in

the latter instance: the machine on whose glass surface the document is placed films and digitizes it then transmits the information to the user's computer. In the former instance, it is clear that if we wish to remain within the strict limits of the definition of reprography, we cannot include the printing of an originally digital text, because "a machine (the printer) is given technical instructions to darken the paper at specific points. In this instance, the reproduction does not involve any light capture."[82] Yet the result is virtually the same: in one instance, the original of the work is materially available in the user's hands, while in the other it appears on his computer screen. He can photocopy or scan all or part of the work, just as he can print out all or part of it. And at the end of the process, he has obtained printed copies of the work. Consequently, we may reason by analogy with these two modes of reproduction and say that the rules applicable to reprography should apply to printing.

b) Other forms of reproduction

Several other forms of reproduction are likely to be used in a school setting. For example, if we consider works of visual arts, these are likely to be reproduced by means of photocopies, the making of manual copies, etc. In this respect, it is clear that the principle of reproduction for the needs of teaching cannot be called into question. In art schools or in art courses taught in general schools, such works must necessarily be reproduced to be studied, and such reproduction must be in full. If it were fragmentary, it would no longer resemble the original and would without any doubt misrepresent what the author of the work reproduced was trying to say.

In the context of distance learning, we may ask ourselves whether a teacher can upload a work on networks so that learners can download it to learn their lessons. This query can be answered in the affirmative. Moreover, such downloading is generally only done in a clear framework, in which learners can only access the lessons and documents placed at their disposal once they have identified themselves by means of a user name and a password.[83] We can therefore understand that the teacher would be overstepping the bounds of the exception if he were to upload the work in such a way that it could be accessed by any Internet user.

A number of national texts authorize the insertion of works in a publication or anthology. In the first instance, recourse to the work makes it possible to illustrate a "publication" prepared in a teaching context. We should no doubt take this to mean that the work or an extract thereof is incorporated into a new work published in a school setting. This would be the case for example if extracts from the work were included in duplicated lecture notes or if a photograph or drawing were reproduced in such notes. Moreover, some texts stipulate that the "publication" must specify that it is for teaching purposes. This is the case for example with the relevant laws of Swaziland and Zimbabwe, where a publication including extracts must itself indicate that it is meant for teaching purposes or where this must be indicated in any advertising document from the publisher.

The second case is a distinctive feature of the law of the Democratic Republic of Congo. According to Article 25 of this law, "with a view to illustrating a text, the reproduction of

[82] P. Laurent, *Les nouvelles exceptions au droit d'auteur en faveur de l'enseignement : l'ère de* l'e-learning, Auteurs & Media 2008/3, p. 180.

[83] Moreover, Mr. Garnett supplies elements of a technical nature which lead him to conclude that "it is relatively easy to conceive of a technical control system that would mesh perfectly with the regulations flowing from copyright legislation." Cf. N. Garnett, study previously mentioned, p. 104.

photographs in anthologies for teaching purposes and for inclusion in scientific works shall be authorized." It is easy to understand that legislators wished to facilitate the reproduction of photographs when they are necessary to illustrate the text of a literary work intended for teaching. What is less easy to understand is the reference to anthologies for teaching. In fact, according to general copyright principles, an anthology can only be prepared if the authors of the various works brought together have given their consent. In this case, the author of the anthology is protected because he has shown originality with regard to the choice and arrangement of the contents. Consequently, if an anthology is to be prepared for teaching purposes, the author of such a work should secure the consent of the various rights holders. Furthermore, there is no valid reason why the rights to photographs must be sold so cheaply. How should we interpret the relevant Congolese law? The only approach that can lend it meaning consists of saying that all anthologies for teaching purposes are covered by the copyright limitation. Yet this would make the protected rights very cheap indeed. In this respect, the relevant law of Swaziland contains a provision that could provide a basis for an amendment of the Congolese law. Indeed, this law includes a provision which, at first sight, recalls that of the DRC. It refers to the publication of the work in a collection, while specifying that such a collection must primarily consist of unprotected works and that the only works likely to be incorporated in such a collection are literary works, which in the final analysis is but a special arrangement for the insertion of the work in a publication, as examined above.

Even the reference in the Congolese law to scientific works is not above criticism. What type of work is not scientific in an educational context? Brochures, folders and other documents setting out the elements of a course in a simplified, succinct fashion may well be considered "scientific works" in the field of education, even if they differ from more elaborate creations.

In addition, many national laws cover the insertion of works in a sound or audiovisual recording or in a broadcast.

In the first two instances, the teacher may make a recording to teach the lesson by means of a phonogram or videogram made available to the learners. This is the situation with distance learning and even face-to-face learning in some cases. For the preparation of this type of medium, the law authorizes, in conjunction with the exception for education, recourse to the protected works of third parties. For example, for a phonetics class, an audiovisual work consisting of a *vox pop* made by a broadcasting organization may be taken up in full or in part with a view to teaching pupils how to pronounce words. Likewise, for a history class, a sequence filmed or recorded at the time of the facts or following a simple staging or reconstitution can be inserted into the commentaries prepared by the teacher.

In the last case, the protected work is incorporated into a radio or television broadcast. The broadcasting arrangements are not important. Insofar as the teaching can be provided to students via face-to-face teaching or distance learning, the material can be aired live or pre-recorded, by Hertzian wave or cable, or even via the Internet for a number of identified, known learners.

The question may arise with regard to a change in the format of a work. Does this constitute a reproduction[84] likely to be covered by an exception or limitation for teaching? This is a difficult question. In one sense, the change in format does not entail any risk and can therefore easily fall within the purview of the restriction for teaching. This would for example be the case with a work originally in digital form that was printed on paper. Conversely, when a work originally in analog form is digitized, its new format opens up possibilities that did not exist in the original form. In this instance, it is no doubt appropriate to propose a two-tier solution: if digitization in itself is necessary for the lesson, it may be classified under the generic terms "of illustration" used by most of the national laws. However, if digitization is but a means of which only the outcome is used for the illustration of teaching, things are not as clear-cut. Indeed, if digitization is performed by the teacher or student, it could well be considered as a reproduction made for private purposes. Yet this is precisely the problem: a private copy can only be used for private purposes. It should not be used in a public setting such as teaching. However, digitization may be an essential technical stage for making the work or extracts thereof available to the learners in analog form. Here, this would imply that digitization is a means, not an end, and that the objective of illustrating teaching can continue to take precedence over any other consideration.

However, if digitization makes the protected work available to learners in digital form, this implies that the dangers inherent to this form of exploitation of the work must be taken into consideration, leading to an obligation to solicit the agreement of the beneficiaries. Moreover, if we look at some conventions which have granted licenses to educational establishments on the African continent, we see that these specify that the license does not extend to digital reproductions. Thus, we can read in the agreement proposed to institutions of higher education by the Reproduction Rights Society of Kenya (Kopiken) relating to the reproduction of the works protected by means of photocopying and analogous modes of reproduction that the agreement does not cover the utilization of digital copies, whether it be for on-screen display, transmission over a local or external network, communication to e-mail addresses or storage on a platform, a diskette, a CD-ROM or a similar medium. On the whole, the agreement specifically prohibits the making of digital copies in conjunction with teaching. Consequently, if an institution of higher education wishes to make such reproductions, it must solicit the consent of the rights holders.

Nevertheless, it is clear that if legislation is adapted, one can imagine that such reproductions may be made under a license which takes into consideration the dangers of counterfeiting and the virtual certainty of a conflict with the normal exploitation of the work.

2. Transformation

Transformation is generally understood as the adaptation of a work. It consists of creating a new work, based on an existing one, with no input from the author of the existing work. To put it simply, transformation leads to the creation of a second-hand work known under the name of the work from which it is derived. In the context of a limitation or exception for teaching, very few national laws specifically cover acts relating to the transformation of the work in conjunction with teaching activities.

[84] The change in format (digitization of a work hitherto presented in an analog form, execution in two or three dimensions of a work hitherto presented in three or two dimensions, etc.) constitutes a reproduction. On this question, see F. Pollaud-Dullian, *Le droit d'auteur*, Economica, 2005, No. 723, pp. 473 and 474.

On the whole, the power to make a transformation comes rather from the general nature of the language used by the law. Indeed, when the law refers without clarification to the right to use works by way of illustration for teaching, it is clear that the said use can consist of the transformation of the work, if such a transformation is part of the normal activities of the educational establishment where it is effected.

Nevertheless, some texts grant the right to make translations. This is the case with the relevant law of the Central African Republic. A key distinction should be made with regard to translations. A distinction must be made between translations made in conjunction with teaching and translations which are merely used in a teaching setting. In the first instance which is examined here, translation is itself viewed as an activity which comes under the field of education. This is the case when, in translation or interpretation schools, students learn the techniques of adapting a text from one language to another. This is also the case when, as part of the language learning process, pupils or students are given texts to translate. In any event, the exception extends to the activity of translation when it constitutes "use" of the work in conjunction with teaching. This implies that an explicit provision to this effect might not be necessary. If the text speaks of the "use" of a work in conjunction with teaching or of recourse to a work by way of illustration for teaching or of adaptation, this should suffice. In the second case, the work used in conjunction with teaching is already a translation. The question of applying the exception is posed in the same terms as with all other works.

3. Performance

In the context of academic activities, performances of works of the mind are staged to illustrate lessons. In this instance, such performances are covered by the exception or limitation contained in the law. However, stating that performances staged in conjunction with teaching are for the illustration of lessons implies that we are excluding from the scope of this restriction performances put on "for purposes of recreation or play", which would mean that school fêtes and other year-end events are no exception to the normal rules of literary and artistic property.[85]

Most national laws foresee a specific provision in this respect, alongside the general exception which relies on the concept of "illustration for teaching". This is the case with the laws of Angola, Benin, Cape Verde, Cameroon, Central African Republic, Ghana, Madagascar, Mali, Mozambique, Niger, Togo, Zambia and Zimbabwe.

The question which may arise is who must put on the performance: the learners, the teachers or third parties? Some laws such as that of Zambia stipulate that the performance must be staged by the staff of the educational establishment or by the pupils or students. Such a restriction needlessly curtails the scope of the exception for teaching, excluding both performances put on by third parties and communications effected by means of mechanical or electronic means. With regard to the former, the Zambian exception rules out bringing in professional actors to stage public performances even if the work performed is for educational purposes. Such an exclusion should be changed. It should be possible for a professional theatrical troupe to stage in connection with a class a dramatic work on the teaching syllabus in an art school or an ordinary school. With regard to the latter, the exclusion of indirect

[85] C. Alleaume, *Les exceptions de pédagogie et de recherche*, Communication – Commerce électronique, Nov. 2006, p. 14.

performances by means of a pre-recorded medium or via radio broadcast restricts the scope of the restriction even more, removing much of its substance. All forms of communication to the public should be accepted for purposes of illustration for teaching.

The relevant law of Zimbabwe (Article 25, paras 4 and 5) corrects this defect in the law of Zambia. While mentioning the fact that the performance must be put on by students or their teachers, it covers the case where such performances could be staged by third parties, requiring that in such cases the performance take place on the premises of the educational establishment. It also covers the case where the performance could take place by mechanical means, such as the screening of an audiovisual work, the playing of a phonogram or the airing of a broadcast.

The question of the modalities for communication to the public should also be examined. Indeed, does the exception for teaching also apply to performances put on for an audience that is physically present or does it extend to communications by mechanical means and to modes of communication relying on transmission? Some authors suggest that a broad understanding of the notion of "performance" depends on the wording of the law. For example, in the case of Belgium, the fact that the law covers the "performance" is interpreted as authorizing only a specific communication implying the unity of time and place, "which means that it must be staged in the presence of the audience brought together at the original venue and at the time of the communication."[86] In other words, such a "performance" covers the performance of works live by one or more performers (concerts, plays, recitations or any other event) or the screening or staging in public of works recorded on any medium (films, music, slide shows or PowerPoint presentations, etc.). This interpretation suggests excluding from the scope of the exception broadcasting (or rebroadcasting), namely communication to a person or audience not present at the place of origin of such communication, notably by means of radio broadcasting, as well as the making available of works on networks.

Although we can understand the exclusion of acts of making available which require the prior reproduction by the person making the work available, we cannot understand the exclusion of all transmissions. These must be included in the purview of the exception for teaching. Using radio and television broadcasts for teaching purposes is a long-standing tradition, and we must not subject such broadcasts to the systematic payment of royalties at a time when the communication sector is undergoing a clear revival.

Moreover, similar reasoning can be applied to countries which do not specifically provide that the exception for teaching should extend to at least some modes of performance. Indeed, a number of legislators have acted as though reproduction was the only means of allowing the utilization of a work for educational requirements. This is in particular the case with Burkina Faso, Côte d'Ivoire, Kenya, Tanzania, etc. Does the fact that these legislators have remained silent on the issue of performances on school premises means that such performances are subject to the payment of fees? The answer would have to be in the affirmative if we were to apply the law strictly. Moreover, given the rule that exceptions and limitations must be interpreted narrowly, it would be inadmissible to create an exception where the law has remained silent. What is more, if we rely on the stringent triple test foreseen by the international conventions, the absence of an exception in the law may be interpreted to mean that legislators considered that the situation envisaged did not constitute a "special case". This solution is satisfactory from an intellectual standpoint. If we were to follow it to its logical

[86] P. Laurent, mentioned previously.

conclusion, it would assume that the admission of performances in countries where legislators have remained silent requires an amendment to the law.

Such a solution would not be realistic. Even though the law does not specifically cover performances within the scope of exceptions or limitations for teaching, we should not completely exclude performances from its scope. In some texts such as that of Namibia or Côte d'Ivoire, the approach which consists of authorizing "use" of the work by way "of illustration for teaching", then specifying certain modes of reproduction to which such use refers (publication, radio broadcasts, recordings, etc.) can be interpreted as a means of covering both the reproduction and the performance, the most important factor being the purpose of the act carried out. When the law authorizes the insertion of the work in an audiovisual or sound recording or in a radio or television broadcast, it is to allow pupils or students to become familiar with the work, by means of a performance in a school or university setting.

When the law has not authorized "use" in general but has covered solely and precisely reproduction, any communication to the public is not excluded. Indeed, Botswana for example only refers to reproductions, as do Chad and Swaziland. However, these countries all allude to the reproduction of works on phonograms or videograms or broadcasts for educational purposes. Should we therefore conclude that only reproduction is permitted and that educational establishments must solicit the consent of rights holders for performances? The answer proposed above can apply in these cases: given that fixations are permitted on mediums intended by definition for communication to the public, it would be absurd to oblige the beneficiaries of these mediums to solicit agreements in order to become familiar with their contents.

4. Quotation

The exception of quotation is compulsory under the Berne Convention, which states straightway that it is lawful, unlike the general exception for the use of works in conjunction with teaching which is left up to the discretion of national legislations.[87] As a result, national legislators must foresee such an exception, which some IP specialists rightly describe as a subjective right for the benefit of the other authors.[88] In accordance with this direction imposed by the Berne Convention, the great majority of African national laws have incorporated this restriction on protected rights.

On the whole, the conditions required for quotations are the same in all countries.[89] Thus, quotations are understood as short borrowings made by an author from the work of another for purposes of instruction, criticism, argument, illustration, etc. From this commonly accepted meaning, it flows first of all that the quotation is a short borrowing from a previous work. In other words, the quoting author must, on the one hand, limit himself to the amount that is strictly necessary to illustrate or support his remarks. Specifically, brevity is a relative notion which can only be appreciated in relationship to the work from which the quotation has

[87] In the same vein, see L. Guibault, *Nature et portée des limitations et exceptions au droit d'auteur et aux droits voisins au regard de leurs missions d'intérêt général en matière de transmission des connaissances : l'avenir de leur adaptation à l'environnement numérique*, mentioned previously.
[88] A. and H.-J. Lucas, op.cit. No. 322 and following, pp. 260 and following.
[89] As a preliminary remark, it will be noted that there is unanimous agreement that only a lawfully published work available to the public can be quoted.

been taken. For literary works, it is easy to make a comparison: a quotation which makes it unnecessary to consult the work from which it is taken in principle exceeds the legal limits and constitutes a counterfeit. Even the need to avoid misrepresenting the intent of the author or giving a false picture of the work cannot entirely justify longer borrowings. However, the length of the original work may not allow a "brief" quotation in the etymological sense of the word. This is the case in particular with slogans and some poems.[90] In such cases, the work appears to form a whole in relation to which the other authors have only one option: either they quote the work in full, which comes down to competing with it, or they refrain from quoting it. This problem, which has no middle-of-the-road solution, is resolved to the detriment of the author of the first work: it is possible to quote a work in full, "provided that it is incorporated into a development that justifies the quotation."[91]

The relevant law of Cape Verde (Article 48.e) contains an original provision aimed at limiting the length of borrowings. It stipulates that borrowings must not be so long as to prejudice the interests of the work quoted. In other words, borrowings must not, because of their length, make it unnecessary for the person taking cognizance of the quoting work to consult the quoted work.

Moreover, saying that the quotation is a borrowing taken from a previous work presupposes that this work can be identified. This is why there is unanimous agreement that the quoting author must indicate the source of the quotation. The wording generally used in the law includes this requirement. Basically, it implies that the name of the author quoted, if this name appears in the source, must always be indicated, at the same time, for practical reasons, as the reference to the year and date of publication of the work. This reference must be visible, in the text or as a footnote, following the insertion of the quotation in quotation marks or italics.

If the work is anonymous or under a pseudonym, this requirement does not suffice. In the former instance, the quotation must be linked to a given work and to a specific publishing firm. In the latter case, there is no problem since the pseudonym leaves no doubt as to the real identity of the author. And even if such doubt were to exist, the quoting author should still mention the pseudonym and the source if this pseudonym appears in the source.

Next, the quotation is only accepted if it is made by an author. This requirement means that the quotation is in principle only lawful if it is incorporated in another work that is original in itself. Compilation of quotations would be more of an anthology and as such would be subject to copyright. Consequently, someone who prepares a compilation of quotations must seek the authorization of the holders of the rights to the various works which have provided the material for the said compilation.

As a result, the work into which the quotations have been incorporated must have its own features. It must be able to survive the deletion of the quotations, which could not be the case with an anthology or compilation of selected bits. The relevant laws of Uganda and Burkina Faso provide cogent examples in this respect. The former provides in Article 15, paragraph

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[90] For example, this is the case with the Chinese poem : *"The wind arrives from here and there, rippling" (Tu Fu)*, quoted by Mr. Vivant, *Pour une nouvelle compréhension de la notion de la courte citation, J.C.P. 1989, I, 3372*.

[91] F. Pollaud-Dullian, *Exercice des droits d'auteurs,* Juris – classeur, Propriété littéraire et artistique, fasc. 371, No. 60.

1(b) that a quotation is authorized in a published work if this quotation is "*used in another work*". As for the latter, it stipulates in Article 22 that "quotations (must be) justified by the critical, polemical, instructional, scientific or information nature of *the work in which they have been incorporated*". The same wording is taken up in Article 67, para 1(c) of the corresponding law of Cameroon.

Finally, the quotation is only lawful if the borrowing made is for purposes of criticism, teaching, science or information[92] in the work in which it has been incorporated. To take up the learned expression of Desbois, "borrowings are free on the conditions that they serve as a document and argument in support of personal development."[93]

Apart from these traditional conditions, or to avoid listing all of them, some texts stipulate that the quotation must comply with fair practice. This is the case with the law of the Central African Republic, Mozambique, Niger and Senegal. In the spirit of these texts, the point, as Professor Colombet sums up using a formula based on Italian law, "to avoid competing with the economic use of the work from which one is borrowing."[94]

Complying with the requirements of quotations used in conjunction with teaching precludes the preparation of compilations of short extracts with a view to their distribution to students. Given that such extracts constitute an anthology, the consent of the various authors must be secured. In these conditions, we must take a closer look at the system of extracts from works and articles of doctrine often photocopied and compiled in the form of sheets (what the Anglo-Saxon countries call *course packs* or *study kits*) and made available to learners by teachers and school or university administrations, particularly in the context of practicals or exercises. Clearly, such extracts do not meet the conditions for quotations. Consequently, in order to verify their lawfulness, they must be tackled under the angle of the general exception or limitation for the benefit of teaching.

Granted, the main problem that quotation poses today for jurists is not so much the understanding of the conditions for its implementation as the fields of intellectual creation it is supposed to cover. In other words, can one quote in a field other than the literary sphere?

Some African laws stand out because of their clarity with regard to this issue. Several laws evoke quotations in fields other than that of literature. This is the case with Angola and Cape Verde. According to the texts of these two countries, one can quote short fragments of written, sound or audiovisual works for the various purposes mentioned above. Namibia and South Africa follow the same logic, including both literary works and musical works within the purview of quotation. The same holds true for Ghana, which extends it to performances, phonograms, audiovisual works and radio broadcasts.[95] Finally, with regard to the field of the quotation, the relevant law of Tanzania adopts the most open approach: it tolerates quotation in general, excluding only computer programs and architectural works.

The present study does not offer an appropriate forum for opening up a reflection on the difficulties raised by quotation in fields other than that of literature. The point shall merely be

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[92] The law of the Democratic Republic of Congo adds that the quotation may have a cultural purpose.
[93] H. Desbois, *Le droit d'auteur en France*, 3rd edition, Dalloz, Paris, 1978, No. 248, p. 314.
[94] C. Colombet, *Grands principes du droit d'auteur et des droits voisins dans le monde*, op.cit., p. 58.
[95] However, the relevant law of Ghana stipulates that the quotation shall consist of short borrowings intended for the public's information.

made that if, for the use of a work in conjunction with teaching, the actors are not able to meet the rather demanding requirements of quotation, they should refrain from invoking this technique in order to hide behind the general exception or limitation for teaching.

But what about laws such as those of Kenya, Nigeria and the Seychelles, which do not make any allusion to quotation? Does the fact that legislators have remained silent mean that quotation is forbidden by the national law of these countries? This question cannot be answered in the affirmative. Given that the Berne Convention considers that quotation is an imperative exception, the fact that a national legislator remains silent has no real impact on the benefit of this exception for nationals of the member States of the Union. In other words, no national of this Union should be prosecuted for counterfeiting for having made a quotation whereas this was not covered by national law.[96]

G. Activities covered by the exceptions and limitations

The activities covered by the exceptions and limitations for teaching flow from the wording used to present restrictions. On the whole, what is covered is the use of the work or the protected subject matter with a view to “illustrating” teaching. This implies that in reality, virtually all of the activities carried out in conjunction with teaching are covered by the restriction.

One must first of all consider the *preparation of the lesson.* The integration of the lesson in the sphere of the restriction for teaching is open to discussion. When a teacher prepares his lesson, he is still engaging in an activity that is more or less private. For example, when he conducts documentary research, there is no guarantee that he will use all of the compiled documentation for the lesson. At this stage, his behaviour cannot be interpreted unequivocally. This conclusion can be maintained, even if the teacher conducts research in the field in which he is used to intervening or teaching or for which he has been assigned teaching responsibilities by the governing bodies of his institution. This means that only the incorporation of the documents assembled in the lesson provided to students makes it possible to include, *a posteriori*, the activity of preparing the lessons within the framework of the exception for teaching, provided that the activity of assembling the documentation does not itself constitute counterfeiting. In the majority of cases, this activity is covered by either the exception for private use or by the exception for researchers carrying out projects of their own.

One aspect of this preparation, if we take a broad view, can however easily be incorporated in the scope of the exception for education: the one concerning meetings of an academic nature, such as meetings to discuss programmes, meetings to allocate classes and teaching, etc. During these meetings, which represent the collective stage of putting in place the conditions to prepare lessons, copies of protected works or performances of such works may be made. Such reproductions and performances must be considered as an integral part of the scope of the restriction, given that they come under the heading of educational activities. Nevertheless, if the law of the country in question limits certain acts to face-to-face teaching,

[96] It is worth recalling the wording used in Article 10, para 1 of the Berne Convention : “It shall be permissible to make quotations from a work which has already been lawfully made available to the public (…)”. This wording appears to be addressed to both the legislators and judges of the member States of the Union.

none of these acts may be performed in the context of such meetings, unless the institution has signed a license granting it the corresponding right.

Next, we must consider *face-to-face teaching*, where learners are in the teacher's presence. Restrictions for teaching mainly cover this activity. If such an exception had not existed, the exception of reproduction for private use would not have allowed use in a school setting insofar as such use is necessarily collective. Nor would it have covered performances in the family circle insofar as the school community may not be put in the same category. Consequently, the exception or limitation for teaching is truly unique, which makes it very useful. In the context of such teaching, the teacher has the power to make relatively free use of the work. National texts generally speak of "illustration for teaching". Such illustration may take different forms: a pure and simple performance or a commentated performance of the work may be staged; a reproduction of the work may be recommended; extracts of the work may be quoted, etc, the purpose being that the work must be used to "illustrate" the lesson.

A fundamental requirement flows from this affirmation: the work may only be used to illustrate a lesson which is expected to stand on its own. This presupposes that the teacher has created a lesson that could stand on its own as a work of the mind, independently of the work used to illustrate it.

It is clear, however, that in certain cases, the lesson will focus almost exclusively on the work of the mind itself. In art schools for example, the dissection of the different artistic styles of the painters studied necessarily depends on the use of a work as the sole subject matter for lessons. Similarly, computer schools may have to devote entire lessons to programs created previously.

Finally, we must consider *distance learning*. Basically, this form of teaching "consists of offering instruction by means of one or more analog or digital telecommunications technologies to traditional or non-traditional students or pupils who are separated from the instructor by distance and/or in time. The characteristic of distance learning is not so much the remoteness but rather the utilization of a technology making it possible to provide instruction in class, in a library or in a computer lab on a college or university campus, in student housing, a workplace or another site that is physically distant from the site from which it originates on a campus. The instruction may be imparted live or asynchronously, by video or text, via multimedia or through a combination of various means. It may be interactive and can enable students to earn credits in conjunction with the preparation of a training qualification or diploma or continuing education, to improve their job prospects or simply to enhance their personal development."[97] Distance learning uses both basic and state-of-the-art telecommunications technologies to meet students' means: unidirectional or interactive unscrambled or encrypted broadcasts, transmission via cable or satellite, fibre optic links and hyper frequencies, CD-ROM, Internet, etc. The question which may arise here is whether the exception extends for the same content to this form of teaching. Any hesitations may be justified in both the analog and digital worlds. In the former, complete written documentation is sent to teachers by mail. In the latter, the networks serve as the mode of transmission for documentation. In both cases, use of the work sometimes necessitates prior reproduction or

[97] L. Guibault, *Nature et portée des limitations et exceptions au droit d'auteur et aux droits voisins au regard de leurs missions d'intérêt général en matière de transmission des connaissances : l'avenir de leur adaptation à l'environnement numérique*, quoted above.

fixation, which impacts on two rights of exploitation the right of reproduction and the right of performance.

On the African continent, only the relevant law of Zimbabwe, which was repealed in 2000, featured specific regulations governing distance learning. At present, no text in force refers to such learning.[98]

Nevertheless, the fact that legislators have remained silent should not be interpreted as a desire to exclude distance learning. In countries where the law speaks of "use of works by way of illustration for teaching" without specifying the modalities for such use or the various types of teaching covered, we may attempt to transpose the existing legal standard to distance learning, in particular Internet learning. Under these conditions, we can reaffirm that educational institutions have the faculty of using protected works to illustrate the teaching offered to their distance learners. However, it will be noted that the law is not entirely suitable and that it should be amended to ensure that it is more appropriate for the Internet context.

In this connection, US legislation offers a service which is likely to inspire African legislators. In 2002, the United States of America[99]adopted a noteworthy model for regulating the use of digital technologies in the context of distance learning. This model confirms that truly and simply transposing the exceptions and limitations approved from the analog world to the digital world would be an imperfect solution.

As became clear when the amendment to article 110, paragraph 2 of the relevant United States Law of 1976 was adopted, adapting the exception for teaching to the digital technologies used for distance learning assumes that provisions will be incorporated to limit the omnipresent risk of counterfeiting to a minimum. Finally, the definitive amendment, known as the Technology, Education and Copyright Harmonization Act (TEACH), introduced such innovations as new guarantees to offset the new risks for copyrights holders, the broadening of the categories of works covered by the exception[100] and the redefinition of the conditions in which approved non-profit educational establishments may use works protected by copyright in distance learning -- including on Websites and by other digital means - without having to obtain the consent of the copyrights holder or pay a fee. Among other guarantees, the TEACH Act provides that learners may consult each study module within a certain time frame. They may not store the works or extracts at their disposal or come back to them later in the school year. Teachers may include protected works in the modules but generally only in the form of extracts or in conditions analogous to those of teaching and traditional courses. Certain acts, such as scanning or downloading entire or long works stored at a Website so that students can access them throughout the semester in question, are not

[98] It is true that the new Zimbabwean law envisages in Article 25, para 2 the communication of the test to candidates. We may therefore ask ourselves whether the legislator did not intend to incorporate into the field of the exception the case where, in a distance learning setting, candidates would be called to receive their test subjects by some means of transmission. If the answer is in the affirmative, the said transmission would then be one of the activities covered by the exception.

[99] US legislation follows the same logic as the European Directive on the information society, a summary of whose grounds invites Member States to take due account of the considerable economic impact that the exception is likely to have when it is applied to the new electronic environment, so that finally, the scope of application of this exception should be even more restricted in the case of these new uses than for the traditional environment.

[100] In addition to the non-dramatic literary and musical works already covered, the TEACH Act include short extracts from films among the works concerned by the exception.

permitted without a special licence, even if such acts are carried out for purposes of private study linked to formal teaching.

In this context, we can understand that technical measures are associated with the works placed online, even when they have been created to serve as teaching materials. Moreover, Mr. Xalabarder[101] considers that the second and third stage of the triple test can only be satisfied if educational institutions take technical steps to ensure that the works made available to a school audience will not be used for other purposes and make fair payment based on the type of act to be carried out by the learners, their number, etc.

Some of these restrictions may appear overly stringent for African countries, whose populations are relatively poor. Notwithstanding, to minimize clashes between rights holders and educational institutions, legislative frameworks must be adapted. Failing this, licensing agreements between rights holders and educational institutions can offer an alternative solution.

Finally, we must give thought to the *various tests* carried out in a teaching context. Several of the texts specifically refer to this point: the relevant national laws of Madagascar, Mozambique, Niger, Zambia and Zimbabwe. On the whole, the French-speaking African countries have relatively little to say about the use of works for testing, merely authorizing the reprographic reproduction of works for this purpose without providing further clarifications. The English-speaking countries in Africa however offer more explicit wording that reflects the reality of school and university testing. According to article 21, paragraph 1(f) of the relevant law of Zambia, the work or extract from the work used for testing must be either a part of the test which the candidate must sit or part of the answer proposed by the candidate. In fact, tests most often reflect the personal view of the teacher who has compiled them. They rarely consist solely of protected works. Even when a text commentary is involved, it often forms part of a body of compulsory or optional subjects. And when a text is itself the test, it is most often a short extract or an entire short work taken from a compilation. Moreover, the duration of the test limits the volume of borrowing from the protected work. Even the relevant law of Zimbabwe, Article 25, paragraph 2 of which provides that any act carried out in relation to a protected work for purposes of preparing testing subjects, communication of the test to candidates and answers to the said subjects is covered by the exception,[102] must not be interpreted as allowing actors in the educational sphere to go beyond these limits.

H. Beneficiaries of the exceptions and limitations

It is not difficult to identify the beneficiaries of the exceptions and limitations for teaching purposes. Given that the framework is clearly delineated, we can guess that it is the institution itself if a legal entity is involved, as well as the persons who drive it and enable it to fulfil its mission, namely, the teachers and the learners.

[101] R. Xalabarder (2004), *Copyright exceptions for teaching purposes in Europe* [online working paper]. IN3:UOC. (Working Paper Series: WP04-004), *http://www.uoc.edu/in3/dt/eng/20418.html*.
[102] However, the making of copies of music scores with a view to their performance during testing is excluded from the scope of the exception.

1. Institutions

Obviously, educational institutions are the primary beneficiaries of the exception for educational activities, as they are the ones who provide the framework for recognition of the exception. If an institution is not recognized as part of the educational field, this constitutes an impediment which prevents it from applying the exception for teaching.

More particularly, if we say that educational institutions benefit from the exception for teaching, this implies that they are not *a priori* liable to be sued for infringement because they have allowed the use of works on their premises. This rule applies even if the institution has provided the necessary material for the use of works. For example, the institution is by no means liable simply because it has provided teachers and learners with the equipment used to reproduce works, such as photocopiers or CD-ROM/DVD burners. The same holds true if the establishment places a free Internet connection or equipment to reproduce or transform the protected works at the disposal of the educational community.

Moreover, the relevant law in Angola goes even further. In article 29(b), it authorizes public libraries, non-commercial documentation centres, scientific institutions and educational establishments to make their own reproductions by photographic means by or a similar process, provided only that the number of copies does not exceed the amount necessary for the extent of the purpose. Consequently, the Angolan exception for education is one of the most generous because it expressly grants the institutions in question a power which other legislations do not envisage. By doing so, it makes it possible to resolve so to speak the problem of the unavailability of the documentary resources, whereby a library may make copies for a more or less large number of persons in order to preserve a single available copy . However, it must be pointed out that the triple criteria may come into play, limiting the exception to proportions preventing its use from prejudicing the protected rights.

The logic is the same when the institution supplies the premises used for performances or discussions among teachers requiring recourse to the protected works. In short, the institution is not liable simply because it has actively contributed within the framework defined by the national law to the use of works for the purpose of teaching.

Some national laws, such as those of Kenya and Nigeria, require that the benefit of the exception be reserved for approved educational institutions. The requirement of consent raises an interesting point: does such consent concern the existence of the institution or the use of works? If we consider that consent is required for the use of works by the educational institution, this means that in reality, such consent imposes restrictions on the institution. It becomes an instrument allowing the authorities in charge of copyright and neighbouring rights to set the conditions for the use of works. To put it simply, if this approach is adopted, consent could become a license disguised under another name or a text containing guidelines for the use of works. This is why the first interpretation must prevail. Moreover, the relevant law in Kenya, which is particularly explicit in this regard,[103] provides that the institutions which may benefit from the exception are schools which have been registered in accordance with the Law on Education and Universities and have been established by means of a written text. This tends to indicate that the consent referred to must be appreciated in accordance with the laws relating to teaching, not in relation to those pertaining to copyright and neighbouring

[103] The relevant law of Nigeria merely speaks of “any use made of a work in an approved educational institution (…).”Cf. Second schedule, (h)

rights. Accordingly, we could deduce *a contrario* that schools and universities which do not meet the requirements of the law are excluded from the scope of the exception or limitation.

In the case of an educational institution providing distance learning, it continues to benefit from the exception of limitation for teaching. However, it must take special precautions. The institution would be liable if it made protected works available to all and sundry. It must take technical precautions to ensure that only its teacher and its learners and possibly its staff have access to the works placed at their disposal.

2. Teachers

Teachers benefit from the exception for educational activities to the extent that, as noted, they have the possibility of using works to illustrate their lessons. In this respect, the acts they are likely to carry out in relation to the protected work are relatively varied. They can use the works in both the preparatory phase and during the course. One question that may arise is whether they can make copies of works with a view to placing them at the disposal of learners (photocopies, copied cd-roms, attached files sent to learners, etc). This question is all the more interesting in view of the fact that in Africa, given the widespread impoverishment, learners often lack the necessary resources to acquire the protected works included in training programmes. This is a key argument that could lead us to answer this question in the affirmative: as soon as we find ourselves in a teaching setting, any use is permitted if the law itself does not set any limits.

Yet this argument is not the determining factor. National laws do not grant unlimited power to just anyone with relation to the use of works in a teaching setting. This power is always limited by relatively restrictive conditions that do not allow teachers to reproduce each of the works to be used in the lesson with a view to placing them at the disposal of learners. Only the law of Senegal (article 42) appears quite liberal, because the only limit set is that the reproduction (or performance) must not be for profit. Even in this regard, however, it would certainly be wrong to interpret the law too broadly, because even if the prejudice caused to the rights holders is perfectly justified for the purpose of reproduction, such use could conflict with the normal exploitation of the work.

Would the situation be different if the reproduction only concerned extracts from the work? If for example the teacher merely reproduced the exercises relating to each chapter and if such exercises hardly exceeded the threshold above which it is deemed that reproduction is likely to conflict with a normal exploitation of the work? If we answer in the negative, we render the exception meaningless for several educational actors who are unable to purchase the protected works on the program or sometimes even secure the necessary resources to make copies of the extracts required to understand the lesson. If we answer in the affirmative, however, we clash head-on with a category of national legislation which prohibits use within the framework of the exception for education of works created especially for educational purposes (Ethiopian, Swaziland, Tanzania, etc.) Even if the law does not specifically exclude certain categories of works, it is difficult to allow the reproduction and distribution of extracts outside the framework of a license, without violating the second and/or the third stage of the triple test.

In this respect, only the Liberian legislators appear not to have had any difficulty with the notion of reproductions being made and distributed to learners with a view illustrating a classroom lesson. Section 2.7 of the relevant law provides as follows: “Notwithstanding the

provisions of Section 2.6, the fair use of a copyright work, including such use by reproduction in copies or sound recordings 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." It is difficult to say whether the Liberian law, worded in this way, is more open than the others, for the requirement that reproductions must meet the criterion of "fair use" could well lead actors in the educational sphere to seek a license that would make it possible to avoid any conflict with the normal exploitation of the work.

3. Learners

It is a truism to say that pupils and students, depending on the level of teaching considered, are the end beneficiaries of the exception for teaching. Indeed, they are the recipients of the teaching provided, the understanding of which justifies recourse to the protected work. Consequently, such use, even though it is carried out by the teacher, is for the purpose of instructing the learners.

Yet learners may be actively involved in such use. For example, a teacher may merely indicate the references of the protected works which the learners must consult to supplement their information. In this case, the learners actively consume the protected work in conjunction with the teaching activity. Even when they do not play an active role, they contribute to the use of the work within the framework of such activities. It is because they are present at performances of works that the latter constitute public communications, which in turn raises the question of their lawfulness.

Precisely with regard to performance of works, learners are in no way liable as long as they watch or perform works in a setting which Swiss law calls "the teaching family circle".

With regard to reproduction, the question of their liability may take an unusual turn. In African countries, learners who lack financial resources often resort to photocopies to obtain the necessary materials for their instruction. In other words, the teacher merely indicates the protected work, as has been noted, and each of the learners makes a photocopy which he keeps for use in the lesson rather than consulting it on the spot or borrowing it for consultation at home. The situation is the same with regard to works available on networks, for which learners make printouts, copy CDs or make copies for use in class as a supplement to their instruction.

Here, we can see the exception for teaching exists alongside the exception for private use and even the exception foreseen in certain laws with regard to personal research.

The exception relating to private use is of particular interest. When the learner makes a copy not for classroom use but rather to supplement his knowledge in private, he has indeed made a private copy insofar as the copy is for his own use. The problem is that in this case, the individual rapidly becomes a group when several students from the same class, acting on instructions from the same teacher, make copies of the same work. As we know, the majority of national legislations prohibit the collective use of copies when they are made for private use. In addition, it is clear that when large-scale reproductions of a work are made by learners in the same class acting on a given teacher's instructions, this certainly conflicts with the normal exploitation of the work. Consequently, even though the exception to a private use is a great help in a teaching context, it cannot be as useful as the exception relating to the illustration of such teaching.

In fact, given that it implies a necessarily collective use of the work or of its reproductions, it is inevitably more open. The problem is that despite the substantial help it provides, it cannot justify a very large number of reproductions without compensation, for this would constitute misuse going beyond the limit authorized by the restriction and would therefore conflict with the normal exploitation of the work.

Finally, if learners cannot benefit significantly from the exception set aside for them, will this exception not become meaningless?

Actually, the point should be made that, while there are no major difficulties with the management of performances in a context of exceptions and limitations for educational activities, this is not the case with reproductions. The solution for the African continent would no doubt be to make a distinction between the different levels of teaching.

At the level of basic and secondary education, there is a relatively low rate of reproduction of protected works within the framework of educational activities. As a result, even if these reproductions are utilized in this framework, misuse leading to a conflict with the normal exploitation of the work can only be deemed to have occurred in specific cases. Consequently, it would not be an exaggeration to say that sometimes, their use will remain restricted to reasonable limits justifying either a total lack of compensation or relatively modest compensation.

On the other hand, at the higher education level where there is intensive consumption of such works, one can understand that misuse and conflict with the normal exploitation can rapidly be deemed to have occurred, which is why the exceptions and limitations foreseen by the law are rapidly replaced by licenses.

I. Conditions to which the exceptions and limitations are subjected

In all of the relevant African laws, exceptions and limitations for teaching purposes are subject to often stringent conditions. Such wariness is understandable. Indeed, as we have noted, teaching both produces protected works and consumes them on a large scale. If no precautions are taken, this could threaten the survival of creativity. Yet whereas certain conditions are common to all of the relevant national laws, others are foreseen only in some laws. Basing ourselves on the preferences expressed in the national laws, we can classify the conditions required by decreasing order of importance.

1. Purpose of use: illustration for teaching

The objective of the use is the main precondition for the application of the exception. Use of protected works must be for purposes of illustration for teaching. The word “illustration” used in Article 10, para 2 of the Berne Convention, is primarily designed to require that the works used are “in support of a teaching or scientific discourse.”[104] This requirement assumes that these works may only be an accessory to the teaching imparted. It can be understood if we draw a parallel with quotation. Just as a work including one or more quotations must be

[104] Valérie-Laure Benabou, *L’exception au droit d’auteur pour l’enseignement et la recherche ou d’une conciliation entre l’accès à la connaissance et le droit d’auteur*, http://www.edutice.archives-ouvertes.fr/docs/00/00/15/70/PDF/Juri5_Benabou.pdf

able to stand on its own, the course must be able to stand on its own without the works. However, this statement must be qualified somewhat. Some courses concern only a precise work which acts as a medium for them. This is the case with literary works or visual art which make it possible to envisage the particular style, vision or intent of an author. This is also the case with software, which make it possible, via decompilation, to create compatible software or practise developing software.

According to some authors, the exception is also aimed at imposing a quantitative limitation on the number of works used. However, this question will be studied further on.

2. Publication or prior disclosure of the work

The requirement of publication or prior disclosure of the protected work or object is common to virtually all of the relevant national laws in Africa. The wording to express this may vary greatly. Legislators may refer to the “disclosed work”, the work “made lawfully available to the public”, “the published work”, “the work published with the author’s authorization”, or “the lawfully published work”. In all of these cases, the idea expressed is that the work used in the context of an exception for teaching must have been made available to the public by the author or with his consent. In other words, depending on the legislation, the work must have been either disclosed by the author or published by the author or with his consent.

A few countries such as Senegal, Seychelles, South Africa and Zambia do not specifically refer to such disclosure. Others, such as Zimbabwe, mention it only for certain aspects of the limitation or exception. We can see this from Article 25 of the relevant Zimbabwean text, devoted to the various uses of protected objects in a teaching setting, the beginning of which makes no allusion to publication. It is only in paragraph 3 that the requirement of publication of the work appears, as though for the other uses lack of publication was not an obstacle. Yet there is no doubt but that an undisclosed or unpublished work could be used for teaching purposes. If the author decided to keep his work secret or not to publish it, use of this work in a teaching setting would be gravely prejudicial to this intent, insofar as teaching involves a relatively large audience, if we consider that the body of schools or universities could use the same work in the context of the curriculum designed by the competent authorities. Consequently, the source which provides the material for the exception for the benefit of teaching is rather important, and an establishment which uses an undisclosed or unpublished work would infringe the author's moral rights.

Yet the relevant law in Uganda appears to minimize the impact of publication of the various exceptions. As far as it is concerned (Article 15, para 3),[105] the fact that a work has not been published must not in itself prevent the fair use of this work, once the criteria for such use have been met.

The question which may arise is whether, once disclosure or publication has occurred, the source utilized for the exception for teaching must be lawful. In other words, this brings us back to the question of determining whether, in a teaching setting, the work used must be an original or if it can simply be a copy made for private use, or even a counterfeit copy as is very common on the African continent.

[105] This provision is worded as follows: “(3) The fact that a piece of work is not published shall not of itself prejudice the requirement of fair use in accordance with subsection(2).”

The question of the lawfulness of the source is not a new one. It came up recently in France with regard to private copies obtained via downloading on music file-sharing sites.[106] One possibility could be a two-tiered solution, depending on whether the illustration for teaching was based on a copy of the work in the physical possession of the teacher or institution or whether the illustration was based on materials present on networks. In the former instance, it can be said that, since the exception for teaching is already enough of an infringement of the protected rights, the least that educational establishments could be expected to do would be to acquire legitimate copies for their activities. This type of solution would make it possible to reduce the prejudice suffered by the rights holders, in a business environment dominated by counterfeit works.

One of the rare texts that considers the question of the lawfulness of the source, namely that of Liberia, seems to run along these lines. The law in question authorizes performances and communications of protected works by teachers and students for face-to-face teaching in non-profit establishments. However, it prohibits such acts with regard to audiovisual and similar works if the person in charge of organizing the performance or communication was aware or had reason to be aware that the copies used were illegal.

In the latter instance, we could be a bit less particular with regard to the question of the lawfulness of the source. Requiring such lawfulness "would create a right for the director of the teachers to ensure that these materials are made available with the consent of the rights holder, or at least in a lawful manner".[107]

3. Non-profit nature

The absence of a for-profit nature with regard to the use of the protected subject matter within the framework of the exception for teaching constitutes another fundamental requirement. The great majority of national laws stipulate that the use of the protected subject matter may not have any profit incentive. Appreciating whether a profit incentive exists should not pose any particular problems. It is enough to specify that the absence of profit does not necessarily mean free of charge: learners may pay various fees, but the money collected must only be a contribution to the creation of the necessary conditions for the conduct of teaching, thereby excluding any profit by the organizer. In the context of traditional face-to-face teaching, the profit may come from the sale, to students and pupils, of copies made on

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[106] See in particular G. Florimond, *La copie privée et la licéité de sa source*, IntLex.org (2006) [online} : *http://www.intlex.org/La-copie-privee-et-la-liceite-de.html*; Th. Maillard, *Retour aux sources (illicites) de la copie privée : A propos du jugement du TGI de Bayonne du 15 novembre 2005*, Revue Lamy Droit de l'Immatériel, No. 12, January 2006, No. 338.

[107] P. Laurent, *Les nouvelles exceptions au droit d'auteur en faveur de l'enseignement : l'ère de l'e-learning*, quoted above. This author further argues that the fact that Article 10, para 2 studied above of the Berne Convention remains silent as to the conditions in which the work is made available to the public, unlike paragraph 1 of the same Article which gives national legislators the power to grant a right of quotation for works "which have already been lawfully made available to the public." In reality, this argument is not valid: as it recognizes itself, the above wording used in paragraph 2 refers back to the exercise of the moral right of disclosure. Thus, even in the case of the exception for teaching, the work has have already been lawfully made available. Consequently, there are grounds to think that the lawfulness of the source only refers to the legitimacy of a copy acquired or an uploading authorized by the rights holders onto this network, which assumes that the question of disclosure has been settled first.

the basis of the protected copy, at a price in excess of the cost of producing such copies, tending to indicate that the educational establishment or the teacher responsible for making copies available will make a profit on the operation.

This profit could also come from the very nature of the educational establishment. Thus, one should assume that any use within an educational establishment empowered to operate as a commercial undertaking is by definition for profit, and therefore make such use contingent upon the consent of the beneficiaries or at least fair payment.

As far as form is concerned, two types of wording are generally used to prohibit all profit seeking. Some laws speak of the absence of a lucrative nature of teaching, whereas others refer to the absence of a lucrative nature of the use. A distinction can be made between the two formulas. If we rely on “the absence of a lucrative nature of teaching”, the idea of prohibiting a profit is primarily aimed at the institution. In this logic, as we have just noted, any educational institution likely to generate a profit for its promoter is excluded from the scope of the exception for teaching. Consequently, any use of the protected subject matter within such an establishment is subject to the payment of royalties. The focus on “the absence of a lucrative nature of use” targets institutions and their actors. In this logic, even when the public or private institution is eligible to benefit from the use carried out within it, such use must not be of a profit-seeking nature. In other words, the exception indeed benefits the institution, but the use must be devoid of any profit-seeking nature.

Some countries, such as Congo Brazzaville, Democratic Republic of Congo, Ghana, Kenya, Malawi, Nigeria, Seychelles, South Africa, Tanzania, Togo and Zimbabwe, do not mention the lucrative nature of teaching or the lack thereof in the conditions required for the restriction for teaching purposes. However, this does not mean that this condition was totally absent from the legislators’ minds. In several cases, a reference to the other conditions tends to indicate that the legislators’ concern was to situate the use for teaching within a legal framework which would preclude all profit seeking. This is the case with countries that stipulate that the use must be consistent with “fair use” or “fair practice” (Ghana, Namibia, South Africa, etc.) or be in compliance with “proper usage” (Congo Brazzaville). Yet this is also the case with countries that merely restrict the use to the number of copies justified for the purpose or a given number of copies.

The same desire to rule out profit seeking can moreover be deduced from the reminder in some texts of two of the three stages of the triple test, which would tend to indicate that it is the absence of the lucrative nature of the use or teaching that is meant. This is the case with Zambia, which refers to the absence of conflict with the normal exploitation of the work and the absence of unreasonable prejudice to the business interests of the copyrights holder.

4. Absence of misuse

The absence of misuse is not specifically mentioned by any international convention. The Berne Convention, which was the first to open up the restriction for teaching in paragraph 2 of Article 10 studied above, stipulates that the use of the work for teaching purposes must be “compatible for fair practice”. This requirement is translated into the national laws using various formulas.

A first group of national laws seems to reflect this requirement by a prohibition of any misuse in the utilization of protected works within educational institutions. This is the case with Burkina Faso, Cameroon and Chad. A second group of countries takes up the wording of

the Berne Convention: Congo Brazzaville, Madagascar and Niger, whose laws require compatibility with fair practice, like the Convention. The last group, the English-speaking countries, speaks of “fair practice” (Ethiopia, Ghana, South Africa, Tanzania), “fair dealing” (Seychelles), or “fair use” (Liberia and Uganda).

The national texts of the first group, which only prohibit misuse of the utilization for purposes of illustration of teaching, do not provide any criteria for helping to identify such misuse, even though the appreciation of this notion is hard to grasp.

One criterion could be the *number of copies* made or the number of performances staged. Such a benchmark could be useful, given that teachers and learners may only reproduce or stage performances in the proportions required by the lesson. Thus, if one of the educational actors reproduces more copies or stages more performances than the number needed for a proper understanding of the lesson, this would be a clear-cut case of misuse. Owing to the simplicity of its application, however, this criterion appears insufficient by itself: a teacher acting in good faith, who exercises a normal degree of caution, is diligent and wishes to avoid any wastage of the resources of his establishment or those of his students or pupils, should not allow more use of the protected subject matter than necessary.

Another criterion could be the *number of uses* of the copies made or the amount of time such copies are kept. Yet this criterion is not absolute, because even though the copy becomes a simple document which the pupil or student many not necessarily need to keep, it remains very important for the teacher, who in the majority of cases will have to use it again.

Finally, there is the *traditional notion of abuse of rights*. In this framework, we could look for misuse by bringing in considerations of fairness and legal policy. First of all, fairness makes it possible to compare the opposing interests, and “when the rights holder expects no other advantage from this act than the satisfaction of harming his victim, the scales naturally tip in favour of the victim.” [108] Next, legal policy considerations make it possible to “moralize the exercise of rights and sometimes guide them in accordance with certain economic and social objectives.”[109] If we apply these guidelines, we could think that misuse occurs when the teacher or the learner, through his or her behaviour, harms the holders of the rights to the protected work. Such misuse could be appreciated in terms of the usefulness or lack of usefulness of the copy or performance of the work for the lesson or in terms of the quality, quantity or time of use. Unfortunately, this argument is not decisive either in view of the generally recognized legal nature of exceptions and limitations. Indeed, as has been noted, these exceptions and limitations are not rights which benefit the public or the users of the works. Consequently, a user may not be prosecuted on the basis of misuse of a right whereas precisely, he does not possess rights.

The same undoubtedly also applies with regard to quotation and parody. Some authors do not hesitate to assert that, given that these exceptions do not benefit passive consumers as the others do but rather an author or a performer who requires a relative degree of freedom to

[108] J. Ghestin and G. Goubeaux, *Traité de droit civil, Tome I, Introduction générale*, 3rd edition, LGDJ, Paris, 1990, No. 736, pp. 616 to 618.
[109] Ibid. We can envisage for example the case where there is no intention to harm but out of this desire to moralize the exercise of the faculty to reproduce for teaching, compensation for the rights holders is accepted.

create or perform, they may be considered as genuine rights recognized for these authors or artists.[110]

Some national laws, such as that of Nigeria, raise an interesting point with regard to this latter aspect: as far as they are concerned, if the use consists of making copies, such copies must be destroyed after a certain period of time, generally at the end of the school year. In this instance, utilization after the end of the school year would constitute misuse.

In any event, when the law is silent with regard to the criteria for misuse, the judge must be free to appreciate this on a case-by-case basis.

These difficulties which arise when we search for a criterion with regard to misuse in the context of the use of protected subject matter for purposes of teaching lead us to ask ourselves whether the legislations of the countries of these three other groups, in particular those of the English-speaking countries, should not be easier to interpret. Indeed, the legislation of these countries refers to notions of "fair dealing" (Seychelles), "fair practice" (Ethiopian, Gambia, Ghana, South Africa) and "fair use" (Liberia and Uganda). Clearly, the first two expressions, which seem to correspond to the French expression "conformité aux bons usages" (compliance with good practice) used in the Berne Convention and taken up by the laws of some African countries, remind us of the famous US doctrine of "fair use", which has itself been incorporated into some of the above-mentioned South African laws. According to this doctrine, which is taken from article 107 of the relevant US law of 1976, an exception to a right must be based on the purpose of the use, the volume of borrowing in relation to the source works and possible works including this material, as well as any economic prejudice.[111]

Professor Sirinelli[112] writes that "fair use" has the advantage of flexibility, because "the amount of borrowing from a first work will not be judged in the same fashion depending on whether a reproduction of a work or a parody is involved. The possibility of photocopying works will not be admitted in the same fashion depending on whether or not the activity is prejudicial to publishers' rights to distribute books or grant licenses authorizing the photocopying of these extracts (photocopying by a commercial firm of extracts of protected works with a view to the preparation of collections for use by university students)." However, he acknowledges that the system's flexibility, which could give rise to opposing interpretations by judges, is also its weak point, and views "fair dealing", as a more limited

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[110] A. and H.-J. Lucas, op.cit., No. 314, p. 256.

[111] These criteria are taken up by the two African texts mentioned. For example, Article 15 of the relevant Ugandan law provides as follows:

"(2) In determining whether the use made of a work in any particular case is a fair use the following factors shall be considered-

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

(b) the nature of the protected work;

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

(d) the effect of the use upon the potential market for value of the protected work."

[112] P. Sirinelli, *Exceptions et limites aux droits d'auteur et droits voisins*, Workshop on the application of the WIPO Copyright Treaty (WCT) and the WIPO Phonograms Performance Treaty (WPPT), Geneva, December 6–7, 1999. See WIPO Internet site.

technique that is better suited to guaranteeing that right holders and users enjoy the necessary legal security.

As far as he is concerned, “the reasoning put forward by the legislations which admit ‘fair dealing’ is based on a two-stage study. In the first stage, we ask: does the case before us fall within the purview delineated by legislators? Exceptions are only tolerated in a series of specific cases for special purposes, and we must check to see whether the activities in question do indeed fall within this field (...). In the second stage, the question is: does the study lie within the field of admissible exceptions, is it fair? If – and only if this case – the idea is to check the planned usage to see whether it meets the conditions of “fair use”.

Comparing the two systems does not really help us move forward. The first stage of appreciating “fair dealing” is simple: no use can be accepted for teaching if it has not been foreseen by the legislators. If this is not the case, misuse has occurred. As for the second stage, it consists of saying that, once the usage has been accepted in the first stage, it is necessary to check that it is fair. If this is not the case, misuse has occurred.

Under these conditions, caution is advised: the system of “fair use” or “fair dealing” adopted by legislators in the second and third groups is neither easier nor more difficult to apply: it is simply different.

5. The audience and the premises affected by use

African lawmakers attach varying degrees of importance to the conditions relating to the audience which is likely to receive protected subject matter as well as those relating to the premises on which a performance or communication of the protected subject matter is likely to take place.

With regard to the venue of the performance, some laws, including that of Cameroon, require that the venue consist of “premises set aside for that purpose”. In reality, the silence of the other legislators can be amply justified, for it goes without saying that if a derogation is accepted for teaching, it is indeed because in the mind of legislators, communications are intended for an audience composed of learners and supervisors who do not need to go anywhere to receive these communications. Rather, the practice consists of bringing in to the school or university the necessary material for a possible communication, if this requires equipment which the educational institution does not possess.

Yet this does not mean that if the institution has no suitable premises, it loses the benefit of the exceptions for teaching simply because it has used premises belonging to a third party. This exception must be interpreted in such a way that even in this case, the teaching purpose covered by bringing together the learners and supervisors takes precedence over the premises used and makes it possible for the institution organizing the event to retain the benefit of the restriction.

Not everyone shares this point of view, as we can see from two examples.

In Zimbabwe, Article 25, paragraph 4 of the relevant law stipulates that when the performance is staged by the learners or their supervisors, it may take place in any venue whatsoever, provided that it fits into the activities of the educational establishment. However, when it is performed by someone other than a teacher or a learner but still for an educational purpose, it must take place on the premises of the establishment. In Madagascar, the Copyright Office does not charge any fee when events for educational purposes are staged on

in educational institutions exclusively for students, teachers and members of parents' associations. However, when such events are held in an auditorium, royalties must be paid.

This kind of a one-size-fits-all approach lends itself to criticism. Distinctions should be made based on the audience invited to attend the event. If the event organized by the educational institution on premises which do not belong to it is open to the general public, it is clear that the educational purpose is not the only goal pursued. Under these conditions, it is only normal that the collective management body requires the payment of royalties. If on the other hand the event, albeit organized in a room located outside the campus of the institution and belonging to a third party, is solely intended for the audience specified above, it must continue to benefit from the exception.

In short, the premises used to communicate the protected subject matter to the public are of no great importance if the event is organized by a school or university for a lesson. In this case, it matters little whether or not the law has remained silent on this question.

The problem of the audience intended to receive the communication of the protected subject matter appears to be more serious, given the large number of texts which devote specific provisions to this issue. Several national laws specify the kind of persons likely to make up the audience intended to receive the work. In this connection, the relevant law of Madagascar is very evocative. In article 43.3, it stipulates that in conjunction with a performance for teaching purposes, the audience must "consist solely of the staff and students of the establishment or the parents and supervisors of the children or other persons directly linked to the activities of the establishment." These persons make up the "teaching family circle" mentioned above. Other laws follow this lead: Annex VII of the Bangui Agreement, as well as the relevant laws of Benin, Mozambique, Niger, Rwanda, Zambia and Zimbabwe.

With regard to these national laws stipulating the kind of audience that must be present at performances, a broader interpretation cannot be accepted. In practical terms, this obliges the organizers of school or university gatherings to make sure that all those who attend such events belong to one of the categories of persons who make up the teaching family circle. If persons who do not belong to one of these categories attend the event, it must be considered as being open to the general public and subject to the payment of royalties.

However, a close look at this list shows that it merely formalizes what could be deemed obvious in relation to the audience invited to take part in a performance for teaching purposes. Within the framework of such a use of protected subject matter, the admission of teachers and students is a truism. Admitting the staff of the establishment is inevitable, given that these are generally persons who assist the teachers in their work. Finally, with regard to the parents or guardians of the children, it is necessary to take into consideration performances of an academic nature that could take place outside classroom hours or off campus and which would require that these persons who are legally responsible for the children accompany them.[113]

[113] The relevant law of Zimbabwe limits the teaching family circle to teachers, learners and persons directly involved in the activities of the establishment. However, it contains a novel provision which stipulates that simply being a parent or guardian of a child registered in an educational establishment does not suffice to characterize the involvement in the activities of such establishment (Article 25, paragraph 5).

6. Volume of use

National legislations have not attached the same importance to the question of quantification of use as with the previous questions. There may be two reasons for this. First, as the other conditions may suffice for delimiting the exceptions and limitations for teaching, it is no longer absolutely necessary to specify a number that is likely to further restrict use. Second, it is not easy to stipulate the number of uses in advance. With regard to reproduction, it must be possible to extend tolerance for the benefit of educational establishments to the "number of copies necessary for their activities".[114] It is therefore necessary to appreciate on a case-by-case basis whether or not this number has been exceeded to conclude that misuse has occurred.

Furthermore, the great majority of national laws prefer to use wording that leaves educational actors sufficient freedom while providing them with a yardstick. This consists of saying that the limitation for teaching must be exercised to the extent justified by the purpose. For example, the relevant South African law provides that "the copyright in a literary or musical work shall not be infringed by using such work, *to the extent justified by the purpose (...)*". Several other texts are permeated by a similar logic, such as those of Angola, Benin, Botswana, Central African Republic, Congo Brazzaville, Democratic Republic of Congo, Madagascar, Malawi, Mali, Mauritius, Mozambique, Namibia, Niger, Tanzania and Zimbabwe.

Only a few countries do not specifically mention this limit: Burkina Faso, Cameroon, Cape Verde, Chad, Côte d'Ivoire, Ghana, Kenya, Senegal, Seychelles, Swaziland, Togo and Zambia. However, this does not imply that the use of works for teaching is freer in these countries. In reality, restricting use to the extent justified by the purpose is consubstantial with the restriction itself, insofar as teaching is both the source of this restriction of protected rights and the main yardstick.

A similar logic must govern whether or not a work is reproduced in full. Teaching "can limit itself to extracts chosen effectively and wisely."[115] This rule can only change in the case of a short work or a work that cannot be split up. This is the case with works of art and photographs. It should also apply to audiovisual works in certain circumstances. If such works are used to illustrate traditional teaching, we could limit ourselves to a relevant extract. However, if teaching is dispensed in a school where training in the audiovisual arts is provided, we can understand that the work must be reproduced in full to ensure that the lesson is understood.[116]

The problem mainly arises with quotation, but also with reproductions using reprography or similar means.

With regard to quotation, it is clear that a quotation is a short extract. If the borrower exceeds a reasonable length for a quotation, there is no doubt but that the extract has become unlawful. Nevertheless, it can still be justified if it is used by way of illustration for teaching. Indeed, as Professor Gautier writes, "we must understand that in the public interest, as

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[114] C. Colombet, *Grands principes du droit d'auteur et des droits voisins*, op.cit., p. 61.
[115] A. Françon, A. Kerever, H. Desbois, *Les conventions internationales du droit d'auteur et des droits voisins*, op.cit. No. 171, p. 202.
[116] Subject to the key condition that the establishment is not for profit.

represented by the school, the university and research centres, the use of extracts from works – a broader notion than quotation (but less than in full) – justifies the elimination of the exclusive right."[117] In other words, it is possible that the educational purpose justifies borrowing halfway between the work in full and a short quotation.

As for reproductions by means of reprography, it is also quite clear that strict oversight is necessary. Indeed, this is what some national laws do. For example, the Angolan law simply provides that for the implementation of the exception relating to reprographic reproductions, the number of copies made must not exceed the number justified by the purpose. The relevant law of Benin offers one of the best examples of delimiting the reproduction by this means. According to the end of Article 21 of this law, this mode of reproduction is only permitted in a teaching setting if it does not directly or indirectly seek commercial gain, and above all, only "isolated articles lawfully published in a magazine or newspaper, short extracts from a lawfully published short work or a lawfully published short work". The relevant laws of Madagascar and Nigeria follow virtually the same logic. They limit reprographic reproductions to face-to-face teaching, which naturally rules out distance learning.

The relevant law of Zambia most definitely represents the extreme to be avoided with regard to fears concerning the disadvantages of reprography. According to Article 21, paragraph 1(f), a reproduction may be made:

"(...) for the purpose of the educational system of Zambia:

a- By a teacher or pupil in the course of instruction, provided that the reproduction is not made by means of an appliance capable of producing multiple copies."

This provision excludes from the field of the exception for teaching the mode of reproduction that is the most useful for instructing learners. It gives rise to two comments. First, by requiring that the reproduction be made by a teacher or pupil, the law leaves it to be understood that any reproduction made for these persons by a third party must be prohibited under the exception or limitation for teaching. In most African countries, however, copies are made by an operator on the reproduction appliance, who owns it or who is an employee of the educational establishment to which the pupil or student belongs. Yet, this interpretation may easily be discarded for one whereby the key person to be taken into consideration is the person for whom the copy is meant. Second, the relevant Zambian law stipulates that reproduction must not be made on an appliance capable of producing multiple copies. In reality, applying this provision strictly would mean that no modern appliance should be used for the reproduction of the work, given that they are all capable of making series of copies, unless they have been fitted out with an anti-copying device or the work itself is protected by an effective technical measure. *A contrario*, this would imply that the only mode of reproduction authorized is manual reproduction. In other words, for example in art schools, paintings by masters can be imitated with a view to teaching people how to paint, while in general educational establishments, a pupil or teacher may not photocopy a page of a book. Consequently, the field of the exception for teaching is astonishingly limited under Zambian law. If such a provision were rigorously applied in a developing country, it would be much harder for educational establishments to carry out their mission due to copyright requirements.

[117] P.-Y. Gautier, *L'élargisssement des exceptions aux droits exclusifs, contrebalancé par le « test des trois étapes*, Communication-Commerce éléctronique, Nov. 2006, p. 10.

Reprographic reproductions are not the only field in which reproductions have been specifically quantified by the law. In some texts, particularly those of the English-speaking countries, the restrictions for teaching are more clearly delineated. In the relevant law of Mauritius, for example, we can read: “(1) The following acts shall be permitted without the authorization of the author of, or other owner of the copyright, in the work:

- The reproduction of a short part of a published work, by way of illustration, in writings or sound or visual recording for teaching, where the reproduction is compatible with fair practice:”

This provision implies that use of the work is only authorized for the insertion by way of illustration of a single extract from a published work in a literary work or in a recording, be it sound or visual. Next, this use must not conflict with “fair practice”. The relevant laws of Kenya, Niger and Seychelles go almost as far. They stipulate that use for teaching consists solely of the inclusion in a collection of a maximum of two extracts from literary or musical works.

7. Duration of use or conservation

National laws do not generally spell out the use or conservation of works employed by educational actors. The main justification for this silence could be that these laws contain monitoring mechanisms which, owing to their general nature, make it possible to punish most deviations from the norm with regard to the restriction for teaching. These legal mechanisms are the absence of misuse, compliance with “fair use” (or its derivatives, “fair dealing” and “fair practice”). Nevertheless, at least one law, that of Nigeria, contains an important detail in relation to the duration of conservation of reproductions for teaching purposes. As far as this law is concerned, reproductions must be destroyed at the end of the “prescribed period” and, if no such period is stipulated, they must be destroyed after twelve months. This clarification could however have unfortunate consequences: if applied to the letter, it would mean that pupils, students and teachers would be obliged to destroy the reproductions they have made once this period is up. Although this restriction is understandable to a certain extent for learners, it is unrealistic from the perspective of teachers, who are often obliged to use the works several years running in conjunction with the lesson taught. Consequently, it is preferable that legislators remain silent on the duration of use of works in an educational establishment and adopt a system which simply makes it possible to avoid misuse.

8. Respect for moral rights

Two requirements that can be found in virtually all of the national laws pertain to respect for moral rights.

The first relates to the lawfulness of the making available to the public of the work used for teaching. This condition has already been studied in connection with publication and disclosure.

The second requirement has to do with the reference to the source and name of the right holder whose work is used by way of the illustration for teaching. All of the national laws specify that the source and name of the right holder must always be indicated if this name appears in the source. This stipulation, which is taken from Article 10 of the Berne Convention, serves a twofold purpose. First, it makes it possible to ensure compliance with the law with regard to the paternity of the protected subject matter. Second, it pursues a

practical goal: it allows any interested person who becomes familiar with the extracts used in teaching to locate the work from which the extracts were taken.

This reference must be visible, either in the text or in a footnote. If the extract used is a quotation, it must, as noted, be inserted in inverted commas or italics.

Granted, the publishing company cannot invoke its own right to require a reference to its name next to that of the author, but it is in the reader's interest to include it in order to avoid pointless, painstaking research. As far as Desbois is concerned, the legal requirement does not exclude a reference to the year and the date of the edition, which must be included in the reference, for reasons of a practical nature.[118]

If the work is anonymous or pseudonymous, the requirement stands. In the former case, the extracts used are linked to a given work and to a specific publishing house. In the latter instance, there is no problem since the pseudonym does not leave any doubt as to the real identity of the right holder. And even if such a doubt were to exist, the persons using the work should mention the pseudonym and the source if this pseudonym appears in the source.

9. Other conditions

Several specific conditions have been incorporated into some African national legislations. They are sometimes quite original and their existence is no doubt justified by the distinctive nature of teaching methods in the countries which have foreseen such conditions. For example, in Mali, the authorization the Ministry of Culture is required to use a work in teaching. In addition, the educational establishment must take all necessary steps to inform in advance the author whose work it wishes to use or the collective body for the management of copyright and related rights.

Some English-speaking countries also stipulate special conditions: for example, in Botswana and Mauritius, the relevant law provides that with regard to the exception for teaching:

- The reproduction must be isolated or, if it is repeated, the occasions justifying the reproductions must be separate and unrelated;
- No collective license must offered by a collective management body of which the educational establishment is aware or likely to be aware and under which the reproduction can be made.

In Ethiopia, Swaziland, Tanzania and Zimbabwe, the special conditions governing the exception are as follows:

- The publication containing the extracts must itself specify that it is intended for teaching purposes, or this must be specified on any promotional material provided by the publisher;

- The publication must primarily consist of unprotected subject matter;

[118] H. Desbois, note under: C.A. Paris, June 1, 1977, D. 1978, 230.

- The protected subject matter (works of the mind, performances, phonograms, etc.)[119] must not be intended for teaching purposes.

This latter condition deserves special attention. It stems from the above-mentioned legislations, according to which the only form authorized is "reproduction solely for the purpose of face-to-face teaching activities, except for performances and phonograms which have been published as teaching or instructional materials." This in turn provides a relatively clear demarcation of the subject matter concerned by the exception or limitation for teaching. Such a provision has major repercussions. Indeed, when a legislation exempts subject matter created for teaching from the field of this exception, it is necessary to check each time the purpose for which the subject matter has been created before using it. On the basis of this verification, a distinction would be made, the subject matter created for teaching would be subject to the normal rules of copyright, and the remaining subject matter would be covered by the exception. If we follow this logic, textbooks, treatises, summaries, exercise books, books of methodology, etc. would be exempted, probably along with encyclopaedias and other dictionaries or lexicons. Sound or audiovisual works, databases, software specifically designed for teaching, etc. would also be exempted.

The exemption for works created for educational purposes can be justified: it is aimed at ensuring the survival of works of this kind. For as Professor Alleaume writes, "what incentive would there be to write or publish textbooks if any teacher, using a book on the syllabus, could photocopy it for the entire school, making it unnecessary for all of the students and his colleagues to purchase it?"[120] Nevertheless, it gives rise to two sets of questions. The first, of a general nature, is to ascertain whether it might not sometimes be difficult to decide whether or not the original work serves an educational purpose. This is not always easy to appreciate.[121] If we take the example of novels included in high school and college syllabi, we can understand just how difficult this is.

The second set of questions is specific to the African continent and is linked to the widespread poverty of the peoples concerned, who often have difficulty procuring the necessary teaching materials to instruct pupils. In such a context, should we exclude works intended for teaching purposes from the scope of the exception for teaching? Despite the noble character of this exclusion, the opposite option is the most appropriate. It is indeed preferable to subject all works of the mind to the exception, with no distinction as to purpose. One could simply, like virtually all of the national laws, surround the exception with a maximum number of precautions with a view to avoid misuse. Moreover, the fact that the exception is subordinated to the triple test rule and can subsequently be turned into a license should suffice to reassure right holders.

Some countries have incorporated two of the three stages required by the test included in the international conventions. This is the case with Madagascar, where the relevant law

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[119] This subject matter protected under neighbouring rights is specifically excluded by some laws, especially those of Rwanda and Tanzania. The latter provides in Article 35(c) of the relevant law that their reproduction for teaching purposes is authorized "solely for the purpose of face-to-face teaching activities, *except for performances and phonograms which have been published as teaching or instructional materials."*

[120] C. Alleaume, *Les exceptions de pédagogie et de recherche*, mentioned previously.

[121] Professor Alleaume further fears that when such provisions are implemented, the law may prove to be "worse than the evil it is intended to combat." Cf. C. Alleaume, mentioned previously.

stipulates that use for teaching must not conflict with the normal exploitation of the work or unreasonably prejudice the interests of the author. The relevant laws of the Central African Republic, Mali, Zambia and Zimbabwe contain similar requirements.

Other conditions are even more marginal. This is the case with the requirements foreseen by the law of the Democratic Republic of Congo, which restricts the limitation for teaching to the subject matter concerned by the lesson being taught and during class time. The first condition is superfluous: if educational actors consider that recourse to a work is necessary, it is indeed because it constitutes an element without which the lesson could not be given or would not be complete. As for the second condition, it lends itself to criticism: restricting use of the work to class time pointlessly reduces the opportunities for use as illustration for teaching. If this law were to be interpreted rigorously, it would be forbidden to use an extract from the work for homework to be done by learners in their respective homes.

J. Compensation for the restriction

The system of compensation for the restriction for teaching is rather varied. By considering that educational needs necessitate an exception or limitation to rights and by stipulating often restrictive conditions as we have seen, national legislators have opted in principle for a system that is free of charge, which implies that use should take place without payment of any compensation for the right holders. Moreover, several legislations specifically stipulate that use in this context shall not give rise to any compensation. This is for example the case with Annex VII of the Bangui Agreement, Angola, Cape Verde, Mozambique, Niger, Rwanda and Tanzania. The relevant law of Madagascar also stipulates that compensation shall only be paid in cases that come under the right of reproduction (analysis, short quotations, inclusion of a work in a publication, reprographic reproduction).

As for those legislations which remain silent, the philosophy appears to be the same: the goal pursued by the restriction seems to have required a total exemption for those educational establishments which benefit from the exception. When legislators are supposed to provide for compensation in connection with a restriction, they take pains to set up a legal licensing system. This is what we see in the texts which foresee compensation for private copying of phonograms, videograms and printed works.

Yet this does not imply that all compensation is prohibited, whether it be for countries where the law specifically provides that no compensation shall be paid or for countries where the law remains silent in this respect. As we have seen, a contract signed by the right holders and the beneficiaries of an exception can very well put an end to the exception. This is justified by a simple reason: as soon as the parties note that the prejudice to the right holders is no longer reasonable or that the use of the work has started to conflict with its normal exploitation, the restriction no longer meets the conditions set by the international conventions and the relevant national laws, at which point they are empowered to set it aside. In addition, we can say with Mr. Geiger that “even though the social function of copyright implies facilitating the use of works for purposes of research and instruction, by assigning exclusive rights when they can lead to bottlenecks, it does not in any way require that such use must be free.”[122]

[122] C. Geiger, *La loi du 1er août 2006, une adaptation du droit d’auteur aux besoins de la société de l’information,* Revue Lamy droit de l’immatériel, No. 25, March 2007, p. 71.

Moreover, some laws themselves provide that compensation can be paid if certain conditions are met. The relevant laws of Benin and Congo make provision for original licensing systems. With the former, the restriction for teaching entitles right holders to compensation when the establishment provides the necessary appliances for reprography and charges a fee. This provision for the protection of rights is rather bold and deserves a closer look. The explanation is that in a number of university libraries in Africa, appliances, especially photocopiers, are placed at students' disposal by the university administration. This administration then proceeds to charge a fee designed to offset the replacement cost of consumables and sometimes payment or a fee for the person in charge of making photocopies. According to the relevant law of Benin, everything tends to indicate that, even under these conditions, right holders would be entitled to compensation. This requirement seems excessive given the circumstances. The possibility for educational actors to benefit from the restriction foreseen by law implies the making available of the necessary means for that purpose. At most, we could open the debate on the case where the means of reproduction are made available to these actors by a third party. In this instance, the latter expects a profit from the reprographic activity made possible by his appliances, whereas the exception or limitation for teaching is not supposed to be carried out in circumstances likely to generate a profit.

The answer to this debate is actually quite simple: the party expecting a profit is not the educational establishment or one of the educational actors, but rather the third party enabling them to benefit from the restriction. Accordingly, it is this third party, not the institution, who should pay royalties for the use of the works.

As for the relevant Congolese law, it foresees fair payment for reproductions of phonograms intended for teaching. We must admit that this provision is a bit strange. Indeed, Article 98 in which it may be found reads as follows: "however, licenses shall be issued by the Ministry for Culture for the reproduction of copies of phonograms, when such reproduction for the sole purpose of instruction or scientific research is made and distributed on the territory of Congo, to the exclusion of any export of copies, and comprises fair payment for the producer of the phonogram set by the said Ministry, taking into consideration in particular the number of copies to be made and distributed." This wording tends to indicate that the license in question is situated within the context of the compulsory licenses foreseen by the Berne Convention. However, only Articles 35 and 36 of this law, which seem sufficient on their own, are devoted to such licenses. What is more, the above-mentioned Article 98 pertains to reproductions of phonograms. Yet as we know, if we exclude oral teaching which is sometimes recorded on CD-ROM or interactive CDs, works expressed by phonogram are not the most common format in a teaching setting. Consequently, a license should no doubt have been foreseen for literary works.

On the whole, lack of compensation for the use of works under the restriction for teaching is the rule in the African national legislations, whether they have specified that such compensation is not owed or whether they have remained silent. Nevertheless, educational institutions and right holders may very well sign a contract, possibly through their collective management society, if it turns out that the prejudice suffered by the right holders has become unreasonable or the reproductions made conflict with the normal exploitation of the work.

Such contracts do indeed exist in several countries, especially in the field of higher education, which is clearly the educational sector which uses the most works. This is the case with Ghana, Kenya, Malawi, Mauritius, Nigeria and South Africa. These conventions set fair payment, taking into consideration both the number of learners and the total staff of the

establishment, the number of copies made by these persons and the estimated amount for each page. In this case, they replace the exception foreseen by the relevant law.

In other countries, the groundwork is being laid for a convention. In Burkina Faso for example, institutions likely to be covered by a convention have been polled, information letters have been sent out, and awareness has been raised among directors of public and private educational institutions through a seminar organized by the Burkinabè Copyright Office. Similar awareness-building efforts are under way in Madagascar. In Cameroon, things got off to a bad start insofar as, rather than facilitating negotiations between educational institutions and collective management societies, the Ministry for Culture decided to set corresponding rates, as we have seen. This procedure lends itself to criticism and creates resistance that a contract-based approach would have avoided.

K. Impact of digital technology

What is special about the digital environment is that it facilitates the exploitation of works, in particular the reproduction of unlimited numbers of perfect copies and the communication of these works to thousands of other users, while giving right holders the technological power to dictate, even better than in the analog universe, the conditions for the use of their works. In Africa, the impact of digital technology is starting to be felt, even though in the majority of countries certain factors still check the spread of ICTs[123] and their use for teaching.

Nevertheless, there is a need to speed up reflection on this subject, in view of several factors. The first, which is of a general nature, stems from the fact that educational actors have always relied on technical equipment (audio and video cassettes, slides, overhead projectors, recordings, etc.) to dispense or illustrate lessons. Mrs Guibault espouses this point of view when she writes that “the creators of multimedia technology have fittingly incorporated each of these teaching materials into their own original works, providing condensed teaching tools that offer greater flexibility in terms of teaching and learning. Information is stored in such a way that it can be retrieved in a non-linear fashion, based on need or students’ centres of interest. Students can also use these materials for independent study depending on their needs or at a pace suited to their abilities. These teaching activities are based on a whole series of not only basic but also state-of-the-art technologies in the field of telecommunications at the service of pupils, including unscrambled or encrypted unidirectional interactive broadcasting, distribution by cable or satellite, fibre optic links and hyperfrequencies, CD-ROM and the Internet.” In addition, analog works (musical works, photographs, pictures, drawings and cards) are often digitized for use in teaching.

The second factor, which has already been mentioned, is due to the fact that the digital environment entails specific risks against which legislators must protect right holders. The distinctive feature in Africa is that despite everything, there is keen interest in ICTs.[124]

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[123] The main reasons are the lack of electricity and telephony, the limited number of computers in service, the high cost of equipment and connection, computer illiteracy, etc.

[124] This is clearly reflected by the growing number of digital campuses, established under the guidance of the *Agence Universitaire de la Francophonie* (University Agency of Francophony) (AUF). Moreover, this body has been setting up as many connection points as possible, which it calls *Centres d’Accès à l’Information* (Information Access Centres), or CAIs. Other initiatives taken by certain African countries also bear witness to this keen interest. In Cameroon for example, in addition to the

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The problem is that on the whole, exceptions to copyright and related rights prejudice or could prejudice the market for distribution, using this means, of works which have a direct or indirect educational purpose and which are disseminated online from African countries or abroad. The threat is real.[125] It has never been so easy to act on a work. As soon as a work is available on the networks and is not protected by any technical measure, it is so easy to access that it gives the impression of being there for the taking.

The legal bases for this reflection must naturally be sought in the WCT and the WPPT. According to the Agreed Statement concerning Article 10 of the WCT, "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 network environment." The WPPT, after recalling in Article 16, paragraph 1 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", takes up the Agreed Statement concerning Article 10 of the WCT. The option chosen by the WPPT may be interpreted as meaning that new exceptions and limitations specific to the digital network environment can be added to those already in existence.

Have the African laws incorporated these provisions? Have they foreseen exceptions specific to the digital environment?

On the whole, most of the texts contain an exception relating to computer programs. More interestingly, however, some texts adopted after the two WIPO treaties incorporate exceptions relating to the digital environment: the relevant laws of Cameroon, Ghana and Tanzania, which foresee a special system for temporary reproductions. Hardly any of the laws examined contain any direct allusion to the use of digital technology in conjunction with the exception for teaching. It is therefore necessary to scrutinize the terms used in these exceptions as well as their content to determine whether they remain applicable with digital technology. When this is done, we note first of all that the exceptions and limitations for teaching are broadly worded in the majority of African laws. Indeed, African legislators generally rely on the term "use", which is sufficiently generic to cover the reproduction,

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CAIs run by the AUF which are located in certain universities, an Interuniversity Documentation Centre has been set up to facilitate remote access to scientific information available on the networks. In Senegal, the government is introducing distance learning in schools, high schools and universities using ICTs. In Benin, the *learnlink* project offers distance training in Songhai, relying on state-of-the-art technology for distance learning. Similar initiatives have been taken in Burkina Faso, Gabon, Madagascar, etc. On the question as a whole, see L.M. ONGUENE ESSONO, *La formation à distance en Afrique francophone à l'heure des TIC. Bilan, perspectives et interrogations*, http://www.africanti.org.

[125] In Europe, the summary of the reasons set out in the Directive on the Information Society invites member States of the European Union to take due account of the considerable economic impact the exception is likely to have when it is applied to the new electronic environment, as a result of which in the final analysis, the scope of application of this exception should be even more restricted in the case of these new uses than for the traditional environment.

performance and transformation of the work, provided that the educational purpose remains constant and that the acts carried out in conjunction with such use do not cause any unreasonable prejudice or conflict with the normal exploitation of the work. If we apply this logic, no restrictions should be imposed on educational institutions merely because the work is digital or has been digitized or merely because it is present on digital networks. It is only with regard to the modalities for the use of these works by these institutions that special precautions must be taken to avoid infringing the last two stages of the test.

However, the relevant Liberian law has incorporated at least one aspect of the use of digital technology in teaching. It refers to performances and communications of any work of the mind (apart from dramatic literary works and musical works) through a broadcast which could well be digital, when such a performance or communication constitutes a normal activity for the educational institution, when the performance or communication is part of the educational content of the broadcast, when the broadcast is meant to be received in a classroom or similar place set aside for instruction, or when it is intended to be received by persons who, owing to their disability or certain circumstances, cannot take part in classroom teaching or on premises normally set aside for instruction. This provision is genuinely original. It envisages several cases where a protected work is an integral part of a broadcast in the context of educational activities. In this framework, it evokes the very interesting case of broadcasts meant to be received in classrooms or similar places, and above all broadcasts that can be received outside these premises, depending on the circumstances. This possibility leads us to think that digital broadcasting targeting these persons is conceivable within the framework of the exception. If such a broadcast is meant to be received in classrooms, the precautions to be taken will simply make it possible to ensure that the broadcast does indeed reach these rooms. If it is meant to be received outside the classrooms, these precautions will have to be of a technical nature and consist of rigorous identification of the beneficiaries, as we have seen above.

The point should also be made that several laws reserve the admission of certain practices for face-to-face teaching, leading us to conclude *a contrario* that when teaching is done via the Internet, these practices should give rise to the payment of royalties to the right holders. This holds true for such English-speaking countries as Botswana, Ethiopia, Mauritius, Swaziland and Tanzania. This opinion is fraught with consequence. In fact, when for example the relevant Ethiopian law like all of the others mentioned authorizes “reproduction solely for the purpose of face-to-face teaching activities”, does this prohibit any reproduction in the digital universe for teaching purposes? The answer is clearly “no”. When the law stipulates that reproductions only fall within the scope of the exception if they are made with a view to face-to-face teaching, it merely excludes any other form of teaching. It does not forbid reproductions based on digital technology if they are used for face-to-face teaching.

L. Impact of technical protection measures

The delegations to the Diplomatic Conference for the Adoption of the WIPO Internet Treaties agreed to introduce into these two instruments an essential provision aimed at guaranteeing the implementation of technical measures of this type which certain authors deem “indispensable for the protection, exercise and application of copyright in the interconnected digital environment.”[126] The difficulty consists simply of reconciling the

[126] These authors (Koelman, 2003, p. 57 and following; Ficsor 2002, p. 544) are quoted by C. Guibault, *Nature et portée des limitations et exceptions au droit d’auteur et aux droits voisins au*

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legislative provisions for the protection of technical measures with the exercise of the limitations and exceptions to copyright and neighbouring rights.

On a preliminary basis, it should be noted that Mrs. Dusselier and Mr. Strowel[127] brilliantly explained the different types of technical measures which now make it possible to protect works in a digital universe.[128]

A first type of technical measures protects copyright. The first example is that of *technical tools preventing the execution of any act or use subject to exclusive right*, such as printing, communication to the public, digital copying, alteration of the work, etc. Here, one mainly speaks of anti-copying systems. One of the examples is the *dongle*, primarily used for software, which generally consists of a hardware component,[129] a sort of key that plugs into the computer's serial port. Any software protected by this system logs onto this key to check the scope of the user's rights. The other example consists of *smart cards*, which store more material and can also contain prepaid payment units. In this category, there is also the *Serial Copy Management System*, primarily used in the United States on such digital audio recording devices as DAT (Digital Audio Tape) and minidisks. This technology enables the device to decode the audio signals incorporated in the medium, in particular the data relating to the protection of the medium. The system authorizes the making of a single digital copy from the original but prevents all subsequent copies. A similar system, the *Content Scrambling System*,[130], based on the technology of cryptography, is sometimes affixed to DVDs in order to prevent any reproduction.

These systems make it possible to offer secure access to a work, to a body of works, or to a service comprising protected works. To deactivate the protection mechanism, it is necessary to either make an electronic payment or meet other licensing conditions agreed with the right holders.

There are also devices to control access to the protected works. These may offer several possibilities: controlling only the first access then leaving the work free for use; requiring that conditions be met for each new access; or providing differentiated access depending on the user type. For example, a university or another educational institution may have obtained

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regard de leurs missions d'intérêt général en matière de transmission des connaissances : l'avenir de leur adaptation à l'environnement numérique, mentioned previously.

[127] A. Strowel and S. Dusollier, *La protection légale des systèmes techniques*, Workshop on the implement of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), Geneva, December 6–7, 1999, which can be consulted at *www.wipo.int/edocs/mdocs/copyright/en/sccr_8/sccr_8_6.pdf.*

[128] See also D.S. Marks and B.H. Turnbull, *Mesures de protection techniques: au croisement de la technique, de la législation et des licences commerciales*, Workshop on the implementation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), Geneva, December 6–7, 1999, available at *www.wipo.int/edocs/mdocs/copyright/en/sccr_14/sccr_14_5.doc*; E.A. Caprioli, *Mesures techniques de protection et d'information des droits d'auteur*, Communication-commerce électronique, Nov. 2006, p. 25.

[129] It can also be a diskette which one inserts in the computer when the user wishes to use the software. The software will only run if the user has this diskette in his possession.

[130] D. McCullagh, *Blame US Regs for DVD Hack, Wired News*, November 11, 1999.

access, in exchange for a lump sum payment covering a given period,[131] to a work or collection of works for a set number of learners and for an agreed duration. In this case, the system can be programmed to check that the decoding key has been installed on the computers of the university or educational institution, ensure that the contractually agreed password is used or even verify the learner's identity. At the same time, this technology can grant a private individual repeated access in exchange for periodic payments.

Many technologies can be used to achieve these goals:[132] cryptography, passwords, set-top boxes, black boxes, digital signatures,[133] and digital envelopes.[134]

Other technical measures are used for the marking and tattooing or identification of works. This is the case with *watermarking*, where certain information is inserted into the work's digital code. Another example is *fingerprinting*, widely used by photo agencies, which affix their name or logo to a copy of a photo solely for promotional purposes and only transmit the image without this marking once the agreed fee has been paid. Finally, this is also the case with the digital serial numbers incorporated in works. If an unauthorized copy is found on the market, these numbers make it possible to trace the copy back to the original copy made by a licensee which was used to make the unauthorized copy.

The last category of technical measures consists of electronic management systems, which are designed to handle the management of rights on networks by allowing the signing of user licenses and by monitoring use of works. These tools can also serve other purposes: distributing the fees levied; collecting payments, sending invoices, conducting user profiling, etc. Mr. Strowel and Ms Dusselier give such examples as *electronic agents*[135] and the *Electronic Right Management System (ERMS)* or *the Electronic Copyright Management Systems (ECMS).*

With regard to the question of exceptions and limitations, "it is clear that, by blocking access to a work or by preventing the execution of an act subject to the author's authorization, a technical measure can by definition sharply curtail the user's ability to perform the acts permitted by virtue of a legal exception. If, further to the use of a technical protection measure, the user is no longer capable of quoting the work, making a private copy or using it

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[131] For example the academic year.

[132] Dongles and smart cards can also be used to control access.

[133] *Digital signatures* are a special application of cryptography used to certify and identify a document. This technology is generally used to guarantee the security of transmissions of works on networks and to prevent unauthorized persons from accessing the work. The decoding key is provided in exchange for payment of an access fee and/or compliance with the conditions to which use of the work is subject.

[134] The *digital envelope* or *digital container* is another application of cryptography whereby a work is "inserted" into a digital envelope containing information relating to the work and the conditions of use. It is only by meeting these conditions (such as payment of a fee, use of a password, etc.) that the envelope opens and the user can access the work.

[135] A technology developed to perform many functions on networks. Some of them are programmed to negotiate and sign electronic contracts, and sometimes, when they are efficient, they even provide automatic handling of the distribution and use of the work, in particular by incorporating an electronic payment system, by renewing user licenses, or by drawing up an accurate inventory of use showing the number and identity of the works copied, printed, blown up, downloaded, both with a view to proper invoicing that is proportionate to real utilization and guided by a future marketing goal.

for purposes of instruction or information, the scope of these exceptions in the digital world could well be drastically reduced."[136]

In other words, technical protection measures raise a set of issues that are posed in virtually black-and-white terms. By accepting them, it is clear that they offer right holders influence over users since they restrict access to works. Yet this access might be authorized by the law, in the analog or even digital world. In such a case, the consumer would be deprived of a possibility to use the work, which is available to him under the law. Under these conditions, how can we strike a balance between the acceptance, by international treaties and national laws, of technical protection measures and exceptions to protected rights?

The search for a solution is complicated by a key technical factor: technical protection mechanisms are blind. When they have been designed to prevent or control access to a work by requiring information or the fulfilment of certain conditions, they perform their function mechanically. In doing so, they naturally impact both those trying to use the works unlawfully and those who are authorized by the law to use the works. Mr. Strowel and Mrs Dussolier further write that "it is difficult to imagine that a mechanism might be designed solely to make private copies or copies of an unprotected work. It is clear that the same systems allow the neutralization of the protection mechanisms for illegal purposes. In addition, authorizing the placing into circulation of systems used solely for legitimate purposes would enable their manufacturers to systematically avoid any responsibility."[137]

The outcome is that technical measures assume an all-or-nothing policy. In fact, they raise two additional questions in conjunction with exceptions and limitations. The first consists of verifying that the law protects the technical measure in itself. When the first question is answered in the affirmative, the second consists of attempting to reconcile the protection afforded by such measures with the benefit of exceptions and limitations to the protected rights.

In connection with the first question, the point should be made at the outset that the protection of technical measures most often comes not from an enumeration of technologies or an affirmation that the security of all technical mechanisms is guaranteed under the law but rather an incrimination of the acts centring on the neutralization of the device. When the protection of the technical measure does not apply in a country, neutralizing the technical measure is by no means an objectionable deed. Consequently, the user is only liable if, after such neutralization, he uses the work outside the scope of an exception or limitation. *A contrario*, this implies that in a country where neutralizing the technical measure is not an offence, an educational establishment could well unlock the work and reproduce it or perform it in the course of its activities. This is the logic in the United States where, as circumventing technical measures is not forbidden in itself, users can unlock the technical protection device with a view to exercising an act of "fair use".[138]

Things are different if the technical measure is itself protected. In this case, attempts to neutralize it would themselves constitute offences, even if there is no intent to commit such an offence. In other words, if the neutralization of technical protection measures in a country is forbidden, the reason for such neutralization matters little. The offence of neutralizing a

[136] A. Strowel and S. Dussolier, mentioned previously.
[137] Ibid.
[138] Ibid.

technical measure shall be deemed to have occurred even if the author of such neutralization intended to subsequently make lawful use of the work protected by the measure.

The situation is rather worrying: owing to a technical protection measure, the beneficiary of an exception or limitation is deprived of an act authorized by the law. In a teaching setting, educational institutions are deprived of valuable teaching tools and aids. The balance is apparently upset between the protection of rights and the public interest. In the case of Europe, this break is virtually taken for granted: under the directive relating to copyright and neighbouring rights in the information society which authorizes right holders to take technical measures preventing the benefit of exceptions,[139] technical measures clearly take precedence over limitations imposed by the law on exclusive rights."[140]

In the special case of Africa, this approach could further limit opportunities for the dissemination of knowledge. A solution could be sought in two directions. The first, which is often proposed in response to these problems, consists of endowing exceptions with an imperative nature from which neither contracts nor technical measures could derogate.[141] Yet this solution is not perfect. Due to the fact that technology is blind, a technical measure cannot differentiate between acts performed in conjunction with exceptions and other acts. It reacts to "requests for technical acts such as copying, printing, sending, reading and access. It cannot recognize the context in which the act is performed. The often subjective conditions imposed on the exercise of an exception cannot be analysed and recognized by such technical measures."[142]

The second direction is the one sought by right holders when they lock their works. The idea is to impose a contractual relationship on users. Within the framework of these relations, the authors oblige users to submit to their conditions before being able to access the words. In a teaching setting, this could take the form of a contract under which the right holders could either provide establishments which have legitimately acquired the work with a copy of the said work with no technical protection device or make available a copy whose technical protection device would take into consideration the specific type of exceptions which the establishment is authorized by the law to exercise.[143]

As we can see, the exception for teaching and all of the other exceptions would be completely neutralized and would turn into contractual negotiations between the rightful

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[139] Subject to the safeguarding of certain exceptions foreseen in Article 6.4 of the directive.
[140] S. Dusollier, *L'introuvable interface entre exceptions au droit d'auteur et mesures techniques de protection*, Communication – Commerce électronique, Nov. 2006, p. 21. See also T. Maillard, *Le monopole malmené : l'impact des mesures techniques de protection et d'information*, Revue Lamy droit de l'immatériel, supplement No. 49, May 2009, p. 69.
[141] B. Hugenholtz, *Rights, Limitations and Exceptions: Striking a Proper Balance*, Keynote Speech at the Imprimatur Consensus Forum, October 30–31, 1997, Amsterdam; L. Guibault, *Contracts and Copyright Exemptions*, Amsterdam, Institute for Information Law, 1997.
[142] A. Strowel and S. Dussolier, mentioned previously. These authors take as an example the imperative nature granted by the European directive on the basis of data concerning the exception enabling the legitimate user to perform the necessary acts for normal utilization. How can the technical measure protecting the database determine what normal use is?
[143] For the question of technical measures and contracts, see G. Gomis, *L'influence des mesures techniques sur les pratiques contractuelles*, Revue Lamy droit de l'immatériel, Supplement No. 49, May 2009, p. 73.

beneficiaries and users. The law would be neutralized by one of the actors in the field it is meant to regulate.

The question which could arise is: What would happen if the director of an educational institution paid a fee online like a normal consumer but subsequently used the work and allowed it to be used by way of illustration for teaching? Would he and his establishment be acting illegally because they had jointly used a work meant to be used by a single person? To understand the issues at stake, the point should be made that the content of a licensed granted online for the user should not matter. Following this logic, even if the contract prohibits such use, this cannot bind the user, who is acting in accordance with the law which authorizes him to perform the contentious usage.

An attempt to reconcile opposing interests could consist of a two-stage solution. First, the fact that the educational establishment benefits from an exception should enable it to be exempted from any payment. However, if such payment is required by a technical protection measure to assess the work online, we must accept that it is obliged to make such payment. Subsequently, and moreover, the extract or copy of the work at its disposal would necessarily be lawful, leading us to suggest that the exception once again prevails and allows very broad use, provided that the other conditions of the restriction are met. This interpretation has the advantage of not obliging each individual educational actor within a given establishment to pay the fees required to access the work online.

V. CONCLUSION

The term which the law chooses when foreseeing a restriction on teaching is of little importance. On the whole, what matters is the identification of a zone of use that does not come under the control of right holders in the initial stages. This zone, which is tailored to each context by the national legislator, is, according to a non-partisan reading, sufficiently well mapped out by international conventions. Outside the licensing system foreseen for the benefit of the developing countries which should be streamlined, the rules stemming from multilateral treaties are quite relevant and balanced: they take due account of the interests of right holders and teaching needs as far as the use of protected subject matter is concerned. In particular, the rule of the triple test or triple criteria provides a genuine tool for justification and a yardstick for measuring exceptions and limitations. In the initial stages, it lets lawmakers appreciate the appropriateness and legitimacy of an exception to be created. Subsequently, it provides an means of evaluating the proportionality of an exception already created with a view to deleting it from the arsenal of positive law or at least providing for fair payment designed to limit any harmful effects.

The latter situation should not come as a surprise: the exception or limitation for teaching affects the exclusive nature of the right, not the existence of the right itself. Following this logic, the main issue at stake with the granting of an exception or a limitation is a reversal of the burden of pressure. In a system which allows intellectual property to function normally, users are obliged to obtain prior consent from right holders or collective management bodies. On the other hand, in a system where an exception is foreseen, the consumer makes free use of the work without having to obtain any consent. And given that such use is restricted to the limits defined by the law, it is generally free of charge. It only becomes subject to payment when, owing to its frequency, volume, or inappropriateness, it unreasonably prejudices the interests of the right holders or conflicts with a normal exploitation of the work. As a result,

more of the burden is on the right holders. They are the ones responsible for proving that the conditions for free use in exchange for fair payment are met.

In general, given the intensive use of works in a teaching setting, it is easy to meet the conditions required for use to give rise to fair payment. This is why it is not surprising to assert that even in countries where the law specifically maintains that the use of works for teaching purposes shall not give rise to any form of compensation, it is easy to replace the exception or limitation by a license signed with educational establishments or on their behalf by collective management bodies.

In all of these cases, the law must foresee an exception or limitation for teaching. It must be painstakingly delimited to avoid any misuse while remaining as broad as possible to cover the manifold needs of education. Some legislations wrongly limit it to certain categories of works: all intellectual creations must benefit education. Other legislations further wrongly limit it solely to certain acts: all acts of performance or reproduction must be able to be performed by way of illustration for teaching.

Granted, one can understand legislators' mistrust of certain modes of exploitation of works. This is the case with reprography and the Internet. The former is so dangerous for creation that some texts devote special provisions to it in an attempt to contain it without ignoring the needs of education. We must however acknowledge that the solution which strikes the best balance between opposing interests is that of the license whereby right holders receive minimum compensation. The Internet features specific risks as a result of which few legislations have examined it in detail. In the final analysis, teaching relying on this mode of communication (e-learning) is insufficiently regulated. Consequently, it would be appropriate for the African countries to draw inspiration from the experience of certain developed countries to legislate on this issue. In the meanwhile, efforts will be made to adapt rules in each instance in the event of a dispute. In the process, we will see for example that existing technical protection measures are to a large extent legitimate on the networks. We cannot require right holders to freely place their subject matter which is still protected at the disposal of all those who could log onto such networks. Under these circumstances, we are obliged to recognize that only an agreement with these right holders can make it possible to strike a balance between the possibilities offered by a legal restriction for teaching and the interests of authors, which are particularly threatened by exploitation of a digital nature.

[Annexes follow]

APPENDICES: ANALYTICAL TABLES OF THE EXCEPTIONS AND LIMITATIONS FOR TEACHING FORESEEN BY NATIONAL LEGISLATIONS

Bangui Agreement (Annex VII) revised in 2002, applicable to the member countries of the African Intellectual Property Organization (OAPI) with no domestic legislation

References	Art. 12; Art. 13; Art. 20.iii; Art. 52.iii
Field concerned by the restriction	Copyright and neighbouring rights
Type of teaching benefiting from the restriction	All (for certain acts, it is stipulated that teaching must not be directly or indirectly for profit)
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Insertion in a publication, broadcast or sound or visual recording intended for teaching - Reprography - Quotation - Performance
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Lawfully published work - Limitation justified by the purpose - Performance limited to a specific audience - Indication of source and author’s name

Angola: Law No. 4/90 of March 10, 1990 on Copyright Protection

References	Art. 29 (a), (b) and (e)
Field concerned by the restriction	Copyright
Type of teaching benefiting from the restriction	All (the law contains no restrictions)
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Reproduction by photographic means or any analogous process - Performance and communication of the work by any means, including cinematography - Radio and television broadcasts - Quotation
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Lawfully disclosed work

	- Utilization not for profit - Performances stages on private premises - Number of copies limited by the purpose - Reference to the source and author's name

Benin: Law No. 2005/30 of April 5, 2006 of Protection of Copyright and Neighbouring Rights

References	Art. 13; Art. 15; Art. 21; Art. 69; Art. 79
Field concerned by the restriction	Copyright and neighbouring rights
Type of teaching benefiting from the restriction	All (for some acts, it is stipulated that teaching must not be directly or indirectly for profit)
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Insertion in a publication - Radio or television broadcast - Sound or visual recordings - Reprography - Quotation
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception, legal license
Compensation for the restriction	- Free in certain cases - Compensation when the establishment supplies the devices needed for reprography and charges a fee
General conditions	- Work made lawfully available to the public - Teaching not for profit - Limitation justified by the purpose - Limitation restricted to a specific audience - Reference to the source and author's name

Botswana: Copyright and Neighbouring Rights Act, 2000 (entry into force 2007)

References	Art. 12.ii and iii; Art. 14; Art. 15; Art. 28.c
Field	Copyright and neighbouring rights
Type of teaching benefiting from the restriction	All (for certain acts, it is stipulated that teaching must not be directly or indirectly for profit; other acts are reserved for face-to-face teaching)
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All, as extracts or in full if they are short
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Insertion in a publication - Radio or television broadcast - Sound or visual recordings - Reprography (for face-to-face teaching) - Quotation

Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Published work - Teaching not for profit - The reproduction must be isolated or, if it is repeated, the occasions justifying the reproductions must be separate and unrelated - There must not be any collective license offered by a collective management body and known or likely to be known to the educational establishment and under which the reproduction may be made - Limitation justified by the purpose - Reference to the source and author's name on all copies

Burkina Faso: Law No. 032-99/AN of December 22, 1999 on Protection of Literary and Artistic Property

References	Art. 22; Art. 80
Field concerned by the restriction	Copyright and neighbouring rights
Type of teaching benefiting from the restriction	All (the law contains no restrictions)
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Publication - Broadcasts - Sound or visual recordings - Quotation
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Lawfully disclosed work - Fair use - Non-profit nature of the utilization - Reference to the source and author's name

Cameroon: Law n° 2000/11 of December 19, 2000 on Copyright and Neighbouring Rights

References	Art. 29.1.(a) and (d); Art. 67.1(c)
Field concerned by the	Copyright and neighbouring rights

restriction	
Type of teaching benefiting from the restriction	All (the law contains no restrictions)
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Publication - Broadcasts - Sound or visual recordings
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Work published with the author's authorization - Fair use - Non-profit nature of the utilization

Cape Verde: Law No. 101/III/90 of December 29, 1990

References	Art. 48.1 (a), (b) and (e)
Field concerned by the restriction	Copyright
Type of teaching benefiting from the restriction	All, including vocational training
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Reproduction by photographic means or any analogous process - Performances and communication of the work by any means, including cinematography - Radio and television broadcasts - Sound or visual recordings - Quotation
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Work lawfully published or disclosed - Non-profit nature of the utilization - Number of copies limited by the purpose - Reference to the source and author's name

Central African Republic: Ordinance No. 85/002 of January 5, 1985 on Copyright Law

References	Art. 11.1; Art. 12; Art.17; Art. 18
Field concerned by the restriction	Copyright law

Type of teaching benefiting from the restriction	All (the law contains no restrictions)
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All
Rights covered by the restriction	Reproduction, translation, performance
Acts authorized in conjunction with the restriction	- Reproduction - Translation - Performance - Radio and television broadcasts
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Work made lawfully available to the public - Number of copies limited by the purpose - Utilization not for profit - No conflict with the normal exploitation of the work - No prejudice to the author's interests

Chad: Law No. 2000/11 of December 19, 2000 on Protection of Copyright, Neighbouring Rights and Expressions of Folklore

References	Art. 34.3 (a) and 34.5
Field concerned by the restriction	Copyright law
Type of teaching benefiting from the restriction	All (the law contains no restrictions)
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All
Rights covered by the restriction	Reproduction
Acts authorized in conjunction with the restriction	- Publication - Broadcasts - Sound or visual recordings - Quotation
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Work published with the author’s authorization - Fair use - Utilization not for profit

Congo: Law No. 24/82 of July 7, 1982 on Copyright and Neighbouring Rights

References	Art. 33 (b) and (c); Art 97; Art. 98.
Field concerned by the restriction	Copyright and neighbouring rights
Type of teaching benefiting from the restriction	All, including vocational training

End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All, in the original or in translation
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Publication - Radio or television broadcast - Sound or visual recordings - Performance - Reproduction of works and phonograms - Quotation
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception, legal license
Compensation for the restriction	Free, fair compensation
General conditions	- Lawfully published work - Limitation justified by the purpose - Compliance with fair practice - Reference to the source and author's name - Prohibition on exporting phonogram copies made

Côte d'Ivoire: Law of July 25, 1996

References	Art. 31
Field concerned by the restriction	Copyright
Type of teaching benefiting from the restriction	All (the law contains no restrictions)
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Publication - Television broadcasting - Sound or visual recordings - Quotations
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Work made lawfully available to the public - Fair use - Non-profit nature of the utilization - Reference to the source and author's name

Democratic Republic of Congo: Decree-Law No. 86-033 of April 5, 1986 on Copyright and Neighbouring Rights

References	Art. 24; Art. 25; Art. 31; Art. 89
Field concerned by the restriction	Copyright, neighbouring rights
Type of teaching benefiting from the restriction	Educational establishments (the law contains no clarifications)

End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All, particularly photographs
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Insertion in an anthology or a scientific work - Performance - Radio or television broadcasts - Quotation
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Disclosed work - Limitation justified by the subject of the course - Limitation restricted to class time - Number of broadcasts determined in advance

Ethiopia: Proclamation to protect copyright and neighboring rights, Proclamation no.410/2004

References	Art. 11; Art. 16; Art. 32
Field concerned by the restriction	Copyright and neighbouring rights
Type of teaching benefiting from the restriction	All. Certain acts are reserved for face-to-face teaching.
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All (phonograms are also covered)
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Reproduction - Performance - Quotation
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Published work - Non-profit performance - Fair practice - Reproduction of performances and phonograms limited to face-to-face teaching, unless such performances and phonograms were made for educational purposes - Reference to the source of the work or sound recording and to the author’s name

Gambia: Copyright Bill, 2003

References	Art. 29; Art. 30; Art. 43

Field concerned by the restriction	Copyright and neighbouring rights
Type of teaching benefiting from the restriction	All. Certain acts are reserved for face-to-face teaching.
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All (phonograms are also covered)
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Insertion in a written work or a sound or visual recording - Reprography - Quotation
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Published work - Limitation justified by the purpose - Fair practice - Reprography of articles, short works or short extracts, for face-to-face teaching, in non-profit establishments - Reference to the source and author's name on all copies

Ghana: Copyright Act 2005, Act 690

References	Art. 19.1(b,(c)(i), (ii), (iii); Art. 19.3; Art. 22.2; 35(c) and (d)
Field concerned by the restriction	Copyright and neighbouring rights
Type of teaching benefiting from the restriction	All, including vocational training
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All, including portraits
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Publication (for portraits) - Insertion in a publication - Radio or television broadcasts - Sound or visual recordings - Quotation
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Published work - Fair practice - Reference to the source and author's name

Kenya: Copyright Act, 2001

References	Art. 26.1(d), (e), (f)
Field concerned by the restriction	Copyright
Type of teaching benefiting from the restriction	Teaching provided by schools and universities established in accordance with the law
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	Literary and musical works
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Insertion in a publication - Radio or television broadcasts - Reproduction of broadcasts for use in schools
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Borrowing limited to two short extracts - Reference to the source and author's name

Liberia: Copyright Law, July 30, 1997

References	Section 2.7; Section 2.10 (1) (2).
Field concerned by the restriction	Copyright
Type of teaching benefiting from the restriction	All. Certain acts are reserved for face-to-face teaching.
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All (phonograms are also covered)
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Reproduction by the making of copies - Insertion in a sound recording - Performances and communications to the public - Transmission
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Fair use - Performances and transmissions originally intended to be received in classrooms or similar premises - The copy of the cinematographic or audiovisual work used for the performance must be lawful

Madagascar: Law No. 94-036 of September 18, 1995 on Literary and Artistic Property

References	Art. 43.3; Art. 44; Art. 45
Field concerned by the	Copyright

restriction	
Type of teaching benefiting from the restriction	All
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Insertion in a publication or a radio or television broadcast - Reproduction - Quotation - Reprography of short extracts or of the entire work - Performance - Radio or television broadcasting
Purpose of the restriction	Illustration for teaching and related tests
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Lawfully published work - Compliance with fair practice - Limitation justified by the purpose - Limitation restricted to a specific public - Non-profit nature of the utilization - Reference to the source and author's name

Malawi: Copyright Act, 1989

References	Art. 10(a); Art 39
Field concerned by the restriction	Copyright and neighbouring rights
Type of teaching benefiting from the restriction	All, including vocational training
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All, in the original or in translation
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Insertion in a publication or a radio or television broadcast, including distribution by cable - Sound or visual recordings - Performance
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Lawfully published work - Limitation justified by the purpose - Reference to the source and author's name

Mali: Law No. 8426/an-rm of October 17, 1984 laying down the system for literary and artistic property in the Republic of Mali, as amended by Law No. 94-043 of October 13,1994

References	Art. 37.1(b); Art. 39.1; Art. 40
Field concerned by the restriction	Copyright
Type of teaching benefiting from the restriction	All, including literary programs
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Radio or television broadcasts - Reproduction by "scientific means" - Quotation - Performance
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception, license
Compensation for the restriction	- Free for performances - Fair compensation for reproductions
General conditions	- Lawful work made available to the public - Prior information of the author or the collective management body - Non-profit nature of use - Respect for moral rights - Authorization of the Ministry of Culture - Number of copies limited to the needs of the activity - No conflict with the normal exploitation of the work - No unreasonable prejudice to the author's interests

Mauritius: Copyright Act of July 28, 1997

References	Art. 14; Art. 15; Art. 30(c)
Field	Copyright and neighbouring rights
Type of teaching benefiting from the restriction	All (for certain acts, it is stipulated that teaching must not be directly or indirectly for profit; other acts are reserved for face-to-face teaching)
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Insertion of short extracts in a publication or a sound or visual recording - Reprography of extracts or entire short works for face-to-face teaching - Quotation
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Published work - The reproduction must be isolated or, if it is

	repeated, the occasions justifying the reproductions must be separate and unrelated - Non-profit nature of the teaching - No collective license offered by a collective management body that is known or likely to be known to the educational establishment and under which system the reproduction can be made - Limitation justified by the purpose - Reference to the source and author's name on all copies

Mozambique: Law No. 4/2001 of February 27, 2001 Ratifying Copyright

References	Art. 10; Art. 11; Art. 19.b; Art. 47.c
Field concerned by the restriction	Copyright, neighbouring rights
Type of teaching benefiting from the restriction	All (for certain acts, it is stipulated that teaching must not be directly or indirectly for profit)
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Insertion in a publication, radio or television broadcast - insertion in sound or visual recordings - Reprography of short extracts or of the entire work if it is short - performance - quotation
Purpose of the restriction	Illustration for teaching and use for related tests
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- disclosed, non-reserved work - Limitation justified by the purpose - Limitation restricted to a specific audience - Use not for profit - Use not consistent with practice - Indication of source and author's name

Namibia: Copyright Act 98 of 1978

References	Art. 12.3 and 4
Field	Copyright law
Type of teaching benefiting from the restriction	All
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	Literary and musical works

Rights covered by the restriction	Reproduction
Acts authorized in conjunction with the restriction	- Insertion in a publication, in a radio or television broadcast or in sound or visual recordings - quotation
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Limitation justified by the purpose - Fair practice - Indication of source and author's name

Niger: Ordinance No. 93-027 of March 30, 1993 on Copyright, Neighbouring Rights and Expressions of Folklore

References	Art. 10; Art. 11; Art.19; Art. 47 (iii) and (iv)
Field concerned by the restriction	Copyright law
Type of teaching benefiting from the restriction	All (for certain acts, it is stipulated that teaching must not be directly or indirectly for profit)
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Insertion in a publication, radio or television broadcast - Reproduction by reprography of short extracts or of the entire work if it is short - representation - quotation
Purpose of the restriction	Illustration for teaching and use of related tests
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Lawfully published work - Limitation justified by the purpose - Limitation restricted to a specific audience - Use not for profit - Compliance with fair practice - Indication of source and author's name

Nigeria: Copyright Act (Cap. 68, Laws of the Federation of Nigeria, 1990 as amended by the Copyright Amendment Decree No. 98 of 1992 and the Copyright (Amendment) Decree 1999

References	Art.28 (b); second schedule (f) (g) (h)
Field	Copyright law
Type of teaching benefiting from the restriction	Approved establishments
End beneficiary of the	Pupils, students, teachers

restriction	
Works covered by the restriction	All, including expressions of folklore. Special clarifications with regard to literary and musical works
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Insertion of maximum two extracts in a collection of literary or musical works - Radio or television broadcasts - Reproduction - Any other use
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- published work - The collection compiled must indicate that it is for an educational purpose - The educational purpose of the broadcast must be approved by the regulatory authority - The reproductions must be destroyed at the end of the prescribed period; if no such period is specified, at the end of twelve months - Indication of source and author's name

Rwanda: Bill adopted on March 31, 2008 (awaiting promulgation)

References	Art. 205; Art. 206; Art. 213; Art. 247.4, 5 and 6
Field concerned by the restriction	Copyright and neighbouring rights
Type of teaching benefiting from the restriction	All (for certain acts, it is stipulated that teaching must not be directly or indirectly for profit)
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All (excluding phonograms and public performances for teaching purposes)
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Insertion in a publication, radio or television broadcast or sound or visual recording intended for teaching - Reproduction by reprography of short extracts or of the entire work if it is short - Performance - Quotation
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Lawfully published work - Limitation justified by the purpose - Limitation restricted to a specific audience - Indication of source and author's name

Senegal: Law No. 2008-09 of January 25, 2008 on Copyright and Neighbouring Rights

References	Art. 42; Art. 44; Art. 89
Field concerned by the restriction	Copyright and neighbouring rights
Type of teaching benefiting from the restriction	All (the law contains no restrictions)
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Reproduction - Performance - Quotation
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Use not for profit - Indication of source and author's name or of the holder of the neighbouring right

Seychelles: Copyright Act (chapter 51), revised edition 1991

References	Schedule I, section 6
Field	Copyright law
Type of teaching benefiting from the restriction	All
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	Literary and musical works
Rights covered by the restriction	Reproduction
Acts authorized in conjunction with the restriction	- Insertion of maximum two short extracts in a collection of literary or musical works meant for educational institutions
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Fair dealing - Indication of source and author's name

South Africa: Copyright Act 98 of 1978 as amended by the Copyright Amendment Act 9 of 2002

References	Art. 12.3 and 4
Field concerned by the restriction	Copyright law
Type of teaching benefiting from the restriction	All (the law contains no restrictions)

End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	Literary and musical works
Rights covered by the restriction	Reproduction
Acts authorized in conjunction with the restriction	- Insertion in a publication, radio or television broadcast or in a sound or visual recording - Quotation
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Limitation justified by the purpose - Fair practice - Reference to the source and author's name

Swaziland: Copyright Act, 1912

References	Art. 4.1 (d)
Field concerned by the restriction	Copyright law
Type of teaching benefiting from the restriction	All (the law contains no clarifications)
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	Literary works
Rights covered by the restriction	Reproduction
Acts authorized in conjunction with the restriction	- Insertion in a collection primarily composed on unprotected subject matter
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Published works - The extracts must be short - The insertion must have been made in good faith by way of illustration for teaching - The publication containing the extracts must itself specify that it is meant for teaching purposes or this must be specified on any advertising materials from the publisher - The original work must not have been meant for teaching purposes - Two extracts of works by the same author may not be borrowed from and published by the same publisher within a five-year interval - Indication of source and author's name

Tanzania: Copyright and Neighbouring Rights Act, 1999

References	Art. 12. 1; 12. 2 (c); Art. 35 (c) (d)
Field	Copyright and neighbouring rights

Type of teaching benefiting from the restriction	All, including vocational training (certain acts are reserved for face-to-face teaching)
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All, in the original or in translation, excepting architectural works and computer programs
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Insertion in a publication - Radio or television broadcasts, including distribution by cable - Sound or visual recordings - Reproduction (neighbouring rights) for face-to-face teaching - Quotation
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Lawfully published work - Limitation justified by the purpose - Fair practice - Indication of source and author's name - The performance or phonogram must not have originally been for teaching purposes

Togo: Law No. 91-12 on Copyright Protection, Folklore and Neighboring Rights of June 10, 1991

References	Art. 20.1 (b); Art. 21; Art. 109 (c); Art. 110
Field concerned by the restriction	Copyright, neighbouring rights
Type of teaching benefiting from the restriction	All (the law contains no clarifications)
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All
Rights covered by the restriction	Reproduction (for phonograms), performance
Acts authorized in conjunction with the restriction	- Performance - Radio or television broadcasts - Reproduction (for phonograms) - Quotation
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception, license
Compensation for the restriction	Free, fair compensation
General conditions	- Work made lawfully available to the public - Performance on premises set aside for that purpose

Uganda: Copyright and Neighbouring Rights Act, 2006

References	Art. 15.1 (b), (c), (d), (j); Art.15.2; Art.34 (c)
Field concerned by the restriction	Copyright, neighbouring rights
Type of teaching benefiting from the restriction	All, including vocational training
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	Literary works
Rights covered by the restriction	Reproduction
Acts authorized in conjunction with the restriction	- Insertion in a publication, radio or television broadcast or in a sound recording - Performance - Quotation
Purpose of the restriction	Illustration for teaching
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Published works - Fair use - Indication of source and author's name

Zambia : Copyright and performance rights Act, 1994

References	Art. 21.1 (f) (g); Art. 21.2; Art. 50.1 (a) and 2 (a) (b)
Field	Copyright, neighbouring rights
Type of teaching benefiting from the restriction	All
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Reproduction - Performance (dramatic works)
Purpose of the restriction	Illustration for teaching including related tests
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Performance executed by a means that does not allow for mass reproduction - Performance limited to dramatic works - Performance limited to a specific audience - No conflict with the normal exploitation of the work - No unjustified prejudice to the legitimate interests of the copyright holder

Zimbabwe: Copyright, Act (Ch. 26:1 Consolidation), (2000)

References	Art. 25; Art. 31; Art. 73.
Field concerned by the restriction	Copyright and neighbouring rights

Type of teaching benefiting from the restriction	All (the law contains no clarifications)
End beneficiary of the restriction	Pupils, students, teachers
Works covered by the restriction	All
Rights covered by the restriction	Reproduction, performance
Acts authorized in conjunction with the restriction	- Performance including communication of phonograms, audiovisual works and programs broadcast via cable - Insertion in a publication, collection, broadcast or recording - Performance, including the reprography of literary and musical works - Quotation
Purpose of the restriction	Illustration for teaching, including related tests
Nature of the restriction	Exception
Compensation for the restriction	Free
General conditions	- Performance limited to a specific audience - Performance staged by learners, teachers or others - Limitation justified by the purpose - The publication containing the extracts must itself specify that it is meant for teaching purposes, or this must be specified in any promotional materials received from the publisher - The publication must primarily consist of unprotected subject matter - No conflict with the normal exploitation of the work - No unreasonable prejudice to the author's interests - Indication of source and author’s name

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