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LIMITATIONSANDEXCETIONSUNDERTHE“TH REE-STEP
TEST”AN DINNATIONALLEGISL ATION –DIFFERENCES
BETWEENTHEANALOGA NDDIGITALENVIRONME NTS

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Introduction

1. I have been asked to speak to you today on the subject of limitations and exceptions to copyright and related rights. I am sorry to say that I do not know enough about the nature of society in this region to be familiar with the feelings of right owners and the wider public here about this issue. But in the United Kingdom (UK), and in Europe generally, it is a contentious one, with strongly held and conflicting views as between right owners on the one side, and, on the other, various user groups, ranging from those with specialized interests such as the library, research and educational sectors, the press, and broadcasters, to the general public.
2. Recently, the European Union, of which the UK is a member, has been engaged in formulating a Directive for harmonizing the laws of its member states in relation to copyright in the "Information Society", that is the new digital environment and in particular the Internet. One aspect of this Directive deals with exceptions to rights, and this has proved by far its most controversial element, which has given rise to enormous lobbying campaigns throughout Europe by interested parties on both sides of the question. And the story is not over yet. For while the governments of the member states of the European Union reached agreement in June on a text of the Directive which they feel is balanced, the Directive has to be read for a second time by the European Parliament before it can be adopted. I have little doubt that the Parliament will be heavily lobbied by right owners to tilt the balance more in their favor, and, conversely, by users to shift it more in their favor.
3. Governments, then, have an important role to play in deciding what is a fair and reasonable balance between, on the one hand, the entirely necessary and justified rights of authors, performers and producers, and, on the other, the interests of others in society. Certainly, finding this balance, chiefly by means of exceptions and limitations, is something to which we attach considerable significance in the UK. As we see it, this balance is vital in making copyright law acceptable to society as a whole, and satisfactorily workable in practice. Without it, we think it would be harder for us to carry out our role of increasing awareness of, and respect for, intellectual property among the public at large.
4. Clearly, however, governments cannot be free simply to create *any* exception or limitation to rights, regardless of its scope and effects, without compromising the very object of protecting copyright and related rights, that is, to enable authors, performers and producers to control use of their material and obtain proper economic rewards from this. If this is not possible for right owners, then there is no incentive for further creativity and investment. How then are governments to determine what is appropriate in making limitations and exceptions without impairing the protection of copyright and related rights? Over the years, an international standard has developed to assist governments in this respect. I refer, of course, to what has come to be known as the 'three-step' test, which will form an important part of my presentation today, and which I will now begin to examine.

The three-step test

5. The test has its origins in the work of the 1967 Stockholm Revision Conference of the Berne Convention. Surprisingly, prior to this Conference, the reproduction right, the most basic of the rights granted to authors, had not in fact been expressly stated in the Convention, although it had generally been recognized in national laws. The Stockholm Conference wished to remedy this situation, but it was difficult for it to do so without also acknowledging

that exceptions to the reproduction right already existed in national laws around the world. Therefore, what the Conference decided was to introduce a general reproduction right into the Convention, and at the same time allow for exceptions to the right, but by means of a provision which would not permit contracting parties to maintain or introduce exceptions so wide as to undermine the reproduction right.

6. The Stockholm Conference provision on exceptions to the reproduction right, the three-step test, eventually passed into the 1971 Paris Act of the Berne Convention as Article 9(2). Since then, it has gained much greater significance. Firstly, by virtue of 'TRIPS', the 1994 GATT Agreement on Trade-Related Aspects of Intellectual Property Rights. Article 13 of TRIPS in effect requires not only that national exceptions to the reproduction right should comply with the three-step test, but also that exceptions to the other exclusive rights covered in TRIPS must meet the test. Since then, a similar approach has been followed in Article 10 of the 1996 WIPO Copyright Treaty (WCT) and in Article 16 of the WIPO Performances and Phonograms Treaty (WPPT). Each of these treaties requires that exceptions to any of the rights specifically covered in the treaty meet the test. In addition, the WCT, which obliges contracting parties to comply with all of the substantive provisions of the Berne Convention, requires that exceptions to the rights covered by Bernemust also meet the test. Thus, at international level, the test now applies not only to exceptions to the reproduction right but also, for example, to exceptions to rights of distribution and communication to the public.

7. Let us now begin to look at the three-step test itself. The first step requires that exceptions should be confined to "certain special cases". The second requires that exceptions "do not conflict with a normal exploitation of a work" - or of a performance or phonogram, when, as in the WPPT, the test is applied to these things rather than copyright works. The third step of the test requires that exceptions "do not unreasonably prejudice the legitimate interests of the author" , or, correspondingly, of the performer or phonogram producer. It should be noted that the three steps of the test are cumulative, that is, all of them apply jointly to exceptions so that if an exception fails to comply with any one of the steps, it does not meet the test.

8. Of course, having this test is one thing, but what does it actually mean? Terms such as "special", "normal" and "unreasonable" are all open to interpretation rather than being absolute in meaning. Therefore, I will now try to examine further what is intended by the wording used in the test. In doing so, I will draw in particular on two sources of information. One is what is in my view a very good book on the Berne Convention, published in 1987 to commemorate the centenary of the Convention, and written by an Australian lawyer, Mr Sam Ricketson¹. This is a comprehensive commentary on the Convention, prepared from a legal and academic perspective.

9. The second source I shall draw on is from a rather different background. As you may know, the TRIPS Agreement includes a mechanism for resolving disputes between WTO members about whether their national laws are in compliance with TRIPS. Recently, a panel appointed under the TRIPS dispute settlement procedures has reached conclusions on a dispute between the European Union (EU) and the United States over an exception to

¹ "The Berne Convention for the protection of literary and artistic works: 1886 - 1986", by Sam Ricketson, published by the Centre for Commercial Law Studies, Queen Mary & Westfield College, University of London, 1987.

copyright in US law, which the EU has argued to be inconsistent with the TRIPS obligations, including the three-step test in Article 13 of TRIPS. The panel's report, which was circulated to WTO members on 15 June, is interesting since, so far as I am aware, it is the first time that any form of international tribunal has sought to interpret the test. Moreover, the panel has had to approach the test from a practical and economic standpoint, rather than a legal or academic one.

10. The issue in the dispute between the EU and US is an exception in US copyright law to rights in respect of the public performance of music as covered in Articles 11 and 11 bis of the Berne Convention, and more particularly an exception applying where music is performed indirectly, that is, by causing a broadcaster or other transmission containing music to be heard in public. I would emphasize, however, that it is not my purpose today to comment in any way on the substance of the dispute between the EU and US, but simply to look at the way in which the TRIPS dispute panel interpreted the three-step test.

11. What then do these sources have to say about the first step of the test — that exceptions should only be made in “certain special cases”? I should point out at the outset that words in brackets in this slide are merely reminders rather than those of Ricketson or the TRIPS Panel. In essence, Ricketson believes that the first step means that exceptions should be for a quite specific purpose (that is, they should only be made in ‘certain’ specific cases, and not in broad cases, or in all cases), and that the purpose for which an exception is made must be ‘special’ in the sense of being justified by a clear reason of public policy or other exceptional circumstance. Ricketson cites the needs of education or research as being one example of a public policy reason which might justify exceptions. It seems to me that the view of the TRIPS Panel is somewhat different. In essence, the TRIPS Panel appears to me to have interpreted the first step of the test as meaning that exceptions must be clearly defined (that is, of sure or ‘certain’ scope or meaning) and of narrow scope or reach (that is ‘special’ or exceptional in quality or degree).

12. There are subtleties of English involved in these two interpretations and I am not sure how they translate into other languages, but my own view of the term “certain” is close to Ricketson's, and I feel that the history of the Stockholm Conference supports his opinion. I think that ‘certain’ was used because the Conference did not wish to identify all of the cases where exceptions might be permissible, since this would have been difficult and may well not have been comprehensive, for example in catering for situations unknown at the time of the Conference. It seems to me, therefore, that ‘certain’ is an indication that exceptions may only be made in *some* cases, which although not identified in the treaties have to be specifically identified in national laws. On the other hand, it seems to me that the views of Ricketson and the TRIPS Panel on “special” are closer, and both conclude that there must be something exceptional or out of the ordinary in the purpose for which an exception is made, which in turn implies that it will be of narrow scope.

13. Before leaving the first step of the test, it is perhaps worth also noting that the TRIPS Panel declined to comment on whether the public policy reason for which an exception is made has to be ‘legitimate’ in order to be considered ‘special’. The Panel felt that ‘special’ does not require passing judgement on the legitimacy of the reason for an exception in national law, but rather that it is the narrowness of scope of an exception implied by the term ‘special’ which is relevant.

14. Turning now to the second step of the test -that exceptions “do not conflict with a normal exploitation of a work” -I am not sure how much the interpretation of Ricketson and the TRIPS Panel assist us since both of them involve terms which are themselves rather subjective. Ricketson feels that common sense dictates that the second step means there should not be conflict between an exception and the ways in which an author might reasonably be expected to exploit his work in the normal course of events. He goes on to indicate that the corollary to this is that there are cases where an author would not usually expect to exploit his work (and therefore where exceptions would be permissible), such as, for example, where a work is used for the purpose of judicial proceedings.

15. The overall conclusion of the TRIPS Panel on the second step was that an exception to a right rises to the level of a conflict with a normal exploitation of the work if uses, that in principle are covered by the right but exempted by the exception, enter into economic competition with the ways in which right holders normally extract economic value from that right, and thereby deprive them of significant or tangible commercial gains.

16. In my view, one thing that is particularly interesting about the Panel's deliberations is that they consider that 'normal exploitation' of a work has to be judged for each right granted under copyright individually, rather than in the context of all of the rights conferred by copyright in a work. Thus, in the particular case at issue, the Panel did not believe that the fact that authors can obtain income from giving permission for their work to be included in a broadcast justifies or counterbalances the fact that they are deprived of further income by an exception which prevents them from exercising their public performance rights when the same broadcast is caused to be heard in public. I personally am slightly uneasy about this conclusion, since it does seem to me that there can be circumstances where although a use of a work is in principle a new or additional use covered by a further right under copyright, the use in question is actually very much the same as one for which right owners have already been properly compensated through exercise of another right.

17. It is also worth noting that the TRIPS Panel felt that it is the *potential* damage caused by an exception which is relevant to deciding whether it conflicts with normal exploitation, rather than the *actual* damage occurring at a particular time. The reason for this is that actual damage could simply be, for example, a reflection of the fact that right owners are currently not in a position in practice to exercise their rights, whereas if they were able to do so they could potentially obtain significant income from a use of a work covered by an exception.

18. Looking lastly at the third step of the test -that exceptions “do not unreasonably prejudice the legitimate interests of the author” —both Ricketson and the TRIPS Panel consider that this hinges on the term “unreasonable”. Ricketson points out that word “unreasonable” was included in the test since, in theory at least, any exception causes some prejudice to the interests of authors, so that unless the term “prejudice” was qualified in some way it would be doubtful whether any exceptions at all would be permissible. He then goes on to explain that, at the Stockholm Conference, the view was held that “unreasonable prejudice” might be countered by providing that authors are compensated for an exception by way of giving them equitable remuneration. However, such an arrangement is in effect a compulsory license of an author's rights, and, as Ricketson points out, this might well be in breach of the second step of the test -that exceptions or limitations should not conflict with a normal exploitation of a work. It seems to me that circumstances in which right owners are actually unable to exercise rights are relatively rare, and therefore I personally am extremely skeptical about exceptions in exchange for remuneration which are tantamount to compulsory licenses, and do not generally feel these are at all acceptable.

19. The overall conclusion of the TRIPS Panel about the third step of the test is that prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception causes, or has the potential to cause, an unreasonable loss of income to the right holder. Again, this interpretation may not assist us greatly in that it is rather circular because it itself uses the term "unreasonable". In practical terms, however, what the Panel was driving at is that it is the scale of losses to right owners which is the determining factor in judging whether an exception is unreasonable, and again they emphasized that is potential, rather than actual, losses which in their view are relevant.

20. I hope that this examination of the meaning of the three -step test has been of some value, although I realize that there are many other points which could be discussed and that there are probably many questions which remain unanswered for you. Clearly, the task of the legislator in putting the three -step test into practice is not an easy one, but the test is, as I have indicated, a standard to which all parties to Berne, TRIPS, the WCT and WPPT must seek to adhere. To those of you involved in framing exceptions in national law, I would recommend a full reading of the TRIPS Panel report in the EU/US case. Although this is lengthy, and one may not entirely agree with all of the Panel's views, the report does, I think, provide a comprehensive discussion of factors which need to be considered in assessing whether exceptions meet the three -step test. Certainly, the Panel's views must surely merit careful study by all countries party to TRIPS.

Exceptions in national and other legislation

21. I would now like to look at exceptions in practice in national and other laws, with particular reference to the three -step test. I am going to take as my starting point the draft European Union Directive on Copyright in the Information Society which I mentioned at the beginning of my presentation. I apologize for using this rather than a more local example, but, naturally, I am more familiar with European laws, and, also, I suspect that the situation in Europe does have parallels in other parts of the world. As I said earlier, the draft Directive addresses exceptions to rights, and this has been a very controversial aspect. The Directive does not seek to harmonize exceptions completely within the European Union (EU), but it does place constraints on the exceptions to rights which EU states may provide in their national laws, and in effect sets upper limits on exceptions beyond which EU states must not go.

22. Thus, one aspect of the draft Directive is that it permits EU states to provide exceptions for certain purposes, although it does not require each EU state to provide exceptions in any or all of these areas. In particular, EU states will be permitted by the Directive to provide exceptions for the following purposes:

- copying for private use;
- copying in libraries, educational establishments, museums and archives - examples here might be copying for preservation or conservation purposes in museums or archives, and the recording of broadcasts for use in schools;
- illustration for teaching or research;
- use by people with disabilities, for example, to allow Braille copies to be made for the blind;
- reporting of current events;
- criticism or review;
- use in administrative or judicial proceedings or the like;

- photography or the like, such as painting or broadcasting images of, works of art in public places, such as buildings or sculptures;
- advertising the exhibition or sale of works of art;
- use for caricature, parody or pastiche.

23. I should make clear that this is not an exhaustive description of the provisions of the draft Directive on exceptions. There are some other optional categories of exception besides those I have highlighted, and, more importantly, each category of exception is much more closely defined in the Directive than in the abbreviated way I have presented them here, so as to set limits on national exceptions. For example, the provision in the Directive on exceptions for private use is accompanied by a condition that fair compensation must be paid to right owners where this would be appropriate. But what I hope this part of my presentation shows is the sort of areas in which exceptions exist in the 15 countries of the European Union, and, as I said earlier, I imagine that there must be countries in Latin America and the Caribbean which either have, or have considered, exceptions in much the same areas.

24. As I have said, the Directive does not require all EU states to provide exceptions in each of these categories. The list of categories has to accommodate different traditions in different countries of the EU. The EU states do not all have exactly the same sensitivities about exceptions to consider, and exceptions can be very much a reflection of individual national circumstances. For example, in the UK we do not have any exceptions relating to caricature, parody or pastiche, but I know that in France and some other EU states these are regarded as important and integral to freedom of expression in those countries. Conversely, it seems, for example, that we in the UK are much more concerned about exceptions for the library and academic communities than are some other EU states.

25. Although the Directive will permit EU states to provide various categories of exception, these categories are, as I have said, closely defined, and over and above this the Directive also places further obligations on EU states. The Directive also requires EU states to ensure, when they decide to make exceptions in any of the categories permitted by the Directive, that each exception only applies in a special case, which does not conflict with a normal exploitation of a work or other protected subject-matter and does not unreasonably prejudice the legitimate interests of the right holder. In other words, the three-step test is directly reflected in the Directive.

26. The particular significance of this for EU countries is that, should there be complaints, for example from right owners, about the nature and scope of exceptions in any of the EU states it will ultimately be for the European Court of Justice to determine whether exceptions in the EU meet the three-step test. Since the EU states are also parties to TRIPS, this raises the possibility of the exceptions being scrutinized both by the European Court and a TRIPS dispute panel, with not necessarily the same conclusions being reached.

27. It remains to be seen to what extent the EU states actually incorporate the three-step test in their own laws when implementing the Directive. To date, the main tendency appears to have been not to do this, but to use the test as a guideline determining the way in which particular exceptions are framed in national law, and I think that this is fairly common practice outside Europe also. In other words, states have in many cases drafted exceptions that they believe they fall within the test, without actually referring to or using the language of the test.

28. Generally, this has been our practice in the UK, although I think it can be said that elements of the test can be found in certain of our exceptions. For example, in the UK, there are exceptions permitting what is termed 'fair dealing' with a work for purposes of private study, research, criticism, review or news reporting. This concept is similar, although less wide-ranging, than that of 'fair use' in the United States. In my view, the limitation of these exceptions to what is 'fair' very much captures the elements of the three-step test concerned with avoiding conflict with normal exploitation and an unreasonable prejudice to right owners, since a use would be unlikely to be regarded by the courts as 'fair' if it did these things.

29. Much closer reflections of the three-step test can also be found in national laws. For example, as I understand it, the Chapter in the copyright law of Spain concerned with exceptions now ends with a provision added in 1998 to the effect that the Articles of the Chapter setting out exceptions may not be interpreted as to be applied in a manner capable of unreasonably prejudicing the legitimate interests of the author or adversely affecting the normal exploitation of a work². Examples of such direct reflection of the test, can, I think, also be found in the copyright law of Greece³. It seems to me that, in instances such as these, the legislator has in effect set out the special cases in which exceptions apply, but then, by incorporating the other two elements of the three-step test in the law, has made it directly incumbent on users, and ultimately the national courts, to consider whether in practice the test is indeed met in any specific use of a work made under the special cases where exceptions exist. Clearly, therefore, there are different approaches around the world which might be considered when deciding how to implement the three-step test in national laws.

Differences between the analog and digital environments

30. In this final part of my presentation, I am going to look at differences between the analog and digital environments in their implications for exception rights. I should make clear that I certainly do not claim to know everything here, as we in the UK, like people in many countries, are still going through a process of determining what is appropriate in terms of exceptions in the new digital environment. I suspect also that we still need more practical experience of the operation of this environment before more definite conclusions can be reached.

31. Those of you who were present at the 1996 Diplomatic Conference which led to the adoption of the WCT and WPPT will no doubt recall the intense debates about how far the reproduction right should extend in the digital environment, which went on right up to the end of the Conference. Some countries clearly felt that the kind of temporary electronic copies which occur, for example, simply to allow material to be viewed on screen, should not be regarded as reproductions at all, since such copies do not represent a real or separate act of exploitation. Other countries saw no basic difficulty with a comprehensive reproduction right extending to copies of this kind, or considered that this already exists by virtue of the wide definition of the reproduction right in the Berne Convention. Eventually, delicate

² See Article 40 *bis* of the Consolidated Text of the Law on Intellectual Property, as published by WIPO in September 1999.

³ See, for example, Article 18(2) of Law No. 2121/1993, as last amended by Law No. 2435 of 1996, published by WIPO in July 1997.

compromises were reached as reflected in the agreed statement to Article 1(4) of the WCT, indicating that the reproduction right in Article 9 of Berne fully applies in the digital environment, and that acts such as electronic storage of works in digital form constitute reproduction.

32. The other side to this coin was, however, an understanding that exceptions to the reproduction right permitted under Article 9 of Berne also fully apply in the digital environment, as the agreed statement to Article 1(4) of the WCT also reflects. Moreover, the agreed statement to Article 10 of the WCT on exceptions sets out the understanding that contracting parties to the treaty are permitted "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", that is, not only in the case of the reproduction right but also of other rights. Similar understandings apply in the case of the WPPT.

33. There are, I think, essentially two dimensions to considering what exceptions might apply in the digital environment. Firstly, whether any new exceptions are needed in this environment. Secondly, whether existing exceptions from the analog environment remain appropriate in the digital environment, or need to be restricted in some way in that environment. As I see it, the factors that might dictate a reduction in scope of exceptions in the digital context are mainly the perfect reproduction that the technology allows, and the ease with which intangible material can be disseminated to large numbers of people, again without any loss of quality. Some of the factors which might mean that new exceptions are desirable were raised at the 1996 Diplomatic Conference, such as the status of electronic copies which simply allow a work to be seen or heard.

34. I would like to start by looking at possible new exceptions in the digital environment, as I have recently had experience of this in the context of the draft EU Directive on Copyright in the Information Society. As it stands, the Directive includes the following exception, which all EU states will have to introduce. This will be a new exception for us in the UK, and, I think, also for the other EU states. This exception means that so many kinds of temporary electronic copies which occur as part of the technical process of making Internet transmissions will be exempted from the reproduction right, the aspect covered in part (a) of the provision. It also means that some kinds of temporary electronic copies simply enabling the use of a work will also be exempted from the reproduction right, part (b) of the provision. I should add that this exception is also subject in the Directive to the three-step test, so that when EU states implement the exception in their national laws they will need to ensure that they do so in a manner consistent with the test.

35. One major driving force behind the exception is the understandable concern of intermediaries such as Internet service providers and telecommunications companies that they might be unreasonably held responsible for the myriad of temporary electronic copies occurring in Internet transmissions, when they have no knowledge of, or control over, whether third parties are using their systems to illegally disseminate copyright material. Part (a) of the exception in the Directive therefore exempts certain of these copies, but from the point of view of the intermediary only. As I see it, a person who actually initiates unauthorized use of copyright material in the Internet would not benefit from the exception, which I think can only be right. Moreover, the Directive also provides that right owners can still obtain injunctions against intermediaries where their services are used by third parties to infringe copyright.

36. Europe is not the only place where there has been intense debate about the position of intermediaries such as Internet service providers. The debate has also occurred in the United States, and it may be that you are, or will be, facing it there. In the US, the result of the debate was rather different, and I would characterize the approach taken in the US Digital Millennium Copyright Act as essentially being one of limiting the liability of intermediaries for copies occurring in their systems, provided that they comply with certain conditions, rather than one of exempting reproductions by intermediaries as in the EC approach. Personally, I think that a liability-limiting approach is equally valid, and it seems to me that whatever solution a country adopts on the issue of intermediaries will depend very much on the way copyright law, and the law in general, function in that country in terms of deciding who among various players is responsible, and to what extent, for unauthorized uses of material.

37. A second reason behind the exception in the draft EC Directive is the concern which was reflected at the 1996 Diplomatic Conference about treating electronic copies which merely enable an end use of material, such as listening or viewing, as reproductions in copyright terms. Part (b) of the exception in the Directive exempt such copies, but it is important to note that it applies only in the context of lawful uses of material. I see no reason why anyone who has illegally obtained access to copyright material should benefit from the exception.

38. It seems to me also to be possible to reach a conclusion that an exception for temporary electronic copies which simply allow material to be perceived is not necessary at all, but much, I think, depends on the way in which copyright law functions in a particular country. Certainly, in the UK, we have never seen a particular difficulty with copies of this kind. Under our legal system at least, it is extremely unlikely that a right owner who has, say, agreed to transmit material to the public, could then object to, or claim more money for, the material being viewed or listened to because this involves reproduction. In all probability, the right owner would be held in the UK courts to have impliedly licensed the reproduction by agreeing to the consumer having the material in the full knowledge that the technology necessitates reproduction for the material to be seen or heard.

39. Turning now to the issue of whether analog exceptions remain appropriate in the digital environment, time does not permit me to discuss this exhaustively, but let us look at some examples. I mentioned earlier that the draft EC Directive will permit EC states to make exceptions allowing libraries to copy material. In the UK at least, libraries are currently allowed to copy limited amounts of material, and give copies to library users who require them for purposes such as research or study. The Directive does not, however, allow exceptions to the rights of communication or making available to the public to be made for the benefit of libraries. The concern here is that libraries should not be able, for example, to set up electronic databases of material which the general public can access and copy at will. This would be quite a different matter to allowing libraries to make limited copies and physically hand these to their clients as in the analog world, and would quite clearly be likely to conflict with the normal exploitation of works. Authors, publishers and database producers are obviously going to want to offer similar electronic services themselves, and against payment.

40. To take another example, I indicated earlier that some EC states have exceptions allowing the use of a work of art for advertising or exhibition. We have such an exception in the UK, but currently it extends only to making and distributing hard copies of the work, in printed catalogues or the like. However, those who sell works of art point out

that they will also wish to do so over the Internet, and would like to see the exception extended to that environment. But how far should one go? It seems to me that it would be wrong if works of art could be advertised on the Internet in such a way that anyone could download and obtain a perfect reproduction of the work. Clearly, this could undermine the market that exists for artists in the sale of reproductions of their original work.

41. It seems to me also that particular care is necessary in the digital environment over exceptions in respect of private copying, especially as regards materials such as sound or audiovisual recordings. As is well known, there are many countries where private copying of phonograms or videos is permitted under exceptions, but right owners are compensated for this by way of levies on recording media or equipment. Often, this approach has been followed on the basis that private copying inevitably takes place but right owners cannot in practice control this through exercise of their rights, and therefore the state has thought it preferable to legislate private copying and compensate right owners in return. However, it seems to me that the position is very different in the digital environment.

42. Here, for the first time, right owners are in a position of being able to control more directly what consumers can do with their material. Record companies and others want to be able to use the Internet to sell services directly to the public, which might simply be services allowing the public to listen to particular recordings, alternatively to download them and make copies for retention. Clearly, exceptions which allow private copying could seriously undermine such services. In these circumstances, right owners need to be able to exercise the reproduction right for themselves either to restrict copying or to be able to charge the market rate for making a copy. However, this is not to say that I consider all private copying exceptions to be unacceptable in the digital environment, but that much greater care has to be taken to ensure that private copying exceptions do not interfere with what are going to become some of the main ways of exploiting copyright material in that environment.

43. I have talked of constraints on exceptions that might be necessary in the digital environment, but I think also that there are cases where it is difficult to see why any change is desirable or justified as compared to what is permitted in the analogue environment. For example, in the case of exceptions to public performance rights, it seems to me generally to make little difference whether a work is performed using analogue or digital equipment. Moreover, if it is difficult to see how changes to exceptions in the digital environment could easily be justified in matters of public interest such as news reporting, criticism or review, or administrative or judicial proceedings.

44. Before concluding my presentation, I would like to speak briefly about one aspect of exceptions in the digital environment which has featured greatly in the debate on the EC copyright Directive. As you will no doubt know, both the WCT and WPPT require that protection is given to technical measures employed by right owners to control use of their material, which are another feature of digital technology, and which clearly are going to be of vital importance to right owners in providing services such as music on-line. The Directive provides for the protection of technical measures as required by the WIPO treaties, but there has been a lively debate in Europe about precisely how far this protection should go. Consumers in Europe are very conscious of the fact that, if right owners are able to control use of their material completely by means of technical measures, then the exceptions which exist in copyright law could no longer be of any value, since the technical measures will not allow users to benefit from them. Of course, one might argue that this does not matter if, as in the UK, exceptions are simply defenses against infringement, rather than conferring positive

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rights or freedom on consumers. But certainly consumers in the UK and in Europe generally do not seem to matter this way.

45. To cut a long story short, a position has been reached in the Directive where EC states will be able to intervene if situations develop where right owners use technical measures in such a way that consumers are unreasonably prevented from benefiting from copyright exceptions. It remains to be seen precisely how this will operate in practice, but it does not necessarily mean that consumers will be given the means to circumvent technical measures which could well defeat the whole object of these. Rather it might mean, for example, that right owners are required to take exceptions into account in the way technical measures are used or are simply required not to apply them in certain circumstances. I have mentioned this debate in Europe because it too has, I think, occurred elsewhere. For example, it seems to me looking at the US Digital Millennium Copyright Act that this puts conditions or limitations on the protection of technical measures, and also provides the ability to review matters if there are difficulties in relation to exceptions. You may well also face this debate in this region.

46. That concludes my presentation. I am acutely aware that I have by no means covered everything that could be said about exceptions and limitations, but that would take a much longer time. I hope, however, that I have at least given an insight into the main issues involved, and provided some food for thought.

[Annex follows]

ANNEX

THE 'THREE -STEP' TEST

Require that exceptions or limitations -

(1) are confined to "certain special cases"

and

(2) "do not conflict with a normal exploitation of a work" (performance or phonogram)

and

(3) "do not unreasonably prejudice the legitimate interests of the author" (performer or phonogram producer)

The three steps are *cumulative*

MEANING OF THE THREE -STEP TEST (1)

Step 1: “certain special cases”

Ricketson

Exceptions must be for a quite specific purpose (that is, made in ‘certain’ cases only and not in broad cases or in all cases)

and

the purpose should be ‘special’ in the sense of being justified by some clear reason of public policy or other exceptional circumstance.

Trips Panel

Exceptions must be clearly defined (that is, of ‘certain’ scope or meaning)

and

of narrow scope and reach (that is, exceptional or ‘special’ in quality or degree)

MEANING OF THE THREE -STEP TEST (2)

Step 2: “do not conflict with a normal exploitation of a work”

Ricketson

Exceptions should not conflict with the ways in which an author might reasonably be expected to exploit this work in the normal course of events.

TRIPS Panel

An exception to a right rises to the level of a conflict with a normal exploitation of the work if uses, that in principle are covered by the right but exempted by the exception, enter into economic competition with the ways in which right holders normally extract economic value from that right, and thereby deprive them of significant or tangible commercial gains.

MEANING OF THE THREE -STEP TEST (3)

Step 3: “do not unreasonably prejudice the legitimate interests of the author”

TRIPS Panel

Prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception causes or has the potential to cause an unreasonable loss of income to the right holder.

Exceptions in the draft European Community (EC) Directive on Copyright in the Information Society

The Directive allows (but does not require) EC states to provide exceptions for certain purposes, such as:

- copying for private use
- copying in libraries, educational establishments, museums and archives
- illustration for teaching or research
- use by people with disabilities
- reporting of current events
- criticism or review
- use in administrative or judicial proceedings or the like
- photography or the like of works of art in public places, such as buildings and sculptures
- advertising the exhibition or sale of works of art
- use for caricature, parody or pastiche

The Directive also requires that these exceptions:

“shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder”

Draft EC Directive on Copyright in the Information Society

The Directive requires that:

“Temporary acts of reproduction, which are transient or incidental, which are an integral and essential part of a technological process, whose sole purpose is to enable:

- (a) a transmission in a network between third parties by an intermediary or
- (b) a lawful use of a work in other subject matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right.”

This exception is also subject to the three -step test

[End of Annex and of document]