

**TOWARDS A NEW CORE INTERNATIONAL COPYRIGHT NORM:
THE REVERSE THREE-STEP TEST**

Daniel J. Gervais¹

Introduction.....	2
I. A Brief History of Copyright.....	5
II. The “Problem with Copyright”	11
III. Comparative and International Analysis of Exceptions to Copyright	14
A. The Berne Convention	14
B. Analysis of the three-step test	15
1. “Certain special cases”	15
2. Interference with normal commercial exploitation.....	17
3. Unreasonable prejudice to legitimate interests of rightsholder.....	19
C. European “InfoSoc” Directive	21
D. National Laws	22
1. Fair dealing	22
2. Civil law enumeration approach	23
3. Considerations Concerning Private Use	25
E. Application of copyright exceptions to the Internet.....	27
IV. The Way Forward	29
A. The Reverse Three-step test.....	29
B. Comparison with Other Proposals.....	32
C. Further Considerations on an Effects-Based Test.....	35
Conclusion	36

¹ Oslers Professor of Technology Law, Faculty of Law, (Common Law Section), University of Ottawa. Visiting Scholar, Stanford Law School. The author wishes to acknowledge the financial support of the Centre for Innovation Law and Policy of the University of Toronto and of Bell University Labs. The author is indebted to Alex Cameron, LL.M. candidate at the University of Ottawa, and Marina Pavlovic, LL.D. candidate at the same university, for their diligent research assistance. The author also wishes to acknowledge constructive suggestions made by Professors Anupam Chander and David Nimmer and students in Professor Chander high-tech contract & property seminar at Stanford Law School (Winter '04), where an earlier version of this paper was presented.

Introduction

Copyright is dead.² The first to pronounce its passing was probably John Perry Barlow. In his famous 1993 essay, “The Economy of Ideas,”³ he defended the theory that dematerialization has made copyright, which was designed to protect the bottle and not the wine, irrelevant, for in the digital era the bottle has disappeared.⁴ He then handed down his verdict, with no possible appeal:

Intellectual property law cannot be patched, retrofitted, or expanded to contain the gasses of digitized expression any more than real estate law might be revised to cover the allocation of broadcasting spectrum. (Which, in fact, rather resembles what is being attempted here.) We will need to develop an entirely new set of methods as befits this entirely new set of circumstances.

In the slipstream of this former rancher and spokesperson for the *Grateful Dead*, academics in the United States and in other countries began to explain why copyright had become obsolete in the Internet era.⁵ However, the funeral was perhaps a bit premature.

² Eben Moglen uses a “Star Wars” analogy to make the point: “. . . the obsolescence of the IPdroid is neither unforeseeable nor tragic. Indeed it may find itself clanking off into the desert, still lucidly explaining to an imaginary room the profitably complicated rules for a world that no longer exists.” *Anarchism Triumphant: Free Software and the Death of Copyright*, in THE COMMODIFICATION OF INFORMATION 107, 131 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002)

³ John Perry Barlow, *The Economy of Ideas: A framework for patents and copyrights in the Digital Age. (Everything you know about intellectual property is wrong.)* WIRED, 2.03, Mar. 1994, available at: <http://www.wired.com/wired/archive/2.03/economy.ideas.html>

⁴ “Copyright worked well because, Gutenberg notwithstanding, it was hard to make a book. Furthermore, books froze their contents into a condition that was as challenging to alter as it was to reproduce. [. . .] For all practical purposes, the value was in the conveyance and not the thought conveyed.”

“In other words, the bottle was protected, not the wine. Now, as information enters Cyberspace, the native home of Mind, these bottles are vanishing.”

⁵ The reader will find a good example in the article by Glynn S. Lunney Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 Virginia L. Rev. 813, 815 (2001): “COPYRIGHT is dead. The Digital Millennium Copyright Act (“DMCA”) has killed it. [...] With the enactment of the DMCA, there is a very real danger that our system of protecting creative works will serve primarily private interests. If so, then the protection of creative works will have come full circle [...] and copyright, in the sense of protection intended primarily to serve the public interest, will surely have died”. See also Robert C. Denicola, *Mostly Dead? Copyright Law in the New Millennium*, 47 J. Copyright Soc’y of the

Copyright is still with us, and few can prove that a (capitalist) society⁶ without something like copyright would ensure as well, or better, the creation and distribution of new works.

But certain blows have been dealt. First of all, it must be said that the copyright industries (the so-called “rightsholders”) have not been dazzling in their rush to adapt to the Internet. These industries have essentially fought the Internet, and the music and movie industries are still fighting.⁷ I was among those who suggested in 1998 that a “business model” approach be used.⁸ The text industry and scientific journals put their material on line four or five years ago, and some have considerably broadened the choices offered to their readers, whether by making available lab data files (too voluminous to print out) or three-dimensional models of molecules, or simply by accelerating distribution.⁹

USA 193, 207 (2000): “Yet how much of the old, legislatively-defined copyright will remain relevant in the new Millennium? Copyright law may be mostly dead in the wake of the DMCA, but ‘mostly dead is still alive.’ Traditional copyright will no doubt remain as a convenient if redundant alternative to breach of contract. Copyright law will also be necessary for works that leak out of their containers and are accessible without a contract. We may also need traditional-looking copyright law to pursue stronger protection abroad.”

⁶ See *Eldred v. Ashcroft*, 123 S.Ct. 769, 785 (n. 18) (2003), “...copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge... The profit motive is the engine that ensures the progress of science. [...] Rewarding authors for their creative labor and ‘promot[ing]... Progress’ are thus complementary; as James Madison observed, in copyright ‘[t]he public good fully coincides... with the claims of individuals.’”

⁷ We might remember the fight against the photocopier. In a 1961 report of the Register of Copyrights in the United States, a similar alarm was being sounded: “. . . Copying has now taken on new dimensions with the development of photocopying devices by which any quantity of material can be reproduced readily and in multiple copies . . .” REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Jul. 25, 1961).

⁸ Daniel Gervais, *Electronic Rights Management and Digital Identifier Systems*, 4 J. of Elec. Publishing (1999), available at <http://www.press.umich.edu/jep/04-03>: “The content is there. In almost all cases, it is in digital form or can be digitized. Networks with sufficient bandwidth are being built, and many business users and individual consumers are already connected. They are ready for the content. Many copyright industries and other rights holders are coming to the view that global networks represent good business opportunities and that digital, though it may be different, is nonetheless interesting commercially. In fact, it may be the only future growth area. To put it simply, digital is inevitable.” This was a report presented to WIPO (Geneva) in December 1998.

⁹ See Daniel Gervais, *Copyright and eCommerce*, in INTELLECTUAL PROPERTY IN THE GLOBAL MARKETPLACE (Melvin Simensky et al. eds., 2001 Supp., 2002).

After some setbacks concerning standardization issues,¹⁰ and many sensational trials aiming to impede exchanges of files between Web surfers on a central site¹¹ or a peer-to-peer network, the recording industry is just starting to authorize downloading of music files.¹² The movie industry is still testing distribution systems.

The main concern of most industries seems to be to avoid any reuse of the downloaded content. And this is precisely where the problem of adaptability of copyright to the digital world is most obvious.

This paper argues that it is time to replace the existing set of copyright rights by focusing on its true policy objectives. The paper thus begins with a brief look at the history of copyright and tries to identify what is wrong with extant norms. In other words, the spotlight will be on the apparent chasm between the policy objectives and the norms. The paper will then suggest that a new international copyright norm could be created based on the Berne Convention's three-step test, in harmony with the US fair use doctrine¹³.

¹⁰ I am thinking here mainly of the Secure Digital Music Initiative (SDMI), a project that has been put on the back burner. On the project's site at www.sdmi.org is the following (Nov. 2003): "As of May 18, 2001 SDMI is on hiatus, and intends to re-assess technological advances at some later date."

¹¹ Including the famous suit against Napster: *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). See Sarah H. McWane, *Hollywood vs. Silicon Valley: DeCSS Down, Napster to Go?*, 9 *CommLaw Conspectus* 87, 107 (2001): "The recording industry holds stubbornly to the retailing model where people are actually purchasing CDs when, in reality, people are now downloading MP3s". See Michael S. Elkin and Alexandra Khlyavich, *Napster Near and Far: Will the Ninth Circuit's Ruling Affect Secondary Infringement in the Outer Reaches of Cyberspace?*, 27 *Brooklyn J. Int'l L.* 381 (2002) (discussing the findings in and the impact of the Napster case).

¹² For example, on the iTunes.com site belonging to Apple Computers, became an overnight success in spite of the fact that originally it only worked with Macintosh computers using the latest version (OS10) of the operating system. See Neill Strauss, *Apple Finds a Route For Online Music Sales*, *N.Y. Times*, May 29, 2003, at E1. See also Press Release, Apple Computers, One Million Copies of iTunes for Windows Software Downloaded in Three and a Half Days (Oct. 20, 2003), at <http://www.apple.com/pr/library/2003/oct/20itunes.html>.

¹³ Codified in 17 §107. Use will be considered fair (and consequently non-infringing) according to the four following criteria:

- (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.

I. A Brief History of Copyright

The first copyright statute¹⁴ in the United Kingdom¹⁵ was essentially a privilege granted by the Crown to authors and publishers to prevent reuse by other publishers. It seems to have been derived from a previous act designed to limit publications to authorized publishers¹⁶. In other words, it was a “professional right,” used mostly by professionals against other professionals: Certain commercial entities waited to see which books were selling well and then started to copy them. This created a free-rider system, which was rather inefficient from a commercial standpoint: publishers had little incentive to invest in the publication of new books and authors were suffering from the narrow bandwidth for the dissemination of their books. This “free” and rather raw capitalism thus led to a market failure in the book trade that had to be regulated.

On the Continent things were taking a different route. While events paralleled those in the UK (there were printing privileges in Italy and pre-Revolution France since at least the early 17th century) for several decades, things took a different turn at the end of the 18th century: Authors’ rights were born in the purest tradition of human rights, *i.e.*, as natural rights. As such, they had special status and could not easily be limited by the State, politically or legally.

¹⁴ Prior to the Statute of Anne (*see* next note), there had been no copyright proper. Artists in classical Greece and the Roman Empire did not seek personal attribution, and it was common to identify someone else (a teacher, a famous person) as the “author.” During the early and middle Middle Ages (approximately from the 8th to the 12th century), almost all artistic works were created in Europe under the patronage of the Roman Catholic Church, which became *de facto* the owner of all “works.” Michelangelo was one of the first artists under Church patronage to insist on personal attribution. The insistence of the personal role of the author and the recognition of the link between authors and works is mostly a child of the Enlightenment, with, *e.g.*, Kant’s (and later Hegel’s) view that the author infused his or her will into the work. *See* Harold C. Streibich, *The Moral Right of Ownership to Intellectual Property: Part I - From the Beginning to the Age of Printing*, 6 *Mem. St. U. L. Rev.* 1 (1975); Dan Rosen, *Artists’ Moral Rights: A European Evolution, An American Revolution*, 2 *Cardozo Arts & Ent. L.J.* 155 (1983); Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 *Colum.-VLA J.L. & Arts* 361 (1998).

¹⁵ Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

¹⁶ This is the argument made in L. Ray Patterson and Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders’ View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 *Emory L.J.* 909, 916 (2003).

But here again the rights were exercised mostly against infringers who were, by and large, either small-time pirates, or professionals lacking a certain ethical view of publishing (truth be told, the boundary between authorized reuse of existing material and infringement was not and is not always clear.) Authors were also able to use their new human right against publishers who exploited them beyond what they considered to be an acceptable limit.

The history of copyright and authors' rights in the decades that follow is essentially that of an adaptation to new forms of creation (*e.g.* cinema) and, more importantly, of new ways to disseminate copyrighted works (radio, then television broadcasting, cable, satellite). The result is a bundle composed of "copyright rights" *i.e.*, a list of specific rights in respect of particular forms of exploitation of works (reproduction, public performance/communication to the public, adaptation, etc.).

It is important to add, however, that from the 18th century until the 1990's, those copyright rights were aimed at, and used against *professional entities*, either legitimate entities such as broadcasters, cable companies or distributors; or illegitimate ones such as cassette and CD pirates. In most cases, these professionals were intermediaries with no interest in the content itself (*i.e.*, they could have sold shoes instead of movies). Their job was to get content to end-users, most of whom were consumers and of no interest to copyright law (or lawyers).

A fundamental shift has occurred since digital technology and especially the Internet: copyright is now a legal tool that rightsholders can use against *end-users*, including consumers¹⁷. Rightsholders want to use the copyright tools at their disposal for a dual purpose: ensuring that end-users pay the fee for the material they use (which they

¹⁷ See Press Release, Recording Industry Association of America, Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online, (Sept. 8, 2003), at <http://www.riaa.com/news/newsletter/090803.asp>. See also John Borland, *RIAA sues 261 file swappers*, CNET News.com, at <http://news.com.com/2100-1023-5072564.html?tag=nl> (Sept. 8,

see as including getting access through authorized sources), and preventing the transmission of the material by those “end”-users to other users (in other words preventing them from becoming intermediaries). To put it bluntly, rightsholders want to ensure they want to ensure that end-users remain just that, *end*-users.

Individual users on the other hand want to harness the enormous capabilities of the Internet to access, use and disseminate information and content. The demand is huge and ever increasing. Internet technology has responded to this huge pull not only by providing the initial adequate technological means but by responding to legal barriers by providing new ones: close Napster and peer-to-peer emerges. Try to shut P2P down, as was done in the recent wave of subpoenas and law suits against individual file “sharers”¹⁸, and quite predictably another technology will surface: anonymous file exchange systems, thus defeating any subpoena served on the ISP.¹⁹ Because ISPs will not know the identity of users who are exchanging music files, subpoenas will be ineffective. In a similar vein, if a way is found to block music files, software that disguises the music content will be invented.²⁰ In short, users seem poised to win this war and commentators are already saying that the music industry will be lucky to be around to lick its wounds.

The best way forward for the music industry is to completely redefine old business models based on albums, physical copies (CDs) and, more importantly, the

2003) and John Borland, *RIAA files 80 new file-swapping suits*, CNET News.com, at <http://news.com.com/2100-1027-5099738.html> (October 30, 2003).

¹⁸ *Id.*

¹⁹ See Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs. 257 F. Supp. 2d 244 (D.C. 2003). CNet reported the increasing use of proxies to ensure the anonymity of file-sharers. See John Borland, Covering tracks: New privacy hope for P2P, *CNET News*, Feb. 24, 2004. Available at <<http://news.com.com/2100-1027-5164413.html>>(Accessed Feb. 25, 2004). Another example is programmer Wyatt Wasicek has created a program called AnonX that masks the Internet address of people who use file-sharing programs such as Kazaa. Wasicek promises not to divulge his 7,000 users’ Internet addresses, and believes he cannot be forced to do so. See <<http://www.siliconvalley.com/mld/siliconvalley/news/editorial/7927993.htm>>.

²⁰ Regularly, new technologies that promise to stop P2P sharing of copyrighted material (such as Audible Magic) emerge, usually with some concerns about privacy. See John Borland, “File-swap ‘killer’ grabs attention,” *CNet News*, March 3, 2004. Available at <http://news.com.com/2100-1025_3-5168505.html> (accessed March 4, 2003).

abandonment of the scarcity paradigm. *Information is not valuable on the Internet because it is scarce; it is valuable because it is found.*

The commercial and public relations cost of trying to apply copyright to end-users illustrates a simple fact: that is not what copyright was meant to do. The history and underlying policy objectives of copyright indicate that it is a right to be exercised by and against *professionals*. One should add to this equation the fact that copyright was always used to *regulate and organize* markets when a new form of dissemination was invented. The Internet is, from this perspective, probably the biggest jump in technological terms and copyright was used not to organize the music market but rather to deny it. That will not work. Copyright is not a dam, it is a river.²¹ It was always used to channel use and optimize exploitation, not to entirely shut out a new medium.

Following the same train of thought, exceptions and limitations to copyright were also mostly written in the days of the *professional intermediary* as user. This explains why in several national laws, the main exceptions can be grouped into two categories: private use, which governments previously regarded as “unregulatable” and where copyright law abdicated its authority by nature; and use by specific professional intermediaries: libraries (and archives) and certain public institutions, including schools, courts and sometimes the government itself. There are still today several very broad exceptions for “private use” (*e.g.*, Italy, Japan) that were adopted in the days when the end-user was just that, the end of the distribution chain.

The result of those exceptions expressed, in a US context, as a combination of fair use and the first-sale doctrine,²² meant that end-users were trusted by the copyright

²¹ The successes of publishers of scientific and medical journals show that using copyright norms in the Internet environment is possible. By making journals available online and leveraging the technology to provide, *e.g.*, raw lab data or files containing three-dimensional images, those publishers, who still sell plenty of paper copies, have increased total revenues. The key is to *trust* users, and let them use the material. Trust was always implicit in pre-Internet days, with legal devices such as the first-sale doctrine, private copying exceptions, fair use, etc.

²² See R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 *B.C. L. Rev.* 577 (2003). (“For at least ninety-five years, the first sale doctrine in U.S. copyright law has

industries²³. Users enjoyed both “room to move” because of exceptions such as fair use and rights stemming from their ownership of a physical copy.²⁴

The fact that private use is not expressly mentioned as an exception in a number of national laws or the Berne Convention is not surprising: it was of little interest to copyright holders until the invention of the VCR and double-deck cassette players, which only became popular in the 1970’s. A number of countries then introduced regulation *not* to stop the practice (and there were famous court cases where this was tried, including the *Sony* case in the US²⁵), but rather to *compensate* rightsholders by introducing levies on blank tapes and, in certain cases, on recording equipment as well.²⁶ The inapplicability of analog exceptions to the Internet is illustrated by the debate concerning § 110(2) of the US *Copyright Act*. It contains limitations on the nature and content of the transmission, and the identity and location of the recipients. As was noted by the United States

allowed those who buy copies of a copyrighted work to resell, rent, or lend those copies. Copyright law is often viewed as a balance of providing authors with sufficient incentives to create their works and maximizing public access to those works. And the first sale doctrine has been a major bulwark in providing public access by facilitating the existence of used book and record stores, video rental stores, and, perhaps most significantly, public libraries.”)

²³ Not that they liked it. The battle against the VCR is a good example. Of course, today video sales and rentals generate a substantial chunk of change for the film industry.

²⁴ The Canadian Supreme Court in the 2002 case of *Théberge v. Galeries d’art du Petit Champlain, Inc.*, [2002] SCC 34, wrote an interesting comment on this point: “Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright [...] such as fair dealing [...]. This case demonstrates the *basic economic conflict* between the holder of the intellectual property in a work and the owner of the tangible property that embodies the copyrighted expressions.” (emphasis added)

²⁵ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984).

²⁶ P. BERNT HUGENHOLTZ et al., INSTITUTE FOR INFORMATION LAW, THE FUTURE OF LEVIES IN A DIGITAL ENVIRONMENT 9 (2003), *available at* <http://www.ivir.nl/publications/other/DRM%20Levies%20Final%20Report.pdf>: “Historically, copyright levy systems have been premised on the assumption that certain uses, especially private copying, of protected works cannot be controlled and exploited individually. With the advent of digital rights management (DRM) this assumption must be re-examined. [...] Where such individual rights management is available there would appear to remain no need, and no justification, for mandatory levy systems”.

Register of Copyrights in her May 1999 *Report on Copyright and Digital Distance Education*²⁷:

“As written, section 110(2) has only limited application to courses offered over a digital network. Because it exempts only acts of performance or display, it would not authorize the acts of reproduction or distribution involved in this type of digital transmission. In addition, students who choose to take a distance course without special circumstances that prevent their attendance in classrooms may not qualify as eligible recipients.”²⁸

Quite logically, the report recommends updating section 110(2) “to allow the same activities to take place using digital delivery mechanisms, while controlling the risks involved, would continue the basic policy balance struck in 1976.”²⁹ Such an adaptation of 15 USC 110(2) is possible because it still applies to professional users, namely educators. In the case of individual users, the rightsholder’s unwillingness to trust those users and the need to technologically enforce use legal and/or contractual use restrictions has led not only to a refusal to consider new exceptions but in fact to efforts to radically reduce any room to move left for those users.³⁰

²⁷ MARYBETH PETERS, U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION, *available at* http://www.copyright.gov/reports/de_rprt.pdf (May 1999).

²⁸ *Id.* at vii-viii.

²⁹ *Id.* at xv.

³⁰ The image of “fared use” has been mentioned in this connection. *See* Tom W. Bell, *Fair Use vs Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. Rev. 557, 559 (1998): “[automated rights management (ARM)] enables information providers to enforce standard copyright claims mechanically, without resort to the threat of litigation. It also allows copyright owners and others to create and enforce contracts that specify other sets of rights. Although ARM may give information providers newfound power to control the use of their wares, it does not necessarily justify that control. The proper legal response to ARM thus remains an open--and vital—question.”

“ARM portends far-reaching and unprecedented effects on rights to information in the new digital intermedia. Specifically, ARM threatens to reduce radically the scope of the fair use defense to copyright infringement. ARM will interact with existing legal doctrines to supplant *fair* use with an analogous but distinctly different doctrine: *fared* use.”

II. The “Problem with Copyright”

Is the copyright deer stuck in policy headlights? To a certain extent, the answer is yes, but only if one tries to fit too much into the copyright house. Copyright was, as a regulatory vehicle, a way to maintain the necessary level of scarcity *among professionals* who create, publish and disseminate material embodying human intellectual creativity so as to allow the development of an organized marketplace. In other words, copyright works well as a regulation of commercial intercourse. Extant exceptions to copyright protection discussed above show that it is not well adapted to, and was not meant to control private use by individuals.

The problem stems in large part from the way copyright rights were expressed, in turn a direct reflection of its history. From its very beginning in the 1710 Statute of Anne³¹, where copyright was presented as a way to promote the creation and dissemination of new works by protecting publishers from free-riding by other publishers, to today’s copyright legislation and international treaties, including the Berne Convention³² and TRIPS Agreement³³, copyright has been expressed in terms of rights attaching to the *nature* of the use, not to its *effect*. In other words, rights have been granted with respect to *acts* of reproduction, performance, adaptation, etc. But was this ever the true focus of copyright policy? I suggest that its actual target was *commercial use and reuse* and the prevention of free-riding by competitors, including of course true commercial pirates³⁴.

³¹ See *supra* note 15.

³² Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised at Paris July 24, 1971, 25 UST 1341, 828 U.N.T.S. 221 (hereinafter *Berne Convention*).

³³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS, 1869 U.N.T.S. 299, 33 I.L.M. 1125, 1197 (hereinafter *TRIPS Agreement*).

³⁴ The comment is limited to the so-called economic rights. Interestingly, where moral rights exist, a case can be made that (a) the test is not nature but effect and (b) the rationale is partly non-commercial. First, the standard test for the right of integrity is, as expressed in Article 6*bis* of the Berne Convention, a right to oppose “any distortion, mutilation or other modification of, or

I suggest that the time is ripe to abandon this legislative approach based on the nature of the act of use and focus instead on its *effect*. Isn't that, after all, what rightsholders care about? What the rightsholder in a film wants is to control and presumably be paid for the broadcasting of the film, not the number of transient, ephemeral other reproductions made, the fact that the work is "performed", "communicated" or "transmitted by Hertzian waves," wire, wireless networks or otherwise. Rightsholders care about such distinctions to the extent that they represent or affect markets. Otherwise, the technical requirements for the use of their content are irrelevant. Professional users similarly want to be authorized to perform commercial operations (*e.g.*, a certain form of broadcasting at a certain date etc.) independently of what the actual technical requirements are for this operation to be successfully performed. Yet, today copyright focuses instead only on the technical nature of the use.

Exceptions in many national laws for ephemeral recordings are a powerful symptom of the malaise. Broadcasting usually requires temporary copies to be made. Because the real act to be considered is the broadcasting, not temporary copying, many legislators opted to exempt the act of copying from copyright infringement liability. Otherwise, the user's need for an authorization would have been compounded by the fact that the various fragments of the copyright bundle (reproduction, public performance in various forms and media etc.) may very well be owned by different rightsholders, thus requiring multiple authorizations for a single economic operation³⁵.

derogatory action in relation to, the said work, which would be prejudicial to [the author's] honor or reputation." The nature of the act clause in this Article, namely "distortion, mutilation or other modification of, or derogatory action in relation t" is very broad, so broad in fact as to become a non condition. The real test is the effect of the act, i.e., the prejudice to the author's honor or reputation. The rationale of this right is partly commercial (maintaining the integrity of the work) as is the rationale for the right to claim authorship, the other part of the *6bis* rights (ensuring that the source is acknowledged). But part of the rationale stems, historically, from a 18th century civil law worldview that saw a permanent tether between the author and her creation, independently of any transfer of the work (as a object) and/or intellectual property rights therein.
³⁵ See Daniel Gervais & Alana Maurushat, *Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management*, 2 Can. J. of L. & Tech. 15 (2003).

This poses new problems in the Internet environment, where most acts of use have a dual nature from a copyright law standpoint. Any content made available on a server is usually reproduced and performed/ communicated. To make matters worse, in implementing the 1996 WIPO Treaties³⁶, certain countries have introduced a new right or fragment, usually called the “making available” right³⁷. A *single economic operation* in that context may require three or more separate authorizations, possibly leading to over- or split payments (because often each rightsholder will want to be paid for the entire economic value of the operation) and almost certainly to high if not insurmountable rights clearance processes and transaction costs.

The “problem with copyright” was illustrated in the US *Eldred v. Ashcroft*³⁸ case. While ostensibly the plaintiff was trying to obtain a declaration of unconstitutionality of the extension of the term of copyright protection, I would argue that a proper rescoping of the right or more precisely the replacement of the nature of the prohibition(s) it purports to effectuate would eliminate a significant portion of the criticisms leveled at copyright law, especially in respect of its chilling effect³⁹, its impact of the public domain and

³⁶ World Intellectual Property Organisation Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 at 1 (1997), 36 I.L.M. 65 (hereinafter *WIPO Copyright Treaty*) and the World Intellectual Property Organisation Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 at 18 (1997), 36 I.L.M. 76 (hereinafter *WIPO Performances and Phonograms Treaty*).

³⁷ See WIPO Copyright Treaty, Art. 8: “Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them”. See also WIPO Performances and Phonograms Treaty, Art. 8, 10, 12, 14 and 19. See, e.g., Japan’s copyright legislation: Copyright Law, Law No.48 of 1970, as amended, art.18.

³⁸ 537 U.S. 186 (2003)

³⁹ See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283 (1996). See also Lawrence Lessig, *Protecting Mickey Mouse at Art's Expense*, N.Y. Times, Jan. 18, 2003, at A17: “Still, missing from the opinion was any justification for perhaps the most damaging part of Congress's decision to extend existing copyrights for 20 years: the extension unnecessarily stifles freedom of expression by preventing the artistic and educational use even of content that no longer has any commercial value.” See also, Brief of Intellectual Property Law Professors as *Amici Curiae* Supporting Petitioners, available at <http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/ip-lawprofs.pdf>.

ability to use material to create new works.⁴⁰ In other words, a properly defined set of copyright norms would make the negative impact of its duration much less significant.

To abandon the nature of the act approach in favor of an effects-based test is not only possible, but I submit encouraged by both the main international treaties and national legislation, at least in the United States. This requires us to take a brief look at the types of exceptions currently in existence.

III. Comparative and International Analysis of Exceptions to Copyright

Our analysis of the different nature of exceptions to copyright rights will consider first the Berne Convention, and especially the three-step test, which will be the basis of our suggested new core norm. We will also examine briefly the most relevant European Union Directive and then consider the four main models of exceptions and limitations contained in national copyright laws.

A. The Berne Convention

The *Berne Convention* contains a general rule, known as the “three-step test”, which guides national legislators but only with respect to the right of reproduction⁴¹. It may be useful to recall that the so-called three-step allows exceptions to the reproduction right

- in certain special cases;
- that do not conflict with the normal commercial exploitation of the work; and
- do not unreasonably prejudice the legitimate interests of the author.

⁴⁰ An interesting but somewhat different analysis was proposed by Professor Wagner on this question. See R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 Columbia L. R. 385 (2003).

⁴¹ See DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* (2nd ed. 2003), at 144-7 and Mihály Fiscor, *How Much of What? The Three-Step Test and its Application*

B. Analysis of the three-step test

The three-step test has become the cornerstone for almost all exceptions to all intellectual property rights at the international level. It has been used as the model for exceptions to all copyright rights in the TRIPS Agreement⁴² (Article 13), to the rights created by the WIPO Copyright Treaty⁴³ (Article 10) and the WIPO Performances and Phonograms Treaty (Article 16). Interestingly, in the TRIPS Agreement, it is also the basis for exceptions to industrial design protection (Article 26(2)), and patent rights (Article 30). There is, however, a crucial difference in the case of patent rights: The last (third) step of the test [does]not unreasonably prejudice the legitimate interests of the patent owner, *taking account of the legitimate interests of third parties.*⁴⁴” (emphasis added).

1. “Certain special cases”

In his seminal book on the Berne Convention⁴⁵, Professor Sam Ricketson opines that “special” means that the exception must have a purpose and be justified by public

in Two Recent WTO Dispute settlement Cases, 192 *Revue internationale du droit d’auteur* 111, 231-242 (2002).

⁴² The TRIPS Agreement also contains a list of material excluded for copyrightability (Article 9(2)), namely “ideas, procedures, methods of operation or mathematical concepts as such.” It also extended in its Article 13 the three-step test of the Berne Convention to cover any copyright right (including, *e.g.*, public performance).

⁴³ This treaty was implemented in the United States by the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (hereinafter *DMCA*). The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 is title I of the DMCA. The treaty has at least two interesting features for our purposes, namely the application of the three-step test in its Article 10 and the following declaration in its preamble: “Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.”

⁴⁴ I am indebted to Dr. Mihály Ficsor, who shared his views on the WTO panel decision dealing with §110(5) of the U.S. Copyright Act. *See* Mihály, *supra* note 35.

⁴⁵ SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, 1886-1986* (1987)

policy⁴⁶. This purpose-oriented or teleological interpretation of the Convention is reinforced by the use of the phrase “to the extent justified by the purpose” in Articles 10(1) and 10(2) (which allow exceptions to be made for quotation and teaching), and Article 10**bis**(2) (which allows reporting of current events). The purpose of public information is clearly the basis for the latter exception and for the possible exclusion from copyright of certain official texts.

In the 2001 WTO panel decision concerning section 110(5) of the US *Copyright Act*⁴⁷, the first part of the three-step test, namely the meaning of “special,” was interpreted for the first time by an international tribunal. The approach taken was to first politely exclude Ricketson’s view⁴⁸ and essentially to look at the Oxford dictionary⁴⁹:

“The term ‘special’ connotes ‘having an individual or limited application or purpose’, ‘containing details; precise, specific’, ‘exceptional in quality or degree; unusual; out of the ordinary’ or ‘distinctive in some way’.[here was a footnote referring to the Oxford dictionary] This term means that more is needed than a clear definition in order to meet the standard of the first condition. In addition, an exception or limitation must be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow in quantitative as well as a qualitative sense⁵⁰.”

The approach chosen is understandable. For valid policy reasons⁵¹, the WTO Appellate Body has preferred to stick with the ordinary meaning of words, in part to avoid introducing unbargained for concessions in the WTO legal framework⁵². In the

⁴⁶ *Id.* at 482.

⁴⁷ United-States – Section 110(5) of the US Copyright Act, WTO Document WT/DS160/R, June 15, 2000 (hereinafter *Panel Report*).

⁴⁸ *Id.* at note 114.

⁴⁹ *Id.* ¶¶ 6.108-6.110.

⁵⁰ *Id.* ¶ 6.109.

⁵¹ Essentially, that trade-agreements are bargained for and should not, therefore, be “completed” or amended by interpretation. *See, e.g., United States - Standards for Reformulated and Conventional Gasoline*, WTO document WT/DS2/AB/R, in which the Appellate Body stated that “applying the basic principle of interpretation that the words of a treaty, like the *General Agreement*, are to be given their ordinary meaning, in their context and in the light of the treaty’s object and purpose.”

⁵² *See Gervais supra* note 35, at 146.

110(5) case, however, there were two problems with this approach. First, Ricketson's "view" was solidly anchored in the history and the text of the Convention. Second, the logic of the WTO panel's reasoning is incomplete. How helpful is it, from a legal standpoint, to say that "special" means either "limited in its field of application or exceptional in its scope"? The former criterion is not very restrictive, the second clearly is. More importantly, the last sentence of the above quote from the case does not logically follow from what precedes. It is not because an exception must be "limited in its field of application" that one can conclude that it *must* therefore be "narrow in quantitative as well as a qualitative sense." This is a huge logical jump which in fact elevates the threshold of acceptable exceptions under Berne.

I previously argued⁵³ that the three-step test is really a two-step test and that little time should be spent on finding the proper meaning of "special". Indeed, if the meaning of "special" as used in Article 13 of TRIPS and Article 9(2) of the Berne Convention is that there should be a *sound policy justification*, few countries will act in a purely arbitrary way. In addition, WTO panels should not try to step into the shoes of national policy makers. If its meaning is that the exception should somehow be circumscribed, all exceptions should fit the mould. Indeed, while the "dictionary approach" seems a much safer alternative for WTO panels in most cases, in the 110(5) case it was mostly useless. Any exception to copyright is arguably "special," because any exception short of a complete repeal of the Copyright Act would arguably be "limited in its field of application."

The two steps in the test that can truly be operationalized are thus the "interference with commercial exploitation" and the "unreasonable prejudice to the legitimate interests of the author".

2. Interference with normal commercial exploitation

⁵³ *See id.*

What is the meaning of “exploitation” in the context of this second step of the test? It seems fairly straightforward: any use of the work by which the copyright owner tries to extract/maximize the value of her right. “Normal” is more troublesome. Does it refer to what is simply “common” or does it refer to a normative standard? The question is relevant in particular for new forms and emerging business models which have not thus far been common or “normal” in an empirical sense. During the last substantive revision of the Berne Convention in Stockholm in 1968, the concept was clearly used to refer to “all forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance⁵⁴.” It thus seems that the condition is normative in nature: an exception is not allowed if it covers any form of exploitation which has, or is likely to acquire, considerable importance. In other words, if the exception is used to limit a commercially significant market or, *a fortiori*, to enter into competition with the copyright holder, the exception is prohibited⁵⁵.

We can, therefore, agree with the WTO panel on this point. It concluded as follows:

“[...] it appears that one way of measuring the normative connotation of normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance.”⁵⁶

⁵⁴ RECORDS OF THE INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM, JUNE 11 TO JULY 14, 1967, WIPO, Geneva (1971), at 112 (hereinafter *Records of the Stockholm Conference*).

⁵⁵ One could see the scope of an exception based on non commercially significant use in H.R. 3261, 108th Cong. (2003), known as the Act to Prohibit the Misappropriation of Certain Databases, §4(b) of which would allow the “making available in commerce of a substantial part of a database by a nonprofit educational, scientific, and research institution, including an employee or agent of such institution acting within the scope of such employment or agency, for nonprofit educational, scientific, and research purposes [...] if the court determines that the making available in commerce of the information in the database is reasonable under the circumstances, taking into consideration the customary practices associated with such uses of such database by nonprofit educational, scientific, or research institutions and other factors that the court determines relevant.”

⁵⁶ Panel Report, *supra* note 41, at ¶ 6.180.

3. Unreasonable prejudice to legitimate interests of rightsholder

The third step is perhaps the most difficult. What is an “unreasonable prejudice,” and what are “legitimate interests”?

Let us start with “legitimate.” It can have two meanings: (a) conformable to, sanctioned or authorized by, law or principle; lawful, justifiable; proper; or (b) normal; regular; conformable to a recognized type. To put it differently, are legitimate interests only “legal interests”? I do not believe so. I suggest that the third step is the clearest indication of the need to balance the rights of copyright holders and users anywhere in the Berne Convention. An analysis of the Records of the Stockholm Conference shows that the United Kingdom took the view that legitimate meant simply “sanctioned by law,” while other countries seems to take a broader view, meaning “justifiable” in the sense that they are supported by social norms and relevant public policies⁵⁷. In my view, and it seems to be the approach taken by the WTO panel⁵⁸, the combination of the notion of “prejudice” with that of “interests” points quite clearly towards a legal-normative approach. In other words, “legitimate interests” are those that are protected by law. The interpretation might be different if the third step of the test was formulated as “the reproduction not contrary to the legitimate interests of the author.” With the unreasonable prejudice element, however, the legitimate interests are almost by definition legal interests.

This leaves open one key question: what does “unreasonable prejudice” mean⁵⁹. Clearly, the word “unreasonable” indicates that *some level* or degree of prejudice is justified. To buttress this view, the French version of the Berne Convention, which

⁵⁷ See Records of the Stockholm Conference, *supra* note 48.

⁵⁸ Panel Report, *supra* note 41, at ¶¶ 6.223-6.229. At paragraph 6.224 the panel somehow tried to reconcile the two approaches: “the term relates to lawfulness from a legal positivist perspective, but it has also the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights.”

governs in case of a discrepancy⁶⁰, uses the expression “préjudice injustifié,” which one would be tempted to translate as “unjustified prejudice.” The translators opted instead for “not unreasonable.”⁶¹

I would suggest that the inclusion of a reasonableness/justifiability criterion is a key that allows legislators to establish a balance between, on the one hand, the rights of authors and other copyright holders and the needs and interests of users, on the other. This seems even clearer when the French term (“unjustified”) is used. In other words, *there must be a public interest justification* to limit copyright.

As a result, I cannot agree with the WTO panel, which essentially conflated the second and third steps when it concluded that “prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner⁶².” A public interest imperative may lead a government to impose an exception to copyright that may translate into a loss of revenue for copyright holders. It can nonetheless be “justified”. In addition, by focusing on economic harm, the panel may have considerably expanded the scope of exceptions: it is not the fact that a user obtained some value that is determinative, but rather the fact that a rightsholder can show that it lost actual value (revenue), *i.e.*, the existence of a prejudice. This view is reinforced by the arbitration decision and the fact that non-implementation leads to a determination of the level of harm suffered.⁶³

⁵⁹ It is worth noting that “not unreasonable prejudice” is not quite the same as “reasonable prejudice.” “Not unreasonable” seems to connote a slightly stricter threshold (*See* Panel Report, *supra* note 41 at ¶ 6.225).

⁶⁰ Berne Convention, *supra* note 26, at Art. 31.

⁶¹ Records of the Stockholm Conference, *supra* note 48, at 1145 § 84.

⁶² Panel Report, *supra* note 41, ¶ 6.229.

⁶³ Under the Dispute Settlement Understanding (DSU) that governs the WTO dispute-settlement process, a party may ask for arbitration if another party fails to implement an adopted panel (or Appellate Body) decision. Because the US failed to implement the Panel report (which is still true as of March 2004-- the WTO had ordered the United States to bring the exemption in line with the Panel’s ruling by July 27, 2001), the European Union asked for arbitration and decision on the level of harm, which was determined to be \$1.1 million/year. The European Union has proposed levying a fee on copyrighted material against United States nationals unless the United States reforms its law. *See* World Trade Organization Dispute Settlement Panel on United States--

Let us look at national and regional legislation to determine the parameters of exceptions to copyright.

C. European “InfoSoc” Directive

The European Union’s Information Society (“InfoSoc”) Directive⁶⁴ contains two sets of exceptions. The first, and only mandatory, exception is for transient copies “forming an integral and essential part of a technological process.” Otherwise, the Directive contains an *exhaustive* list of *permitted* exceptions (*i.e.*, exceptions that EU member States may choose to use in their national copyright legislation). These are all purpose-specific exceptions. There is no set of criteria comparable to the US fair use doctrine⁶⁵.

However, the preamble to this Directive, which serves as a guideline for the interpretation of the operative part of the text⁶⁶, refers to permitting “exceptions or limitations in the public interest for the purpose of education and teaching” and to the need to safeguard a “fair balance of rights and interests between the different categories of rightsholders, as well as between the different categories of rightsholders and users” through exceptions and limitations, which “have to be reassessed in the light of the new electronic environment.”⁶⁷

Section 110(5) of the U.S. Copyright Act, WT/DS160/22 (Mar. 1, 2002); World Trade Organization Dispute Settlement Panel on United States--Section 110(5) of the U.S. Copyright Act, WT/DS160/12 (Feb. 19, 2002); World Trade Organization Dispute Settlement Panel on United States-- Section 110(5) of the U.S. Copyright Act, WT/DS160/19 (Jan. 11, 2002); World Trade Organization Dispute Settlement Panel on United States--Section 110(5) of the U.S. Copyright Act, WT/DS160/12 (Jan. 15, 2001).

⁶⁴ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society.

⁶⁵ As embodied in 17 USC §107. *See supra* note 13.

⁶⁶ Directive 2001/29/EC, *supra* note 57.

⁶⁷ Directive 2001/29/EC, *supra* note 57, ¶ 14 and ¶ 31.

Otherwise, the Directive also refers to the three-step test as an overarching test for all permitted exceptions. Article 5(5) reads:

“The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.”

D. National Laws

Exceptions in national copyright laws can be grouped under four main headings. The first, I reserve for fair use⁶⁸ and do not need to belabor its content here.

1. Fair dealing

A second category is the *fair dealing* approach of other common law countries, generally modeled after the UK Copyright Act of 1911⁶⁹. These consist of a list of situations where “dealing” with a protected work is permitted combined with a requirement that the use be fair in light of the purpose. These specific purposes are usually related to criticism and review, news reporting, teaching, archives and libraries, use by visually impaired readers, etc⁷⁰. In a recent Canadian Supreme Court decision, the research component was interpreted very broadly, apparently covering even for-profit research⁷¹. The fairness criterion usually requires that no more of the work be used than was necessary for the (authorized) purpose⁷².

⁶⁸ See *supra* note 13.

⁶⁹ Copyright Act, 1911, 1 & 2 Geo. 5, c. 46 (Eng.)

⁷⁰ See, e.g. Copyright Act, R.S.C., c. C-42, §§ 29-30 (1985) (Can.), Copyright Act 1968, c.63 as amended, §§ 40-42 (Austl.), and Copyright, Designs and Patents Act 1988, c.48, §§ 29 - 30 (Eng.).

⁷¹ CCH v. Law Society of Upper Canada, [2004] SCC 13 (Can). (“The fair dealing exception under s. 29 is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study. ‘Research’ must be given a large and liberal

Commonwealth members are not the only countries where fair dealing exists. Israel has a fair dealing with civil law overtones. According to Sec. 2(1) of the *Copyright Act, 1911*⁷³, fair dealing for the purposes of private study, research, criticism and review, or to make a journalistic summary is allowed. Interestingly, however, in determining whether a particular dealing was fair, the Israeli Supreme Court used the US fair use criteria.⁷⁴ The “desirable social goal” was clearly mentioned as a relevant criterion.⁷⁵ There are additional exceptions for private recording⁷⁶, public recitation⁷⁷ and education,⁷⁸ and good faith is considered a defense against all remedies except injunction⁷⁹.

2. Civil law enumeration approach

The third category is that used in most civil law countries, where certain very narrow uses are allowed without authorization and usually without an express

interpretation in order *to ensure that users’ rights are not unduly constrained*. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts.”) (Emphasis added)

⁷² See *idem*. (“the following factors [should] be considered in assessing whether a dealing was fair: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. Although these considerations will not all arise in every case of fair dealing, this list of factors provides a useful analytical framework to govern determinations of fairness in future cases.”) See also WILLIAM PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW*, (2nd ed., 1995), at 594-599. See also JAMES LAHORE & WARWICK A. ROTHNIE, *COPYRIGHT AND DESIGNS* (2003) at §§ 40.050, 40.065 and 40.115-40.130 (Austl.); WILLIAM CORNISH & DAVID LLEWELYN, *INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADEMARKS AND ALLIED RIGHTS*, (5th ed., 2003), at 440-448 (Eng.); and DAVID VAVER, *COPYRIGHT LAW* (2000), at § Fair Dealing (Can.).

⁷³ Copyright Act, 1911, 1 and 2 Geo. 5, ch. 46, (Extension to Palestine) S.R. & O. 1924, No. 385 (U.K.).

⁷⁴ See *Geva v. Walt Disney Co.*, P.L.A. 2687/92, P.D. (1) 251. This is not far from the six criteria used by the Canadian Supreme Court. See *supra* note 72.

⁷⁵ *Id.* and see Joshua Weisman, *Israel*, in *INTERNATIONAL COPYRIGHT LAW AND PRACTICE*, at ISR-38-39 (M. Nimmer & P. Geller eds., 1991)

⁷⁶ Copyright Act, *supra* note 64 §§ 3C and 3D. A right to remuneration is provided.

⁷⁷ *Id.* § 2(1)(VI).

⁷⁸ *Id.* § 2(1)(IV).

⁷⁹ See Weisman, *supra* note 66 at ISR-41.

requirement of fairness. The types of free uses allowed are usually very well defined and limited in scope. A few national examples may be useful to illustrate the scope of these exceptions.

In France, the rights of authors are almost sacred. Therefore, exceptions to copyright are interpreted narrowly and users clearly have no rights following from those exceptions under copyright law.⁸⁰ Exceptions are mostly for private use.⁸¹ In one case, and then only in a obiter, a French court said it would be prepared to consider a defense to infringement based on the “public’s right to information,” which is recognized under Article 10.1 of the European Convention on Human Rights.⁸² There is also a recognition, in France and in Germany,⁸³ that authors must be granted a certain freedom to reuse works of other authors and that such “freedom” is normatively at a higher level than the right of a simple user, in particular a commercial user.⁸⁴

The main exception under Dutch copyright law is for private use.⁸⁵ It applies to both reproduction and performance. The private copying exception applies to companies in the area of press and journal reviews. There is an exception for quotations⁸⁶, use by government⁸⁷ and for public education⁸⁸. Universities believed they could freely produce “anthologies” (coursepacks) for students but after losing a court battle in 1986 made an agreement with the Dutch publishers and reprography collective.⁸⁹ There are also interesting exceptions specific to the field of fine arts. Section 19 allows “the

⁸⁰ See ANDRÉ LUCAS & H. J. LUCAS, *TRAITÉ DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE*, (2nd ed., 2001), at 251-254.

⁸¹ Code de la propriété intellectuelle, § L.122-5.

⁸² TGI Paris, 3rd ch., 23 Feb. 1999, D. 1999 580.

⁸³ See the *Alcolix* and *Asterix Persiflagen* cases, both by the Federal Court (BGH), at [1994] GRUR 191 and 206, also available in English at [1994] IIC 605 and 610; and the “*Germania 3*” case, [2001] GRUR 149.

⁸⁴ In French, known as the “exploitant” (“exploiter”) of the work—an indication of the mindset. See ALAIN STROWEL, *DROIT D’AUTEUR ET COPYRIGHT* 268 (1993).

⁸⁵ See Herman Cohen Jehoram, in *INTERNATIONAL COPYRIGHT LAW AND PRACTICE*, *supra* note 66 at NETH-62,3; and § 16 of the Copyright Act, 1912 (as last amended by the Law of October 27, 1972).

⁸⁶ Copyright Act, *supra* note 76 at § 15a.

⁸⁷ *Id.* § 15b.

⁸⁸ *Id.* § 16.

reproduction of a portrait by or on behalf of the person portrayed,” while Section 24 allows “unless otherwise agreed, the author of a painting [to] make further similar paintings,” notwithstanding the transfer of his copyright.

In the Nordic countries, there are exceptions for private reproduction coupled with a remuneration system (levy), as in s. 12(1) of the Swedish *Copyright Act*⁹⁰. Exceptions are also provided for quotations⁹¹ and use by libraries and archives⁹². The remuneration system for private copying is highly developed in most Nordic countries. For example Norwegian schools and universities paid €39.06 per university student and €34.13 per college students in 2002-2003 just for photocopies.⁹³

3. Considerations Concerning Private Use

A fourth and final “category”, which in reality is a subset of the second and third, deals with *private use*. But the rationale is different. Legislators tend to see private use as uncontrollable, technically but also from a policy standpoint.⁹⁴ In other words, they are not excluded because of a public interest imperative but almost as a practical matter following from the unenforceability of the right. Whether often accompanied by a remuneration on blank media, recording equipment or both, certain private uses, usually limited to reproduction and performance for family and friends, is allowed. Clearly, these exceptions have end-users in mind, because they use works in ways that, at least pre-Internet, did not interfere with “normal commercial exploitation” and were, in fact, uncontrollable.

⁸⁹ See Informatierecht/AMI 1986/5, 119-121.

⁹⁰ An Act on Copyright in Literary and Artistic Works, Law No. 729, of December 30, 1960, as last amended by Law No. 1274, of December 7, 1995.

⁹¹ *Id.* § 22.

⁹² *Id.* § 16.

⁹³ KOPINOR News, No. 2 vol. 6, Summer 2002. See www.kopinor.no. As of October 31, 2003, the U.S. equivalents are \$45.50 and \$39.75 respectively.

⁹⁴ In the sense that enforcement of copyright *vis-à-vis* individual users was not foreseen. The RIAA (civil) and Australian (criminal) lawsuits may force us to question the assumption.

The recent adoption by the European Parliament of a Directive concerning the enforcement of intellectual property rights is not consonant with this approach and allows stringent enforcement measures, such as search and seizure of equipment and other provisional measures against not only professional pirates but also, it seems, individual end-users⁹⁵, and a right to order the disclosure of the origin of infringing material⁹⁶. In the case of infringements on a commercial scale, additional measures, such as seizure of bank accounts, is also provided⁹⁷.

A final type of exception, if that is what it is, is the *exhaustion* of rights, also known as the first-sale doctrine⁹⁸. Conceptually, it is very close to the private use exceptions and is congruent with the idea that end-users should be free to use lawfully-acquired copies as they wish, but could also be said to reflect a balance between the chattel rights of the user and the intellectual property rights of the copyright owner. This was the approach chosen by the Supreme Court of Canada in a recent decision⁹⁹. Binnie J., writing the majority opinion, stated:

“The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to under-compensate them. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.

⁹⁵ See Art. 8 of the “Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights - Text agreed by the Permanent Representatives Committee following its meetings on 11 and 13 February 2004 with a view to reaching agreement with the European Parliament at first reading”, EU Council document 6376/04 of 16 February 2004 (8 March 2004). Available at <http://europa.eu.int/comm/internal_market/en/indprop/piracy/>.

⁹⁶ *Idem*, Art. 9.

⁹⁷ *Idem*, Art. 10.

⁹⁸ See *supra* note 22 and accompanying text.

⁹⁹ *Théberge v. Galeries d’art du Petit-Champlain, Inc.*, [2002] SCC 34. The decision was “confirmed” in a unanimous decision by the same Court in March 2004. See *supra* note 71.

*This case demonstrates the basic economic conflict between the holder of the intellectual property in a work and the owner of the tangible property that embodies the copyrighted expressions.*¹⁰⁰” (emphasis added)

E. Application of copyright exceptions to the Internet

Analogue-era exceptions to copyright do not apply easily to the Internet environment.¹⁰¹ Let us start with private use. In several countries, blank tape levies are now imposed on blank digital media. In Greece, the levy was applicable to personal computers (PCs)¹⁰² and the same could be true of Germany, according to proposals made by VG WORT¹⁰³, the reprography collective in that country. In Canada, private copying now applies to CDR, CD audio and, as of February 2004, also to certain types of removable memory devices. The levy on Apple’s iPod and similar devices is now \$CAN25 (approximately US\$19) per unit.¹⁰⁴

Can a levy on a PC achieve the same “rough justice” purpose¹⁰⁵ as a levy on a blank audio cassette? There was minimal cross-subsidization in the case of cassettes (few people recorded sounds other than protected music, or their own music), and in aggregate the measure could be said to be fair because most of the material recorded was

¹⁰⁰ *Id.* ¶¶ 31-33.

¹⁰¹ See PETERS, *supra* note 27 and accompanying text.

¹⁰² But was retroactively cancelled. See HUGENHOLTZ, *supra* note 20 at 30 § 4.2.7.

¹⁰³ The full name of the organization is Verwertungsgesellschaft Wort: <http://www.vgwort.de>. See Press Release, German Patent Office, Schiedsstelle nach dem Urheberrechtswahrnehmungsgesetz entscheidet über urheberrechtliche Vergütungspflicht für PCs, (Feb. 6, 2003) at <http://www.dpma.de/infos/pressediens/pm030206.html>. See also HUGENHOLTZ, *supra* note 20, at 26 § 4.2.3

¹⁰⁴ See Tariff of Levies to Be Collected by CPCC in 2003 and 2004 on the Sale of Blank Audio Recording Media, in Canada, in Respect of the Reproduction for Private Use of Musical Works Embodied in Sound Recordings, of Performer’s Performances of Such Works and of Sound Recordings in Which such Works and Performances Are Embodied, Decision of the Copyright Board of Canada, Dec. 12, 2003, at 20. Available at <<http://www.cb-cda.gc.ca/decisions/c12122003-b.pdf>> (last accessed Feb. 24, 2004).

¹⁰⁵ See, e.g., Michael Hart, *The Copyright in the Information Society Directive: An Overview*, 24 Eur. Intell. Prop. Rev. 58, 60 (2002). See also Conference, *Franklin Pierce Law Center’s Seventh*

presumably recorded music. Perhaps the same is true of MP3-specific recording apparatus, but is the same true of CD-Rs? When it comes to PCs, however, clearly copying recorded music, except for a minority of users, will not be the main activity. Cross-subsidization thus becomes the rule rather than the exception.

More fundamentally, is it more desirable, from a policy standpoint, to regulate private use in a digital environment than it was in the analogue one? The answer is multifaceted. Technical protection measures are now routinely used to limit the type of private use that one can make with some forms of protected content. The policy justification is that private use is in fact no longer private because *end*-users become intermediaries by re-disseminating the content (such as in peer-to-peer situations). In addition, current copyright rights focus on various *uses* of protected material, not their effects. In that respect, the DMCA¹⁰⁶ probably introduced an entirely different layer of rights, an *access right*, which is not linked to the protection of the use of the content and is independent of whether the use benefits from a license or exception¹⁰⁷. Measures to scan hard disks and sundry spyware pushed on individual users were the subject of debate in Congress.¹⁰⁸ Yet, until the DMCA and in the entire history of copyright, measures destined to control end-users were by far the exception and not the rule.¹⁰⁹

Biennial Intellectual Property System Major Problems Conference - Digital Technology and Copyright: A Threat or a Promise?, 39 IDEA 291 (1999).

¹⁰⁶ DMCA, *supra* note 37.

¹⁰⁷ The preservation of fair use was given very little regard in *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 458-459 (U.S. App. , 2001), *aff'g* *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 346 (S.D.N.Y. 2000): "We know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original. Although the Appellants insisted at oral argument that they should not be relegated to a "horse and buggy" technique in making fair use of DVD movies, the DMCA does not impose even an arguable limitation on the opportunity to make a variety of traditional fair uses of DVD movies, such as commenting on their content, quoting excerpts from their screenplays, and even recording portions of the video images and sounds on film or tape by pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie. The fact that the resulting copy will not be as perfect or as manipulable as a digital copy obtained by having direct access to the DVD movie in its digital form, provides no basis for a claim of unconstitutional limitation of fair use."

¹⁰⁸ For example, the controversial H.R. 5211, 107th Cong. 2d Sess. (2002) from Rep. Howard Berman (D-CA).

¹⁰⁹ See *supra* note 17 and accompanying text.

Another huge shift in the application of copyright exceptions is of course that online access has replaced distribution (of copies) with *licensing*. Hence the first-sale doctrine, perhaps one the most important “exceptions” to copyright, is fast disappearing. This applies to professional users, such as in inter-library loans situations, but also to individuals who can no longer pass on content that they no longer wish to use to other users

IV. The Way Forward

A. *The Reverse Three-step test*

Fair use is one of the keys to understand the way forward I am proposing. I am not suggesting that US-style fair use be introduced in all countries. Clearly, however, fair use is a much more flexible and adaptable doctrine with respect to new forms of use than purpose-specific exception¹¹⁰, most of which are not technologically-neutral.¹¹¹ This explains why its introduction is being considered in a number of countries currently using the more restrictive fair dealing exceptions¹¹². If one can agree with the premise that fair use reflects an appropriate set of criteria to balance the rights of copyright holders and the needs and interests of users, I suggest it could serve as a basis to build the copyright of the future.¹¹³ To do this, we must internationalize the test, by combining it with the Berne three-step test¹¹⁴

¹¹⁰ See *supra* notes 13 and 72.

¹¹¹ Although it has to be said that technological neutrality is not always desirable. Applied to a regulation, it means that the regulation will apply to new technologies, the invention or development of which cannot be foreseen. The pre-regulation of those technologies may produce undesirable consequences and even prevent the deployment of new technologies. See also, Ruth Okediji, *Toward An International Fair Use Doctrine*, 39 Colum. J. Transnat'l L. 75 (2000) and GERVAIS, *supra* note 35, at 120.

¹¹² For example, Canada. See SUPPORTING CULTURE AND INNOVATION: REPORT ON THE PROVISIONS AND OPERATION OF THE COPYRIGHT ACT, at 33-37 § B2, available at <http://strategis.ic.gc.ca/pics/rp/section92eng.pdf> (October 2002).

¹¹³ See Okediji, *supra* note 95, at 168-169.

¹¹⁴ See *supra* III.B.

Fair use is an exception to copyright¹¹⁵ or more precisely a test to determine whether a use of copyrighted content not authorized by the rightsholder constitutes an infringement of the copyright. In the same way, the three-step test is the accepted international standard to determine whether an exception to copyright in national legislation is TRIPS-compliant.¹¹⁶

What I suggest is *reversing the test*, based on the assumption that *what the exception* (whether fair use in domestic US law or the three-step test at the multilateral level) *does not allow is what in fact copyright intended to protect*. Expressed in mathematical terms, if fair use is the “A” universe, then the “non-A” universe contains uses that require a license. The reversal, as we will see, is both appropriate and powerful. It is appropriate because it focuses on the *effect* of the use on rightsholders. The right (which can be viewed as the “non-exempt” universe) is also effects-based, thus addressing much of the criticism examined above.¹¹⁷ It is powerful because it both solves the issues related to the nature-based bundle now used in most national laws¹¹⁸ and is by definition TRIPS-compliant. If uses not allowed by the three-step test are protected (i.e., only uses allowed under the three-step test are exempted), there can be no violation of Berne. Other solutions requiring an amendment to TRIPS do not have the same appeal, simply because amending the Agreement seems far from simple politically.¹¹⁹

¹¹⁵ For the purposes of this analysis, we do not need to enter into the debate as to whether fair use is a right, whether one can derogate to fair use by contract, etc. For more on these debates See LUCIE M.C.R. GUIBAULT, *COPYRIGHT LIMITATIONS AND CONTRACTS: AN ANALYSIS OF THE CONTRACTUAL OVERRIDABILITY OF LIMITATIONS ON COPYRIGHT* (2002); and L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS* (1991), at 191-222.

¹¹⁶ See *supra* section III.B

¹¹⁷ See GUIBAULT, *supra* note 98, at § Definition of the Problem.

¹¹⁸ Though not all. See *infra* note 110 and accompanying text.

¹¹⁹ Recent debates in the context of the Doha Round have shown that any modification of the TRIPS Agreement will be extremely difficult to achieve. One reason is that once the Agreement is reopened, all of its contents may become fair game. An attempt to update the copyright section (Articles 9-14) may thus prompt demands by others to reopen the patent or enforcement sections. As of March 2004, there were ongoing consultations on how to convert the 30 August 2003 Decision on paragraph 6 of the Doha Declaration (on access to generic medicines) into an amendment of the TRIPS Agreement.. See GERVAIS, *supra* note 35, at 43-51.

How does one reverse the test? Starting from a domestic US viewpoint, the question would be simply as follows: If fair use is fair, then what use is unfair use? I submit that “unfair” (*i.e.*, protected) use would be use that does not meet the two real steps of the Berne three-step test, that is, use that interferes with normal commercial exploitation or unreasonably (unjustifiably) prejudices the copyright holder’s rights. Any use that *demonstrably* and *substantially* reduces financial benefits that the copyright owner can *reasonably expect* to receive under normal commercial circumstances would be “unfair” without authorization.

How one measures unfairness and interference with normal commercial exploitation in this context is fundamental. I suggest that the question should not be whether a user got “value” without paying but whether the user should have obtained the content through a normal commercial transaction¹²⁰. Three observations are in order: First, this clearly applies only to *published* content¹²¹. Second, it is not because a work is unavailable in a given form that taking is *ipso facto* fair because no normal commercial transaction is possible. Rightsholders must be given a certain degree of flexibility in how they make works available on various markets and in various formats. It also means, however, that market practices are relevant: Is the type of use or user one that would normally be licensed (on a transactional or collective basis)? Is the kind of material normally (only) available on a commercial basis? Finally, *it is essential to view normalcy (of commercial exploitation) as a dynamic notion* that is influenced by technological development and consumer behavior. It is clear, in my view, that the Internet may have changed what “normal commercial exploitation” means. Unlicensed access for private use to material available on the Internet should in most cases be considered normal¹²².

¹²⁰ See *supra* note 63 and accompanying text.

¹²¹ A right of first publication exists in most national laws. In the US, fair use of unpublished material has been limited by a number of court decisions. See Kate O’Neill, *Against Dicta: A Legal Method for Rescuing Fair Use From the Right of First Publication*, 89 *Cal. L. Rev.* 369 (2001).

¹²² This is not unprecedented. There are many areas of law, from antitrust to contract formation, where courts routinely consider relevant market practices. See David McGowan, “Recognizing Usages of Trade: A Case Study From Electronic Commerce,” 8 *Wash. U. J.L. & Pol’y* 167 (2002).

The second step of the Berne test, namely the unreasonable prejudice to legitimate interests of the rightsholder, is one of public interest v. author's rights.¹²³ The relevant rights must be those protected under the *Copyright Act*. This is where the reasoning blends the two steps (without, one hopes, becoming circular). The author has a right in respect of any commercially significant use (use that would normally be the subject of a commercial transaction). Any situation not covered by this right would be one that is not subject to normal commercial exploitation and is justified by a valid public interest purpose.

B. Comparison with Other Proposals

There have been various suggestions to create a “use right,” because the current fragmented lists of copyright rights do not mesh with the reality of cyberspace. Prof. Litman suggested such a right in her *Digital Copyright* book¹²⁴. Stanford law professor Lawrence Lessig points in that direction, notably in *The Future of Ideas*, first when he discusses the VCR example and the potential for substantial non-infringing uses¹²⁵ and then when he writes,

In responding to the shock that the Internet presents to copyright law, it is of course important to account for the increased exposure to theft. But the law must also draw a balance to assure that this proper response to an increased risk of theft does not simultaneously erase the important range of access and *use rights* traditionally protected under copyright law.

¹²³ One is reminded of the *Garner v. Teamsters* case (74 S.Ct. 161, 171 (1953)), in which the Supreme Court wrote: “We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. *To the extent that the private right may conflict with the public one, the former is superseded*” (emphasis added).

¹²⁴ JESSICA LITMAN, *DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY ON THE INTERNET* (2001).

¹²⁵ LAWRENCE LESSIG, *THE FUTURE OF IDEAS : THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2002), at 195-196.

Professor Andrew Christie has also suggested a use-based copyright right¹²⁶. Prof. Christie proposes that patrimonial rights be grouped in two categories: reproduction and dissemination.¹²⁷ Professor Ricketson criticized this type of simplification, however.¹²⁸ There is also a proposal to create a specific right to “Internet transmission,”¹²⁹ which might resolve certain problems specific to the Internet.

The approach suggested by Professor Jessica Litman is *a priori* the most interesting, but as Professor Ginsburg rightly emphasizes,¹³⁰ the conceptualization must be pushed much farther. In my opinion, one should also take into account international treaties, particularly the TRIPS Agreement¹³¹.

Other examples of attempts at simplification can be found in certain national laws. These attempts are incomplete, and none moves all the way toward an effects-based paradigm. This being said, the efforts deserve to be underlined. One of the best examples is the Swiss *Copyright Act*,¹³² which provides, in Article 10, “The author has the exclusive right to decide when and how his work will be used.”

China also has a fairly broad notion of copyright, approaching a use right. The relevant provisions of the Copyright Law¹³³ read as follows:

“Article 55 Exclusive Rights

- (1) Unless otherwise provided, the author shall have the exclusive right to *use* his work, in whole or in part, including notably the right to disclose, publish and

¹²⁶ See, e.g., Andrew Christie, *A Proposal for Simplifying UK Copyright Law*, 23 Eur. Intell. Prop. Rev. 26 (2001).

¹²⁷ *Id.* at 37–38.

¹²⁸ See Sam Ricketson, *Simplifying Copyright Law: Proposals from Down Under*, 21 Eur. Intell. Prop. Rev. 537 (1999).

¹²⁹ See M. Lemley, *Dealing With Overlapping Copyrights on the Internet*, 22 U. Dayton L. R. 547, 582–583 (2002).

¹³⁰ J. Ginsburg, *Can Copyright Become User-Friendly? Essay Review of Jessica Litman, Digital Copyright (Prometheus Books 2001)*, 25 Columbia-VLA J. of L. & Arts 71, 83 (2002).

¹³¹ See *supra* note 119 and accompanying text.

¹³² *Loi fédérale sur le droit d’auteur et les droits voisins*, 9 Oct. 1992.

¹³³ Decree-Law (Consolidation), of August 16, 1999, No. 43/99/M (WIPO translation).

- economically exploit it in any form, either directly or indirectly, within the limits of the law;
- (2) The guarantee of the pecuniary benefits deriving from exploitation of the work shall constitute the *basic objective, in economic terms, of legal protection*¹³⁴.” (emphasis added)

The Canadian government recently opened the door to a broad reflection on this subject by putting on the agenda a review of the question of “clarification and simplification of the law.”¹³⁵

These proposals are interesting and many reflect or incorporate solutions to the problem of copyright laws and treaties: a fragmented bundle of rights focusing on the nature of the use rather than its effects.

What I am suggesting is that to go a step further and use the recognized international test now applicable to all copyright exceptions as the basis to determine the appropriate scope of copyright and, by way of consequence, the appropriate exceptions. That scope should extend to the control of only commercially significant forms of normal exploitation, the normalcy of exploitation being measured dynamically in light of changing technological possibilities and societal norms.

Two additional remarks are in order. My reasoning only applies to the so-called economic rights¹³⁶. Moral rights (of authorship and integrity) protected by the Berne Convention should be analyzed separately. Exceptions to such moral rights cannot be based on commercial exploitation, but on a combined test of public interest¹³⁷ and practicality.

¹³⁴ *Id.*

¹³⁵ SUPPORTING CULTURE AND INNOVATION: REPORT ON THE PROVISIONS AND OPERATION OF THE COPYRIGHT ACT, *supra* note 96, at 51.

¹³⁶ *See supra* note 34.

¹³⁷ As to the public interest defense generally, it is available in Australia (Australia v. John Fairfax & Sons Ltd., 55 A.L.J.R. 45 (1981)—in respect of at least government documents) and the UK. There are however, UK precedents that limit the application of copyright protection on grounds of public interest. In *Ashdown v. Telegraph Group, Ltd* ([2002] R.P.C. 5 (C.A.)), the Court ruled that freedom of expression was a valid defense to copyright infringement. It is worth quoting at some length the decision of the court (¶¶ 30-34):

Second, the approach I am suggesting has the advantage of being compatible with existing international treaties. Trying to renegotiate the main copyright treaties would not be easy and by the time we are done, digital may have been replaced by “trigital” technology or whatever comes next, and a host of new challenges for copyright, or should I say “useright” lawyers.

C. Further Considerations on an Effects-Based Test

As mentioned above¹³⁸, one of the weaknesses of copyright law is that it focuses on the nature of the use. As a result, whether one uses a work for private use, to make commercial use or to make a transformative use is of no concern as far as the rights are concerned: what matters is that technically a reproduction has taken place. To circumvent this structural difficulty, exceptions (*e.g.*, for private use¹³⁹, parody¹⁴⁰ etc.) were added to the mix.

Using an effects-based test would allow courts to draw appropriate distinctions. In almost all cases, non-transformative commercial reuse will infringe the second or third part of the three-step test, or both, due to the effect on the market of the rightsholder(s) and the absence of an overriding public interest. A private use normally will not have an effect and it may be considered desirable to allow private use, both because the cost (in

30 [...] ...*copyright is essentially not a positive but a negative right*. No provision of the Copyright Act confers in terms, upon the owner of a copyright in a literary work, the right to publish it. The Act gives the owner of the copyright the right to prevent others from doing that which the Act recognises the owner alone has a right to do. Thus copyright is antithetical to freedom of expression. It prevents all, save the owner of the copyright, from expressing information in the form of the literary work protected by the copyright.

34 [...] the defense to a claim for breach of copyright that can be mounted on the basis of "public interest." This is not a statutory defence, but one which arises at common law,[...]"

¹³⁸ See *supra* note 33 and accompanying text.

¹³⁹ See *supra* III.D.3.

¹⁴⁰ See *infra* note 143.

terms, e.g., of privacy invasion¹⁴¹) and the public interest considerations of favoring broad access to information and culture. It will thus pass the test. In that case, implementing an effects-based test simply avoids the current labyrinthine process of determining that there was a reproduction or other use (*i.e.*, the nature-based test) and then looking for an exception.

But the most striking impact would be in the area of transformative reuse. There is a public interest in allowing creators to reuse existing material, something recognized in many legal systems¹⁴², including the United States where the Supreme Court arguably stretched the notion of parody well beyond its ordinary meaning to accommodate this objective.¹⁴³

By introducing an effects-based test, reuse of material would be allowed not just in parody cases, but in all cases where a genuine public interest is served by allowing a new creation to emerge without demonstrably affecting (negatively) the market for the preexisting work.

Conclusion

This paper first showed that, while exceptions to copyright have historically focused on the *effects* of a particular use of protected works, the rights to which these exceptions

¹⁴¹ See *supra* note 95 and accompanying text.

¹⁴² For a civil law example, see *supra* note 84.

¹⁴³ See Elizabeth Troup Timkovich, The New Significance of the Four Fair Use Factors As Applied to Parody: Interpreting The Court's Analysis in *Campbell v. Acuff-Rose Music, Inc.*, 5 *Tul. J. Tech. & Intell. Prop.* 61, 75 (2003) ("the Supreme Court's actions in *Campbell* in a way that aligns with the public benefit goals of copyright. The Court's fair use analysis in the context of parody can be explained as shifting the primary fair use emphasis away from the fourth fair use factor (market harm), where it was placed by the Nation Court in 1985 in the context of news reporting, to the first fair use factor (purpose of the work). It is plausible that the Court made this shift knowingly, so as to advance the public policy of copyright, to foster the creation of new works available to the public. The analysis involved in the Court's evaluation of the first fair use factor is the most in tune with this public policy question, as it entails determining whether the disputed parody has transformed the original copyrighted work into something new. The fourth fair use factor has far less significance in this analysis, as, ideally, a transformative parody should not supplant market demand for the copyrighted work upon which it is based.")

apply are based on the *nature* of the use. This has at least two undesirable consequences. First, it forces copyright holders to organize the legal structure of protection against technical forms of use where in fact their real concern is with the market and the effects that a particular use may have in reducing or enhancing future market options. Second, there is a logical discrepancy between the right and the exception which renders exceptions difficult to apply and their borders very difficult to circumscribe.

In the search for a solution to enhance the current situation, we suggested that an effects-based norm (a new copyright right) would better respond to problems that copyright holders currently face, in particular on the Internet, while enhancing legal security for users by increasing the correlation between the right and the exception.

Because the three-step test found in Article 9(2) of the Berne Convention is now the foundation for all exceptions to intellectual property rights in treaties concluded since 1994, including the TRIPS Agreement, we first studied this fundamental test and its application in key national and regional laws to determine what uses would be allowed under it. We then suggested reversing the test, as it were, to determine the scope of disallowed uses, *ie* those to which the exclusive right of the copyright owner should apply. The proposal, in effect, is that rights be defined to mirror permissible exceptions under Berne Article 9(2) and Article 13 of TRIPS. In doing so, international copyright treaties would no longer constitute set of minimum standards with a cap on permissible exceptions but rather coherent normative approach to regulating commercially significant uses of material, including on the Internet.

We then analyzed this proposal against extant proposals to improve or simplify international copyright norms. The last section of the article demonstrates that the use of an effects-based test would both simplify the determination of infringements and allow greater transformative reuse of protected material.