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EXCEPTIONS AND LIMITS TO COPYRIGHT AND NEIGHBORING RIGHTS

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Introduction

Examining the exceptions to copyright and neighboring rights means, negatively speaking, determining the boundaries of literary and artistic property and, indirectly, defining their basis and philosophy. In most cases, the discipline as a whole is perceived in this way. This study is naturally more modest and will be confined to examining the restrictions on the prerogatives of rightholders.

NEED FOR HARMONIZATION

This does not mean that such a limited focus is without interest. Obviously, it would serve little purpose to try to harmonize systems dealing with the content of the prerogatives given to rightholders without paying attention to the limits that have to be imposed on their rights. The digital revolution makes it necessary to look at some issues anew. Transboundary use of works is now a fact. The new technical media ignore space and time. The use of works is no longer restricted to a particular territory or linguistic area. Many works (music, images, statues, paintings, utilitarian works …) do not in any case depend on the language spoken by the people to whom they are addressed. Others, as a result of the storage and transmission possibilities afforded by digital technology, can be offered simultaneously in several languages.

It has become necessary to find a common foundation for the rules applicable. Three major multilateral agreements are aimed at ensuring international protection of copyright and neighboring rights: the Berne Convention (of September 9, 1886; the Paris Act of July 24, 1971) for the Protection of Literary and Artistic Works (and the Universal Copyright Convention, signed at Geneva on September 6, 1952), the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, October 26, 1961), and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs Agreement of April 15, 1994).

The World Intellectual Property Organization considered it necessary to return to the issue and this led to the adoption of the Treaties of December 20, 1996 : one on copyright and the other on performances and phonograms. This first stage (although work also has to be conducted in relation to the pre-existing Conventions) only dealt with one aspect of the issue, namely, recognized rights. The Commission of the European Communities, which benefits from these efforts and has the advantage of the *acquis communautaire* (the Community patrimony), is trying to achieve this harmonization (amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society; latest version dated May 21, 1999) by tackling simultaneously the two issues of the rights granted and the exceptions thereto. It is true that both aspects are closely linked and that, in the interests of consistency, it is not without merit to try to determine the content of rights using both a positive approach (what is being granted?) and a negative analysis (what has to be allowed?). This is so true that in certain cases it is difficult to see which side of the fence one is on. In the case of provisional fixation, for example, the texts being elaborated envisage laying down a rule that these acts are not covered by the author's monopoly (see below). But this practical solution can be approached from two different legal perspectives. Either one considers that it constitutes an exception to the right of reproduction (the latter prerogative is certainly affected by the act performed but is evinced for certain reasons). Or one affirms that the right is not affected (by nature, the act performed is not covered by copyright). In practice, the result is the same for the person using

the work, but for the sake of consistency of rights, it is useful to know how the solution is reached.

SEMANTIC VAGUENESS AND UNCERTAINTY

The term "exception" is not to be found in all legal systems. It appears, for example, in Belgium and in the proposal for a Community Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (Article 5). But the same concept has another name in other countries. For example, the word "limit" is used in Germany and Spain, while the similar term "limitations" is used in Sweden, Greece and the United States. Switzerland refers to "restrictions", while the United Kingdom uses "authorized acts" and Portugal "free use". The legal ingenuity of French law-makers has allowed them not to use the term at all (circumlocutions are employed¨ Art. L. 122-5 of the French Intellectual Property Code (IPC) "Once a work has been disclosed, the author may not prohibit …")!!

In fact, this study only deals with acts performed by users of works that might not be covered by the owner's exclusive right. The terminological uncertainty is interesting, however, because it incites one to consider how the subject is constructed. Exceptions to copyright and related (or neighboring) rights cannot be examined without an understanding of the overall balance of these forms of intellectual property.

EXCEPTIONS AND LIMITS

It is impossible to approach the issue of exceptions to copyright and neighboring rights without placing it in the broader context of the limits on these rights. The word "limits" means "boundaries" or "restrictions" in addition to "exceptions". Each of these concepts in fact corresponds to a fundamental parameter of the subject. In all three cases, it is a question of determining to what extent intellectual property can be relied on against third parties. The boundaries attempt to define the border between the "reservation zone" and the free use of elements. It is necessary to understand what comes within the scope of protection by nature. In the case of copyright, for example, they show that protection is usually only afforded to original creations. It is thus a question of delimiting the boundaries of the reservation. Restrictions or exceptions, on the other hand, set the limits within the discipline. They are more closely concerned with the acts that relate to the protected elements. It is therefore a matter of defining what is not covered by the natural reservation and must consequently be accepted by rightholders. Sometimes the word "exception" covers legislative decisions which remove certain original creations from the owner's monopoly (the text of laws or judicial decisions, for example) but, on the whole, it is a question of determining what uses of protected elements are not subject to authorization nor remuneration.

This broader vision goes beyond the strict context of this study and will not be pursued. It must, however, be borne in mind because it helps in understanding that the general structure is in fact a subtle balance built on these parameters. It incites caution because it is impossible to regulate one of these parameters without taking the others into account. Thus, without prejudging subsequent developments, it has to be noted that the inclusion (contested by some because it does not appear natural) of certain practical creations within the scope of protection, for example, computer programs, has been simultaneously accompanied by significant limits imposed on the prerogatives given to rightholders.

Lastly, it has to be acknowledged that, although copyright has often been proclaimed as "sacred property", it is by no means certain that its sovereignty is so absolute that all other rights have to give way to it. On the contrary, copyright contains its own limitations within itself and, as a special right, must be harmoniously integrated within any legal system. In other words, it must also obey the logic of the General Principles of Law. To take the framework proposed by the organizers of this meeting, the internal limits (First Part) and then the external limits (Second Part) are considered, even though the same justification is often given for both.

FIRST PART: INTERNAL LIMITS TO LITERARY AND ARTISTIC PROPERTY

If more precise terminology was used, it would probably be more accurate to speak of "limitation" when considering a right to remuneration and "exception" when copyright or related rights no longer exist. But the force of habit is so strong and the diversity of laws so wide that the two words are often used without distinction to designate restrictions to the exclusive right, which is customarily the rule in copyright. The prejudice does not, however, have the same scope nor the same consequences. It is necessary in any case to draw a clear distinction between the hypotheses of restrictions (offset by a right to remuneration), and which are sometimes termed "licenses", and collective administration, even if it is compulsory (despite what some artful people might think).

The real question is whether the delicate structure put in place in the 19th century is still relevant. Is it time, on the contrary, to review the subject, especially as a result of the "digital revolution"? In order to decide this, it is necessary to proceed in stages. First of all, an attempt has to be made to describe the overall physiognomy of positive law (§1). Next comes a definition of what the points of convergence for a future common structure might be (§2).

1. Overall physiognomy of positive law

In the context of this study, it is not possible to give a precise picture of the various systems of exceptions adopted in different parts of the world. An entire thesis would not get to the bottom of the matter because, over and above the legal aspects, it would have to be understood how each of the systems is implemented in practice. It might be added that the "impenetrability" of rules adopted in a succession of legislative acts at the instigation of pressure groups makes each of these systems difficult to understand in the first instance. The older a country's basic law, the less the structure appears consistent or justified at first sight. It is rather the broad outline which can be described. This picture may be accused of being short sighted, but at least it gives a basic outline of the subject. In order to envisage a unification of the rules, it is necessary to understand what the common foundation is today at the international level (A) and to try to reply simply to some basic questions (B).

A. The international bases

Here one has to define the minimum commonality imposed by the various Treaties and Conventions. The least that can be said is that the common foundation is not very broad. This no doubt explains the wide diversity of national solutions. It is even difficult to find many transversal solutions which could be applied in the same way to various rights given to

authors and owners of related rights. Although this form is, quite rightly, disappearing (see the amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society), the following are brief outlines of the current solutions in copyright matters (I) and then the solutions adopted in respect of neighboring or related rights (II).

I. COPYRIGHT SOLUTIONS

The point of departure will be the Berne Convention, followed by a short survey of the Treaties subsequently adopted.

The Berne Convention imposes few solutions on the member States. This can be seen in the wording of its provisions, many of which begin with the following: "It shall be a matter for legislation in the countries of the Union ...". Furthermore, the numbering of the provisions still used shows clearly that, as in many other laws, the text was built up in stages. It is thus not easy to find common solutions for rights and difficult to maintain a certain consistency. This is not surprising because the aim was to find, step by step, solutions acceptable to all. Nevertheless, it will be difficult for a reader who is not an expert in this field to find his way around.

As far as the right of reproduction is concerned, the heart of the matter can be found in Articles 9, 10 and 10 bis[1]:

"*Article 9*

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) 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.

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

Article 10

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

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[1] With the exception of the question of compulsory licenses granted in favour of developing countries.

(2) 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, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair pratice.

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

Article 10 bis

(1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.

(2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public."

A general examination of the provisions of the Berne Convention shows that the text imposes a small number of mandatory exceptions concerning news items, current events and quotations (Article 10.1 and 10.3). Otherwise, the Convention permits member States to adopt a number of exceptions (consequently they are optional), in particular reproduction for information or educational purposes. These exceptions apply to most of the rights, but lay down "standards" which fix their limits. The text only permits uses that correspond to the cases envisaged and are compatible with fair practice. Thus, the Convention's role in practical terms is only to oblige countries which utilize the options to make the freedom granted subject to the observance of a certain number of conditions.

Article 9.2 of the Berne Convention also authorizes member States to limit the right of reproduction in "certain special cases". This option is, however, placed in a context which attenuates the negative effects for authors or rightholders. The reproduction allowed must not "conflict with a normal exploitation of the work" nor "unreasonably prejudice the legitimate interests of the author". The formula might appear vague to a person not conversant with the subject, but it is in fact this flexibility which gives it its strength. The three cumulative conditions it lays down for the exception to the exclusive right are now known by the term "three-stage test".

The exceptions to exclusive rights for reasons of performance are fairly similar to those allowed for reproduction (information, teaching, …). However, freedom to use in private appears to be more widely accepted (interpreting the texts which refer to public performance) whereas the "special cases" introduced into Article 9.2 in 1971 only concern reproduction.

It is undoubtedly the "three-stage test" which provides one of the keys to the future structure. From this point of view, the fact that the TRIPs Agreement extends this test to all exceptions to copyright (see below) is a welcome development.

Article 13 of the TRIPs Agreement (entitled "Limitations and Exceptions") provides that "*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 right holder.*"

The same solution has been adopted in Article 10 (also entitled "Limitations and Exceptions") of the WIPO Treaty of December 20, 1996, on copyright. This states the following:

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

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

Admittedly, these new texts do not go into detail concerning the exceptions that should be allowed. It might even be questioned whether they will permit harmonization in the future because they appear to authorize the contracting parties to maintain and define new exceptions and limitations adapted to the digital environment if these are consistent with the rules laid down in the Berne Convention. They do at least have the merit of generalizing the way of reasoning and making States review (and amend) their legislation in the light of this new generalized reference standard consisting of the "three-stage test".

II. SOLUTIONS FOR NEIGHBORING OR RELATED RIGHTS

The limitations applicable to neighboring rights provided in the Rome Convention of October 26, 1961, appear wider in scope, particularly with regard to private use, short extracts when reporting on current events, ephemeral fixing by a broadcasting organization and exclusive use for educational and scientific research purposes. Moreover, the exceptions to copyright permitted must also be deemed to apply to neighboring rights. It would be difficult to understand how a work could elude the author's monopoly and then be subject to authorization by the owners of neighboring rights. In addition, the Convention does not provide any standard of reference. There is no provision referring back to any measures on the effects of exceptions similar to that in Article 9.2 of the Berne Convention ("three-stage test").

The TRIPs Agreement, which nevertheless generalized this test by extending it to all exceptions to or restrictions on copyright, does not contain any similar measure on related rights. The WIPO Treaty of December 20, 1996, on performances and phonograms does not cite any particular exceptions but, and this is significant progress, it does impose the "three-stage test" for all the exceptions to rights given to performers or producers of phonograms (Article 16). Just as in copyright, this provision gives contracting parties the possibility of

maintaining and defining new exceptions and limitations adapted to the digital environment provided that they "*do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram*".

The search for a "common foundation" is thus a very complex task.

It might be asked, however, whether, with the help of the TRIPs Agreement and the common acceptance of the principle of international protection, it would not be preferable to envisage more peremptory solutions. The goals sought are no longer exactly the same. The efforts made in the 19th century and during the first half of the 20th century were intended to impose recognition of intellectual property rights throughout the world and to convince the greatest possible number of States to accede to the Convention. These objectives have to a large extent been achieved. Now it is less a question of the principle of protection but rather of a minimum degree of harmonization. From this perspective, it is interesting to note that the amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society chose a method that consists of making certain solutions mandatory (Article 5.1) and making optional others for which harmonization is less urgent, although member States cannot choose solutions other than those contained in a closed list (Article 5.2 and 5.3).

In the version of May 21, 1999, this text provides that:

"*Article 5*

Exceptions to the restricted acts set out in Articles 2, 3 and 4

1. Temporary acts of reproduction referred to in Article 2, such as transient and incidental acts of reproduction which are an integral and essential part of a technological process, including those which facilitate effective functioning of transmission systems, whose sole purpose is to enable use to be made of a work or other subject matter, and which have no independent economic significance, shall be exempted from the right set out in Article 2.

2. Member States may provide for limitations to the exclusive right of reproduction provided for in Article 2 in the following cases:

a) in respect of reproductions on paper or any similar medium, with the exception of musical works in published form, effected by the use of any kind of photographic technique or by some other process having similar effects, provided that the rightholders receive fair compensation;

b) in respect of reproductions on audio, visual or audio-visual analogue recording media made by a natural person for private and strictly personal use and for non-commercial ends, on condition that the rightholders receive fair compensation;

b)bis. in respect of reproductions on audio, visual or audio-visual digital recording media made by a natural person for private and strictly personal use and for non-commercial ends, without prejudice to operational, reliable and effective technical means capable of protecting the interests of the rightholders; for all digital private copying, however, fair compensation for all rightholders must be provided;

c) in respect of specific acts of reproduction made for archiving or conservation purposes by establishments which are not for direct or indirect economic or commercial advantage, such as in particular libraries and archives and other teaching, education or cultural establishments;

d) in respect of ephemeral fixations made by broadcasting organisations by means of their own facilities and for their own broadcasts;

3. Member States may provide for limitations to the rights referred to in Articles 2 and 3 in the following cases:

a) use for the sole purpose of illustrating for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved, on condition that the rightholders receive fair compensation;

b) uses for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature and to the extent required by the specific disability;

c) use of excerpts in connection with the reporting of current events, as long as the source and, if possible, the author's name is indicated, and to the extent justified by the informatory purpose and the objective of illustrating the event concerned;

d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, that the source and, if possible, the author's name is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

e) use for the purposes of public security or to ensure the proper performance or reporting of an administrative, parliamentary or judicial procedure.

3bis. Where the Member States may provide for an exception to the right of reproduction pursuant to paragraphs 2 and 3 of this Article, they may provide similarly for an exception to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

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

Without making detailed comments on each of these provisions, some remarks on the text as a whole can be made.

Firstly, Article 4 provides for the "three-stage test", which becomes the inescapable standard of reference.

Secondly, it should be noted that the text makes a great effort to generalize because the Directive deals both with copyright and neighboring rights.

Thirdly, the generalization also affects the rights concerned because Article 5.3 tries to find common solutions for all the rights wherever possible (see Article 5.2 concerning exceptions to the right of reproduction).

In fact, the ideal Convention (the dream of a naïve academic) would be one devised as a sort of "funnel". First of all, there would be the principles common to both branches of the discipline (copyright and related rights); then would come the principles which might apply to all the rights granted; last, but only last, there would be special solutions. The whole would remain under the umbrella of one identical measure : the three-stage test.

This method might have the disadvantage of making it difficult for someone to find a solution after only one reading, but it would have the advantage of imposing guidelines and would be redolent of logic and consistency.

B. The fundamental issues

The basis for each legal system has been the quest for a balance among three social objectives. The first is the concern to give the author a reward or the means of subsistence. He naturally has the right to own the fruits of his work and in copyright this is especially true because the work bears the stamp of his own personality. But if this justification did not suffice, one could add that the role of individual property rights as an incentive has a beneficial effect because, indirectly, it helps to enrich the world's heritage. Secondly, there is the concern to protect investment. This does not mean that this concern is as acute as the preceding one, but its existence cannot be ignored. Lastly, one should not forget a third objective, the quest to satisfy the public interest. This last concern actually encompasses situations that are both distinct and changing. Nevertheless, the statements made today on satisfying the needs of users must be borne in mind.

This process can be clearly seen in some systems, for example, in United States law. Over and above the explicit avowal of such a quest, it appears that the "balance of interests" is indeed present in all the systems, even where copyright is linked to a property right embodied in the Constitution. What does change, and the difference is important, is the point of balance, the "centre of gravity" in the systems. It is obvious that the scope of exceptions to copyright is indicative of these balances and consequently of the philosophy underpinning the various systems.

Examining the limits of copyright and related rights in fact means trying to answer three basic questions : what ? (1), how? (2) and why? (3). A natural sequence in any person's mind would be to pose the questions "what?" and "why?" first of all, and together. The problem for the lawmakers is whether to intervene. The question "how?" is more technical and bears a greater relation to the method of legislating. Nevertheless, as this is simply an *a posteriori* examination and as the study cannot in any way be exhaustive, the questions will be taken up in another order. The response to the question "why?" will lead to the consideration of new solutions.

I. WHAT?

What exceptions should be allowed? What solutions have already been adopted in various domestic laws?

It is not possible to summarize them here. The flexibility allowed by the international texts has led to a plethora of exceptions (some of them picturesque such as the Italian text on military bands). The overall idea common to the various systems is that, although there indisputably have to be exceptions so that our discipline can have an internal balance, *a priori* the principle of an exclusive right remains.

The rest is more vague. A few exceptions will be described briefly (b), after a preliminary review of the diversity of solutions (a).

(a) Diversity of the solutions adopted

In order to see how many different solutions there are, it suffices to read the explanatory memorandum in the first draft of the proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (text of December 10, 1997). In Chapter 3, entitled "The particular issues for harmonization", the present status regarding restrictions on the right of reproduction are described as follows:

"*3. The scope of the reproduction right also depends on the limitations and exceptions applying to the right. Numerous differences exist in Member States legislation with respect to such exceptions and limitations. For example, some Member States (UK and Ireland) provide in their legislation a general 'fair dealing' exception for the purposes of research, private study, criticism and review and reporting of current events. Exceptions for these purposes also existin other Member States, but are more narrowly defined there (such as in Sweden, Belgium, Germany and Greece). Exceptions for educational and scientific purposes form another important category set out in most Member States' legislation, whereas the scope of such exception differs widely. In some Member States, exceptions for educational purposes allow for the copying of entire works, in others only particular kinds of, or parts of, a work may be copied as illustration for teaching or examination purposes. The picture is even more fragmented with respect to exceptions set out for the benefit of institutions accessible to the public, such as libraries and archives, since the international conventions do not provide for minimum standards in this area. In certain Member States, whilst no specific exceptions for library use exist (for example Germany, Belgium, France), these institutions may benefit from the general exceptions set out in favour of educational or private use. Other Member States (such as the UK, Austria, Sweden, Finland, Denmark, Portugal, Greece) set out specific exceptions for the benefit of libraries and archival use of protected subject matter, although these differ widely and do not necessarily cover the use of digitized material. With respect to the use of digitized material by libraries, on-line as well as off-line, initiatives are on-going in a number of Member States, notably the UK, where library privileges are most developed, to arrive at more flexible contractual solutions.*

4. Almost all Member States provide in their legislation an exception to the exclusive right of reproduction for copying of audio and audio-visual material for private use. The major reason for this exception has been the non-enforceability of the exclusive right in this area in practice as well as the thought that it was not even desirable to try to enforce an exclusive right in this area of private use for reasons of privacy. In view of the significant economic

importance of 'private copying' of copyright protected material, eleven out of fifteen Member States do not provide for a 'free exemption' but set out a 'legal licence'; they compensate rightholders for taking away their exclusive right with a right to remuneration ('levy system'). These systems vary widely in their scope and the way in which they function. The economic significance of private copying revenues is considerable.

Usually, no distinction is made in Member States' private copying legislation between analogue and digital technology. At present, only one Member State (Denmark), does not provide for a 'private copy exemption' for the copying of protected subject matter incorporated in digital media, regardless of whether the copying facility is digital or analogue. Figures indicate that, in parallel with the new digital environment, analogue private copying will remain an important market at least for the next five to fifteen years to come.

5. In recent years, the majority of Member States has also provided for an exception to the reproduction right for photo/print type reproductions ('reprography'), combined with a right to remuneration. The rationale for this exception is similar to that for private copying of audio and audio-visual material. These levy systems, where they exist, differ only to some extent.

6. Almost all Member States' laws list a variety of other exceptions and limitations to the reproduction right and, to a much more limited extent, to the distribution right or the communication to the public right. These include a variety of specifically defined, but widely differing exceptions for educational and/or scientific use as well as for library and archival use. Apart from these situations, many national legislations provide for a wide set of other exceptions, which were, at least in the traditional environment, of a more limited economic significance. These are, for example, exceptions allowing for short excerpts in connection with the reporting of current events, for the purpose of criticism and review, in favour of people with disabilities, for the purpose of public security, or for administrative or judicial procedures."

The same can be seen in connexion with the right to communication to the public:

"*3. Substantial differences between Member States also exist with respect to the limitations and exceptions applied to the exercise of the communication right (or a right belonging to that family), which, for a number of uses (notably for the purposes of education and research, for information purposes, for library and archival use), are the same as those applicable to the reproduction right (see Chapter 3, I.a. above). Some Member States, however, do not provide for exceptions to the communication to the public right at all with respect to library and archival uses (e.g. Austria, Belgium, France, Spain and Luxembourg). Moreover, it is far from being clear which of the limitations, where they exist, will be applicable in the new digital environment and in particular to 'on-demand' on-line exploitation of protected material. Since the library use exception is in most cases limited to certain forms of copying and physical distribution of protected material, it seems that on-line delivery of protected material to remote users would, in general, not be exempted from the exclusive right of communication to the public by a large number of Member States (Italy, Sweden, Denmark, Greece, Portugal, Austria, Belgium, Finland, France, Luxembourg, and Spain). In other Member States the situation is less clear (Germany, Netherlands, UK and Ireland).*

In view of the significant economic importance of the use of digitized works by libraries and equivalent bodies and their users, a number of 'library initiatives' are being undertaken,

with a view to arriving at new solutions involving licenses, based on contracts. Their aim is to ensure adequate control and a fair economic return to the rightholders involved, while enabling users of protected material, such as non-profit libraries, to provide their information services even more efficiently and at affordable cost. First results appear to be promising, as it seems that it is possible to arrive at mutually satisfactory solutions for all the parties involved, including libraries."

The diversity of solutions can be discouraging. A synthesis at the international level is even more complex because the countries of this world are not all united by a common history like the countries of the European Union. Moreover, the variety of means and needs, in addition to cultural or economic disparities, helps to amplify the differences. The European Commission felt the "need to act". The same is even more apposite for the World Intellectual Property Organization. But the task is more difficult. Countries which "produce" works and countries which "consume" them do not share the same approach. And even among the former, users are calling for more and more "concessions" or even recognition of rights.

(b) Examples of exceptions adopted

To illustrate the diversity of approaches and solutions in the various régimes, it suffices to take the example for which one would imagine that agreement would have been the easiest to reach, namely, private copies. A few comments should also be made on certain tolerated public uses.

Private copies

At first glance, the exception applicable to private copies appears to be a universal solution. Many different forms of private copying are, however, accepted and a certain number of questions remain unanswered.

The principle of freedom to make private copies appears in almost all régimes, but in very different forms or stated in very different ways.

It may apply implicitly as a result of the author's monopoly and "acts subject to restriction". The requirement on reproduction for public use (to be found in almost every law, see for example Article L.122-3 of the French Intellectual Property Code), on the other hand, leads to the conclusion that private copies are not subject to the author's authorization.

In other countries, the freedom stems quite simply from the acceptance of a general exception. This is the case in the United States, for example, with the "fair use" exception (see below) because United States legislation takes account of the purpose of the use and appears to allow private copying provided it does not constitute a generalized practice likely to compete with the exploitation of a potential market for the work.

The solution adopted in other countries regarding this freedom is expressly set out by the legislators in the list of exceptions to copyright. (In France, for example, Article L.122-5 of the Intellectual Property Code; Germany, Article 53.1 of the Law of September 9, 1965; Portugal, Article 81b) of the code of September 17, 1985; and Tunisia. It should be noted that in France the solution is found twice. In the second instance, the limits are better defined.)

Lastly, in some countries it can be inferred from somewhat more specific exceptions. These can include “fair dealing” (for example, copies for individual study purposes or research, see below) present in some copyright laws (Article 29.2 a) of the Canadian Act, Article 29.1 of the British Act – see below – for the moment Article 40 of the Australian Act). In Canada, for example, a private copy can be made both of a work already existing on a material medium and a work not yet fixed on such a support (a broadcast is one example). A private copy means one single reproduction of the work (uniqueness of the copy made) and genuinely private use (which excludes any reproduction for the purposes of distribution or communication to the public or for profit).

When it becomes a question of making a distinction between digital and other copies, the consensus is less widespread. The majority of countries do not draw any such distinction. In parallel with the principle of freedom to make a private copy and pursuant to Directives (May 10, 1991 and March 11, 1996), the members of the European Union do not allow private copies of software (except the safeguard copy; although the Directive does not make this distinction specifically, the question is really only of relevance for digital copies of computer programs) or electronic databases. In addition, Denmark has adopted broader solutions regarding digital copies (Article 12, paragraph 4, of the Danish law on digital copies of works existing in digital form).

In addition, despite the homogeneity of the general principles, a certain number of questions highlight significant differences in the grounds invoked (see below) or the methods used to implement these rules.

Is freedom to copy a right of the user or an exception to a monopoly?

Is this an exception to intellectual property rights (the monopoly no longer exists) or a straightforward restriction (loss of an exclusive right or existence of a right to compensation)? Within the European Community, eleven out of the fifteen Member States do not provide for any “free exemptions” but have established a “legal license” (right to compensation based on a “levy system”). These systems have widely varying scope and modes of operation.

What direct or indirect effect can the use of technical copying processes have on the exemption régime? Does the principle remain the same or is the exemption evinced by such reproduction facilities (one example is Article 68.1 of the Italian law of 1941)? Should the greater loss caused by the use of technical processes not at least be compensated so that total freedom is replaced by the application of a right to remuneration (only the exclusiveness of the right would be affected)? Here, the solutions differ widely. While many States have allowed compensation systems in certain cases (reprography, sound or audiovisual copies, or only digital copies), other countries seem to have generalized this type of solution (see, for example, Article 18.3 of the Greek law extending it to all reproduction processes but requiring at least one of them for the right to remuneration to apply).

How can the concept of private copying be defined : the number of copies allowed, copies physically made by a third party, wholly private use or also collective use within an establishment?

How can one be sure a copy is strictly confined to the copier’s private use? It is usually at the reproduction stage that this has to be determined. In the United Kingdom, for example, pursuant to Article 29 (3) of the Act of November 15, 1988, reproduction by a person other

than the researcher or student is not deemed to be a fair act if the person who makes the copies knows, or has reason to believe, that the copies will be given to more than one person almost immediately and for the same purpose. The question has to be examined in the light of the destination envisaged. It thus becomes subjective because, at that particular time, only the copier knows what he intends to do. The destination may change subsequently, however, and the copy be given to a third person. Although it was originally private, it became public through the use to which it was put. In other words, it is actually at the time it is distributed that the copy reveals its true nature, not at the time it is made.

These are just some of the questions that may arise and which not all systems resolve in the same way.

Public use

Here there are even more hypotheses and wider diversity. *A priori*, public use of a work leads to application of copyright. But all States have not adopted the same position in connexion with exceptions for teaching purposes or for transmitting knowledge.

Quotations

The principle that quotations are not affected by the exclusive right of the owners of the copyright or related rights is fairly general. This comes from Article 10(1) of the Berne Convention, according to which "*It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.*"

This is one of the rare solutions imposed, the Convention simply defining the (broad) conditions. Different techniques are used to implement the principle however.

First of all, there is the opposition between the approaches followed in the common law and the Roman law copyright régimes. For the advocates of common law copyright legislation, there are significant differences according to whether the solution involves fair use (United States) or fair dealing (the others: see below for the distinction between the two).

There are even wider disparities among countries that have adopted the Roman law régime. Whereas some countries have simply laid down requirements concerning respect for moral rights and use for teaching purposes, others have added a requirement on the length of the quotation. Among these, some have attempted to determine a relatively precise length of quotation allowed, whereas others simply refer to an excerpt of reasonable length or to uses.

Lastly, there may be disparities in different laws concerning the type of work that may be quoted. While some laws limit exceptions to literary works, others take a broader view and allow musical or artistic works (the words "passages or extracts" are more frequently used).

Exceptions for teaching purposes

Article 10(2) of the Berne Convention gives Member States the possibility of adopting specific exemptions. In Article 5.3 of the amended proposal for a Directive on copyright and related rights in the Information Society, the European Commission approaches the issue in parallel with limits on rights for reasons of research (*"Member States may provide for limitations to the rights referred to in Articles 2 and 3 in the following cases: a) use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved, on condition that the rightholders receive fair compensation;"*).

The wide disparity in the positions adopted in the laws makes any attempt at synthesis extremely difficult. Certain States have not adopted any specific solution and rely on less precise exceptions. Some of these countries do not make any express reference to teaching needs, whereas others simply mention teaching as one of the reasons justifying or explaining short quotations or authorizing the application of "fair dealing". Lastly, others only refer to educational manuals as being among the works covered by a special regime without vindicating this specifically by teaching requirements.

Other States have exceptions that are slightly broader than those concerning brief quotations, although the system adopted is not very different to that generally applied to such quotations.

Finally, some States have more specific solutions, although their content and scope vary. Nevertheless, the principal categories of legal approaches to this problem can be defined. Mediterranean countries or those with a Latin influence are usually fairly reticent on this matter. They either ignore it, as we have seen, or if they do deal with it, they adopt general solutions without trying to determine the scope and dimensions of the exemptions through legal channels. Northern European countries, on the other hand, have extraordinarily detailed legislation. The substance of their solutions is also fairly similar. There are some minor differences, but the scope of the measures and the content of the provisions adopted are virtually identical. This concern for detail is true of some common law countries and, to a lesser degree, German-speaking countries.

A large number of laws only specify exceptions to the right of reproduction, but a smaller number also refer to the right of performance.

With regard to the right of reproduction, a dividing line can be drawn between States which allow exceptions both for teaching manuals and for texts drawn up by educational establishments themselves, on the one hand, and States which only allow the latter on the other. It is true, however, that the distinction is not always clearly set out in the text. Where it is clearly indicated, there is often less freedom for manuals than for texts published within establishments. This can no doubt be explained by the fact that the latter are purely for educational purposes, whereas the former are bought and sold.

There are also differences concerning the compensation given to rightholders. Some States provide for fair remuneration, whereas others do not mention it. Among the former, there are differences according to the right invoked or the medium used. Nevertheless, there is often a relationship between the extent of the prejudice allowed (scope of the copying, number of copies, destination of the copies …) and the condition of fair remuneration.

In fact, the greatest common denominator in the various laws that really deal with this issue seems to be the partial repetition of pre-existing elements in a second work composed of extracts from works by other authors.

While many countries are relatively flexible concerning the extent of copying and refer to uses or standards ("*fair use*"), others are very precise on several points, defining the volume or conditions of reproduction in detail.

More generally, some conditions or limits to freedom, whether explicit or implicit, appear to be allowed. This may be due to concern to ensure that the second work does not compete with the first work reproduced; requirements relating to observance of moral rights (right of authorship, but also right to the integrality of the work, although this is mentioned less often), the inclusion in the second work made for teaching purposes of works by other authors or the absence of several works by the same author (for example, a text composed of one work by author A and one work by author B); time-bound requirements imposing the rapid destruction of the copies made or observance of a certain time-limit (five or ten years) before repetition of the first work; ban on repeating the first works themselves used for teaching purposes; justifying the destination of the reproduction. In this connexion, it should be noted that, while the vast majority of laws are careful to reaffirm the requirement of use for teaching purposes, others allow identical solutions, subject to the same provisions, for uses other than teaching. Many States also refer to reproduction for research purposes or for disseminating knowledge, which is not so surprising. Others have adopted broader objectives, for example, helping the disabled or propaganda. Furthermore, the Nordic countries have similar provisions for reproduction or performance for the purposes of religious services, while Germany refers to worship.

In addition, it should be noted that not all media and not all types of works are treated in the same way. For copying media, reproductions on paper appear to be more easily accepted than copies on magnetic media. Nevertheless, some laws contain special provisions on reprography. Many States also draw distinctions among different categories of works. Infringement of copyright appears to be more easily accepted in the case of literary works. In many cases, art works can only be reproduced in order to illustrate developments.

It is the Nordic countries which appear to have been the most meticulous in regulating these hypotheses in detail. In the case of the right of reproduction, the law gives freedom to reproduce short excerpts from works published over five years previously, subject to remuneration, provided that the excerpts are included in a composite work. The law specifies, however, that this does not apply if the excerpts are from works specially created for teaching purposes. The law also allows the copying of broadcast or televised works in the form of sound or visual recordings for teaching purposes. The criteria vary in different texts, not only as regards remuneration (in some States, if the recording is made from an educational programme, the author cannot claim remuneration), but also the temporary nature of the recording. In the case of the right of performance, States provide that works other than dramatic or cinematographic works may be performed in public if they are for teaching purposes. The author is sometimes given the right to remuneration, however, if an entrance fee is charged.

It is not necessary to give further examples (the question of private performances, libraries, or the use of commercial phonograms could also be examined), the conclusion is clear : the flexibility allowed by the international texts has given rise to a plethora of different solutions.

In the absence of agreement on the substance, are there common features in different countries regarding the approach to the question and the wording of the texts? This responds to the second question: how?

II. HOW?

The method used to draft laws is not impartial and often reveals the goal sought by the legislator (a) each approach, whether open (b) or closed (c), has its advantages and disadvantages.

(a) Choice of legislative approach

In countries that have adopted the Roman law approach, the exceptions regime is usually "closed". It is interesting to relate this aspect to the way in which the rights are set out. In most cases, but not all, the overall structure is as follows: there is a synthetic definition of the scope of the author's exclusive monopoly, but an analytic list of exceptions, i.e. they are indicated in a highly descriptive and limitative way. This means that the scope of the rights given to the creator is wide open and should be viewed as advantageous for the authors, while the list of exceptions which users can claim is restrictive and cannot be interpreted in such a way as to impair the interests of the creator. French law typifies this approach. A close look at Belgian, Spanish and Portuguese law would show the same (in Germany, the limits on rights are carefully set out, but the law defines rights of use in a much more analytic way).

This conclusion is not without significance. It can have a number of consequences.

Firstly, it gives an indication to the courts. Judges must confine themselves to this restrictive reading and not go beyond the exceptions allowed. There is a clearly marked contrast here with the flexibility allowed to judges in relation to the content of rights. Although this approach may appear rigid, it has the benefit of predictability and consequently of security.

The second consequence is that, as far as the "balance of interests" is concerned, the author occupies by far the most important place.

The third consequence is that the exceptions defined in the law do not give the user rights. This was the goal in Recital (21) of the proposal on a Community Directive, but the text needs to be redrafted to make it clear that only authors and owners of neighboring rights possess "rights", whereas for users it is question of their "interests". Consequently, a user is not entitled to contest the use of technical protection devices. This is a very topical issue. Great hopes are being placed in technical solutions, on the one hand to ensure the effectiveness of exclusive rights by prohibiting or restricting access to works or services, and on the other to improve and refine the administration of the corresponding rights. The effectiveness of the system cannot therefore be threatened by proclaiming an inalienable right to private copying.

In common law copyright régimes, on the other hand, the theory of the "balance of interests" is appreciated because it in fact allows the "public interest" to be claimed.

Systematization of the legislative approach is more problematic here because there is less unity of thought than in Roman law copyright régimes. One constant feature is of course an analytic list of rights, but there is less agreement on restrictions. The United States (and perhaps Australia in the near future) allow a general exemption ("fair use") from copyright that can be applied in any situation. This is called an "open" system. The Berne Convention does not prevent this.

(b) Advantages and disadvantages of an "open" system

Section 107 of the American Law of October 19, 1976, provides the following:

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

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

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

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

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

This is the major exception to exclusive rights for the purpose of criticism, comment, information, teaching, research or parody. The text is in fact the consequence of case law since 1976. In order to allow an exception to rights, judges usually take as a basis the purpose of the use, the length of the extract in relation to the original work, as well as any economic prejudice. This technique has the advantage of being flexible.

The length of the extract from the original work will be evaluated differently depending on whether it is used for reproduction of a work or for a parody. The admissibility of photocopying works will be evaluated differently depending on whether or not it prejudices the rights of the publishers to distribute the books or grant licenses authorizing photocopying of extracts (for example, where a business firm photocopies excerpts from protected works with a view to compiling an anthology for university students).

This flexibility has often proved its value. For example, the Supreme Court at one time considered that any commercial use of the second work (containing elements from the original work) precluded recourse to the "fair use" provision, but subsequently it considered that, if the second work was not simply a slavish copy of the original work but transformed it, the exception clause had to be allowed to cover certain commercial uses.

The logic underlying the exception (to promote knowledge) is of course fundamental. According to jurists on the European continent, however, "fair use" results in a lack of predictability both for rightholders and users. Where is the security expected of any legal system? Taking account of the four conditions can be a difficult task (purpose of the intended use, nature of the work, length of the extract and, above all, the effect on the market). How can one be certain in advance that a judge will interpret these parameters in the same way in a particular situation? It should be pointed out, however, that the Americans are more accustomed than European jurists to this type of approach and an American judge is trained to deal with extremely complex matters.

(c) Advantages and disadvantages of a "closed" system

In comparison with open systems, closed systems have the advantage of predictability. Users of works or rightholders are not dependent upon the court's evaluation and can gain a reasonable idea of the solution to the problem raised simply by reading the legal provisions. Nevertheless, a system that is too closed can also cause problems. It is not security that is lacking, but the capacity to adapt. It then becomes necessary to be attentive to secondary effects. To understand this, the examples of the French system and the "fair dealing" approach have to be examined.

French solution – To take the French example, it can be seen that the extreme rigidity of the Court of Cassation regarding the application of certain conditions relating to quotations has led to even stronger reactions than the interdict itself. Considering (rightly) that reproductions on a small scale (but in full) of paintings in an auction catalogue did not constitute short quotations, the Court of Cassation strictly applied Article L.122-5 of the IPC ("*Once a work has been disclosed, the author may not prohibit …(…) 3. On condition that the name of the author and the source are clearly stated: (a) analyses and short quotations justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated*;"). But as pressure groups are more at home in parliamentary assemblies than in courtrooms, the law of March 27, 1997, added a further exception to the list in Article L.122-5 of the IPC in order to "quash" this case law ("*the author may not prohibit … (d) complete or partial reproductions of works of graphic or three-dimensional art intended to appear in the catalogue of a sale by public auction held in France by a public or ministerial officer, in the form of the copies of the said catalogue that he makes available to the public prior to the sale for the sole purpose of describing the works of art on sale*."). The effect has been disastrous. The law has become excessively detailed. It is becoming increasingly difficult to be conversant with the law, the overall coherence of the system is being lost and users of works do not see why a restriction is imposed in one instance but not in others where it would be equally, if not more, justified.

Sometimes a judge himself circumvents a strict legal provision. The Court of Cassation has shown itself to be particularly severe regarding the concept of brevity in audiovisual works which fleetingly show already-existing creations and on February 23, 1999, the High Court in Paris (not published) considered the matter in relation to the right to information. This decision deserves to be quoted at length in this study, not in order to explain the French solution (because it could have been adopted in other countries which have a closed system), but because it illustrates the strength of the reaction to a system that appears to be immobile. It might be added that it is particularly interesting because it refers to a concept that will be dealt with at greater length in the Second Part of this study.

The judges in Paris considered that: *"Regarding the right of the public to information: Whereas Article 10 of the European Convention on Human Rights declares that everyone has the right to freedom of expression, which includes freedom to receive or impart information regardless of frontiers; Whereas Article 14 of the Convention states that the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as.… property, birth or any other status; Whereas, pursuant to Article 55 of the Constitution, the provisions of the European Convention take priority over domestic law and their authority is mandatory for national judicial authorities; Whereas the defendant therefore claims that, under the Convention, the public has a a right to information which constitutes an exception to the provisions in the Intellectual Property Code, invoked by the plaintiff, and justify that the defendant used the works of Maurice Utrillo in a report without the authorization of the rightholder; Whereas the right of the public to information shall comprise not only a right to know but also a right to see; that in consequence a fact to be made known to the public may be in the form of pictures that are necessary to the extent that they provide an element of knowledge; Whereas a report showing a work of an artist disseminated solely in a television news programme of short duration does not infringe the intellectual property rights of another person because it is justified by the viewer's right to be informed rapidly and appropriately of a cultural event that constitutes a current event related to the work or its author and does not compete with normal exploitation of the work; Whereas, in this particular case, the court notes that the report concerned was disseminated in a television news programme whose informatory purpose is not contested by Mr. Fabris; that it is addressed to a wide public; Whereas the purpose of the report was to inform the public rapidly of the holding of an important cultural event in the Lodève Museum; that the purpose of presenting the artist's work was to illustrate the report and to give the public a better understanding of the subject of the exhibition; that the paintings illustrated the information consisting of providing information on the exhibition organized in the Lodève Museum and encouraging viewers to visit the exhibition; Whereas requiring the broadcasting of such a report to be subject to the authorization of the rightholder, who had agreed to the principle of the exhibition, would be equivalent to depriving some of the public of knowledge of the existence of the event and consequently of the work of the painter; that this would destroy the equality of all in relation to information and consequently to culture; (…) Whereas, pursuant to the right of the public to information, the national television company France 2 was not obliged to request an authorization to show the works of Maurice Utrillo in a short report in its television news programme; that, consequently, the showing of these works is not unlawful and does not constitute infringement giving Mr. Fabris the right to claim damages."* (WIPO translation)

The destructive effect of such an interpretation will be considered in the Second Part of this study. What use is it to build a system that weighs the interests of some and the expectations of others if it is then destroyed by other theories?

The two examples cited are worrying. It is not certain that they are fully representative of the problems caused by the so-called "closed" systems. "Closed" does not mean "static". Why not agree that, within the framework laid down by the law, a judge enjoys a certain latitude, inspired and guided by the "three-stage test"?

The truth (if it exists) is perhaps half-way between the two approaches, open and closed. It may be found in a system that is *a priori* closed, but adjusted by the flexibility of "fair dealing"?

Fair dealing – This means the solutions to be found in Articles 29 *et seq* of the British Act and Article 29, 29.1 and 29.2 of the Canadian Act, which set out the cases of use not covered by copyright. These formulas may not, however, avoid the pitfalls of the French system.

This approach indubitably tempers the (possibly) too open character of the American "fair use" system, but does not remedy the defects of such closed systems as that under French law.

It might be assumed that the British or Canadian solutions, in the examples mentioned (auction catalogues, fleeting reproductions in a television report) are similar to the French solutions. The reasoning underlying the laws that allow "fair dealing" is based on a two-stage process. First of all, is the situation in question covered by the restrictive hypotheses to be found in the law? Exceptions are only allowed in a number of specific instances for well-defined reasons ("dealing"), and the activities in question must be covered by these. The determination of whether activities are eligible as exceptions is not so different to the one in closed systems, for example, in French law. The second stage is whether the use covered by the admissible exceptions is fair. At this stage (but only now) the use envisaged is screened in the light of conditions similar to those of "fair use".

Articles 29. 30, 33, 36, 38, 39 and 40 of the British Act of November 15, 1988, envisage this hypothesis. To simplify, according to these texts, the use of a work is not covered by copyright if it is for the purposes of criticism or reports on current events. Likewise, the use of literary, dramatic, musical or artistic works is fair if it is for the purposes of research or personal studies.

Although the legal texts do not state this, in practice guidelines have been developed which highlight the parameters taken into account by judges. In Britain, for example, full-scale reproduction may be allowed if it is for private use or for research. On the other hand, more than one reproduction of the same work would no longer be fair use, unless the research necessitated more than one copy. There is thus a measure of evaluation and flexibility in the second condition/stage. <u>On the contrary, there is no such measure in the first condition/stage. Exceptions cannot therefore be claimed in the case of works not specified in the law</u>.

The same approach has been adopted in Canada. Determination of the fairness of use is entrusted to the courts. The latter take into account the nature and purpose of the use, the volume copied in comparison with the volume of the work used and the personal contribution of the copier. The Hubbard v. Vosper case (1972) 2 W.L.R. 389,393, is a perfect illustration of the flexibility and the difficulty of the evaluation : "*It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair. Then you must consider the use made of them. If they are used as a basis of comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But after all is said and done, it must be a matter of impressions*". Even though some flexibility is to be found in this stage of the analysis, it can only apply if the first stage has been conclusive. The analysis can only be conducted in the cases laid down in the law. Canadian law is quite distinct from American law because it does not allow a general exception for fair use.

This system is therefore based on a dual “filter” (special cases, fair use). It is only more flexible when compared with laws which impose very specific conditions for allowing certain exceptions (for example, a system which allows quotations under certain circumstances but provided that they meet precise criteria : so many words or so many bars of a musical work, but no more).

The truth is therefore difficult to define. Nevertheless, it should be noted that, even if it is claimed that in practice both the Roman law and the common law copyright systems will lead to fairly similar solutions, the American formula, which is symmetrical and contrary and is based on an analytic approach to rights in order to allow a synthetic vision of exceptions, no longer makes the author the focus of the regime. In any event, the exceptions regime can only with difficulty be examined outside its overall context.

In the absence of agreement on the method (“how?”), can States reach agreement on the substance, the grounds for exceptions? This brings us to the third question : why?

III. WHY?

It is usually necessary to answer this question because once the criteria for access to protection have been met the principle should be monopoly. This means that there must be grounds for the exceptions. This is particularly true if copyright has virtually constitutional status. The determination of the grounds should not only make it possible to understand the need for exceptions, but also determine their scope.

One might be tempted to systematize by explaining that some limits are based on practical reasons whereas others are due to the need to take into consideration social interests. But in fact this explanation, which has already been given, is more descriptive than reasoned. It would have been interesting to define other approaches. Although the other analyses considered might explain the solutions adopted in a particular State, they could not be transposed to another system.

For example, it would have been interesting to compare solutions allowed for certain public uses and use of works for private purposes. This rationalization, which could have applied to certain laws, would have been based on the following analysis : private use is not covered by copyright at all, there is no right of prohibition nor any right to remuneration or compensation. These solutions only apply to public use of works if the user gives them added value by making his own personal contribution (for example, the régime relating to quotations). In other instances of public use, which must be allowed for certain reasons but which do not add any value, exclusive rights give way to a right to remuneration.

In addition to the fact that another parameter should be added – total or partial use of the work – this approach, which is by no means illogical, is outstripped by the variety of systems and the trends in each of them. In some cases, authors have obtained compensation for certain private uses. In Europe, for example, the complete absence of a creator’s right has, in certain cases, been replaced by remuneration for private copies.

What remains is the long-standing division generally to be found in legal textbooks. Some exceptions are based on practical reasons (a) whereas others are based on considerations of a social nature (b). This division is useful because it provides an immediate explanation, but is it consistent?

(a) Reasons of a practical nature

Three types of argument are put forward: the first is resignation, the second concerns recognition of the necessity of the act performed, and the third is the absence of economic prejudice.

First argument : resignation

Here it is a question of private use of a work. Copyright no longer applies because in any case it could not be respected. It is out of the question to enter a person's private life in order to control possible uses. Rather than imposing a principle that copyright should apply, which in many cases would remain without effect, it is preferable to close one's eyes to this situation.

This argument has undoubtedly lost a great deal of its force in the digital era. Marking or locking devices make it largely obsolescent. Anyway, should legislation be built on resignation? There is nevertheless a widely expressed concern regarding these new devices: technical remedies should not lead to other problems and, for example, facilitate interference in people's private lives. Is there any justification for such complaints? While it may be right to view meters and "cookies" with suspicion, it is difficult to see how such a complaint could be made in respect of simple anti-copying devices. Marking and locking are not the same.

Second argument : authors must allow the necessary acts performed by users

This is a relatively new argument which has come to the fore with the inclusion of computer programs in copyright and has become even more topical with the protection of databases or the circulation of works on networks.

It has become particularly relevant for software, i.e. a creation-tool. A more detailed study of copyright matters would no doubt show that works of utility generally enjoy less protection in case law. Without going into this debate, which is outside the framework of our programme, it should be noted that, for this type of work, taking the user into account is the least that can be done. This is a common-sense exemption.

Nevertheless, what is the future of this justification? Extending this concept to cover the circulation of works on networks is not as easy as it might seem. Are the circumstances in fact the same? This is doubtful! The reasoning given here leads one rather to ask what is the exact scope of the right of reproduction? What is the point of giving an author extensive rights if one has to take back with one hand what one has given with the other on the pretext of exemptions?

Third argument : the absence of economic prejudice

This argument is well-known and has been put forward many times, even outside national Parliaments. Private copying would result in significant losses. On the one hand, because it would take a long time and on the other because only one copy would be made.

As we know, this is totally unacceptable. Technicalequipment makes it possible to produce perfect copies capable of replacing the original in a short space of time. Use of digital technology allows copying of copies of copies (etc …) of a quality that is almost identical to the matrix. As for economic loss, it is such that many States have imposed remuneration for private copies.

It is thus impossible to apply this argument generally and it can only be used on a case-by-case basis, which is more complex but has been done in certain régimes.

The same objection could be made to the economic arguments put forward to justify the existence of non-voluntary licenses. The "cost of the transaction" implied by searching for the owners of the rights and the time required for negotiation would be such that it would be better to forget exclusive rights and allow licenses. The American experience in this regard is not conclusive (see A. Strowel, *Droit d'auteur et copyright*, Bruylant, 1993, §492 *et seq*) and the erosion of copyright loses its relevance if the justification put forward in theory does not have advantages in practice. Furthermore, would the new technical devices permitting works and owners of rights to be identified, whether or not combined with collective administration, not provide an identical service at the same or even lower cost? The uncertainty in this area does not mean that licenses are irredeemably rejected but the hopes placed in technical devices certainly mean refusing to extend licenses to new cases in new texts. The idea that technical solutions could provide a practical answer to the problem so that non-voluntary licenses would no longer be an unavoidable evil for rightholders was realized over twenty years ago (P. Goldstein, Preempted State Doctrine, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright; UCLA, Law Review, 24, p.1139). The development of digital technology and the facilities it offers should enable voluntary licenses to be looked at anew.

To summarize, it has to be admitted that the practical arguments bear little weight. However, they are still put forward. Some day, it will have to be recognized that they destabilize the structures they are supposed to uphold. It would be preferable to seek elsewhere an explanation for the limits to his rights which an author must accept, particularly in social reasons, which brings us back to the quest for a balance, that is to say a "balance of interests".

(b) Justification based on social reasons

Here it is a question of defending certain values, some of which are greater or at least the equal of the values underpinning literary and artistic property. This is the case for "public interest". The idea is present both in the "external" limits to copyright (see Second Part below) and in the "internal" limits. The latter can be called "internal" on the one hand because they are sometimes expressed within the texts on copyright themselves and, on the other, because they sometimes allow works to be created and, lastly, because some of these justifications are closely related to the subject of copyright : works.

Among the foremost of these reasons is the concern to respect freedom of expression. This is an aspect that is covered by copyright because it means encouraging expression by other creators. Consequently, quotations, reviews, summaries or parodies are facilitated. In short, "free speech". There is no need to dwell further on this. The foundations are solidly laid and have a bright future with the emergence of networks which give wide choice and opportunities for utilizing works.

The second series of reasons, public access to information, is more divisive. The viewpoint diverges because exemptions are less advantageous to creators than to users of works (see Second Part below on this aspect). Naturally, nearly every State has special provisions on current events. Some régimes also contain limitations on copyright and related rights for teaching purposes. The exemption is either specifically defined or is included in a broader exemption. But little by little, the public's right to culture is sometimes being used to place obstacles in the path of copyright and related rights.

This is where laws differ the most because, indirectly, in seeking the reasons for some of these exemptions one reaches the very substance of copyright and related rights and the place to be given to creators. It is difficult to examine this aspect because, in addition to the divergences between the two major régimes, there are also differences within each group.

In common law copyright regimes, "fair use" and "fair dealing" tend to place the public interest and the interests of rightholders on the same level. For example, American law evaluates the scope of the "fair use" exception using *inter alia* the public interest. Article 171(3) of the British Act is more specific and proclaims the public's right to "knowledge", allowing the exclusive right to be superseded by the public interest. This exception, which is the result of the 1988 codification of case law, is rarely claimed successfully (in this connection, see the statements by Professor Gendreau, ALAI symposium, Cambridge 1998, record to be published), but it is noteworthy that it can, in theory, be claimed in order to allow access to a work which an author nevertheless wishes to see remain confidential.

Other systems are more circumspect, to varying degrees. In France, although the general interest is present in the copyright and neighboring rights structure, this eventual limitation would come outside literary and artistic property. In fact, in France, it is difficult to see why the rights of creators in their works should be superseded by an alleged public access to elements of knowledge, i.e. to raw data. It is true that the latter are often included, within the works. But no-one has ever claimed a monopoly of ideas found in a creation. To realize this, it suffices to look at the explanatory memorandum of the proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society. As can be seen, the various texts have already taken this aspect into account by resolving the question of the boundaries of copyright and neighboring rights.

Assuming nevertheless that such a limitation on copyright has to exist, it is then necessary to evaluate the conditions. Is a right to remuneration not the least that a rightholder can expect? Shouldn't such cases be considered with caution? As is well known, this argument is often used by infringers. On the Internet, it has become the justification for piracy.

While the argument that the public interest must be taken into account is a deserving one, it has to be recognized that the use to which this argument is sometimes put is disturbing. Several years after the adoption of certain solutions, because of the practices that have evolved, it is still not always possible to understand what are their real bases. Public interest was used as the point of departure for limitations on copyright and related rights, but this justification has sometimes been disregarded along the way. Lastly, it should be emphasized that it is a case of public interest and not of the interest <u>of</u> the public. This distinction is not without its importance (see Second Part below, section B). Along the same lines, it should be reaffirmed that the protection of copyright and related rights is also in the public interest.

At the end of this initial review, the conclusion is somewhat discouraging. Many of the solutions adopted are based on arguments that are worthless and there is no agreement on the importance of other arguments. It is often difficult to ferret out the real justification. In fact, in many instances, the exceptions preceded the grounds. Lastly, the immutability of the successive texts means that the regimes lose some of their coherence. How is it possible therefore to build the future properly?

2. Possible trend in exceptions

Is it possible to envisage the harmonization needed (I)? Of what aspects (II)?

I. HOPES OF HARMONIZATION

The practical solutions are often very similar and this is reassuring at a time when works are used at a global level. Similar, but not identical. It is obvious, however, that there cannot be any fundamental differences in this regard. It is useless to agree on the content of rights at the international level if this agreement is deprived of all substance by the adoption of divergent exceptions. As has already been emphasized, the limits placed on rights lead to a negative view of the content of such rights.

In this connection, the Directive being drafted within the European Communities can be instructive. The work of course only concerns some European countries, but it is well known that Directorate General XV of the Commission is a testing ground for all countries and what is done there incites other institutions or States, even the most powerful, to reflect on the matter.

The solution adopted in Brussels is to set out a list of exceptions that is both closed and optional (Article 5.2 and 5.3), in addition to the compulsory exemption for temporary reproduction (see below). Harmonization, with a closed list, is no doubt a good solution. It seems to correspond to the wishes of the vast majority of member States. But it is above all achievable in a community which groups countries with a common culture and similar goals. If the list is not mandatory for member States, however, and they can pick and choose, can one really speak of harmonization?

There can of course be no unpleasant surprises because unforeseen exceptions are not allowed, but there may well be disparities concerning which ones are adopted from the full list proposed. There is general agreement that the list of exceptions proposed will grow longer so as to placate every State. For example, the exception for parody was not included in the first draft. There is a real danger of seeing the list in Article 5 lengthen because the system cannot develop from the inside (through interpretation by the courts) because Recital 22 clearly states that the list is exhaustive and the system a closed one.

Aware that developments in this respect will take time, in a report published on September 8, 1998, the French Council of State proposed that "*each State should oblige persons responsible for sites on its territory to provide a technical device which limits the exceptions to copyright (especially those relating to 'fair use') to users resident in that country. Such means of filtering access depending on the place of residence of the person using the site already exist on some sites, even though they are not yet wholly effective*". (WIPO translation)

What might these future exceptions be?

II. OUTLINE OF FUTURE EXCEPTIONS

A debate is going on concerning the need for new exceptions and opinions are currently divided. Some people consider it is too soon. The partisans of open systems consider that their rights are sufficiently flexible to adapt to the new order. Others fear that over-hasty consideration under the scrutiny of pressure groups will lead to the acceptance of inappropriate provisions. An in-depth examination seems to be required : should any new solutions adopted distinguish between digital and analogue systems? An affirmative answer should not be put forward as the basis for consideration. The structure to be built should, on the contrary, be impartial. Digital technology should provide the opportunity to study the substance of the issue anew and undertake some reorganization, but too much importance should not be attached to elusive technical developments or trends that will one day be superseded. The in-depth examination and the quest for coherence being undertaken do not prevent consideration being given to the specific issues raised by digital technology and networks. This is a vast area and just a few cases will be mentioned : private digital copies (A) and technical copies (B).

A. Private digital copies

The dangers of digital copies are well known : easy copying, vast storage capacity, quality of reproduction, large number of media … MP3 technology is a matter of concern. The natural self-limitations which existed in analogue technology have disappeared.

The 1996 WIPO Treaties do not contain any specific provisions in this respect and the first version of the proposal for a Community Directory evaded the issue. Following action by rightholders, the text evolved (version of May 21, 1999) and seems to give States the possibility of allowing exceptions for private digital copying subject to remuneration; without prejudice to the possibility given to rightholders to instal operational, reliable and effective technical means to protect their interests, thus authorizing anti-copying devices (*Article 5.2: "Member States may provide for limitations to the exclusive right of reproduction provided for in Article 2 in the following cases: … (b) bis. in respect of reproductions on audio, visual or audio-visual digital recording media made by a natural person for private and strictly personal use and for non-commercial ends, without prejudice to operational, reliable and effective technical means capable of protecting the interests of the rightholders; for all digital private copying, however, fair compensation for all rightholders must be provided;"*).

The question is in fact the following : should private copying be prohibited and the right to copy made subject to authorization by the rightholder, or should compensatory remuneration simply be provided? These choices are not necessarily mutually exclusive and thought is being given by some to combining the two types of solution.

(a) Possible solutions

Prohibit private copying? Denmark tried this and it would be interesting to assess its impact. For the time being, this policy does not seem to have borne fruit.

This possibility raises several questions:

– agreement among rightholders?
– effectiveness of a prohibition?
– acceptance of such a solution by users of works.

Effectiveness could be guaranteed by technical devices. Technology comes to the aid of rights threatened by technology. But can it do everything? In order to be really effective, the devices themselves have to be protected. The WIPO Treaties and the proposal on a Community Directive provide such measures. In a never-ending game of mirrors, rights come to the aid of technology so as to allow the latter to come to the aid of rights ….!!!

Do such effective technical devices exist? Can they be standardized? Can they be imposed on manufacturers? There needs to be an agreement between actors in the "soft" and the "hard" spheres. Taking this reasoning to extremes, can one go so far as to regulate the manufacture or sale of copying equipment? These are questions that will have to be answered if this solution is chosen.

Assuming that these questions can be answered satisfactorily, there remains an even more sensitive issue, would such measures be accepted by users? This proposal would be unwelcome in States which have adopted the inviolable principle that the right to make copies for private use is one of the citizens' inalienable rights. There is also the question of the public's right to culture or information. It cannot be denied that the use of technical devices would restrict access to works. Here once again, but in a different form, appear the irreconcilable differences between the systems.

Should one therefore try to compensate for the losses incurred through lawful or unlawful copying and generalize "fair remuneration" systems (or according to the new terminology "fair compensation", see Recital 26 and Article 5.2 b) bis. of the proposal for a Community Directive)?

(b) The difficulties of implementing a "fair compensation" régime

This raises many questions:

For how long?

While awaiting a solution or on a permanent basis? Along the lines of the Community solutions, on May 12, 1999, the French Senate adopted a resolution indicating that the existence of a right to remuneration does not prevent the use of technical locking devices.

In what area?

All works? Even those that are not sound or audiovisual works (the text of the proposal for a Directive mentions "reproductions on audio, visual or audio-visual digital recording media")? Is it also necessary to go back and review the solutions applying to software and databases?

How?

First of all, by a levy on the sale of equipment. But what equipment: moveable media (diskettes, re-writable disks …), integrated media (hard disks …) or reproduction equipment (recorders, video recorders …)?

What percentage should be levied?

One franc (0.2 Euros or 20 cents) on a blank disk, that is more than 20 per cent of the purchase price for the consumer. But is it enough for a medium that can contain a large number of works?

Should there also be a levy on subscriptions for access to the Internet, where the majority of works to be copied can be found? Or on information flows? For example, some cable access providers already regulate the flows of their subscribers. One must exercise caution in imposing levies because copyright should not be considered a tax.

How to distribute the amounts levied?

The unit of measurement currently used in many laws is related to certain media and a linear mode of consumption (length of time, meters …). What other unit might replace this? Bits? A method of calculation based on bits would not necessarily be relevant because not all compression techniques give the same results and the space taken up in the memory depends on the type of work (just a few seconds of animated pictures use fairly large amounts of storage capacity in comparison with the digital version of an entire book).

Can the two systems of prohibition and compensation be combined? Initially, this seems to be contradictory. But everyone knows that technical devices do not permit zero risk. The proposal for a Directive does not appear to rule out such a combination. In the explanatory memorandum in the text of May 21, 1999, it is stated that "*As regards the relationship between private copying and technical measures, [the Commission] replaces the expression 'without prejudice to the technical means …' with the expression proposed by the Parliament 'where there are no reliable and effective technical means …'.*" (Recitals 26 and 27).

The French Council of State seemed to oppose this and left the author to choose between the two systems. In its report of September 1998 to the Prime Minister, the Council attempted to propose a "compromise solution" which the French Government could put to the other member States of the European Community : "*This would consist of declaring the legal principle that private copying, that is to say copying strictly limited to the private use of the copier and not for collective use, is authorized unless expressly prohibited by the owner of the rights in the work, notified to the copier when the first copy is made on a site through a specific message*". (WIPO translation)

Observance of this prohibition could be ensured through a technical device that prevented copying, but "*the owners of rights could be encouraged not to prohibit private copying by extending the legal provisions on remuneration for private copies*". (WIPO translation) As is the case in Greece, this could be done through a levy on new recording

media. The system would therefore be based on the choice of the owner. It appears somewhat complicated to put in place however.

Moreover, the French solution does not resolve the basic problem, which is the "right" to private copying in some countries. In these countries, the idea that the owner of a right could technically prohibit access to the work, even if the use envisaged is private, may be unacceptable. It is true, however, that the position of the French Council of State is consistent with the continental approach according to which private copying is simply an exception allowed by the author for practical reasons. Once this justification no longer exists, there is no reason to maintain this restriction on the author's rights.

For the moment, it would appear that rightholders are in favour of the assurance of fair remuneration. As a definitive solution or just a first step?

B. "Technical copying"

It has been seen that lively discussion is going on regarding the technical reproductions required for digital transmission (copy on the site server and the access provider, on the RAM and the hard disk of the user's computer …). This aspect was the subject of intensive debate in Geneva (although no solution was reached) and is taken into account in Article 5.1 of the proposal for a Community Directive.

While there is a vague consensus on the need to allow a new exception to permit the circulation of works on digital networks, there is clearly disagreement on the form or the extent of such an exception. The problem has to be circumscribed (a) and a distinction drawn between ephemeral copies and temporary copies (b).

(a) Diversity of technical copies

The explanatory memorandum (text of December 10, 1997 : Document COM (97) 628 final, p.29) of the proposal for a Directive on copyright and related rights in the Information Society provides justification for the search for a uniform solution: "*For instance, when transmitting a video on-demand from a database in Germany to a home computer in Portugal, this retrieval will imply a copy of the video, first of all, at the place of the database and afterwards, in average, up to at least a hundred often ephemeral acts of storage along the transmission to Portugal. A divergent situation in Member States with some requiring authorization of such ancillary acts of storage would significantly risk impeding the free movement of works and services, and notably on-line services containing protected subject matter*". This example makes it easy to understand why certain ephemeral reproductions should not be subject to the author's monopoly. On the other hand, it does not demonstrate why copyright should be disregarded for all temporary digital reproduction.

It is of course also easy to understand the reasons why access providers claim this exception when reproducing works on the "caches" of their servers: rapidity, ease of use, limitation of international communications … Universities themselves use this. It will be noted that, once again, practical reasons serve as the justification for an exception, but it is also easy to understand the fears of owners of rights who see that the use of "caches" limits the numbers of direct access to sites and makes it impossible to count the number of hits for works in the "cache". This phenomenon would be particularly worrying if the author's

remuneration depended on the number of hits. It should be added that "caches" risk preventing the installation of technical mechanisms for identifying works and electronic meters.

It is therefore hardly surprising that there is deep concern regarding these aspects and the discussions within the European Union are very lively. It is true that the adoption of such an exception calls for extreme caution and a high degree of drafting expertise. Even the words "technical copies" are imprecise, dangerous and inoperative because the word "caching" covers many different situations.

The French Council of State proposes that the scope of this exception should be set out precisely and "ephemeral" technical copies should be differentiated from "temporary" copies. "*It could be considered that copyright exemption should only apply to 'ephemeral technical copies', i.e. copies that are an integral part of a technical process whose sole purpose is to permit the use of a work or other protected object on line* and whose existence does not exceed the duration of the transmission. *This exception would therefore only apply to reproductions on routing computers, the RAM of the user's computer, etc., without it being possible to conserve it beyond the duration of the transmission or the use authorized by the owner of the rights. Other copies, including those on the 'caches' of access providers would thus remain subject to the author's exclusive right*". (WIPO translation) The Council of State however immediately tempers this reasoning : *"In view of the technical and economic importance of 'caches' for the development of the Internet, a second exception might be envisaged in favour of 'temporary technical copies', i.e. those on the 'caches' of the access providers"*. (WIPO translation) In this case, however, there would no longer be an exception to copyright but a straightforward restriction, in other words, the principle of "remuneration for technical copies".

After lengthy debate, Article 5.1 (text of May 21, 1999) of the amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society proposes the following: *"1. Temporary acts of reproduction referred to in Article 2, such as transient and incidental acts of reproduction which are an integral and essential part of a technological process, including those which facilitate effective functioning of transmission systems, whose sole purpose is to enable use to be made of a work or other subject matter, and which have no independent economic significance, shall be exempted from the right set out in Article 2*".

Although the text has been improved, Recital 23, which explains it, nevertheless seems to adopt a fairly broad approach : "*Whereas the exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, such as transient and incidental reproductions, forming an integral part of and essential to a technological process carried out for the sole purpose of enabling the use of a work or other protected subject matter and which have no separate economic value on their own; whereas under these conditions this exception should include acts of caching or browsing;*".

(b) Need to distinguish between ephemeral and temporary copies (caching and browsing)

There is still need for caution and the issues must not be confused. There can be little doubt that certain acts of reproduction should not be covered by copyright and related rights. For example, ephemeral reproduction when routing a work should not be subject to copyright

and related rights. Either because it is considered that the right of reproduction, by nature, may not cover such use. Or because copyright, although affirmed, is superseded. It is not because the reproduction is provisional (and in small amounts) that it is not covered by copyright and related rights (in theory, the reproduction is not set in stone and it is of little importance whether or not it is partial), but because it would be absurd and contrary to common-sense to make such an act subject to any special authorization. It is clear that here the logic of a "necessary act" applies. The owner of rights who agrees to the exploitation of his work via the network obviously permits this type of essential use.

The question of "caching" is different. It is not so much the copies made by individuals who consult the work which cause problems but those made by an access provider.

In the first instance, a surfer who regularly accesses a work and consults it on line effects certain acts of reproduction which could, at first glance, be considered as giving rise to a monopoly. To arrive at the opposite solution, it is not really possible to draw a parallel with the necessary acts carried out by the lawful user of a software programme. If the reproduction of a computer program in the RAM by a user is logically not covered by copyright, this is because on the one hand it is impossible for the user to do otherwise than carry out such an act and, on the other, the reproduction is ephemeral. Although reproduction on a "cache" is also necessary in order to use a work, this reproduction is not so ephemeral because itmay remain in the memory even after the communication has ended or the system has been shut down. It would be quite possible, however, to allow the adoption of a text excluding this act from copyright and related rights provided that, upstream, the work had been made available to the public lawfully.

In order to reach the same solution, on the other hand, it is simply not possible to draw a parallel with the tolerance shown to readers who leaf through a book in a bookshop (which accounts for the success of the word "browsing"). Seen not from the point of view of the surfer but from that of the person who makes the work available to the public, it has to be recognized that the practice of browsing or dipping into sites on the networks means that, upstream, there must have been a communication to the public which respected intellectual property rights.

Is it possible to go further and allow freedom to make copies of sites in order to facilitate communication of works on networks? This raises the question of the regime of "caches" installed by access providers who thus try to save on transatlantic communications when accessing sites. The reasons given (rapidity, ease of use, over-loading of loop bands …) are perfectly understandable, but this is nevertheless simply a question of ease of use and not a matter of inevitability. Moreover, contrary to what happens in routing computers, in this case copies are not ephemeral. While the absence of observance of intellectual property rights seems to be obvious as far as the circulation of the work is concerned, here it is not a natural solution and should be envisaged with circumspection, only allowed if a certain number of conditions are respected.

As can be seen, it is difficult to foresee what will happen in the case of internal limits. This imprecision can also be seen below when looking at external limits.

SECOND PART:
EXTERNAL LIMITS

It has been seen that the internal limits on copyright and related rights can be explained by the need to take into account interests other than those of the creators. It is therefore not surprising that similar considerations apply to the fixing of other – external – limits to the rights of authors and related rights. The latter cannot be envisaged in isolation from other legal concepts. The fact that they are special rights whose existence is fully justified does not change the situation. Their autonomy is obviously limited by other considerations that are sometimes more important than those underpinning their existence.

This is a very prolific subject. The real danger for author's rights and related rights in the 21st century will undoubtedly come from the right of competition. Attempting any comparative study of the law here is even more complex. First of all, not only is it necessary to have a comprehensive knowledge of the content of all the different intellectual property texts, but also of the underlying concepts and the content of many disciplines in many different régimes. Secondly, the clash between the major categories of rights cannot be the same in different places. It is immediately apparent that copyright and neighboring rights cannot disregard such concepts and that those States which have already firmly incorporated them within their legislation on literary and artistic property make little use of these external correctives. They find them of little use or redundant. For other States, and this is the heart of the matter, these external legal structures are corrective mechanisms taken from the general theory or the general principles of law. Some allow the abnormal use of a right to be opposed (§1). Others take into account the general interest, which supersedes the interests of creators and creation auxiliaries (§2). It is true, however, that this distinction is more of pedagogical than scientific value because, on the one hand, some mechanisms utilize both concepts and, on the other, structures evolve, moving from one concept to the other.

1. Correctives to the abnormal use of a right

Abuse of rights – It is widespread idea that rights, even if they are absolute, must be exercised normally. In some States, the theory of abuse of a right makes it possible to punish anyone who misuses a prerogative by exercising it badly. He may have been motivated by the intention to harm or he may have used the prerogative given to him for another purpose, or his intended act cannot be justified by any legitimate interest.

It is interesting to show the importance attached to each of these situations. Following a general approach, it can be seen that the theory makes it possible to define the code of ethics imposed on authors and the way in which they must exercise their rights. Applying this to our discipline, the abuse of rights leads to determination of a "code of practice for authors exercising their rights". This remedy seems to be little developed or even unkown in some States. It is accepted first and foremost in countries where there is a "closed" system of exceptions. As it relates to copyright, it involves including a corrective measure in régimes which give pride of place to the creator of a work. In such régimes, a degree of caution in applying the theory is advocated. There should only be interference if there is an obvious deviation. The French nevertheless apply the theory to what they hold most "sacred" in copyright : moral rights, the highly personal prerogative, sometimes termed discretionary. In any event, it is not a question of placing a limit on the right itself, viewed intrinsically, but correcting the way in which it is exercised. Paradoxically, this mechanism does not weaken the author's right. On the contrary. Whereas the abusive exercise of a right would lead to a

general and global rejection of copyright at the risk of a certain ineffectiveness, the presence of the corrective measure reassures and makes copyright stronger or better accepted because third parties know they are protected from abuse. Like all dangerous things, however, this theory must be used in moderation.

Consumer protection – Although this may appear surprising, these solutions can be compared to the solutions to protect consumers to the extent that the right of consumption does not allow limits to be imposed on the list or content of rights, but only on their exercise.

An examination of the limits which consumer rights can place on intellectual property rights was included in the programme of the ALAI seminar at Cambridge in September 1998. The national reports prepared showed that this issue was viewed by academics, who are both users and creators of works, as a real provocation. During the few discussions, there was nothing to show that there were valid arguments that this discipline could bring some external moderation to intellectual property rights, even if the actors were consumers rather than producers of works.

Right of competition – Along the same lines, it might be asked whether some of the solutions adopted in respect of the right of competition should not at least in part be treated in the same way. Here again, it is not usually the content of the right itself (at least one hopes not) that is contested but how it is exercised by some people.

There is room for nuance however. On the one hand, it has to be recognized that, when imposing such solutions, the courts place serious limits on the absolute or exclusive nature of copyright. On the other, however, the reaction of judges is often justified by other reasons which they do not wish to admit. It is clear that the right of competition limits copyright in the case of works which – at best – are the "small change" of literary property. Copyright is restricted because other limits have not been observed : the boundaries of copyright (case law in the European Communities shows this). This is the concept of the plurality of limits described at the beginning of this study. Not having been careful to define the boundaries (what is a work? what is creativeness?), the content of rights suffers the effects. As though "little works" could only have "little rights". Although there is indisputably some logic in this approach, there are also dangers. By losing sight of the reasons for intellectual property, the subject matter itself is corrupted and suffers a brutal counter-attack. The latter can be destructive. Even if they do not destroy the subject matter (but what would copyright be without exclusive rights?), they may remove the coherence.

Non-pecuniary personal rights – As may be seen, the reaction of the judicial authorities can be very sharp. The same is true of non-pecuniary personal rights. All systems which have a strong element of non-pecuniary personal rights allow this to limit the rights of creators and creation auxiliaries. This does not mean that monopoly is banned, but it is possible to prevent the exploitation of a work or a protected element and to impose changes on a creation.

So it is not only economic rights that are limited but also moral rights. This is particularly striking because the studies on exceptions generally only focus on economic rights alone. A broader study of the limits also encompasses more personal rights (see above, the developments concerning the theory of abuse of rights). It is true that the phenomenon is not on the same scale in all régimes. The explanation is simple and is due to the fact that,

while agreement on the content of economic rights seems little by little to have been achieved, diverging views on moral rights are still very much in evidence today.

2. Limits resulting from consideration of the general interest

The concern to respect the general interest is undeniable. This is so evident that the majority of legal systems have included it in their legislation on copyright and related rights (A). This concern has to be borne in mind in order to understand why the "attacks" from outside the discipline have to be countered, even if they are based on the logic of protection of human rights (B).

A. Concern to respect the general interest

During the discussions at the first Congress of the International Literary and Artistic Association in 1878, Victor Hugo (statement at the Paris International Literary Congress, 1878, Paris 1879, p.276), founder of the Association, considered that "*literary property belongs more than anything to the general interest*". The great French writer's position is particularly interesting because it is not that of a user of works but of one of the most fertile creators in the history of French literature. It represented a total departure from the Romantic ideas fashionable at the time and the principle, reiterated in France at every possible opportunity since the Revolution, that "literary property is the most sacred of all property". In Europe, the 19th century was that of the discovery of the condition of originality and the recognition of moral rights, two structures which highlight the extremely personal link between an author and his work, so the poet's declaration gives food for thought. The least that can be said is that current developments in the international texts show growing awareness of the general interest.

This is not surprising because, from the outset, some laws have at least in part been founded on consideration of this interest. In 1787, the American Constitution proclaimed that "*The Congress shall have Power … to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the Exclusive Right to their respective Writings and Discoveries*". Some doctrinal studies (J. Ginsburg "A Tale of two copyrights : literary property in Revolutionary France and America": R.I.D.A., January 1991, pp.125-289) have shown that personal claims by authors were not unknown and that future texts would have to strike a balance between the interests of some and the rights of others, but in 1790 the title of the first American Copyright Act indicated that it was intended as an act "*for the Encouragement of Learning, by securing the Copies of Maps, Charts and Books, to the Authors and Proprietors of such Copies, during the Times therein mentioned*". Today still, the idea that copyright should be used as a way of encouraging public education persists. Some people hope that the new American texts (October 1998) extending the term of protection will be deemed unconstitutionalon this basis.

Such a "balance of interests" can also be found in the international texts. For example, the Berne Convention allows compulsory licenses for reproduction and translation in favour of developing countries. Based on this text, many countries have adopted special waivers for libraries or archives. For similar reasons, there are also waivers for museums or even some non-profit-making associations. This is especially remarkable because, in the first drafts, the Convention only dealt with the rights of authors, even though the rights of other persons were mentioned during the preparatory meetings.

But what about other texts outside the specialized field?

B. The impact of human rights

In this respect, Article 27 of the Universal Declaration of Human Rights of December 10, 1948, can be read in two different ways. It states the following:

"*1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

Either one considers that this provision simultaneously proclaims the rights of the public and of the author so one should not be sacrificed to the other. Or one follows the order of the text and considers that it is indicative of a subtle hierarchy and the rights of the public precede those of creators. The wording is also disturbing : participating in cultural life is a "right", whereas for creators it is only a question of protecting their "interests". In intellectual property texts, the reverse is true.

The same applies to the European Convention on Human Rights, in which Article 10.1 states that "*Everyone has the right to freedom of expression"* which includes freedom "*to receive or impart information and ideas … regardless of frontiers*". This text led the European Court of Human Rights (ECHR, August 25, 1998, Hertel v. Switzerland) to state that this freedom is one of the "*essential foundations of a democratic society*" in that it encourages progress and "*each individual's self-fulfilment*". Can it therefore be assumed that every human being now has the right to receive any element of knowledge without any pre-existing right being claimed, in particular intellectual property?

The problem is that the works are usually the vehicles for these elements of knowledge. To allow access to the knowledge they contain, works of the mind should be reproduced freely. This is the basis on which a French court (the Paris High Court, February 23, 1999, cited above, p.20) considered that there was a new exception to copyright concerning reproduction and televised performances. Assuming that this is acceptable reasoning, what should be the regime for this restriction on copyright? Is there a real exception to rights so that the work can be freely reproduced without charge in order to allow the information to be easily accessible? Or should the elimination of the exclusive right alone be recognized and provision made for a compulsory license or the right to remuneration? The second solution would represent an attempt to strike a balance between two conflicting interests without totally disregarding the rights of authors. The first solution would be in keeping with the logic of disseminating knowledge. If it is really a question of disseminating knowledge, why should access to knowledge be subject to a fee? This option is in fact theoretical. Such rationale only makes sense in a concept of the "internal balance of interests". The problem of external correctives to intellectual property is that not only are they radical but they obey a completely different logic.

There is cause for serious doubt concerning the relevance of such a structure and arguments can be put forward rejecting each of the solutions.

Firstly, as already mentioned, the alleged right to information should only allow access to the elements of knowledge, not authorize the free reproduction of works. The confusion stems from the fact that information is "*any message expressed in a form that makes it accessible to another person*" (P. Catala, "La propriété de l'information", Mélanges offerts à Pierre Raynaud, Dalloz 1985, p.97 *et seq*, especially p.99, no.6). From an etymological standpoint, the word information comes from the Latin "informare", which means putting into form. In the opinion of some, this means that, in order to benefit from this "right of access" to the message, one must be able to "use" the work in which it may appear as one wishes. This, however, confuses the element of knowledge with the form of the knowledge. The right to information should only relate to the messages and the elements of knowledge. If such a distinction is not made, taking this confusion even further and reversing the logic, it would be deemed that any work is information and should therefore be given to the public. It should nevertheless be repeated over and over that this confusion must be avoided : copyright does not concern the ideas but only their form, the works themselves should not be affected by this reasoning. The knowledge they contain, which can be assimilated to ideas, can in any case be used freely. Why should a new exception relating to works be allowed when the subject matter they contain and which is sought is in any event freely available? It might be added that authors are not responsible for any inequalities in access to information. So why should they be made to suffer the consequences of corrective mechanisms?

Secondly, another confusion must be avoided. It is one thing to say that the public interest places a limit on copyright, but another to consider that it should suffer the same restriction in the interest of the public. It is only the former that can be compared to the general interest or the Common Weal. It must not be forgotten that it has become a reflex for infringers to try to justify their illegal action by claiming that they are meeting a hypothetical general interest.

Thirdly, it will be noted that this predicted trend would be radically opposed to the developing trend to the contrary in connection with the creation of a *sui generis* right for producers of databases. This solution is already accepted in all the States of the European Union (transposition of the Directive of March 11, 1996). This does not mean that the author of this report endorses the creation of this new right, but it must be recognized that, in the quest for a balance between the right to information and the right over information, the choice has already been made (although it is true that it is usually "over-reaction" which causes sharp reactions, see the Magill case).

Fourthly, even setting aside this unprecedented structure which, for the time being, has only been accepted by some States, it must be recognized that the copyright and neighboring rights solutions already take account of these expectations and the concern to disseminate knowledge in another way. For example, the exception universally allowed for quotations. Also those systems which allow exceptions for the purposes of education or storing in archives. Moreover, all systems, even the most closed ones, have variations in the way solutions are implemented according to whether it is question of a purely artistic work or a work of information. The "fair use" provisions undeniably demonstrate this in Section 107 2), where reference is made to "the nature of the copyrighted work", while on October 30, 1987, the Plenary Assembly of the French Court of Cassation showed considerable boldness in the Microfor case by allowing a broad right of quotation in connection with the reproduction of newspaper articles (works of information) in a Canadian database.

Over and above this criticism, do the aforementioned international texts really authorize this radical "elimination" of copyright? In fact, the principle laid down in the European

Convention on Human Rights itself has its limits. Article 10.2 contains nuances, stating that "*The exercise of these freedoms* [set out in Article 10.1], *since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, (…) for the reputation or rights of others (…)*".

How should this be interpreted? Part of the answer is to be found in Article 1 of the first additional protocol to the Convention, which states that "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions* " and "*No one shall be deprived of his possessions except in the public interest (…)*". It appears that the broader term ("possessions") in this provision can relate to "a private right and constituted […] a possession" (ECHR, June 26, 1986, Van Marle) and encompass intellectual property rights (in this context, Chr. Caron : La Convention européenne des droits de l'homme et la communication des oeuvres au public : une menace pour le droit d'auteur? Com.com.elec. no.1, 9 & s.).

It might be added that, since copyright itself has been given the status of a human right, it would be difficult to see why the right to information (thus moderated) could eliminate copyright! The Netherlands Court of Cassation in any case seems to have rejected this (December 17, 1993; cited by A. Lucas, Droit d'auteur et numérique, litec, 1998, §365).

This argument no longer carries weight if one considers neighboring rights, which have never really been considered a human right. It is of course true that the exceptions to copyright and neighboring rights must be fairly similar so that the system is not too difficult to implement. But the generally accepted rule is the following : the owners of neighboring rights must be subject to the same exceptions as the owners of copyright. This does not mean to say that the owners of neighboring rights must be given rights that have exactly the same limits as copyright. Where there is no question of copyright (works in the public domain or unprotected documents) but there is a neighboring right (recent performance of a work from the early 19th century, videogram …), should neighboring rights not give way to the need for information? Acceptance of such a solution would once again raise the issue of the interest of recognizing neighboring rights. What is the point of striving to impose recognition of neighboring rights (which have not yet been in existence for fifty years, whereas copyright has been around for two centuries) if the structure patiently built up and carefully elaborated is then immediately destroyed. This raises once again the question of the legitimacy of external correctives to intellectual property rights. Although the justification is very different according to the rights involved, a minimum degree of consistency is required.

What would be the consequences of such an exception? The restrictions on intellectual property would of course, ultimately, benefit the public. In practice, however, the persons who benefit the most are intermediaries which reproduce or disseminate the works that convey knowledge. These are far from being physical persons for whom information is a human right. These are persons whose business is dealing in works and which derive a substantial income from this. In the aforementioned decision of the Paris High Court of February 23, 1999, the benefit of this new exception was claimed by a public television channel. Can one really invoke the European Convention on Human Rights? Can one really envisage eliminating copyright, a fundamental right, in the name of a corrupt logic?

But that is not all. How would this television channel react if the viewers then decided to reproduce and show its programmes in educational establishments without seeking its agreement? Irrespective of the origin (internal or external to intellectual property) of an

exception, it must be consistent. For the sake of consistency, upstream and downstream, an intermediary which claims an alleged right to information in order to circumvent intellectual property and freely disseminate works or protected elements must then be prepared to allow this exception in respect of its own programmes and their future users. Applying the concept of " being hosted by one's own petard", distributors would then be deprived of part of their return on investment.

In short, it appears dangerous to allow the pitiless interaction of such a corrective mechanism. It should be recalled that all literary and artistic property rights are founded on the search for an internal balance. There can be little doubt that the present economy of literary and artistic property is a compromise designed to ensure a balance among three social objectives : rewarding the author, protecting investment, and satisfying users' needs.

This can be seen in the structure of the legislation and is openly proclaimed in the declarations of intention attached to the new texts. It can be found, for example, in the Preamble to the WIPO Copyright Treaty of December 20, 1996, which recognizes "*the need to maintain a balance between the rights of authors and the larger public interest*". Or in certain Recitals in Community Directives, for example, the proposal for a Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (text of May 21, 1999):

"*(2) Whereas the European Council, meeting at Corfu on 24 and 25 June 1994, stressed the need to create a general and flexible legal framework at Community level in order to foster the development of the Information Society in Europe; whereas this requires, inter alia, the existence of an Internal Market for new products and services; whereas important Community legislation to ensure such a regulatory framework is already in place or is well under way; whereas copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content;*

(2bis) Whereas the proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property – including intellectual property – freedom of expression and the public interest;

(3) Whereas a harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors; whereas this will safeguard employment and encourage new job creation;".

Those who drafted these texts recognized what was at stake and the balance that had to be achieved. This does not mean that all claims are equal. It should not be forgotten that, if the "interests" of the public are quite rightly invoked, the basic premise is that authors also have rights. Their importance is clear to all. Even the United States Constitution, whose proclaimed objective is the general interest, uses the word "securing" and not "granting" in relation to the attribution of intellectual property rights. This emphasizes that the existence of authors' rights is quite naturally accepted. If the necessary balance among the various expectations is sought through a structure that is internal to intellectual property, allowing the

easy acceptance of external correctives poses a serious risk. "The balance of interests" can clearly be found in recent texts. The Community Directives on "creation-tools" and computer programs or databases do not hesitate to go as far as giving specific recognition to the rights of legitimate users. So why is it necessary to go any further? It would be dangerous to allow an insidious and uncontrolled change in the logic. Allowing certain correctives is one thing, but accepting the imposition of a new paradigm is another.

Caution must be exercised when seeking a balance and numbers are not all. An author has a public in front of him and he hopes it will be a large public, increasingly consuming and using cultural goods. Works are therefore seen as products, if not tools …! This shift is not impartial and may change a judge's opinion if the public claims the "essential" nature of the work in order to underline the egoistic point of view of one person and the unacceptable pretensions of the creator. This shift is brewing in Community case law, not only in the Magill case. For example, preambular paragraph 131 of the decision of June 12, 1997, of the Court of First Instance of the European Communities states that "*the refusal [to grant a license to] the applicant could not fall within the prohibition laid down by Article 86 unless it concerned a product or service which was either essential for the exercise of the activity in question, in that there was no real or potential substitute, or was a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of consumers*". Copyright could therefore be sacrificed on the common altar of the right of competition and the interests of consumers. If this path was opened up, the reasons would have to be explained better. Although the "sacred" nature of works or copyright is sometimes exaggerated, no one has yet clearly shown how the right of competition is based on better grounds than copyright. A value for a value, why should we sacrifice ours?

The point of balance is of course not exactly the same in all laws and it would be difficult today to find the centre of gravity common to the various régimes. Although the elements taken into account are usually the same in all countries, their importance is not the same everywhere. The balance has been sought in different ways according to the historical, sociological and philosophical traditions of each country. This is precisely the reason for a new structure within the WIPO framework that would attempt to find common solutions or, at least, attentuate the differences.

Concluding remarks

The emergence of the information society has undoubtedly raised certain basic questions anew. But it is important not to confuse the debate. To speak of the information society does not mean considering works of the mind as common merchandise and only envisaging copyright and related rights in the future in the light of consumers' interests alone. Intellectual property rights have always and everywhere provided a balance among conflicting interests : authors, creation auxiliaries, investors or disseminators, the public, enriching mankind's heritage …. This balance must be maintained.

It is in fact digitization and the globalization of the use of creations and elements covered by related rights which give cause for reflection. Digitization incites one to pay greater attention to the losses suffered by rightholders, whereas the circulation of works calls for a search for less divergent solutions.

This means putting on the table the solutions adopted or those that might be envisaged. This new approach to the discipline can only come about by **eliminating false justifications**

for the exceptions allowed : the grounds derived from social reasons seem to be much more relevant than those based on so called practical reasons. Probably the bounds of the rights in question sometimes need to be better defined.

This clarification is doubly necessary. Firstly, because it will make the new structure more coherent. Secondly, because it will provide it with a more solid foundation. The law plays an educational role. It is of course addressed to all users of works, but also to judges. The danger of excesses in copyright and related rights through the use of legal structures that are external to these disciplines (see Second Part above) is less if those responsible for applying the texts are convinced of the balance of the structure adopted and the relevance of the solution (result of the "balance of interests").

A harmonious structure of admissible exceptions would first of all be based on a **foundation common to copyright and related rights**. The reasons which underpin one may of course appear less obvious when applied to the other, but provided that the difference is not absolutely fundamental, simplicity dictates consistency. It is essential for understanding and consequently for the effectiveness of intellectual property rights. A complicated law is rejected by the users of works, and sometimes even circumvented by those who in fact understand its bases and were nonetheless anxious to observe it. If it is incomprehensible, literary and artistic property is seen as a tax, as an obstacle to activities and the dissemination of knowledge.

To the extent possible, the exceptions allowed should be **common to the various rights** given to different owners of rights. Firstly, for the same reasons of simplicity and consistency. Secondly, because the electronic consumption of works leads to simultaneous application of these rights. It has become increasingly difficult to distinguish among the rights involved when a work is consulted on the network. Would it be reasonable to impose limits on the application of certain rights and other exceptions if other rights are contested? It is no doubt impossible to eliminate all the differences, but at least they should not be increased through the adoption of category-specific legislation and everything that is not absolutely indispensable should be eliminated. Some modern laws (Swiss law of October 9, 1992, for example) have started to implement such an approach (see Article 19.1 on private use).

Following such an approach, **the role of special exceptions would be vestigial** and would only concern the hypotheses for which it is impossible to do otherwise. In other words, solutions of convenience or legislation for the sake of effect should be eschewed.

In this effort, which is both educational and regulatory, the WIPO naturally has a vital role to play. In terms of **legislative methods, the choice between the synthetic and the analytic approaches** is of course decisive. The choice of an open system (based on the American fair use) would naturally be a solution which would give full opportunity to adapt the system. It also appears to provide a flexible response to the practical search for a balance among the interests involved. It is not necessarily true, however, that this option can be implemented everywhere because it requires the prior theoretical determination of a large number of facts relating to copyright and related rights, as well as mastery of extremely complex legal methods. In addition, the substantiality of the harmonization sought might be questioned.

Should a closed system be adopted? This is what the European Union has chosen. For the time being, it seems reasonable. What is true for a community of States bound by their

culture, history and economy is even truer for a larger group of countries with different traditions and disparate expectations. Will this be the system adopted however?

The background to the Berne Convention is edifying in this connexion. The emergence of "special cases" was due to the impossibility of agreeing on a broad common foundation. The Convention itself represents a compromise between an open and a closed system. Even though the present structure is not in this form, the Convention is based on a three-tier structure : necessary exceptions, exceptions allowed (but optional), undefined exceptions which are possible provided that the "three-stage test" is respected.

It would no doubt be preferable to strive to broaden the first category. Some exceptions seem to have been imposed without too many problems (use of a work for reasons of public security or to ensure the proper functioning of an administrative, parliamentary or judicial procedure, for example, but greater efforts are required). The limitation, or even elimination, of the third category would perhaps be a good idea.

This observation appears to go against the current trend at a time when the **three-stage test** has become the general rule. The extension of this measure to all rights and exceptions should be welcomed, but it is not the cure-all. It no doubt allows the interests of rightholders to be protected while at the same time seeking a balance among the various expectations. It constitutes a sort of safety barrier every time some international text refers back to domestic legislation. In substance, it makes it possible for a Convention to refer back to a law in a spirit similar to that in which lawmakers refer back to judges in open systems. But it is far from providing harmonization.

Investigating the three-stage test possibility is no doubt interesting, but it remains to be seen how and for what purpose. The example to be found in Article 10 of the WIPO Copyright Treaty is edifying. This text (entitled "Limitations and Exceptions") provides that:

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

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

How should this be understood? This text indisputably allows the determination of new exceptions (special cases) provided that they meet the criteria of the test. This is emphasized in the first paragraph of the agreed statement: "*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*."

Whereas Article 10.2 generalizes the test and seems to require a new look at the exceptions already allowed according to the criteria of the three-stage test, the second paragraph of the agreed statement emphasizes that "*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."! It is by no means certain that a non-expert will be able to understand this. The ambiguities that remain must not give member States a margin of interpretation that would exacerbate the current disparities among laws.

If the three-stage test is to become the cornerstone of exceptions to copyright and related rights, it would be useful to clarify it. First of all, are there really three stages?

The first would be the existence of "special" or "specific" (European Union) cases. This is in fact trying to answer a question with a question. While the formula does not allow generalized exceptions, it does not exclude either exceptions for private copies or even "fair use" cases (see the records of the main committee during the negotiations on the WIPO Treaty), even though these are broad.

The other two conditions ("*do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author*") are based on a more material evaluation. The exceptions allowed must not, in practice, provide third parties with modes of exploitation which compete with those of the rightholder nor cause unreasonable prejudice to the latter. This is not so different to condition no.4, "fair use" ("*effect of the use on the potential market for the protected work or on its value*").

What conclusions can be drawn from this?

Does it mean that, for legislators, the choice is the following : either the exception envisaged would cause "unreasonable prejudice" to the rightholder's interests and is therefore unacceptable; or there is no prejudice and the exception can be allowed (freedom to use the work or the element without charge) provided that it only concerns a special case and does not prejudice a normal exploitation of the work? But how is it possible to be certain at the time the text is adopted? The basic difference between this and "fair use" is that the judge in the United States decides, in full knowledge of the facts, whereas the legislative option constitutes a leap into the unknown in view of the development of technology and markets.

Furthermore, how can an intermediate solution such as the adoption of a right to remuneration be integrated? Is there still unreasonable prejudice if the law allows fair compensation? At the economic level, the answer is no. But copyright and neighboring rights are not only made up of a simple right to remuneration. The adoption of an exception in the foregoing example would nevertheless deprive one of the characteristics of literary and artistic property - the exclusive nature of the right recognized - of its value.

Lastly, in addition to these considerations, one last element must be taken into account : the role and consequence of the **adoption of technical devices**. The most recent texts have dealt with this and both the WIPO Treaties and the proposal for a Community Directive provide for the adoption of legal regulations to protect the technical means used to maintain copyright and related rights in force.

Assuming that this structure (rights – technology – rights) is in place and reliable, what are the consequences? The interaction with the preceding considerations is self-evident, at least as far as the third condition of the three-stage test is concerned.

Moreover, these devices tend to replace legal evaluation by technical means. Is it acceptable to impose a technical prohibition when users enjoyed a certain measure of legal freedom to copy? This is indisputably one of the important issues for future discussion. The problem is how to assess the impact of these technical devices in people's minds. They were originally designed as a legitimate response to the dangers caused by technological developments, but they should not descend to becoming an additional form of protection which would quite rightly be rejected by copyright.

What is the result?

Because of certain defensive procedures, a work is highly protected because it cannot be accessed without a key (or code). This could mean a *de facto* reservation in cases where the law did not perhaps want to allow a monopoly and permitted an exception for the benefit of users. Is this acceptable? At first glance, it would appear not. By acting in this way, the owner of the work upsets to his own advantage the subtle balance constructed by the legislator when determining monopolies. This excessive and immoderate reservation might arouse violent reactions and serve as justification for an anti-exclusive rights stance or the outright rejection of copyright and related rights (riposte from other disciplines? Abuse of a dominant position?). It is unacceptable that the "public domain" should be determined by individuals and not by the law. For the time being, this problem is totally theoretical because, in practice, this hypothesis has little chance of being put into effect. Some people consider that it is highly improbable because it assumes that a work is only accessible in a locked digital or analogue form and that technical protection devices have made it possible to prevent any attempt at circumvention (which highlights the need to follow the latest technical and legal developments in this area). This question might arise in twenty years time, but not before. In the meantime, rightholders can of course arm themselves with technical devices to prevent access to the matrix. They cannot, on the other hand, make use of the existence of such devices to try to prevent access to the work via unlocked copies in circulation. This underlines the difference between a *de facto* situation and a legal monopoly.

Even though excessive technical reservations are only a remote threat for the moment, this analysis leads one to ask whether exceptions to rights are **tolerated, a mandatory restriction or a user's right**? Belgium's experience when transposing the database Directive is enlightening in this respect. Professor Strowel wrote the following (Journal des Tribunaux, 1999, pp.297-304, no.24): *"the adoption of the law of August 31, 1998, provided an opportunity to review the status of the exceptions already present in the copyright law. New Article 23bis LDA, which states that the exceptions in Articles 21, 22, 22bis (new) and 23, §1st and §3 are mandatory, will have significant practical effects in areas where rightholders tended to set the legal exceptions aside contractually. The affirmation of the mandatory nature of exceptions by Belgian legislators is surprising, bearing in mind that, at the same time, Community legislators are proposing a system of optional exceptions*". (WIPO translation).

In some cases, it has been stated that copies are a right and not a possibility. This is the case for safeguard copies of software (Article 5.2 of the Directive of May 14, 1991). The solution here was justified on the grounds that it is a "creation-tool" and consequently legitimate users had to be given certain rights. This right was clearly circumscribed and did not allow private copying, simply one copy for a particular use : as a safeguard. Moreover, it has already been proposed that this could be avoided by installing technical locking devices and giving the user another copy.

It can thus be seen that the question of exceptions to copyright and related rights is a much broader issue than the external and internal boundaries of the disciplines and can only be envisaged in the light of a large number of parameters.

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